

Commonwealth of Pennsylvania

OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
PENNSYLVANIA

FOR THE YEARS
1937 and 1938

Charles J. Margiotti, *Attorney General*
(January 15, 1935 to April 27, 1938)

Guy K. Bard, *Attorney General*
(April 27, 1938 to January 17, 1939)

OFFICIAL OPINIONS

1937 = 1938

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OFFICIAL OPINIONS

1937-1938

OPINION No. 216

Highways—Changes in ditches and drains—Responsibility for damages—Commonwealth—County—Changes within right of way—Appropriation of new right of way—Sproul Act of May 31, 1911—Amendment of April 13, 1933—Ditch and Drain Act of April 29, 1925—Necessity for obtaining resolution from county—Interpretation of resolution—Agreement to assume responsibility for property damages—Failure specifically to mention ditches and drains—Right specifically to exempt or include damages caused by changes in drainage.

1. The Department of Highways is not responsible for drainage damages where the drainage structures are located entirely within the right of way limits, irrespective of whether or not there is new right of way appropriated at the time the changes in drainage are made, unless the appropriation occurred after the amendment by the Act of April 13, 1933, P. L. 41, to section 16 of the Sproul Act of May 31, 1911, P. L. 468, and the county refused to assume liability for land damages, in which event the department would be liable for the consequential drainage damages.

2. The Department of Highways has authority under the Ditch and Drain Act of April 29, 1925, P. L. 360, as last amended by the Act of July 18, 1935, P. L. 1285, to enter upon private property, outside the limits of the highway, to construct ditches and drains reasonably necessary to carry away waters from State highways, and the Commonwealth is responsible to the property owners for the damage accruing therefrom.

3. It is not necessary for the Department of Highways to obtain a resolution from the county approving changes in drainage either within or outside the State highway limits.

4. A resolution by a county, assuming responsibility for property damages, under the provisions of section 16 of the Sproul Act of May 31, 1911, as amended, without specifically mentioning drainage damages would include responsibility for drainage damages where the changes are made entirely within the right of way limits, but it would not include drainage damages arising from those ditches constructed outside the right of way limits under the provisions of the Ditch and Drain Act of April 29, 1925, P. L. 360, as amended.

5. If a county adopts a resolution agreeing to assume responsibility for property damages under the provisions of section 16 of the Sproul Act of May 31, 1911, as amended, it may, in such resolution or by separate resolution, either refuse or agree to assume responsibility for damages caused by changes in drainage as contemplated by the Ditch and Drain Act of April 29, 1925, P. L. 360, as amended.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., March 24, 1937.

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

Sir: We have your request for an interpretation of the so-called Ditch and Drain Act of April 29, 1925, P. L. 360, as last amended by the Act of July 18, 1935, P. L. 1285, and its applicability to particular situations, in view of the decisions of the Courts of Common Pleas of Berks, Bradford, and Lehigh Counties construing this act. We shall consider the particular situations in the order enumerated by you.

1—Responsibility of the Department of Highways in damages for changes in drainage entirely within the right-of-way which affect property outside the right-of-way limits. This would include both parallel and cross drainage where no entry is made on private property outside the limits of the highway. Such changes may be made in the course of maintenance or construction operations either, (a) where no new right-of-way is taken, or (b) where new right-of-way is condemned and the drainage is confined within its limits.

We shall first consider the question of the responsibility of the department for drainage damages where no new right-of-way is taken, and where the changes are made entirely within the right-of-way limits. The Superior Court has clearly ruled in *New York Central Railroad Company v. Venango County*, 105 Pa. Super. 245 (1932), that the Act of 1925 does not make the county liable for water discharged on plaintiff's land from a ditch constructed by the Department of Highways without entry on the plaintiff's land. Similarly, the Superior Court, in *Heid v. Allegheny County*, 122 Pa. Super. 312 (1936), held that this act did not impose responsibility for natural channels on adjacent land, caused by the flow of water from the side of the road, where the department has constructed drainage pipes, without actual entry upon the land damaged. The court also said, by way of dicta, that there was no liability upon the Commonwealth because the act imposed none. See also *Deen v. Delaware County*, 23 Del. 569 (1933), where it was held that damages arising from drainage of State highways are recoverable under the act of 1925, *supra*, only where there has been actual entry upon the lands.

From these decisions it seems clear that there is no responsibility imposed by law upon the department for drainage damages, where there is no new right-of-way taken.

Where additional width is condemned and the drainage is confined within the limits of the newly acquired right-of-way, the department would be responsible only on the theory that such drainage damages are in the nature of consequential damages. It is clear under existing law that the Commonwealth is not responsible for consequential damages when there is no taking of land from the property holder (In re: *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487 (1932), but the Supreme Court has also held in *Puloka v. Commonwealth*, 323 Pa. 36 (1936), that where land is taken the department becomes responsible for consequential damages.

Such drainage damages are not specifically included within the scope of the act of 1925, because there has been no entry upon the land for the installation of drainage facilities under the provisions of that act. Therefore, such damages would have to be regarded as consequential to the actual taking of the land, under the decision in the Puloka case, *supra*.

Three possible situations might conceivably exist wherein this question would arise:

(a) Where the additional right-of-way was taken prior to the 1933 amendment to Section 16 of the Sproul Highway Act of 1911, (Act of April 13, 1933, P. L. 41), and therefore the county would become automatically liable for the taking; in such a case the county would also be liable for the consequential drainage damages;

(b) Where the taking occurred after the 1933 amendment to the Sproul Act, and the county agreed to assume land damages; then the county would likewise be responsible for the consequential drainage damages as pointed out *infra*;

(c) Where the taking occurred after the 1933 amendment to the Sproul Act, and the county refused to assume land damages; in that case the Commonwealth would become responsible for the consequential drainage damages under the reasoning in the Puloka decision.

2—The authority of the department to enter upon private property outside the limits of the highway to construct and maintain ditches and drains and the responsibility for damages, if any, in such cases. This might include both lateral and parallel ditches extending from distances outside the highway limits.

The Act of 1925 *supra*, provides, in section 1:

The Department of Highways shall have the power and is hereby authorized to enter upon any lands or enclosures, and cut, open, maintain, and repair such drains

or ditches, inlets or outlets through the same as are necessary to carry the waters from roads or highways constructed or improved at the expense of the Commonwealth or under its supervision.

This section clearly authorizes the department to enter upon private property; otherwise, the act would be meaningless, since the department would have full authority to make such entry upon its own right-of-way.

Of course, the purpose of such entry must be that expressed in the act, namely, to open and to maintain such drainage ditches as are necessary to carry water from State highways. The extent to which this power could be carried by the department is a question of fact, depending upon the reasonable relation between the ditch and the drainage of the highway. It certainly would not authorize the digging of all sorts of ditches in the adjoining fields, which bore no reasonable relation to the drainage problem confronting the highway engineers. On the other hand, such drains or ditches, as are reasonably necessary, are clearly authorized by the act.

3—The necessity for obtaining a resolution from the county approving such changes in drainage as are contemplated by questions No. 1 and No. 2 above.

Since the facilities constructed by the department would be either entirely within its own right-of-way, under authority conferred by the Sproul Act, or on private property, under the authority conferred by the act of 1925, we are of the opinion that a resolution from the county approving such changes in drainage is not necessary.

4—If a county adopts a resolution assuming responsibility for property damages on a project under the provisions of Section 16 of the Sproul Act, does such acceptance include responsibility for drainage damage, without specific mention thereof being made in the resolution.

In order to answer the question here raised, it is necessary to distinguish between drainage damages entirely within the right-of-way of the highway and such damage occurring on private property.

In the decision of Judge Henninger, of the Court of Common Pleas of Lehigh County, in *Schreiter v. Commonwealth*, 17 Lehigh Co. 76 (1936), it appears that the Commonwealth was held liable for drainage damages, because the pipes were all within the right-of-way limits of the highway. We approve of this proposition of law and concur in the decision of the Lehigh County courts on the facts, although we do disagree with much of the

dicta contained in this opinion. Nevertheless, this decision establishes that the Commonwealth of Pennsylvania is responsible in damages for drainage structures located entirely within the right-of-way limits of the highway (where, as seen under question No. 1, *supra*, there is new right-of-way taken and condemned). Thus, the county's resolution, assuming responsibility for property damages under the provisions of the 1933 amendment to Section 16 of the Sproul Act, would render the county liable in place of the Commonwealth, and such liability would include drainage damages from structures entirely within the right-of-way limits.

On the other hand, such a resolution assuming responsibility for property damages under Section 16 of the Sproul Act would not include damages arising under the act of 1925.

5—If a county adopts a resolution agreeing to assume responsibility for property damages under Section 16 of the Sproul Act may it, either in such resolution or by separate resolution, refuse to assume responsibility for damages caused by changes in drainage as contemplated by the plans or is the drainage responsibility inseparable from the responsibility for property damages?

We are of the opinion that the mere fact that a general resolution of the county would render it responsible only for those damages arising under Section 16 of the Sproul Act and *Schreiter v. Commonwealth*, *supra*, does not prevent the county from agreeing, by separate resolution, or by a separate clause in a general resolution, to assume responsibility for property damages arising under the act of 1925. In *Calkins v. Bradford County*, 23 D. and C. 151 (1935), and *Brumbach v. County of Berks*, 29 Berks County Law Journal 129 (1936), the act of 1925 was held unconstitutional in so far as it tries to impose responsibility upon the counties; but these decisions do not render the remaining provisions of the act unconstitutional. Moreover, the legislature, by its 1935 amendment to the act of 1925, attempted to remove from the counties such responsibility, so that it can be no longer contended that the counties become automatically responsible for such drainage damages.

Nevertheless, we are of the opinion that the counties have the power, either by separate resolution, or by a clause in a general resolution, to assume responsibility for damages caused by changes in drainage, as contemplated by the plans under the act of 1925; on the other hand, such drainage responsibility under the act of 1935 is separable from the responsibility for property dam-

age, (including damage for drainage entirely within the right-of-way limits), and, therefore, must be treated as a separate item in the preparation of the county's resolution.

To summarize, you are advised as follows concerning the application of the Act of April 29, 1925, P. L. 360, as amended:

1. The Department of Highways is not responsible for drainage damages where the drainage structures are located entirely within the right-of-way limits, irrespective of whether or not there is new right-of-way appropriated at the time the changes in drainage are made, unless the appropriation occurred after the 1933 amendment to section 16 of the Sproul Act, and the county refused to assume liability for land damages, in which event the department would be liable for the consequential drainage damages.

2. The department has authority, under this act, to enter upon private property, outside the limits of the highway, to construct ditches and drains reasonably necessary to carry away waters from State highways, and the Commonwealth is responsible for the damage accruing therefrom to the property owners.

3. It is not necessary to obtain a resolution from the county approving changes in drainage either within or outside the highway limits.

4. A resolution by the county, assuming responsibility for property damages, would include responsibility for drainage damages where the changes are made entirely within the right-of-way limits, but would not include drainage damages arising from those ditches constructed outside the right-of-way limits under this act.

5. The counties may, by resolution, either refuse or agree to assume responsibility for damages caused by changes in drainage as contemplated by this act.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 217

Schools—Termination of teachers' contracts—Act of April 6, 1937, sec. 6—Effect on notices of dismissal which had not become effective at time of enactment—Construction in light of legislative purpose.

Section 6 of the Act of April 6, 1937 P. L. 213, supersedes section 1205 of the School Code of 1911, as amended, providing that school directors may terminate teachers' contracts by official notice presented 60 days before the

close of the school term, and supersedes all notices of dismissal which had not become effective at the time of its enactment: contracts in effect upon the effective date of the amending act may be terminated only for cause as provided therein.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 29, 1937.

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

Sir: You request to be advised as to the effect of section 6 of the Act of April 6, 1937, P. L. 213, which amends certain sections of the School Code appertaining to the contract of employment between the school district and the teacher. The particular question involved is the effect of the amendment on notices of termination of contract in effect on the date of the enactment of the act. Section 1205 of the School Code, previous to amendment, provided that a teacher's contract could be terminated by the board by official written notice presented to the teacher 60 days before the close of the school term.

Section 6 provides:

No contract *in effect* at the enactment of this act shall be terminated except in accordance with the provisions of this act. (*Italics ours.*)

This question requires a consideration of Section 1205 of the School Code as it existed prior to the 1937 amendment, which provides, in part, as follows:

* * * " * * * that this contract shall continue in force year after year, * * * unless terminated by the * * * Board of School Directors by official written notice presented to the teacher sixty days before the close of the school term."

This opinion does not in any way involve the dismissal of a teacher for cause during the term, as authorized by the act, but does cover the termination of the contract at the close of the school term.

Under the decision of *Potts v. Penn Township School District*, 20 West. Law Journal 163, in which the court quoted *De Vere Ford v. Kendall Borough School District*, 121 Pa. 543, it was held:

* * * a school district is but an agent of the commonwealth, and as such a quasi-corporation for the sole purpose of administering the commonwealth's system of public education; * * *

Accordingly when the legislature, by statute, changed the procedure for the dismissal of a teacher, such change can be compared to a change in the instructions and authority by a principal to an agent, which changes his method of doing business.

The legislature, by amendment of April 6, 1937, provided that the only valid causes for termination of a contract shall be such causes as are set forth in the amendment. The law, as amended, is deleted of the 60-day notice required to terminate a contract. The effect of such deletion is that all contracts shall continue in force year after year, but with the right of the board of school directors to terminate such contract for cause by official written notice presented to the professional employe. Such notice shall give the professional employe an opportunity to be heard within 10 days, if so requested in writing by such employe. The amendment itself gives the various grounds upon which such termination shall be made.

As to the intent of the amendment, it is the general rule of interpretation that the intention of the legislature is invariably to be accepted and carried into effect. If it admits of more than one construction, the true meaning is to be sought, first of all, in the statute itself as applied to the subject matter to which it relates, from the context viewed by such light as its history may throw upon it, and construed with the help of certain general principles, and under the influence of certain presumptions as to what the legislature does or does not generally intend. *Endlich on the Interpretation of Statutes*, page 92.

The undoubted intent of the legislature in enacting the amendment was to make a teacher's tenure of employment stable. We know of nothing in the discussion of this amendment before the legislature which would nullify this interpretation of this amendment, and the same is certainly in keeping with the spirit of the amendment.

We therefore advise you that in all cases where a contract with a professional employe, as defined in the amendment of April 6, 1937, is in effect on the said date, the termination of such contract can only be legally made by complying with the conditions as set forth in the said amendment and that the provisions of section 1205 prior to the amendment, which provided that the said contract could be terminated upon sixty days' notice, are nullified by the amendment. Accordingly the amendment served to supersede all notices of dismissal which had not become effective at the time of enactment. Therefore, contracts in effect upon

the effective date of the act may only be terminated in accordance with its provisions.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 218

Public officers—Members of State legislature—Right to hold supervisory positions with Works Progress Administration—Constitution, article II, sec. 6, and article XII, sec. 2—Act of May 15, 1874.

1. The term "office" as used in article II, sec. 6, and article XII, sec. 2, of the Constitution, and section 15 of the Act of May 15, 1874, P. L. 186, prohibiting a member of the State legislature from holding any other office under the United States or Pennsylvania during his term of office connotes a function with some degree of executive responsibility involving the exercise of discretion in the performance of the holder's duties and does not, therefore, include a supervisory position with the Works Progress Administration, such as skilled foreman or labor foreman.

2. Members of the State House of Representatives holding supervisory positions, such as skilled foreman and labor foreman, with the Work Progress Administration, may secure a leave of absence from the Works Progress Administration when the House convenes and may resume their employment with the Works Progress Administration when the legislature is not in session, the positions not being incompatible.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., May 25, 1937.

Honorable W. P. Gallagher, Chief Clerk, House of Representatives, Harrisburg, Pa.

Sir: We have your request to be advised whether or not members of the House of Representatives who now hold supervisory positions with the Works Progress Administration, such as skilled foremen and labor foremen, may continue on the Works Progress Administration while serving in the General Assembly. You inform us that these members will have a leave of absence from the Works Progress Administration, and will resume their employment with that administration when the regular session of the legislature adjourns sine die. You desire to be informed specifically whether or not these positions are incompatible.

That part of the Constitution of Pennsylvania that is pertinent to your inquiry reads, in part, as follows :

Article II, section 6 :

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. (*Italics ours.*)

Article XII, section 2, of the Constitution of Pennsylvania prohibits the holding of any office by a member of Congress or person holding a position of trust or profit under the United States.

The Act of May 15, 1874, P. L. 186, Section 15 (65 PS § 16) provides as follows :

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.

Whether a member of the legislature may serve as a skilled foreman or a labor foreman on a leave of absence status, while he is serving in the General Assembly, depends entirely on the question of whether his position as skilled foreman or labor foreman is an office. The word "office" connotes a function charged with some degree of executive responsibility involving the exercise of discretion in the performance of the holder's duties.

There is a well-recognized difference between an officer and a mere clerk or employe. Judge Henderson speaking for the Superior Court in *Richie v. Philadelphia*, 37 Super. Ct. 190 (1908) said, in part, as follows :

* * * It is no doubt true that there are many persons engaged in the public service in subordinate positions exercising functions of such an inferior character that they could not be properly considered public officers within the meaning of the constitution; this much is indicated in *Com. v. Black*, 201 Pa. 433, and *Houseman v.*

Com., 100 Pa. 222, in the latter of which the court expressed the opinion that policemen, firemen, watchmen and superintendents of public property under the orders of the municipal department were subordinate ministerial agents or employees, at the most, petty officers not intended to be embraced in the constitutional provision, and therefore subject to appointment and removal according to legislative regulation. Where, however, the officer exercises important public duties and has delegated to him some of the functions of government and his office is for a fixed term and the powers, duties and emoluments become vested in a successor when the office becomes vacant such an official may properly be called a public officer. The powers and duties attached to the position manifest its character. * * *

In the case under consideration we have been informed by those in charge of the Works Progress Administration that foremen, including labor foremen and skilled foremen, are carried on the records as employes payable on a per diem basis, and not entitled to vacations. It is true that by virtue of their positions as foremen they have certain duties to perform, but in the performance of these duties they perform them in the capacity of employes only, inasmuch as they do not exercise a discretion in the performance of these duties. In these positions tenure is not defined, fixed and certain, but instead it arises out of a mere contract of employment.

This subject matter has been discussed and defined in the following opinions of the Department of Justice: Opinion of Attorney General Carson, rendered July 31, 1902, 12 District Reports 587; Opinion of Attorney General Bell, rendered December 13, 1911, Official Opinions of the Attorney General 1911-1912, page 195, and Opinion of Deputy Attorney General Collins, rendered May 17, 1917, 20 Dauphin County Reporter 161.

It is an established fact that members of the legislature are appointed to various positions which do not arise to the dignity of civil officers. This has been from time immemorial. See *Commonwealth ex rel. v. Binns*, 17 S. & R. 219.

Concurring in the views expressed in the opinions above quoted, we are of the opinion therefore, and you are advised, that members of the House of Representatives who now hold supervisory positions with the Works Progress Administration, such as skilled foremen and labor foremen, may secure a leave of absence from the Works Progress Administration, and may resume their employment with the Works Progress Administration when

the legislature is not in session, these positions not being incompatible.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 219

Trusts—Investment of trust funds—Tax anticipation notes, Series CT—Act of May 20, 1937—Act of July 2, 1935.

1. Commonwealth of Pennsylvania tax anticipation notes, Series CT, issued under the Act of May 20, 1937, P. L. 735, are interest-bearing obligations of the Commonwealth of Pennsylvania and therefore legal investments for trust funds under the Act of July 2, 1935, P. L. 545, amending section 41 (a) (1) of the Fiduciaries Act of 1917.

Banks and banking—Savings banks—Investments—Tax anticipation notes, Series CT—Act of May 20, 1937—Act of May 15, 1933, secs. 1208 and 1209, as amended.

2. Commonwealth of Pennsylvania tax anticipation notes, Series CT, issued under the Act of May 20, 1937, P. L. 735, are interest-bearing obligations of the Commonwealth of Pennsylvania and therefore legal investments for savings banks under the Act of May 15, 1933, P. L. 624, as last amended by the Act of April 22, 1937, P. L. 349.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., June 21, 1937.

Honorable F. Clair Ross, State Treasurer, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning whether tax anticipation notes of the Commonwealth of Pennsylvania, \$60,000,000 Series CT, are legal investments for trust funds and authorized investments for savings banks in this Commonwealth.

The tax anticipation notes were authorized by Act of May 20, 1937, P. L. 735. 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 \$60,000,000. 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 4½%. Section 2 (c) pledges the current

revenues of the biennial fiscal period beginning June 1, 1937, for the payment of interest and principal of these notes. The act provides further in section 4 that such loans are secured by and payable from the current revenues of every kind accruing to the general fund.

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 investment 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.

A strikingly similar statute prescribes and defines authorized investments for savings banks in this Commonwealth. Sections 1208 and 1209 of the Act of May 15, 1933 (P. L. 624) as last amended by the Act of April 22, 1937 P. L. 349 provide, in part, as follows:

Section 1208. Authorized Investments of Savings Banks Not Under Special Charter.—A. Except as otherwise specifically provided in this act, a savings bank other than a savings bank organized under a special act of the General Assembly, shall not make any investments except as follows:

* * * * * * *

(3) Bonds or other interest-bearing obligations of the Commonwealth of Pennsylvania, or of any state of the

United States, or those for the payment of the principal and interest on which the faith and credit of this Commonwealth, or of such state, is pledged, provided that it has not, at any time within the ten years immediately preceding the date of the purchase of such bonds or other obligations by the savings bank, defaulted in the payment of any part of any principal or interest due by it.

Section 1209. Authorized Investments of Special Charter Savings Banks.—A savings bank organized under a special act of the General Assembly may make such investments as may be authorized by its articles of incorporation, * * *

The Commonwealth of Pennsylvania has not at any time defaulted in the payment of any principal or interest due by it.

There are very few specially chartered savings banks in this Commonwealth which are still exercising the powers of their original charters. Such charters, however, almost invariably authorized greater latitude in investment than is permitted to banks not specially chartered.

Although the loans in question are payable out of revenues of a specific fiscal period, the notes are nevertheless "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 $4\frac{1}{2}\%$ per annum.

Accordingly, you are advised that tax anticipation notes of the Commonwealth of Pennsylvania, \$60,000,000 Series CT, are legal investments for trust funds and authorized investments for savings banks generally in this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 220

Unemployment compensation—Act of December 5, 1936, as amended—Exemptions—Federal instrumentalities—State banks and bank and trust companies—Membership in Federal Reserve System.

1. State banks and bank and trust companies which are members of the Federal Reserve System are not instrumentalities of the United States within

the meaning of section 4 of the Unemployment Compensation Law of December 5, 1936, as amended, and are not therefore exempt from its provisions.

2. It seems that the legislature could not constitutionally discriminate between State banks and bank and trust companies which are not members of the Federal Reserve System and those which are members of the system for purposes of unemployment compensation.

3. The adoption by a State of a part of a Federal statute does not carry with it the construction placed thereon by a Federal administrative body.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., July 7, 1937.

Honorable Ralph M. Bashore, Secretary of Labor & Industry,
Harrisburg, Pa.

Sir: We have your request of May 21, 1937, in which you desire to know whether State banks and bank and trust companies which are members of the Federal Reserve System are subject to the provisions of the Unemployment Compensation Law (Act of December 5, 1936). These institutions, hereinafter called banks, are corporations organized under the laws of the Commonwealth.

The Unemployment Compensation Law is a measure designed as a comprehensive scheme for unemployment benefits for workers employed within the state by employers designated by the law. Under sections 301 and 302, these employers include all who employ one or more persons for some portion of each of some twenty days during a calendar year, each day being in a different week, except those engaged in certain specified employments.

The law imposes upon the employers the obligation to pay a certain percentage of their total yearly pay rolls into the State Unemployment Compensation Fund. For 1936, the levy is .9 of 1 percent; for 1937, it is 1.8 percent, and for 1938 and subsequent years, it is 2.7 percent.

Section 4 excludes from the employment upon whose pay rolls a contribution becomes due:

Service performed in the employ of the United States Government, or of an instrumentality of the United States.

The Federal Reserve Act of December 23, 1913, as amended, provides as follows:

All banks or trust companies incorporated by special law or organized under the general laws of any State, which are members of the Federal Reserve System, when designated for that purpose by the Secretary of the

Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary, and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require of the banks and trust companies thus designated satisfactory security, by the deposit of United States bonds or otherwise, for the safe keeping and prompt payment of the public money deposited with them and for the faithful performance of their duties as financial agents of the Government.

In the case of *C. O. Westfall v. United States of America*, 274 U. S. 256, the question was raised as to the power of Congress to enact a law punishing crimes committed against state banking institutions, which were members of the Federal Reserve System. On page 259, Mr. Justice Holmes, delivering the opinion of the court stated:

* * * Finally Congress may employ state corporations with their consent as instrumentalities of the United States (*Clallam County v. United States*, 263 U. S. 341, 68 L. ed. 328, 44 Sup. Ct. Rep. 121), * * *

We may assume, without actually deciding, that state banks, which are members of the Federal Reserve System, may be instrumentalities of the United States. However, are they Federal instrumentalities within the language of section 4 of the Unemployment Compensation Law?

At the outset we may state that it is immaterial for the purposes of this inquiry to determine whether or not the unemployment compensation contribution is a tax. In this connection, see the case of *Carmichael v. Southern Coal and Coke Company*, 81 Sup. Ct. 811, wherein the United States Supreme Court sustained the constitutionality of the Alabama Unemployment Compensation Act. That act had provisions similar to ours with reference to contributions. The Supreme Court of Alabama had already held the levy of such contributions to be a proper excise tax: *Beeland Wholesale Co. v. Kaufman* — Ala. —. The Supreme Court of the United States stated on page 815:

* * * As the present levy has all the indicia of a tax, and is of a type traditional in the history of Anglo-American legislation, it is within state taxing power, and it is immaterial whether it is called an excise or by another name. * * * Its validity under the Federal Con-

stitution is to be determined in the light of constitutional principles applicable to state taxation.

That the State has power to tax these banks, even though they may aid the United States Government in certain particulars, cannot be doubted. The mere fact that their property is used, among others, by the United States as an instrument for effecting its purposes, does not relieve them from State taxation: *Choctaw O. G. R. Co. v. Mackey*, 256 U. S. 531.

In the case of *Metcalf v. Mitchell*, 269 U. S. 514, which involved the right of the Federal Government to tax income received by engineers who were employed to advise states or subdivisions of states with reference to proposed water supply and sewage disposal systems, Mr. Justice Stone, in delivering the opinion of the court that such income was taxable, stated on pages 522 and 523:

When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. * * *

Again on page 524, Mr. Justice Stone states:

While it is evident that in one aspect the extent of the exemption must finally depend upon the effect of the tax upon the functions of the government alleged to be affected by it, still the nature of the governmental agencies or the mode of their constitution may not be disregarded in passing on the question of tax exemption; for it is obvious that an agency may be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government, that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power.

It is on this principle that, as we have seen, any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function (*Gillespie v. Oklahoma*, supra) is prohibited. But here the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service; for practical purposes not unlike a contract to sell and deliver a commodity. In such a situation

it cannot be said that the tax is imposed upon an agency of government in any technical sense, and that the tax itself cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way. * * *

It seems to us extravagant to say that an independent private corporation for gain created by a state is exempt from state taxation either in its corporate person or its property because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. * * *

* * * * *

But we do decide that one who is not an officer or employee of a state, does not establish exemption from Federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state; and *when we take the next step necessary to a complete disposition of the question, and inquire into the effect of the particular tax on the functioning of the state government, we do not find that it impairs in any substantial manner the ability of plaintiffs in error to discharge their obligations to the state, or the ability of a state or its subdivisions to procure the services of private individuals to aid them in their undertakings.* * * * (Italics ours)

In applying the above stated principle to the instant case, there can be no doubt of the right of the State to compel contribution from these member banks. They are given their powers to exist by the State Government. The exaction of contributions would in no way impair their efficiency in acting as an aid of the Federal Government.

Further, precedent is not needed to justify the power of the State to require unemployment compensation contributions from member banks. Section 1019 of the Banking Code (Act of May 15, 1933, P. L. 624) authorizes State banks and State bank and trust companies to become members of a Federal Reserve Bank. This section provides:

A bank or a bank and trust company may purchase and hold, for the purpose of becoming a member of a Federal Reserve Bank, so much of the capital of such Federal Reserve Bank as will qualify it for membership therein. It may acquire and exercise all powers, not in conflict with the laws of this Commonwealth, which are conferred upon any such member bank by the Federal Reserve Act, its amendments and supplements. Such bank or bank and trust company may be examined by Federal authorities in accordance with the provisions of the Federal Reserve Act, but, unless the department

shall, in its discretion, accept the examinations or reports made under the Federal Reserve Act in lieu of those required by the laws of this Commonwealth, it shall be examined by, and make reports to, the department in the manner provided by law for all banks or bank and trust companies. Except as otherwise specifically provided in this act, such bank or bank and trust company, and its officers, directors, employees, and shareholders, shall continue to be subject to all the liabilities and duties imposed upon them by this act or by any other law of this Commonwealth.

The right of the State to impose conditions upon the exercise of corporate and banking powers cannot be doubted. In section 1019, it has imposed a condition upon its allowing these banking institutions to become members of the Federal Reserve System, to wit:

Such bank or bank and trust company, and its officers, directors, employes, and shareholders, shall continue to be subject to all the liabilities and duties imposed upon them by this act or by any other law of this Commonwealth.

Hence, even in the absence of judicial authority, the power to exact these contributions would clearly exist by virtue of the terms of section 1019, authorizing these banks to become members of the Federal Reserve System.

Having the power to exact these contributions, has the Commonwealth exempted these institutions from their payment? This becomes a matter of legislative intent.

If we were to hold that member banks were exempt from the provisions of the Unemployment Compensation Law, while all other State banks were within its provisions, there would be grave danger that such interpretation would be unconstitutional, in that it would violate the equal protection clause of the fourteenth amendment of the Federal Constitution, and article III, section 7 of our State Constitution, which prohibits legislation granting special or exclusive privileges or immunities to any corporation or individual.

It is true that these sections do not forbid classification of objects for the purposes of legislation. However, this classification must not be arbitrary nor based upon illusory distinctions. In the case of *Commonwealth v. McDermott*, 296 Pa. 297, the Supreme Court at page 305 stated:

We said in *Com. v. Grossman*, 248 Pa. 11, 15: "We have sustained classification as the proper exercise of legislative power and held that it is a legislative question with

which the courts will not interfere if made in good faith and based on genuine and substantial distinction of the subjects classified." * * * (Italics ours.)

Although, as stated before, we are not determining the question of whether or not these contributions are taxes, if we should adopt the viewpoint expressed in *Carmichael v. Southern Coal and Coke Co.*, supra, then Article IX, Section 1 of the Pennsylvania Constitution, which provides that "all taxes shall be uniform upon the same class of subjects", would also be involved in the present inquiry.

In the case of *Schoyer, et al. v. Comet Oil & Ref. Co.*, 284 Pa. 189, wherein the interpretation of article IX, section 1 was in question, the Supreme Court stated at page 197:

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. *There must be a real distinction between the objects with which the law deals for it to be valid. As stated in Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U. S. 150, 155, "*Classification cannot be made arbitrarily . . . That 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 . . .* [p. 159]. Arbitrary selection can never be justified by calling it classification." * * * (Italics ours)

The only difference in the character of the operations of State banks not members of the Federal Reserve System, and State banks that are such members, is that the latter may be called upon to aid the United States Government in its fiscal operations. However, it cannot be denied that they may never be called upon to exercise such powers and assume such duties. Hence, the assumption of authority and the imposition of the duty to act as an aid of the Federal Government cannot be a controlling factor in determining the question of the *reasonableness of classification herein involved*. The fundamental characteristics of a State bank remain. No distinction exists with respect to the purposes of the Unemployment Compensation Law.

It should be borne in mind that we are here dealing solely with a question of interpretation and that in this case, we are confronted with a situation in which two constructions may be placed upon an act of assembly. As stated in the case of *Carr, Appellant, v. Aetna, et al. Company*, 263 Pa. 87, at page 91:

* * * Even were this so, there is another rule of greater force which prevents that presumption from applying here, viz: that if there are two constructions which can be placed upon an act of assembly, one of which will make it constitutional and the other unconstitutional, the former will always be preferred, for it can never be presumed that the legislature intended to do the vain thing of passing a wholly nugatory provision: *Sharpless v. West Chester Borough*, 1 Grant 257, 260.

This rule is also well expressed by Justice White in *U. S. v. D. & H. Co.*, 213 U. S., 366, wherein at page 408, the Justice stated:

* * * where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

In the case of *Commonwealth of Pennsylvania v. Schuylkill Trust Company*, 327 Pa. 127, Mr. Justice Stern, in delivering the opinion of the court stated:

* * * "A presumption of much importance in this country, . . . is that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction": Endlich, *Interpretation of Statutes*, Section 178. "It is a safe and wholesome rule . . . to regard as excepted by necessary implication from even the most express and absolute general provisions, all cases to which a statute cannot constitutionally apply": *Idem*, Section 179.

This canon of construction has been enacted into statutory law by Act of May 28, 1937, P. L. 1019, which act, among other things, sets forth rules for the interpretation of statutes, and provides in section 52:

In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions, among others:

* * * * *

(3) That the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth.

If we construe the clause in question as permitting the exemption, the unreasonable classification would strike down the right to subject non-member banks to the law. However, rejecting such interpretation, no constitutional question arises.

It may be argued that by holding that these member banks are not exempt, the exemption clause has been rendered meaningless, since it would have the effect of exempting only those instrumentalities from whom we cannot exact contributions under the Federal Constitution. To this argument, we cannot subscribe.

There may be other instrumentalities upon which the exemption clause may operate where the Constitution of the United States does not forbid the imposition of the duty on such instrumentalities. Even if there would be no such cases, the provisions of an act setting forth that which is already the applicable law under the Constitution, is by no means an unusual situation. We may call attention to the various statutes which allow the appointing power to remove his appointees, even though this power has been expressly hitherto granted by the Pennsylvania Constitution. The exemption may serve a proper purpose as a declaration of notice to officials charged with the administration of the act, and also to remove any question of constitutionality.

In the case of *Carmichael v. Southern Coal and Coke Co.*, supra, the Supreme Court, in suggesting possible reasons for the exemptions allowed under the Alabama statute stated on page 818:

* * * *Fear of constitutional restrictions*, and a wholesome respect for the proper policy of another sovereign, would explain exemption of the United States, and of the interstate railways, compare *Packer Corp. v. Utah*, supra (285 U. S. 109, 76 L. ed. 646, 52 S. Ct. 273, 79 A. L. R. 546). * * * (Italics ours)

For further answer, even if such interpretation would render the clause meaningless, the rule requiring a statute to be given a constitutional interpretation, where possible, is one of "greater force" and must, therefore, be applied to defeat such argument.

It has been suggested that since title 9 of the Social Security Act (which relates to unemployment compensation) contains exemption language identical to that contained in section 4 of the Unemployment Compensation Law, and since prior to the passage of the Pennsylvania law, the Bureau of Internal Revenue had ruled that State banks, members of the Federal Reserve System, were Federal instrumentalities, and, therefore, exempt from title 9 of the Social Security Act, the Pennsylvania Legislature, in using the same language, adopted the construction of the Federal statute.

The adoption of a Federal statute that has been construed by an administrative board of that government does not bring the adopting act within the rule that a statute adopted from another

sovereign carries with it the construction placed upon it by the courts of that state. As shown by the statement just made, this rule is applicable only to a judicial construction.

Hence, as stated at 59 C. J. 1069:

The adoption by a state of a part of a federal statute does not carry with it the construction placed thereon by the interstate commerce commission. * * *

Even though the Pennsylvania act be said to have adopted the language of the Federal statute, the construction of the Bureau of Internal Revenue is in the same position as that of the Interstate Commerce Commission upon Federal laws within its jurisdiction.

An additional reason that must be advanced against this suggestion is the fact that the above stated rule of construction of adopted statutes, is inapplicable when such interpretation would contravene the constitution of the adopting state.

Hence, while the ruling of the Bureau of Internal Revenue might be persuasive, it certainly is not binding upon the Commonwealth. The Pennsylvania act may exist independently of the Social Security Act: section 302 and section 605 of the Unemployment Compensation Law. Whereas title 9 requires contributions only from employers of eight or more, the Pennsylvania law applies to all employers (subject to certain exemptions) who employ persons for the required number of weeks in a calendar year, regardless of the number of persons employed.

Hence, the argument, that both acts must be given a uniform interpretation, is met at the threshold by the fact that the Pennsylvania statute in its positive terms, differs from title 9 of the Social Security Act. Between a desire for uniform interpretation, and a desire for a constitutional construction, the latter must govern.

Although we have assumed that these member banks are Federal instrumentalities, it may well be argued that section 1019 of the Banking Code, hereinbefore quoted, estops these banks from declaring that they are such instrumentalities, and hence, regardless of constitutional questions, the liability would be established. The policy of the Commonwealth as expressed in the said section would appear to deny to these banks any dual status. Rather, it would appear that the legislature intended that at all times these banks must retain their identity as creatures of the State, and as such, subject to any law applicable to banks not members of the system.

The broad provisions of section 1019 would appear to allow the State to impose such liabilities and duties upon these banks as might impair their ability to render any service whatsoever to the United States. Such retention of absolute subjugation to the will of the Commonwealth leads to the conclusion that, within the purview of our laws, State banks which become members of the Federal Reserve System are not Federal instrumentalities.

In the case of *Hiatt v. United States*, 4 Federal (2d) 374 (certiorari denied, 45 Supreme Court, 638), the 7th Circuit Court of Appeals, in sustaining a conviction under a Federal statute governing crimes committed against Federal reserve banks, alluded to the relationship between the state bank and the Federal Reserve System, and stated on page 375:

[2] 2. The matter of affiliation between the Dickinson Trust Company and the Federal Reserve Bank, aside from the investment in stock, seems to present merely a business arrangement between the Federal Reserve Bank and the trust company, which was not made under compulsion, and was doubtless regarded as advantageous by both concerns. It was simply an arrangement made for the advancement and in the interests of the business for which the trust company was chartered.

* * *

This language reduces the relationship between the member banks and the Federal Reserve System to a business arrangement. They stand in exactly the same position in respect to relationship with the Federal Government as did the engineers in the case of *Metcalf v. Mitchell*, 269 U. S. 514, *supra*.

The unemployment compensation contribution is, therefore, not "a tax imposed upon an agency of government in its technical sense." Certainly, the exemption by statute "of an instrumentality of the United States" cannot change these banks into such agencies so that they now may claim a status not hitherto enjoyed by them.

Thus, we are logically led to the conclusion that even if these member banks could claim that they were Federal instrumentalities, undoubtedly, they would be liable for a contribution such as is imposed by the Unemployment Compensation Law if the law were silent upon the question of exemptions; (2d), the exemption of Federal instrumentalities cannot relieve them, since it would bring about an unconstitutional classification between member banks and non-member banks, and hence, under proper rules of construction, such intent to exempt all Federal instrumentalities, even where an unconstitutional classification would arise, cannot

be imputed to the legislature; and (3d), that applying the law to the realm of things as they actually exist, these banks are not Federal instrumentalities.

We are of the opinion that State banks, members of the Federal Reserve System, are not exempt from the provisions of the Unemployment Compensation Law.

Very truly yours,

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

OPINION No. 221

Constitution—Amendment—Publication of proposed amendments—Approval once or twice by General Assembly.

1. Proposed constitutional amendments which have been twice agreed to by the General Assembly should be published and submitted to the electors of the State at the next ensuing election, whether municipal or general, with the exception of such amendments as deal with subjects concerning which amendments have been submitted within five years, or with respect to which the General Assembly may have specifically provided otherwise.

2. Proposed constitutional amendments which have been agreed to by the General Assembly but once should, under article VIII, sec. 1, of the Constitution be withheld from publication until prior to the next general election at which time they should be published once a month during the three months immediately preceding such election.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., July 9, 1937.

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

Sir: You have requested an opinion from the Department of Justice relative to certain phases of your duties in connection with the publication and the submission to the electors of proposed amendments to the Constitution of this Commonwealth.

You refer to the opinion of the Supreme Court of Pennsylvania, filed June 25, 1937, in the case of *Commonwealth v. Lawrence*, which holds that the proposed amendment to article XIV of the Constitution, permitting the consolidation of the city and county governments of Philadelphia, should be published and submitted to the electors at the municipal elections of 1937, and ask whether you should also publish and submit, at the same time, the other

proposed constitutional amendments which have been twice agreed to by the General Assembly.

You also ask whether the proposed constitutional amendments which have been agreed to for the first time by the recently adjourned session of the General Assembly should be published prior to the 1937 municipal elections or withheld until the 1938 general election.

Answering your inquiries in the above order, it is clear that, although the above mentioned case of *Commonwealth v. Lawrence* involved but one proposed amendment, the Supreme Court has definitely discarded its so-called "time-lock" interpretation which has for a long time so restricted the operation of article XVIII, section 1, as to prohibit the submission of proposed amendments except at five-year intervals. The Supreme Court, in deciding this case, made the following statement:

* * * The only logical explanation of this manner of drafting Article 18 is that the electors intended to permit the submission of amendments as frequently as they properly passed through the prescribed steps with the sole prohibition that after an amendment had been once submitted, it or one substantially related could not again be submitted until a period of five years has elapsed.

The above case is certainly a declaration that proposed amendments may be submitted to the electors as often as they have passed through the preliminary steps required for such submission by article XVIII, section 1, of the Constitution, subject of course to the constitutional prohibition that amendments dealing with the same, or substantially the same, subject may not be submitted to the electors oftener than once in five years.

The Act of 1913, P. L. 693, as last amended by the Act of 1925, P. L. 311 (25 PS 21), provides in part as follows:

Unless the General Assembly shall prescribe otherwise with respect to any particular proposed amendment or amendments, the manner and time of submitting to the qualified electors of the State any proposed amendment or amendments to the Constitution for the purpose of ascertaining whether the same shall be approved by a majority of those voting thereon, the said amendment or amendments heretofore, or which may hereafter be proposed, and which have not been submitted to the qualified electors of the State, shall be submitted to the qualified electors of the State for the purpose aforesaid at the first municipal or general election at which such amendment or amendments may be legally submitted to the electors, and which election shall occur at least three

months after the date upon which such proposed amendment or amendments shall have been agreed to for the second time by a majority of the members elected to each house of the General Assembly, as provided in article eighteen, section one, of the Constitution. * * * (Italics ours.)

In view of the decision in the case of *Commonwealth v. Lawrence*, and in light of the direction expressed in the above statute, we feel that all the proposed constitutional amendments which have been twice agreed to by the General Assembly should be published and submitted to the electors of the State at the forthcoming municipal election, with the exception of such amendments as deal with subjects concerning which an amendment has been submitted within five years, and also with the exception of such amendments with respect to which the General Assembly may have specifically provided otherwise.

You also ask whether the proposed amendments which have been agreed to by the General Assembly but once should be published prior to the forthcoming municipal election or withheld until the general election of 1938. Article XVIII of the Constitution provides that amendments which have been once agreed to by the General Assembly shall "be published three months before the next general election".

This portion of our Constitution was construed by the Supreme Court of Pennsylvania in the case of *Commonwealth v. Beamish*, 309 Pa. 510 (1932). In that case the court made the following statement:

* * * In view of all the facts and circumstances, we are of opinion that publication once a month for the three months preceding the election is more reasonable and more nearly conforms to the convention's intent, and at the same time provides adequate notice to the public.

Inasmuch as the above quoted portion of article XVIII, section 1, has been interpreted to mean that the publication shall take place *during* the three months prior to a general election, it is clear that you should withhold publication of the proposed amendments which have been agreed to but once until three months prior to the 1938 general election.

You are advised, therefore, that all the proposed constitutional amendments which have been twice agreed to by the General Assembly should be published and submitted to the electors at the 1937 municipal election, with the exception of such amendments as may deal with a subject concerning which an amendment has

been submitted within five years, and with the exception of amendments with respect to which the General Assembly may have specifically provided otherwise.

You are also advised that proposed amendments which have been agreed to by the General Assembly but once should be withheld from publication until prior to the 1938 general election, at which time they should be published once a month during the three months immediately preceding such election.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,

Attorney General.

OPINION No. 222

Elections—Right to run as candidate of more than one party—Judges—Lay associate judges—Pennsylvania Election Code of 1937.

Associate judges, though not learned in the law, are nevertheless judges of courts of record and therefore within the exception to the provisions of the anti-party raiding sections of the Pennsylvania Election Code of June 3, 1937 P. L. 1333, permitting judges of courts of record to run for election as the candidate of more than one political party.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., July 16, 1937.

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

Sir: We have your request to be advised whether associate judges (judges not learned in the law) are within the exception to the provisions of the anti-party raiding sections of the Pennsylvania Election Code (Act of June 3, 1937, P. L. 1333).

Section 910 of the code requires each candidate for the office of United States Senator or Representative in Congress, or for any state, county, city, borough, incorporated town, township, ward, school district, poor district, election district, party office, party delegate or alternate, *except judge of a court of record*, to include in the affidavit filed with his nomination petition a statement that he is not a candidate for nomination for the same office of any party other than the one designated in such petition.

Section 1004 provides, inter alia, as follows:

* * * That in no event shall the name of any person consenting to be a candidate for nomination for any one office except the office of judge of a court of record be printed as a candidate for such office upon the official primary ballot of more than one party. * * *

Your inquiry is thus directed to ascertain whether an associate judge is a judge of a court of record.

In the case of *Carter's Estate*, 254 Pa. 518 (1916), the following definitions of the terms "judge" and "court" appear:

* * * By "court" is to be understood a tribunal officially assembled under authority of law at the appropriate time and place for the administration of justice. By "judge" is to be understood simply an officer or member of such tribunal. * * *

It is clear that an associate judge not learned in the law is a member in the various county courts which are courts of record and this alone should be sufficient to place him in the classification of a judge of a court of record.

Furthermore, these officials are, without exception, referred to as "judges", in the constitutional and statutory provisions which apply to them. The mere fact that the term "associate" is coupled with the designation of "judge" when applied to them, would not be controlling, for this term "associate" is also used with reference to judges learned in the law, who are certainly judges of courts of record.

It should be noted that in various constitutional and statutory provisions relative to judges, specific reference is made to judges learned in the law and judges not learned in the law: Article V, Section 5 of the Constitution; Section 1 of the Act of May 5, 1915, P. L. 258; Section 4 of the Act of May 16, 1929, P. L. 1780. Unless both these classes were deemed to be judges of the county courts, such distinction would be unnecessary. In other words, it would be unnecessary to refer to judges learned in the law unless there was an additional class of judges, and the only possible additional class would be judges not learned in the law.

In the Pennsylvania Election Code itself, the legislature again gives support to this interpretation in section 913, which provides for filing fees for nomination petitions and imposes a fee of \$35.00 if the petition is filed for the office of judge of a court of record excepting "* * * associate judge".

In view of the foregoing reasons, we are of the opinion, and you are so advised, that an associate judge (not learned in the

law) is a judge of a court of record, and that a candidate for such office may properly file nomination petitions, and seek nomination as the candidate of more than one political party.

Very truly yours,

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

OPINION No. 223

Elections—Nomination petitions—Signators—Qualifications—Registration under Permanent Registration Law of 1937—Election Code of 1937.

1. Under section 907 of the Pennsylvania Election Code of June 3, 1937 P. L. 1333, the only persons qualified to sign a nomination petition for the ensuing primary are qualified electors who are also registered and enrolled under the provisions of The Permanent Registration Law of April 29, 1937 P. L. 487, as members of the party whose nomination is sought by the candidate named in the petition.

2. The purpose of the Act of April 25, 1935, P. L. 83, now incorporated in the Election Code of 1937, requiring a signer of a nomination petition to be a registered and enrolled member of the party is to predicate the right to sign a nomination petition upon the signer's ability to support the candidate by his vote and also to eliminate the anomalous situation of the electors of one party signing petitions for another party's candidate, and the act should be construed to effect this legislative purpose.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., July 19, 1937.

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

Sir: We have your request to be advised concerning the requirement of the Pennsylvania Election Code (Act of June 3, 1937, P. L. 1333) that nomination petitions be signed by duly registered and enrolled members of the party. You inquire specifically whether in boroughs and townships, such registration and enrollment must be under the provisions of The Permanent Registration Law for boroughs and townships.

Reference to pertinent provisions of the Pennsylvania Election Code (hereinafter called Code) shows the necessity of such registration. Section 907 provides, *inter alia*:

The names of candidates for nomination as President of the United States, and the names of all other candidates for party nominations, and for election as dele-

gates, alternate delegates, members of committees and other party officers, shall be printed upon the official primary ballots or ballot labels of a designated party, upon the filing of separate nomination petitions in their behalf in form prescribed by the Secretary of the Commonwealth, *signed by duly registered and enrolled members of such party* * * *. (Italics ours)

Section 908 prescribes the manner of signing nomination petitions. It sets forth:

Each signer of a nomination petition shall sign but one such petition for each office to be filled and shall declare therein that he is a registered and enrolled member of the party designated in such petition. * * * He * * * shall also add the date of signing * * *. (Italics ours)

Section 1812 declares that it shall be a misdemeanor for any person to knowingly and wilfully sign any nomination petition without having the qualifications prescribed by the act, or to set opposite a signature any date other than the actual date of signing.

"Registered and enrolled members" are defined in section 102 of the Code:

(u) The words "registered and enrolled members of a political party" shall mean any qualified elector who shall be registered according to political designation in accordance with the provisions of the registration acts.

The precise expression "registered and enrolled" also appears in section 702, which provides that "no elector who was not registered and enrolled as a member of a political party in accordance with the provisions of this act shall be permitted to vote the ballot of such party or any other party ballot at any primary." As in section 907, the words "registered and enrolled" must be defined in accordance with section 102 (u).

When presenting himself to vote, the elector is required to sign a voter's certificate, and hand the same to the election officer in charge of the district register, who, thereupon, compares the signature with that contained in the district register: section 1210.

The district register is defined by section 102 (e) to mean "the cards containing all or any part of the registry list of qualified electors of the same election district as prepared by the registration commissions." The registration commissions are those who are given the jurisdiction over the registration of electors under The Permanent Registration Law: Section 3 of The Permanent Registration Law for boroughs and townships (Act of April 29,

1937, P. L. 487), hereinafter called The Permanent Registration Law.

Thus, as a prerequisite to the receipt of a ballot, the voter's name must be checked with a registry list prepared by the registration commission in conformity with The Permanent Registration Law. Further, section 1210 (d) of the code precludes voting by persons who have not personally registered, and whose names do not appear in the district register, with an exception immaterial herein. The only manner in which such names could so appear would be by registration under The Permanent Registration Law. Reading section 1012 in connection with section 702, *supra* (which sets forth the qualifications of electors at primaries and requires their enrollment and registration in accordance with the provisions of the code), it becomes apparent that section 702 can refer only to registration under The Permanent Registration Law, and that the voter must be registered in accordance with this law in order to cast his ballot.

Since there is no difference in the language used in section 702, and that used in both section 907 (under which nomination petitions must be signed by duly registered and enrolled members of the party), and section 908 which requires a declaration by each signer that he is so registered and enrolled, in so far as the phrase "registered and enrolled member" is concerned, it logically follows that in the three sections, a like meaning must be given to that phrase, and that to sign a petition, the elector must be registered under the provisions of The Permanent Registration Law.

Section 19 of this law, which provides that "* * * From and after the first day of September, one thousand nine hundred thirty-seven, no person shall be permitted to vote at any election or primary held in any borough, town or township unless he shall have been so registered * * *" does not adversely affect our conclusion. This section relates only to the right to vote prior to September 1, 1937, without being registered under The Permanent Registration Law. The sole purpose of this section was to provide for special elections to be held throughout the Commonwealth prior to that date. However, the requirement of such registration after September 1, 1937, absolutely confirms the conclusion that the registration necessitated by the code is registration under The Permanent Registration Law.

This opinion could well be based on the fact that The Permanent Registration Law, which was enacted before the code, repealed all prior registration laws. Hence, at the time when the code went into effect, The Permanent Registration Law was the

only law under which registrations could be had. Therefore, when the code refers to registration in accordance with registration acts, it can only refer to existing laws, namely, the various permanent registration acts.

We have alluded to the proposition that the right to vote at the primary election depends upon a registration under The Permanent Registration Law. In conjunction with the right to sign a nomination petition, there must be this right to vote, and, therefore, one who is not entitled to vote by not being so registered is not entitled to sign a nomination petition. To state the matter in another form, opportunity for control of a party's nomination petitions by electors of an opposite political faith should not exist.

A short review of the history leading up to the legislation permitting only those voters registered and enrolled in a party to sign a nomination petition sustains this position.

The Act of July 12, 1913, P. L. 719, contained no provisions compelling an elector to be registered and enrolled in the party as a qualification for signing nomination petitions. It merely set forth that such petitions should be signed by qualified electors. Despite the language of the act, the Court of Common Pleas of Dauphin County (before whom comes many of the election questions that arise in the Commonwealth), had uniformly held that a signer to a nomination petition must have been a registered voter of his party at the time he signed the petition: *Wilhelm's Petition*, 33 Dau. 343; *Snyder's Petition*, 30 Dau. 419; *In re Nomination Petition of Samuel Earhart*, 23 Dau. 128. *In re Petition of Werner*, 23 Dau. 129; *In re Petition of Jackson*, 23 Dau. 137.

In the case of *In re Nomination Petition of Samuel Earhart*, supra, the court, in setting forth the reason for such rule, stated on page 128:

* * * to hold otherwise might open the door to fraud, and it is conceivable that parties of another political faith might thus control nomination petitions by changing the registration prior to the Primary Election Day.

However, in *Sullivan's Petition*, 307 Pa. 221 (1932), our Supreme Court reversed the Dauphin County Court on its ruling that such registration was a condition precedent to signing a nomination petition, and held that a qualified elector meant a person who possessed the qualifications set out in article VIII, section 1 of the Constitution, and that this did not require registration. To overcome the effect of this decision, the legislature, by the Act of April 25, 1935, P. L. 83, imposed the requirement that a signer

of a nomination petition must be a registered and enrolled member of the party. This condition is continued in the code.

The obvious purpose is that the right to sign a nomination petition should depend upon the elector's ability to support such candidate by his vote, and also to eliminate the anomalous situation of electors of one party signing petitions for another party's candidates, and perhaps controlling the nomination petitions of the opposition party.

Thus, if we were to hold that a person registered under prior registration laws, now repealed, could, nevertheless, sign a nomination petition for a candidate at the primary election of 1937, we would, in effect, be aiding contravention of the legislative policy, since only through registration under the present law could such elector vote at the primary.

Therefore, you are advised that in order to sign a nomination petition for the ensuing primary, the qualified elector must be registered and enrolled under the provisions of The Permanent Registration Law for boroughs and townships as a member of the party whose nomination is sought by the candidate named in the petition.

Very truly yours,

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

OPINION No. 224

Incompetents—Patients in State mental institutions—Liability for maintenance—Act of May 28, 1937, P. L. 973—Application to patients committed before effective date of act.

1. The provisions of the Act of May 28, 1937, P. L. 973, amending section 308 of the Mental Health Act of July 11, 1923, P. L. 998, which in effect release counties from paying full per capita costs of patients maintained in State institutions except where such patients are undergoing sentence, apply not only to patients admitted after the effective date of the act but to all patients.

2. Counties are liable for the full per capita cost of patients in State mental institutions until the effective date of the Act of May 28, 1937 P. L. 973, where such patients, although not actually serving sentences when committed, were at that time, under the provisions of the Act of July 11, 1923, P. L. 998, before amendment, properly classified so as to impose upon such counties the full per capita rate.

3. Patients in State mental institutions on the effective date of the Act of May 28, 1937, P. L. 973, who were committed while serving sentence, which sentence has not yet expired, must be maintained wholly by county until the expiration of their sentence.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., August 2, 1937.

Honorable J. Griffith Boardman, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to the interpretation of section 308 of the Act of July 11, 1923, P. L. 998 (Mental Health Act) as amended by the Act of May 28, 1937, P. L. 973 with respect to the following questions:

1. Do the provisions of the amendatory act, which in effect release counties from paying full per capita cost of patients maintained in State mental institutions, except where such patients are undergoing sentence, apply only to patients committed after the effective date of such act, or to all patients?

2. Are the counties liable for the full per capita cost of patients in State mental institutions until the effective date of the amendatory act where such patients, although not actually serving sentence when committed, were at that time, and under the provisions of the act before amendment, properly classified so as to impose upon the counties the full per capita rate?

Section 308 of the act, as amended, inter alia, provides:

The expense of examination including the fees of physicians or commissioners and all costs incident to [such removal] *the commitment and transfer of such person and if such person is undergoing sentence all costs of maintenance in the hospital previous to the expiration of such sentence shall be paid by the county liable for the maintenance of the patient in the prison penitentiary reformatory or other penal or correctional institution from which he was [removed] transferred without recourse against any poor district.*

Section 507, which is corollary to the section just quoted, provides:

The expenses of the care and maintenance including clothing *in any mental hospital of an insane [prisoners] or mentally defective person undergoing sentence for a criminal offense shall be paid [in the same manner as the costs of commitment of such prisoner as provided in section five hundred and two of this act] by the county liable for the maintenance of the patient in the prison penitentiary reformatory or other penal or correctional institution from which he was transferred.* Provided, That if the term of sentence of any prisoner shall expire while he is still a patient in any hospital such ex-

penses shall thereupon become chargeable as provided in section five hundred and three of this act.

The material included in brackets was deleted from, and the material italicized was inserted in, the original statute by the provisions of the amendatory act. Such amendatory act by its terms became effective June 1, 1937.

The act defines the liability of counties for the maintenance of persons in State mental institutions. There is nothing in either section referred to, or in any other part of the amendatory act, which restricts the provisions thereof to patients who may be committed in the future. The language of the act applies to all patients; and defines the liability as to them from the effective date of the act forward. Accordingly, patients in mental institutions on the effective date of the act who were committed while serving sentence, which sentence has not yet expired, must be maintained wholly by the counties until the expiration of their sentences. Conversely patients in mental institutions who have heretofore been maintained wholly by the counties but who were not serving sentence when committed are not chargeable to the counties at the full per capita rate after the effective date of the amendatory act. As to such patients the amendatory act re-defines the future liability of the counties.

From the foregoing it necessarily follows that where the maintenance of patients under the original act has been properly charged to the counties at the full per capita cost, the liability of the counties to pay such full per capita cost continues until the effective date of the amendatory act, even if, under the provisions of such act, such patients will not be charged to the counties at the full per capita rate in the future. The amendatory act cannot be applied retroactively to define or limit the liability of the counties prior to its effective date because legislation which affects substantive rights will not be construed to be retroactive. *Kuca v. Lehigh Valley Coal Co.*, 268 Pa. 163.

Therefore, we advise you that:

1. The provisions of the amendatory Act of May 28, 1937, P. L. 973, which in effect release counties from paying full per capita cost of patients maintained in State mental institutions, except where such patients are undergoing sentence, apply not only to patients committed after the effective date of such act but to all patients.

2. The counties are liable for the full per capita cost of patients in State mental institutions until the effective date of said

amendatory act where such patients, although not actually serving sentence when committed, were, at that time, and under the provisions of the act before amendment, properly classified so as to impose upon the counties the full per capita rate.

Very truly yours,

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

OPINION No. 225

Elections—Registration of State institution employes—Place of work—Former domicile—Permanent Registration Act of Boroughs, Towns and Townships of April 29, 1937, sec. 18(g).

Section 18(g) of The Permanent Registration Act for Boroughs, Towns and Townships of April 29, 1937, P. L. 487, providing, in substance, that persons employed in the service of the Commonwealth and required thereby to be absent from their domicile shall be registered as of their domicile, is directory only and not mandatory, and does not prevent such employes, who have in fact established their domicile in the locality in which they are employed, from being registered there.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 1, 1937.

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

Sir: You have asked to be advised whether section 18(g) of the Act of April 29, 1937, P. L. 487, prohibits individuals employed at State institutions from being registered in the borough or township in which they live while working at these institutions, if such individuals lived in other localities before entering into such employment.

Section 18(g) of the act provides, in part, as follows:

(g) Any person employed in the service of this Commonwealth or in the service of the Federal Government, and required thereby to be absent from any borough, town or township wherein he resided when entering such employment, his wife, or her husband, shall be registered as of the district wherein he or she shall have resided immediately prior to entering such service, and be enrolled as a member of the political party he or she designates without declaring a residence by street and number. * * *

It is clear that the answer to the question now before us depends upon whether the above quoted portion of the act is to be construed as mandatory or directory. It is true that the words "shall be registered" are used and that the word "shall" is often deemed to be a word of command. There is an established rule of statutory construction which must be kept in mind in this connection, however. This rule is well expressed in 59 Corpus Juris, at page 1085:

The word "shall" may be construed as merely permissive, where the language of the statute as a whole, and its nature and object, indicate that such was the legislative intent, and where no public benefit or private right requires it to be given an imperative meaning. * * *

In determining the intent of the legislature in adopting this provision, it is fitting that we consider briefly certain pertinent constitutional provisions and the decisions which have been handed down thereunder.

Article VIII, section 1 of the Constitution of Pennsylvania provides as follows:

Section 1. Qualifications of electors.

Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.

1. He or she shall have been a citizen of the United States at least one month.

2. He or she shall have resided in the State one year (or, having previously been a qualified elector or native born citizen of the State, he or she shall have removed therefrom, and returned, then six months) immediately preceding the election.

3. He or she shall have resided in the election district where he or she shall offer to vote at least two months immediately preceding the election.

Article VIII, section 13 of the Constitution of Pennsylvania provides:

Section 13. Residence of electors.

For the purpose of voting no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while employed in the service, either civil or military, of this State or of the United States, nor while engaged in the navigation of the waters of the State or of the United States, or on the high seas,

nor while a student of any institution of learning, nor while kept in any poorhouse or other asylum at public expense, nor while confined in public prison.

Section 18 (g) of the act was undoubtedly enacted in view of the provisions of article VIII, section 13, and was designed to execute those provisions. The Act of April 29, 1937, P. L. 487, should, therefore, be interpreted in conformity with the accepted interpretation of article VIII, section 13.

Shortly before the adoption of our present Constitution, the Supreme Court of Pennsylvania decided the case of *Fry's Election*, which is reported in 71 Pa. 302 (1872). In that case the question before the court was whether students at Muhlenberg College were entitled to vote in the city in which the college was located. The court discussed at length the residence qualification for voting under the provisions of article III, section 1 of the Constitution of 1838, and defined this requirement as follows:

* * * It means that place where the elector makes his permanent or true home, his principal place of business, and his family residence, if he have one; where he intends to remain indefinitely, and without a present intention to depart; when he leaves it he intends to return to it, and after his return he deems himself at home. * * *

Applying this principle, the court held that ordinarily college students did not have voting residence in the city in which the college was located.

Article VIII, section 1 of the Constitution of 1874 does not differ materially from article III, section 1 of the Constitution of 1838 in the manner of the use of the term "residence", and it is safe to say that the elements of a "voting residence" within this Commonwealth are the same as those of a "domicile", as that term is used in legal phraseology, and that the mere fact that a citizen is living in a certain district does not entitle him to vote therein.

When the Constitution of 1874 was drafted, and article VIII, section 13 was added thereto, it was not designed to inaugurate any change in the established law relative to the voting residence of citizens. In fact, article VIII, section 13 merely affirmed the principle laid down in the case of *Fry's Election* wherein it was stated that although a person is living in a certain district, he has not necessarily established a voting residence or domicile therein. Indeed, the Chairman of the Committee on Suffrage, from

whom came article VIII, section 13, made the following statement relative to it (Volume 2 of the Debates, page 152) :

This section (the thirteenth) is not intended to alter the legal construction of the preceding section (which prescribes residence as a qualification for voting). It is simply explanatory, not necessary for a lawyer, but presumed to be necessary for the guidance of election boards.

Thus, it is clear that article VIII, section 13 was intended to have no greater effect than would result from an application of the established principles of the law of domicile, such as are outlined in the case of *Fry's Election*, supra. Under such an interpretation the mere fact that an individual lives in the locality where he is employed by the State does not affect his previously acquired voting residence, but if the other elements of domicile also exist at the place of his employment, he is entitled to vote there. Support for this interpretation is found in several cases involving the right of students to vote in the locality in which they are attending college, which were decided shortly after the adoption of our present Constitution.

In the case of *Lower Oxford Contested Election*, 1 Chester County 253 (1875), twenty-five votes had been cast by students at Lincoln University, but these votes were challenged on the ground of non-residence. In discussing the eligibility of students to vote under article VIII, section 13, the court made the following comments :

Students may, therefore, still acquire residence in this State, as qualification for voting, while at institutions of learning. But the burden of proving such residence is, of course, on those who set it up. And, as we have before stated, presence at the institution, even for years, does not, of itself, tend to prove it. There must be evidence of complete abandonment of the former residence, or the absence from it will be regarded as temporary.***

In the case of *Lower Merion Election*, 1 Chester County 257 (1875), an application had been made to strike off the names on the assessment list of students in the Seminary of St. Charles Borromeo. The court held that in proper cases students were entitled to vote in the locality in which they were attending college, making the following statement :

So it is with a student. He may intend to go elsewhere when his studies are over ; but, if he has no other home while present at the institution, if he has no fixed place to which he intends to go when his under-graduate period

is over, if he elects to become a citizen in the district of his alma mater, and does become such citizen, he has the right to vote,—if the election board is satisfied as to the bona fides of his intent. Of this intent they are the primary judges; and it is for them, and not for the court, at this time, to decide the question in each individual case. * * *

The principles enunciated in these two cases, as applicable to students, are equally applicable to persons in the State service.

In 20 Corpus Juris, at page 74, the following statement appears :

* * * The fact, however, that a person does not gain residence merely by reason of his presence or absence while in the service of the government does not prevent him from otherwise gaining a residence at the place so employed.

In the case of the *Matter of Cunningham*, 45 Misc. 206, 91 N. Y. S. 974, in discussing an analogous constitutional provision relative to employment in the service of the United States, the court stated that it was :

* * * aimed at the participation of an unconcerned body of men in the control through the ballot-box of municipal affairs in whose further conduct they have no interest, and from the mismanagement of which by the officers their ballots might elect, they sustain no injury. Its effect is not to disqualify such persons from gaining or losing a residence, but renders the fact of sojourn or absence impotent as evidence either to create or destroy it; in other words, presence or absence has primarily no effect upon the political status of such person. The question in each case is still as it was before the adoption of this provision of the Constitution, one of domicile or residence, to be decided upon all the circumstances of the case.

In view of the foregoing considerations, we are of the opinion that the legislature intended section 18 (g) of the Act of April 29, 1937, P. L. 487, to be directory rather than mandatory in nature, and that it does not prohibit an individual employed at a State institution from being registered in the borough or township in which the institution is located, in proper cases. Any other interpretation would be contrary to the spirit of the aforementioned constitutional provision and to a line of decisions of long years' standing. Moreover, article VIII, section 1 and article VIII, section 13 of the Constitution of Pennsylvania, in effect, guarantee to the citizens of Pennsylvania the right to vote in the districts in which they are domiciled, and to so construe section

18 (g) of the act as to prohibit individuals employed in State institutions from being registered in the locality in which the institution is located, even though they in fact established a domicile there, might well be held to be an unconstitutional interpretation.

You are advised, therefore, that section 18 (g) of the Act of April 29, 1937, P. L. 487 does not prohibit individuals employed at State institutions who have, in fact, established their domicile in the locality in which they are employed, from being registered in such locality. Whether or not such individuals have actually established a domicile in such places is a question of fact which must be decided under the circumstances of each situation. In order to be entitled to register, these individuals should be required to establish that they have adopted a permanent residence at the place of employment, in which they mean to abide and become citizens until duty, absence, moral obligations, contract relations or convenience compels or induces them to elect new homes as their places of domicile.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

OPINION No. 226

Decedents' Estates—Inheritance tax—Act of May 7, 1927—Liability for interest—Effect of reference to transfer inheritance tax laws—Constitution, art. III, sec. 6—Administrative construction.

1. The Department of Revenue has no authority to impose any interest penalty with respect to inheritance taxes accruing under the provisions of the Act of May 7, 1927, P. L. 859, as amended.

2. The provision of the Act of May 7, 1927, P. L. 859, that taxes imposed thereunder shall be collected "in accordance with the provisions of the transfer inheritance tax laws of the Commonwealth" applies only to the procedure of collection and has no reference to interest provisions, nor could the provisions of the prior law as to interest be constitutionally incorporated by reference only, since any such incorporation would be violative of article VI, sec. 3 of the Constitution.

3. While the contrary is true with respect to Federal taxes, it is a well-established rule that interest is not recoverable on delinquent taxes due a State or political subdivision thereof unless it is expressly so provided by statute.

4. Where the legislature amends an act without making any change in the administrative construction placed thereon its action in so doing is at least persuasive of its recognition and approval of the administrative construction.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 2, 1937.

Honorable J. Griffith Boardman, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You inquire whether your department is required by law to impose an interest penalty with respect to inheritance taxes accruing under the provisions of the Act of May 7, 1927, P. L. 859, as amended, which imposes an additional inheritance tax necessary to take up the slack between the Pennsylvania normal inheritance tax and 80% of the Federal estate tax to which the Commonwealth is entitled by Federal law.

You state that Richard B. Mellon of Pittsburgh died on December 1, 1933; that his estate has paid to the Commonwealth normal transfer inheritance tax in the sum of \$885,000.00 under the provisions of the Transfer Inheritance Tax Law of June 20, 1919, P. L. 521; that under date of June 29, 1937, the Federal Deputy Commissioner of Internal Revenue addressed a letter to the executors of this estate in which he made a determination of the gross tax payable by the estate under the Federal Revenue Act of 1926; that the Commonwealth is entitled to receive from this estate an additional inheritance tax of \$12,424,847.50 under the provisions of the Act of May 7, 1927, P. L. 859; and that the executors of the estate have indicated their desire to pay this tax to the Commonwealth in periodical installments during the balance of the calendar year 1937.

Your inquiry is undoubtedly prompted by the fact that the Pennsylvania normal transfer inheritance tax accruing under the provisions of the Act of June 20, 1919, P. L. 521, is subject to an interest penalty unless it is paid within one year after the date of the decedent's death, and the fact that the tax accruing to the Commonwealth from the Richard B. Mellon estate under the act of 1927, whether paid in a lump sum or in installments, will be received by the Commonwealth more than three years after the date of the decedent's death.

Section 301 (b) of the United States Revenue Act of 1926 (Federal Estate Tax Law), provides as follows:

The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed

by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304.

The above section was amended by the Revenue Act of 1932 by providing, among other things, that the aforementioned credit shall include only such taxes as were actually paid and credit therefor claimed "within four years" after the filing of the return required by section 304.

To obtain this benefit for the Commonwealth, the legislature passed the Act of May 7, 1927, P. L. 859, which, as last amended by the Act of May 12, 1931, P. L. 114, reads in part as follows:

* * * in order that the Commonwealth may receive the benefit of section three hundred and one (b) of the Federal Revenue Act of one thousand nine hundred and twenty-six, or any other legislation of a similar kind or enacted for a like purpose, which grants a credit on the Federal estate tax for inheritance taxes and transfer inheritance taxes paid to the State governments, additional transfer taxes for State purposes are hereby imposed upon the transfer, in trust or otherwise, of any property taxable under the provisions of the transfer inheritance tax law of this Commonwealth, approved the twentieth day of June, one thousand nine hundred and nineteen (Pamphlet Laws, five hundred twenty-one),
* * * Such taxes shall be imposed as estate taxes and shall be collected in accordance with the provisions of the transfer inheritance tax laws of the Commonwealth, in the following cases, viz: Whenever in any estate the total tax paid or payable to the Commonwealth and any other State or territory, at the rates fixed under the inheritance tax law, shall be less than the total credit allowed by the Federal law for taxes paid to the States, then the tax imposed by this act upon the transfer of such property shall be an amount equal to the difference between the total credit, allowable by the Federal law for taxes payable to the State governments, and the total taxes actually paid or payable to the Commonwealth and any other State or territory under the inheritance tax laws. * * * The Commonwealth shall have authority, in any estate taxable under this act, to act to make a provisional estimate for the payment of taxes to the Commonwealth on account, and to make an appraisalment of the taxes due by any estate under this act when the amount of the Federal tax has been finally determined.

In addition to the foregoing, the act requires the personal representatives of the estate to file, within thirty days, with the

Register of Wills, a copy of their Federal return and any communication from the Federal government confirming, increasing or diminishing the Federal estate tax.

In *Knowles' Estate*, 295 Pa. 571 (1929), the Supreme Court declared the act of 1927 to be constitutional, and spoke as follows of the eighty percent provision of the Federal Estate Tax Law:

* * * This is a method of distributing to the several states moneys collectible by the national government from their taxables, and the provision in question is not intended to either burden or benefit the taxpayer. Whenever a state does not see fit to take advantage of the situation thus created, the national government will collect the entire 100% of its assessed federal inheritance taxes.

In *Crane's Estate*, 314 Pa. 193 (1934), the Supreme Court of Pennsylvania made the following statement with respect to the aforementioned act of 1927:

From the terms of the act, it follows that the additional tax assessed thereby must necessarily be the difference between the normal Pennsylvania transfer inheritance taxes and 80 per cent of the amount of the federal tax. The act expressly states that this tax is payable out of the estate. Consequently, any amount of tax not paid to the Commonwealth as normal tax would be included in the additional tax up to the eighty per cent limit designated in the federal act. It must be borne in mind that the amount of the tax payable under operation of the federal law is fixed, and if not paid to the Commonwealth and credit claimed therefor, is due and payable to the United States. The Additional Tax Act of Pennsylvania does not result in double taxation; it merely secures to the Commonwealth the full eighty per cent of the federal tax. * * * The result of the Pennsylvania additional tax, as stated in the act itself, is to make certain that the Commonwealth will "receive the benefit" of the full eighty per cent credit allowed by federal law. * * *

The Act of June 20, 1919, P. L. 521, as amended, which provides for the normal Pennsylvania transfer inheritance tax, contains a complete procedure for the collection of that tax, and, in addition, contains a provision in section 38 for the imposition of interest in the event such tax is not paid within a year of the date of the death of the decedent. On the other hand, the Act of May 7, 1927, P. L. 859, as amended, which is involved here, is

silent with respect to interest, and with respect to the collection of taxes accruing under its provisions, provides that:

* * * Such taxes shall be imposed as estate taxes and shall be collected in accordance with the provisions of the transfer inheritance tax laws of the Commonwealth.

Accordingly, the question immediately presents itself whether the language quoted above extends to the estate tax imposed by the act of 1927, the interest provisions contained in section 38 of the Transfer Inheritance Tax Law of 1919.

In our opinion, it is clear that this language is insufficient for this purpose.

It is a general proposition of law that when interest is charged on a delinquent tax it is in the nature of a penalty and therefore is not part of the tax: 61 Corpus Juris, section 2220, page 1516. The Supreme Court in *Husband's Estate*, 316 Pa. 361 (1934), at page 369, clearly indicated that the interest provision in the Transfer Inheritance Tax Law of 1919 "is obviously in the nature of a penalty."

The portion of the act of 1927 quoted above merely provides that "such taxes" (referring to the additional estate tax) shall be collected in the manner prescribed by law for the collection of transfer inheritance taxes. Accordingly, it is clear that the language under consideration, by its own terms, is limited to the procedure outlined in the Transfer Inheritance Tax Law of 1919 for the collection of transfer inheritance tax, and has no reference to the interest provisions contained in section 38 of that law.

A case precisely in point is *Easton Bank v. The Commonwealth*, 10 Pa. 442 (1849). In that case the charter of the bank provided for the taxation of dividends declared on the stock of the bank, and provided for an interest penalty at the rate of 12% in the event of nonpayment of the tax within a specified time. On April 1, 1835, a statute was passed directing all banks to pay "*in the manner now required by law*" a tax greater than that prescribed by the charter of the bank. On April 7, 1835, a statute was passed extending the charter of the bank which contained the original tax and interest provisions. It was held that the bank was required to pay the increased taxes provided by the act of 1835, but that the words "*in the manner now required by law*" did not continue the provision with respect to 12% interest. Mr. Justice Bell, at page 452 of the opinion, said:

* * * This penalty is thus confined, by the very terms of the statute, to the 8 per cent. tax imposed by it. Neither the acts of the 1st nor of the 7th of April, con-

tain any similar provision to enforce prompt payment of the increased taxes imposed by those laws; and, as a penalty can never be extended by construction merely, it would seem defaulting banks are not liable to be mulcted in 12 per cent. damages under the late acts. The legislature would seem studiously to have avoided the express re-enactment of the penal portion of the older statute, and I do not think it can be extended by force of the words "in the manner now directed by law." The meaning of these words may be fully satisfied by referring to the time of payment, the officer to whom payment is to be made, and the mode of transmitting the sums due, as well as the manner of ascertaining those sums. It would be a very violent construction indeed, that should extend this sentence to comprehend a penalty provided by another law, when, naturally, the law-makers would have given to such an intent a direct and positive expression.

Also in *Commonwealth v. Standard Oil Company*, 101 Pa. 119 (1882), the court had before it for consideration certain acts repealing certain prior tax statutes. The repealing acts expressly reserved "unto the Commonwealth the right to collect any taxes accrued or accruing under the said laws." The court held that this language was not sufficient to retain the interest penalties imposed in the earlier laws. Mr. Justice Paxton, speaking for the Supreme Court, said at page 150:

* * * In reserving, in the repealing Acts, all taxes accrued and accruing the Commonwealth reserved the right to employ all the ordinary remedies for their collection. But the penalties are in no sense such remedy. They are merely a punishment for the omission to make the reports required by law. The state might have also excepted the penalties from the operation of the repealing Acts, but did not do so. Penalty statutes must be construed strictly, and never extended by implication: *Andrews v. United States*, 2 Story 203. When there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of a court not to inflict the penalty: *The Schooner Enterprise*, 1 Paine C. Ct. 32. The charge of interest of 12 per cent is also a penalty, and is governed by the same rules. *Easton Bank v. The Com.*, 10 Barr 442, 451, would seem to be conclusive upon this branch of the case.

In *Hamilton v. Lawrence*, 109 Pa. Super. Ct. 344 (1933), the same conclusion was reached under substantially similar circumstances.

Moreover, it is very doubtful whether the language of the act of 1927 that is under consideration, could constitutionally be construed to incorporate by reference into the act of 1927, the interest penalty contained in the act of 1919.

Section 6 of article III of the Pennsylvania Constitution provides as follows:

No law shall be reviewed, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.

In *Gallagher v. MacLean*, 193 Pa. 583 (1899), the Supreme Court pointed out that the intention of this section is that when the provisions of a former law are to be incorporated in a subsequent statute, they, or the law containing them, shall be re-enacted and published at length. On the other hand, the courts, have ruled that this section of the Constitution does not prohibit the incorporation by reference of an established method of procedure into a subsequent statute. In *re Greenfield Avenue*, 191 Pa. 290 (1899); *Pinkerton v. Penn'a. Traction Company*, 193 Pa. 299 (1899); *New Brighton Borough v. Biddle*, 201 Pa. 96 (1902); *James Smith Woolen Machine Company v. Browne*, 206 Pa. 543 (1903).

As we have previously indicated, the interest provision in the act of 1919 is in the nature of a penalty and is not a matter of procedure; therefore, while it is constitutionally proper for the established procedure for the collection of the normal transfer inheritance tax to be incorporated by reference into the act of 1927, it would not be constitutionally proper for the interest penalty of the act of 1919 to be so incorporated into the act of 1927.

There being no express statutory provision providing for the imposition of an interest penalty with respect to the estate tax imposed by the act of 1927, the question presents itself whether interest may be imposed by implication as in the case of debts. This question likewise must be answered in the negative.

While the contrary is true with respect to Federal taxes, it is a well established rule that interest is not recoverable on delinquent taxes due a State or a political subdivision thereof unless it is expressly so provided by statute. As pointed out in 61 *Corpus Juris*, section 2218, page 1515:

While it has been held by the federal supreme court and by a federal district court that, independently of statute, that interest as a penalty is recoverable on taxes

due the United States, the state and territorial courts, on the other hand, have held that interest is not recoverable on delinquent taxes due the state, or territory, or a political subdivision thereof, unless it is expressly so provided by statute, basing their decisions on the grounds that an obligation to pay taxes is not founded on contract, express or implied, and that a tax is not a debt.

An excellent statement of the Federal rule and the State rule on this subject will be found in *Billings v. United States*, 232 U. S. 261, 58 L. Ed. 596 (1913). In that case the court refers to the State rule as follows:

* * * The cyclopedias and textbooks state the doctrine to be that in the absence of a statute expressly so directing, taxes bear no interest. The principle is thus announced in 37 Cyc. p. 1165: "Delinquent taxes do not bear interest unless it is expressly so provided by statute. But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes, and to regulate its rate. This however, can be effected only by an act plainly manifesting the legislative intention as to the right to recover interest, its amount, and the date from which it shall begin, the latter being ordinarily the time when the assessment is complete and the taxes become payable." *Cooley Taxn.* p. 17; *Sedgwick, Damages*, 9th ed. Section 332; *Sutherland, Damages*, 3d. ed. Section 337; *Black, Tax Titles*, 2d ed. Section 236, and see note in 6 L. R. A. (N. S.) p. 694. * * *

An excellent collection of cases on this subject is contained in a note in 6 L. R. A. (N. S.), page 694.

In *Elliott v. East Pennsylvania Railroad*, 99 U. S. 573, 25 L. Ed. 292 (1878), Mr. Chief Justice Waite, in speaking of the right to add to the provisions of one statute the penalty provided in another, stated:

* * * Penalties are never extended by implication. They must be expressly imposed or they cannot be enforced.

In *Caflisch's Estate*, 21 D. & C. 282 (1933), the Commonwealth brought proceedings to collect taxes accruing under the act of 1927 which had remained unpaid for five years, and attempted to collect interest at the rate specified in the act of 1919. In that case the fundamental question of whether the Commonwealth was entitled to charge interest was not raised or decided; the court merely holding that equitable principles would not permit the Commonwealth to collect interest after such a long delay in bring-

ing suit for the collection of the tax. Accordingly, that case is not helpful here.

We understand that it has been the uniform administrative practice not to impose interest on taxes accruing under the act of 1927. The amendment of the act of 1927 by the legislature in 1929 and 1931 without making any change in this administrative construction, is at least persuasive of legislative recognition and approval of the act as construed by the administrative officials on the question of interest. See *National Lead Company v. United States*, 252, U. S. 140, 146, 64 L. Ed. 496, 499 (1920).

Accordingly, it is our opinion and you are therefore advised that the law does not permit or require your department to impose any interest penalty with respect to taxes accruing under the provisions of the Act of May 7, 1927, P. L. 859, as amended.

Very truly yours,

DEPARTMENT OF JUSTICE

CHARLES J. MARGIOTTI,

Attorney General.

OPINION No. 227

Motor vehicles—Inspection—Periods therefor—Necessity for inspection during previous inspection period—Vehicle Code of May 1, 1929, sec. 823(h), as amended by Act of June 29, 1937.

1. Under section 823 (h) of The Vehicle Code of May 1, 1929, P. L. 905, as amended by the Act of June 29, 1937, P. L. 2329, it is unlawful to operate a motor vehicle during an enforcement period without displaying a certificate of inspection obtained during the most recently completed inspection period, but it is not unlawful to operate a motor vehicle during an inspection period, if it displays a certificate of inspection obtained during that or the previous inspection period.

2. Section 823 (a) of The Vehicle Code of May 1, 1929, P. L. 905, in effect establishes two inspection periods in each year, the first from May 1st to July 31st, and the second from November 1st until January 31st: the months not included therein may be described as enforcement periods.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 24, 1937.

Honorable P. W. Foote, Commissioner, Pennsylvania Motor Police,
Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning the proper interpretation of section 823(h) of The Vehicle Code, as amended

by Act of June 29, 1937, P. L. 2329, which make unlawful the operation of those motor vehicles which have not been inspected "during the present or previous inspection period".

The 1937 amendment to section 823(a) sets up two inspection periods in each year, the first from May 1 to July 31, and the second from November 1 until January 31. During each such inspection period every owner of a motor vehicle must submit such vehicle to inspection. Section 823(b) requires the owners of such vehicles to make the adjustments which the inspections might disclose as necessary "within the period required in this act". Section 823(h), as amended provides as follows:

"It shall be unlawful to operate any motor vehicle, trailer or semi-trailer on a highway unless the motor vehicle, trailer or semi-trailer has been inspected during the present or previous inspection period and a certificate furnished and displayed, or other satisfactory proof of inspection furnished."

The inspection periods here referred to are those set up in section 823(a). The months not included therein might well be described as "enforcement periods". Thus, each three months' inspection period is followed by a three months' enforcement period.

If section 823(h) is applied during an inspection period, the meaning of the language, "during the present or previous inspection period", is clear, and the display of a certificate granted during either the current inspection period or the inspection period immediately preceding is sufficient compliance with the act. But if section 823(h) is applied during an enforcement period, this language can mean only the inspection period immediately preceding the enforcement period, i. e., the "previous" inspection period, because obviously there can be no "present" inspection period.

Therefore, you are advised that section 823(h) of The Vehicle Code, as amended by the act of 1937, *supra*, does permit the arrest and conviction of persons who operate motor vehicles during an enforcement period without displaying a certificate of inspection obtained during the most recently completed inspection period.

Very truly yours,

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

OPINION No. 228

Administrative law—"Debt" of Commonwealth—Constitution, article IX, sec. 4—Turnpike revenue bonds—Act of May 21, 1937.

Turnpike revenue bonds of the Commonwealth of Pennsylvania, to be issued by resolution of the Pennsylvania Turnpike Commission in conformity with the provisions of the Act of May 21, 1937, P. L. 774, being payable solely out of the revenue derived from the turnpike, none of the general revenues of the Commonwealth being available for their payment and no property of the Commonwealth being pledged or available to secure them, will not be debts of the Commonwealth within the meaning of article IX, sec. 4, of the Constitution, prohibiting the creation of debt by the Commonwealth except for certain purposes and in certain amounts.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 28, 1937.

Honorable Walter A. Jones, Chairman, Pennsylvania Turnpike Commission, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether turnpike revenue bonds of the Commonwealth, to be issued by resolution of the Pennsylvania Turnpike Commission in conformity with the provisions of the Act of May 21, 1937 P. L. 774, will be debts of the Commonwealth within the meaning and prohibition of article IX, section 4, of the Constitution of Pennsylvania.

The Act of May 21, 1937, *supra*, creates the Pennsylvania Turnpike Commission and authorizes it to construct and finance a turnpike from a point in Cumberland County to a point in Westmoreland County. The act requires the construction to be financed wholly from funds derived from bonds of the Commonwealth to be issued by the Commission. The authority of the Commission to issue the bonds and the specific nature and contents of the bonds themselves are strictly circumscribed and defined in the act.

Section 1 of the act authorizes the Commission "to issue turnpike revenue bonds of the Commonwealth *payable solely from tolls*, to pay the cost of such construction".

Section 2 of the act, prescribing the nature and the essential contents of the bonds, provides as follows:

That turnpike revenue bonds issued under the provisions of this act *shall not be deemed to be a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth*, but such bonds shall be *payable exclusively from the fund herein provided therefor from tolls*. All such bonds shall contain a statement on their face that the Commonwealth is not obligated to pay the same

or the interest thereon except from tolls and that the faith and credit of the Commonwealth is not pledged to the payment of the principal or interest of such bonds. The issuance of turnpike revenue bonds under the provisions of this act shall not, directly or indirectly or contingently, obligate the Commonwealth to levy or pledge any form of taxation whatever therefor, or to make any appropriation for their payment. (Italics ours)

Furthermore section 8 provides inter alia :

* * * The principal and interest of such bonds shall be payable solely from the special fund herein provided for such payment. * * *

The fund referred to in section 8 is provided for in section 12 which authorizes the Commission to fix and collect tolls and rentals for the use of the turnpike. That section, inter alia, provides "Such tolls shall be so fixed and adjusted as to provide a fund at least sufficient with other revenues of the turnpike, if any, to pay" the cost of maintenance, repair and operation of the turnpike and all debt service, including sinking fund upon the bonds.

The Commission itself is declared to be an instrumentality of the Commonwealth and is given power, inter alia, to acquire property in its own name and to pay all costs of constructing the turnpike, including reimbursement of the Department of Highways for the cost of certain preliminary work. All of these expenses, however, must be paid solely from funds provided under the authority of the act.

The Commission is also given the powers of eminent domain but property seized must be paid for out of the funds provided by the act and the failure of the Commission to accept and pay for property condemned "shall impose no liability upon the Commonwealth except as may be paid from the funds provided under the authority of this act" (section 6).

Even though, as we have seen, no moneys of the Commonwealth except those provided under the authority of the act (i. e. proceeds of bonds, tolls and rentals) can be expended on the turnpike, it is further provided in section 10 that the trust indenture securing the bonds "*shall not convey or mortgage the turnpike or any part thereof.*"

The bonds, therefore, are payable *solely* out of the revenue derived from the turnpike. None of the general revenues of the Commonwealth are available for their payment and no property of the Commonwealth whatsoever is pledged or made available to secure them.

We will now consider whether these bonds will be debts created by or on behalf of the Commonwealth within the meaning of article IX, section 4, of the Constitution. The material portion of this section is as follows:

No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed in the aggregate at any one time, one million dollars * * *

In view of the construction placed upon article IX section 8 which inhibits the creation of municipal indebtedness by the Supreme Court of Pennsylvania in *Tranter v. Allegheny County Authority* (1934) 316 Pa. 65, 173 Atl. 289 and upon section 4, quoted above in *Kelley v. Earle et al.* (1936) 325 Pa. 337 190 Atl. 140, we do not hesitate to conclude that the turnpike revenue bonds will not be debts created by or on behalf of the Commonwealth within the meaning of the Constitution.

In the *Tranter* case the Authority proposed to construct bridges and tunnels and to issue its bonds payable solely from tolls collected for the use of such bridges and tunnels. The court said at page 85:

* * * We are here dealing with the construction of a purely public self-liquidating project. The denial of power to incur liability on the credit of the county or of any municipality is notice to the prospective purchasers of the bonds that their security and their only source of payment will be in the revenues derived from users of the improved highway facilities: see *Moore v. City of Nampa*, 276 U. S. 536. *The bondholders cannot call upon the public treasuries to contribute; no county or municipal property can be taken for the debt*, because the bondholders have agreed to look to a special fund for payment to be raised in the manner provided. It will be the duty of the defendant corporation to provide adequate tolls and charges. *These highways cannot be sold on execution.*

The two cases relied on by plaintiff point the way against him. In *Lesser v. Warren Borough* * * * the borough's bonds were to be secured, not alone by the revenue from the waterworks proposed to be purchased, but by the waterworks itself; if it was mortgaged for the payment of the bonds, the obligation was a municipal debt and that borough asset was liable to be taken in payment. We adhere to what was decided in that case.

* * * But plaintiff in this case can point to no property

that the county or municipalities would lose. It is true that, by the trust indenture, the trustee may enter and collect tolls, if the Authority defaults, but when the debt is paid in that way, the power of the trustee and the Authority is ended, and the property reverts to the public authorities that formerly held it for the state. *This difference between a pledge of property and a pledge of income merely, has been said to distinguish a transaction which creates a debt within the constitutional limitation from one creating a debt not within it.* (Italics ours)

In the Kelley case on rehearing a stipulation was filed setting forth that the bonds to be issued and conferred no right on the holders of the bonds or the trustee to proceed or claim against the lands of the Commonwealth or of the Authority. The court said:

* * * This was true also in *Tranter v. Allegheny County Authority*, supra, where the court, through Mr. Justice Linn, concludes: "This difference between a pledge of property and a pledge of income merely, has been said to distinguish a transaction which creates a debt within the constitutional limitation from one creating a debt not within it."

* * * * *

Much stress has been laid on the various cases that have heretofore been decided. But these cases are and were distinguished in *Tranter v. Allegheny County Authority*, supra, and need not be further discussed in this opinion. There is one outstanding factor which the additional facts present to us—the immunity of State property and the inability of creditors to compel payments beyond the sums available for current revenues—which differentiates this contract from the contracts involved in *McKinnon v. Mertz*, 225 Pa. 85; *Lesser v. Warren Boro.*, 237 Pa. 501; *Brown v. City of Corry*, supra. *The credit of the Commonwealth as such is not behind these bonds.* (Italics ours)

In all of the cases distinguished in the Kelley case property of the municipality was pledged. For example in *Lesser v. Warren Borough* (1912) 237 Pa. 501, 85 Atl. 838, the court said:

* * * A municipal debt will be incurred for the payment of which certain municipal *property will be pledged*, and, if the debt should not be paid, that property will be sold to pay it. Certain assets of the borough may be taken from it to pay its indebtedness * * *

(Italics ours)

These cases, therefore, have no application to the present situation for the same reason that they were held inapplicable in the

Kelley case. Here, as in the Kelley case no part of the property can be conveyed or mortgaged to secure the bonds.

While in the Tranter and Kelley cases the bonds in question were issued by authorities which by definition were independent bodies, corporate and politic, the mere fact that bonds are issued by the Commonwealth itself does not necessarily mean that they create debts within the constitutional inhibition. *Kelley v. Baldwin* 319 Pa. 53. The fundamental basis of the court's findings in the authority cases that the bonds were not debts within the meaning of the Constitution, was that they were payable solely out of revenues, and no property or credit of the county in one case or the State in the other was pledged as security for the bonds. In this respect the proposed turnpike revenue bonds are identical in character to the bonds under consideration in the authority cases and, as we have seen are specifically declared by the statute *not* to be debts of the Commonwealth, or a pledge of its faith and credit, or secured by a pledge of its property.

Furthermore the courts of other jurisdictions have been almost unanimous in holding that revenue bonds of a state or political subdivision, payable solely out of revenues derived from utilities of a public nature, do not create debts within constitutional inhibitions similar to that of the Constitution of Pennsylvania. Reference is made to *Oppenheim v. City of Florence*, (1934) 229 Ala. 50, 155 So. 859; *Garrett v. Swanton*, 216 Cal. 220, 13 Pac. 2d 725; *State v. City of Miami*, (1933) 113 Fla. 280, 152 So. 6; *Williams v. McIntosh County*, (1934) 179 Ga. 735, 177 S. E. 248; *Schnell v. City of Rock Island* (1908) 232 Ill. 89, 83 N. E. 462; *Fox v. Bicknell*, (1923) 193 Ind. 537, 141 N. E. 222; *Bloxton v. State Highway Commission*, (1928) 225 Ky. 324, 8 S. W. 2d 392; *Young v. City of Ann Arbor*, (1934) 267 Mich. 241, 255 N. W. 579; *Brockenbrough v. Comr's*, (1903) 134 N. C. 1, 46 S. E. 28; *Kasch v. Miller*, (1922) 104 Ohio State 281, 135 N. E. 813 and *Park v. Greenwood County*, (1934) 174 S. C. 35, 176 S. E. 870.

We are accordingly of the opinion and hence advise you that turnpike revenue bonds of the Commonwealth, to be issued by resolution of the Pennsylvania Turnpike Commission in conformity with the provisions of the act approved May 21, 1937 P. L. 774, will not be debts of the Commonwealth within the meaning and prohibition of article IX, section 4, of the Constitution of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE

CHARLES J. MARGIOTTI,

Attorney General.

OPINION No. 229

*Labor—Jurisdiction of Pennsylvania and National Labor Relations Boards—
Labor relations affecting interstate commerce—Jurisdiction to determine
jurisdiction—Right to confer jurisdiction by consent.*

1. The National Labor Relations Board has exclusive jurisdiction over all labor relations affecting interstate commerce and the Pennsylvania Labor Relations Board has exclusive jurisdiction over such relations not affecting such commerce: the boards have no concurrent jurisdiction.

2. The Pennsylvania Labor Relations Board has jurisdiction to determine whether or not interstate commerce is affected in any case brought before it, but it has no right to waive jurisdiction over a case which should properly be brought before it.

3. Employers and employes cannot confer jurisdiction upon the Pennsylvania Labor Relations Board by consent.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., October 13, 1937.

Honorable L. G. Lichliter, Chairman, Pennsylvania Labor Relations Board, Harrisburg, Pennsylvania.

Sir: You have asked to be advised upon certain phases of the respective jurisdictions of the Pennsylvania Labor Relations Board and the National Labor Relations Board. According to your request, you are interested particularly in determining whether the National Labor Relations Board and the Pennsylvania Labor Relations Board have any concurrent jurisdiction, and if not, what elements of interstate commerce are sufficient to remove a case from the jurisdiction of the Pennsylvania Labor Relations Board, and to whom the power has been given to determine whether or not such elements of interstate commerce exist.

You also ask for an opinion upon the kindred questions as to whether jurisdiction may be conferred upon the Pennsylvania Labor Relations Board by consent of the parties, and as to whether the Pennsylvania Labor Relations Board may waive its jurisdiction in favor of the National Labor Relations Board. You supplement your request with a reference to two actual situations which are now before the Pennsylvania Labor Relations Board; one of which concerns a corporation manufacturing silk for sale both within and outside the Commonwealth of Pennsylvania; and the other of which involves a steel company which owns mines in Pennsylvania from which coal is shipped to its various plants in other states.

The National Labor Relations Board was established by the Act of Congress of July 5, 1935, C. 372; 49 Stat. 449; 29 U. S. C. A. Sec. 151 et seq. The jurisdiction conferred upon the National Labor Relations Board is defined in section 10(a) of the above act [29 U. S. C. A. 160(a)], as follows:

Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) *affecting commerce*. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. (*Italics ours*)

The key words in the above-quoted provision are "affecting commerce". The term "commerce" and the term "affecting commerce" are defined in the act as follows: [Section 2, subdivision 6. 29 U. S. C. A. 152 (6)]

The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

[Section 2, subdivision 7. 29 U. S. C. A. 152 (7)]

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The Pennsylvania Labor Relations Board was provided for by the Act of June 1, 1937, P. L. 1168. This board, among other things, is empowered to prevent unfair labor practices on the part of employers. The term "employer" is defined in section 3(c) as follows:

The term "employer" includes any person acting directly or indirectly in the interest of an employer, but *shall not include* the United States or the Commonwealth, or any political subdivision thereof, or *any person subject to the Federal Railway Labor Act or the National Labor Relations Act*, as amended from time to time, or any labor organization (other than when acting as an em-

ployer) or anyone acting in the capacity of officer or agent of such labor organization. (*Italics ours*)

In view of these provisions, it is clear that the Pennsylvania Labor Relations Board and the National Labor Relations Board exercise no concurrent jurisdiction. Each case involving labor relations is within the sole jurisdiction of either one board or the other, according to whether or not interstate commerce is affected by such relations.

The question as to whether or not interstate commerce is affected is necessarily one to be determined in each case by that board before which it is pending. We feel that the Pennsylvania Labor Relations Board has powers analogous to those of a court of law with respect to determining its own jurisdiction, and it may be of assistance to refer here to two statements from Corpus Juris relative to the power of courts in that respect. (15 C. J. 851) :

Every court has judicial power to hear and determine the question of its own jurisdiction, both as to parties and as to subject matter, and necessarily does so by proceeding in the cause. When at any time or in any manner it is in good faith represented to the court by a party or an amicus curiae that it has not jurisdiction, the court will examine the grounds of its jurisdiction before proceeding further. The court may receive testimony on a preliminary question to determine its jurisdiction, and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment. A court cannot pass on its own existence as a court.

Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings. * * *

In view of the fact that the Pennsylvania Labor Relations Board and the National Labor Relations Board have no concurrent jurisdiction, the question of waiver of jurisdiction by the Pennsylvania Labor Relations Board in favor of the National board will not arise, for each case is necessarily within the sole jurisdiction of but one board. Thus, if the Pennsylvania Labor Relations Board decides that it will not intervene in a certain case which involves interstate commerce, this action is not a waiver of jurisdiction, but merely a recognition of the fact that

jurisdiction does not exist. It also follows from this that employers and employes cannot bestow jurisdiction upon the Pennsylvania board by consent, although in close cases it might be possible for jurisdiction to be assumed upon the basis of facts which have been admitted by the parties.

We recognize, of course, that the question as to whether or not certain labor relations affect interstate commerce may be a difficult one to decide. Fortunately, the Supreme Court of the United States recently construed the above-quoted portions of the National Labor Relations Act in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 57 Supreme Ct. Rep. 615 (1937). In that case it was contended, inter alia, that the act could have no application to the relations of the Jones & Laughlin company with the employes in its manufacturing department, because such relations affected production and not interstate commerce. The Supreme Court, however, held that the act was applicable to such relations and, in the opinion written by Mr. Chief Justice Hughes, the following comments upon this point appear:

* * * The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. * * * Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise * * *

* * * * *

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved * * *

* * * When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? *We have often said that interstate commerce itself is a practical conception. It is equally true that interfer-*

ences with that commerce must be appraised by a judgment that does not ignore actual experience. (Italics ours)

These principles enunciated by the Supreme Court of the United States should be of great assistance in enabling the Pennsylvania Labor Relations Board to determine whether or not it should entertain jurisdiction in a particular situation. Close cases will of necessity require a careful scrutiny of the nature of the employer's activities and it would be manifestly impossible for us to rule upon the specific situations you describe in the absence of a complete presentation of the facts.

You are advised, therefore, that the National Labor Relations Board and the Pennsylvania Labor Relations Board have no concurrent jurisdiction, and that the Pennsylvania Labor Relations Board may properly determine whether or not the absence of elements of interstate commerce permit it to take jurisdiction in a particular case.

You are also advised that the Pennsylvania Labor Relations Board has no authority to waive jurisdiction over a case which should be brought before it, and that employers and employes cannot confer jurisdiction upon the Pennsylvania Labor Relations Board by consent.

Very truly yours,

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

OPINION No. 230

Incompetents—Liability for medical attention—Institutional districts—Departments of welfare—Department of Public Assistance.

Responsibility for furnishing medical attention to dependents in the Commonwealth of Pennsylvania rests, under the County Institution District Law of June 24, 1937, P. L. 2017, and the Public Assistance Law of June 24, 1937, P. L. 2051, upon the institutional districts of the Commonwealth and the departments of welfare in cities of the first and second classes, and not upon the Department of Public Assistance of the Commonwealth of Pennsylvania.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 12, 1937.

Honorable Karl de Schweinitz, Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your letter of November 8, 1937, in which you desire to have a formal opinion as to

the responsibility of furnishing medical attention to dependent parties throughout the Commonwealth of Pennsylvania. In other words, whether this responsibility rests with the Department of Public Assistance of Pennsylvania, or whether, under the law, it is imposed upon the county institutional districts and the departments of welfare in cities of the first and second classes.

Section 102 of the Act of June 24, 1937, P. L. 2017, reads, in part, as follows:

“Dependent” means an indigent person requiring public care because of physical or mental infirmity.

Section 406 of the Act of June 24, 1937, P. L. 2017, contains the following language:

Contributions for Medical Care. The commissioners of each county and the city council of each city of the first and second classes shall have the power to make annual appropriations from the funds of the institution district or of the city for the support of any public institution operated or to any non-profit corporation organized to give medical care to the dependents and children of the county or of the city without discrimination as to membership in any organization or as to race or sect.

Section 2 of the Act of June 24, 1937, P. L. 2051 reads as follows:

“Assistance” means assistance in money, goods, shelter, service or burial provided from or with State or Federal funds for indigent persons who reside in Pennsylvania and need assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living and for indigent homeless or transient persons. * * *

Political economists long before the adoption of the act of 1937 had been advocating the abolition of almshouses throughout the nation. The thought being that only indigents physically or mentally ill should be committed to hospitals, where such unfortunates could be better maintained; that all other indigents should remain in private homes, rather than suffer the odium of terminating the closing years of their lives in an almshouse.

Section 102 of the Act of June 24, 1937, P. L. 2017, by virtue of the definition of “dependent” imposes upon departments of welfare of cities of the first and second classes and county institutional districts the responsibility of furnishing medical attention to indigent persons requiring public care because of physical or mental infirmity.

Section 406 of the Act of June 24, 1937, P. L. 2017. reposes on the city council of cities of the first and second classes and on the boards of county commissioners of each county, the power to make appropriations from the funds of the institutional district, or of the city, for the support of any public institution operated, or to any non-profit corporation organized to give medical care to the dependents and children of the county or of the city, without discrimination as to membership in any organization or as to race or sect.

Section 2 of the Act of June 24, 1937, P. L. 2051, in defining the word "assistance", refers to money, goods, shelter or services from State or Federal funds for indigent persons to enable them to maintain for themselves and their dependents a decent and healthful standard of living. This assistance may be looked upon and construed to mean that ample aid will be extended to those in good physical and mental condition, who are in need of everything essential to the maintenance of those sound in body and mind, but who are unable through themselves or those legally responsible for their proper maintenance, to provide for such services.

Since there is nothing in the law imposing responsibility on the Department of Public Assistance to furnish medical attention to dependents, and since the institutional districts of the Commonwealth of Pennsylvania and the departments of welfare of cities of the first and second classes have imposed upon them the responsibility of caring for those physically or mentally infirm, and since the institutional districts and the departments of welfare of cities of the first and second classes are permitted to make appropriations to institutions who will give medical care for the indigent children and other dependents of their particular district, it seems clear that the General Assembly intended to place the responsibility of medical attention upon the institutional districts and the departments of welfare of cities of the first and second classes. If the General Assembly of the Commonwealth of Pennsylvania had intended any other plan it would have been very simple to indicate its intention in unmistakable language.

You are, therefore, advised that the responsibility of furnishing medical attention to dependents in the Commonwealth of Pennsylvania rests upon the institutional districts of our Commonwealth and the departments of welfare in cities of the first and

second classes, and does not rest upon the Department of Public Assistance of the Commonwealth of Pennsylvania.

Very truly yours,

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

OPINION No. 231

Fiduciaries—Investment of trust funds—Legal investments—General State Authority bonds—Acts of June 28, 1935, May 28, 1937, and July 1, 1937.

Bonds which The General State Authority expects to issue to secure loans made to it for the financing of the construction of its various projects, pursuant to the provisions of the Act of June 28, 1935, P. L. 452, as amended, will be, by virtue of the Acts of May 28, 1937 (P. L. 1037), and July 1, 1937 (P. L. 2687), proper securities for the investment of trust funds by fiduciaries.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 22, 1937.

Honorable Augustine S. Janeway, Executive Director, The General State Authority, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether bonds which The General State Authority expects to issue to secure loans made to it for the financing of the construction of its various projects, pursuant to the provisions of the Act of June 28, 1935, P. L. 451, as amended, are proper securities for the investment of trust funds by fiduciaries.

The Constitution of Pennsylvania makes general provision with regard to investments for trust funds. Article III, section 22 thereof, as amended on November 7, 1933, P. L. 1558, provides:

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.

In exercise of the authority granted by this section of the Constitution, the General Assembly has specifically prescribed bonds of The General State Authority to be proper investments for trust funds.

The Act of May 28, 1937, P. L. 1037, amends the Fiduciaries Act of June 7, 1917, P. L. 447, adding to the list of investments in which fiduciaries might legally invest trust funds as follows:

Subsection (18). Obligations of the General State Authority and Housing Authorities.—Bonds of General State Authority, issued pursuant to the provisions of the act, approved the twenty-eighth day of June, one thousand nine hundred and thirty-five (Pamphlet Laws, four hundred fifty-two), its amendments and supplements, and bonds of any housing authority, issued pursuant to the provisions of the laws of this Commonwealth relating to the creation or operation of such housing authorities.

In addition to the foregoing the General Assembly by Act of July 1, 1937, P. L. 2687, specifically provided that the investment of trust and other funds in bonds of The General State Authority should be deemed legal investments. The material portion of this act is as follows:

* * * That any fiduciary, insurance company, state bank, trust company, bank and trust company, and any departmental administrative board and commission, or other agency of the Commonwealth, shall have power to invest funds and moneys in his or its possession and control in bonds issued by the General State Authority in which the full faith and credit of The Authority is pledged, and such bonds shall be deemed legal investments for all such purposes.

We are, therefore, of the opinion and, accordingly, advise you that bonds which The General State Authority expects to issue to secure loans made to it for the financing of the construction of its various projects, pursuant to the provisions of the Act of June 28, 1935, P. L. 451, as amended, are proper securities for the investment of trust funds by fiduciaries.

Very truly yours,

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

OPINION No. 232

Master and servant—Working hours—Act of July 2, 1937—Affect on Act of June 4, 1937—Applicability to employes of State and political subdivisions.

1. The Act of July 2, 1937, (P. L. 2766), establishing a 44-hour week for employes in general, does not repeal by implication the Act of June 4, 1937

(P. L. 1547), establishing a 44-hour week for women, but the provisions of the earlier act are to be construed as more detailed regulations governing a particular phase of the general subject covered in the later act.

2. The Act of July 2, 1937 (P. L. 2766), establishing a 44-hour week for employes in general, applies to employes of the Commonwealth and its political subdivisions.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 23, 1937.

Honorable Ralph M. Bashore, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the effect which Act of July 2, 1937, P. L. 2766, (no. 567) will have upon the Act of June 4, 1937, P. L. 1547, (no. 322). You have also asked to be advised whether or not employes of the Commonwealth and its political subdivisions are governed by the provisions of Act No. 567.

Act No. 322, which became effective September 1, 1937, established a 44-hour week for women, and Act No. 567, which becomes effective December 1, 1937, provides for a 44-hour week for employes in general.

Act No. 322 amends certain sections of the Act of 1913, P. L. 1024, as amended, which regulates the employment of females in various respects. Thus, the provisions establishing a 44-hour week for women are embodied in a regulatory statute which deals with many of various conditions surrounding the employment of females which require special legislative treatment. The Act of 1913, P. L. 1024, as amended, in addition to regulating hours of employment, deals with such subjects as night work, seats, washing and dressing rooms, toilets, lunch rooms, exhaust fans, and drinking water.

The provisions of Act No. 322 differ from those of Act No. 567 chiefly in that the exemptions in Act No. 322 are more detailed and slightly wider in scope than those in Act No. 567.

Thus, Act No. 322 contains the following exemption clause:

(c) Nothing in this section or any other provisions of this act shall apply to the employment of females in agricultural field occupations, or in domestic service in private homes, or to the work of females employed in orphans' homes and industrial schools, nor shall any provisions of this act which relates to the regulation of hours of employment apply to the work of nurses in hospitals, or to the work of females over twenty-one

years of age earning at least twenty-five dollars a week in executive positions.

Act No. 322 provides in addition that:

(d) It shall be unlawful for any female to be employed, or permitted to work, in any occupation dangerous to life or limb, or injurious to the health or morals, as such occupation shall, from time to time, be determined and declared by the Industrial Board.

It might be noted also that Act No. 322 expressly applies to the Commonwealth of Pennsylvania and its political subdivisions (Section 1). Act No. 567, on the other hand, has an exemption clause which reads as follows:

(c) Nothing in this section, or any other provisions of this act, shall apply to employment in agricultural occupations, or in domestic service in private homes, or to the work of persons over twenty-one years of age earning at least twenty-five dollars a week in bona fide executive positions, or learned professions.

If Act No. 567, when it goes into effect on December 1, 1937, is to have any effect upon Act No. 322, it could only be because it might operate to repeal all or a portion of the former act by implication, for Act No. 567 makes no specific reference to Act No. 322.

As was said in the case of *Commonwealth, ex rel. Schrier v. Ruggles*, 280 Pa. 568 (1924):

* * * It has always been the rule in Pennsylvania that the repeal of statutes by implication is not favored: * * *

This principle of statutory construction is especially applicable to laws passed at the same session of the legislature, and in 59 C. J. 928, the following statement appears relative to this point:

* * * Also, where two acts relating to the same subject matter are passed at the same legislative session, there is a strong presumption against implied repeal, and they are to be construed together, if possible, so as to reconcile them, give effect to each, and thereby avoid an implied repeal, rather than to infer that one destroys the other; but, if the two are irreconcilable, the one which is the latter expression of the legislative will ordinarily prevail over, and impliedly repeals, the other. * * *

Acts No. 322 and 567 were passed at the same session of the legislature and their provisions are by no means irreconcilable. Rather, the provisions of Act No. 322 are merely the more detailed regulations which govern a particular phase of the general subject covered in Act No. 567.

In the case of *Borough of Huntingdon v. Dorris*, 78 Super. 469 (1922) it is stated that:

* * * statutes enacted at the same session of the legislature should receive such construction, if possible, as will give effect to each; they are within the reason of the rule governing statutes in *pari materia*—each is supposed to speak the mind of the same legislature and the words used in each should be qualified and restricted, if necessary, in their construction and effect so as to give validity to every other act passed at the same session: *Smith v. People*, 47 N. Y. 330; *White v. City of Meadville*, 177 Pa. 643. * * *

In this same case the court also states that:

* * * a subsequent statute treating a subject in general terms and not expressly contradicting the provisions of a prior special statute is not to be considered as to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. The presumption is that the legislature having had its attention directed to a particular subject does not intend subsequently to derogate from its own act when the later legislation contains no repealing clause or reference to the former legislation and is not necessarily incompatible therewith. Unless the provisions of the acts are manifestly inconsistent or there is an express repeal, they will both stand. * * *

See also Section 63 of the "Statutory Construction Act," approved May 28, 1937, and 59 C. J. 1057.

In view of these established principles of statutory construction, we do not feel that there is such general repugnancy between Acts No. 322 and 567, that they cannot stand together or that the legislature intended to repeal impliedly Act No. 322 by Act No. 567.

It is true, as indicated before, that Act No. 322 contains certain provisions which are not included in Act No. 567, but it is to be remembered that the employment of females involves certain special problems which it would be rather inconvenient to

provide for in a general act such as Act No. 567 which relates to all types of employment.

At the time of the passage of Act No. 567 the legislature likely felt that, in view of the particular provisions of Act No. 322 and the Act of 1913, P. L. 1024, which it amended, it would be most expedient to adopt Act No. 567 as a general act providing a 44-hour week for all types of employment and to allow Act No. 322 to stand as an exception to that act in so far as its provisions supply those of Act No. 567.

We feel, therefore, that Act No. 322 will not, in general, be repealed by implication by Act No. 567 when it goes into effect December 1, 1937.

The second question before us for determination is whether or not Act No. 567 applies to the Commonwealth and its political subdivisions. Section 1 (b) of this act contains the following definition:

(b) "Employer" includes every person, firm corporation, partnership, stock association, agent, manager, representative or foreman, or other person having control or custody of any employment, place of employment, or of any employee.

This act contains no express provision that it shall apply to the Commonwealth and its political subdivisions and it is sometimes held that a statute does not apply to the sovereign unless it specifically so states. This rule, however, is not one of universal application and it is subject to certain limitations.

In the case of *United States v. Herron*, 20 Wall, 251; 22 L. Ed. 275 (1874), the following statement appears:

It is a maxim of the common law, said Savage, Ch. J., that when an Act of Parliament is passed for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the King shall be bound by such Act though not named, but when a statute is general and any prerogative, right, title or interest would be devested or taken from the King, in such a case he shall not be bound unless the statute is made by express words to extend to him, for which he cites both English and American authorities, * * *

In the case of *United States v. California*, 297 U. S. 175; 80 L. Ed. 567 (1936), Mr. Justice Stone made the following statement:

Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by

its own statute unless named in it, see *Guaranty Title & T. Co. v. Title Guaranty & S. Co.* 224 U. S. 152, 56 L. ed. 706, 32 S. Ct. 457, 27 Am. Bankr. Rep. 873; *United States v. Herron*, 20 Wall. 251, 22 L. ed. 275; *Re Fowble (D. C.)* 213 F. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States v. Herron*, *supra* (20 Wall. 255, 22 L. ed. 276); *Dollar Sav. Bank v. United States*, 19 Wall. 227, 239, 22 L. ed. 80, 82. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. * * *

Act No. 567 is all inclusive in its terms and its purpose and objective are entirely clear. It certainly occupies a high position among the beneficial and humanitarian statutes which have been enacted in the Commonwealth of Pennsylvania from time to time. The benefits which it is designed to confer should be conferred upon the employes of the Commonwealth and its political subdivisions as well as upon employes in general. Nor would the application of Act No. 567 to the Commonwealth and its political subdivisions result in any substantial derogation of sovereign powers.

We have not overlooked the fact that Act No. 322 expressly applies to the Commonwealth and its political subdivisions while Act No. 567 is silent on that score, and that such a change in language in statutes dealing with the same subject is sometimes presumed to indicate the change of meaning. This rule, however, is but a presumption to be used in ascertaining the intent of the legislature. With respect to a statute of the type of Act No. 567 we feel that any such presumption is overbalanced by the fact that the legislature certainly intended the Commonwealth to set an example in safeguarding the welfare of its employes.

We feel, therefore, that Act No. 567 applies to the Commonwealth and its political subdivisions. Any other result could only be attained by resort to rules of construction whose application in the circumstances would be highly artificial.

You are advised, therefore, that Act No. 322 will not, in general, be impliedly repealed by Act No. 567 when it becomes ef-

fective December 1, 1937. You are also advised that Act No. 567 applies to the Commonwealth and its political subdivisions.

Very truly yours,

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

OPINION No. 233

Workmen's Compensation Board and referees—Accountability to Secretary of Labor and Industry—Financial matters—Accountability to Governor—Appointment of clerical, stenographic, and other assistants—Determination of number and classification thereof—Assignment of quarters for use of board—Duty of Board of Commissioners of Public Grounds and Buildings—The Administrative Code of April 9, 1929.

1. The control of the Secretary of Labor and Industry over the general functions of the Workmen's Compensation Board is limited to the influence which he may exert as an ex-officio member thereof by virtue of section 441 of The Administrative Code of April 9, 1929, P. L. 177; but the board is subject to his supervision with reference to financial matters, by virtue of sections 202 and 503 of the code.

2. Workmen's compensation referees are in the first instance accountable only to the Workmen's Compensation Board, and both the board and the referees are in the final analysis accountable only to the Governor for the proper discharge of their duties.

3. Although the Secretary of Labor and Industry is authorized by section 2208 of The Administrative Code to make actual appointment of clerical, stenographic, and other assistants required by the Workmen's Compensation Board and workmen's compensation referees, the number and classification of such employes is, under section 214 of the code, primarily a matter for the board and referees to determine.

4. It is the duty of the Board of Commissioners of Public Grounds and Buildings, under section 2413 of The Administrative Code, to assign rooms to the Workmen's Compensation Board, both within and outside the capital city: the Secretary of Labor and Industry is, however, authorized by section 220 of the code to decide whether or not branch offices shall be established and maintained for the board.

5. Section 16 of the Act of July 21, 1919, P. L. 1077, making it the duty of the Workmen's Compensation Board to promulgate rules and regulations for legal and judicial procedure and promptly to hear and determine all petitions and appeals, has never been expressly repealed.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., December 13, 1937.

Honorable David Ullman, Chairman, Workmen's Compensation Board, 724 Bankers Securities Building, Philadelphia, Pennsylvania.

Sir: You have asked to be advised upon several questions which have arisen in connection with the activities of the Workmen's Compensation Board and the Workmen's Compensation Referees.

The questions you submit, and our answers thereto, are as follows:

1. What jurisdiction does the Secretary of Labor have over the Workmen's Compensation Board or Workmen's Compensation Referees in the performance of their respective duties?

Section 202 of The Administrative Code of April 9, 1929, P. L. 177, (71 PS § 62), as last amended by Act No. 373, approved June 21, 1937, provides as follows:

The following boards, commissions, and offices are hereby placed and made departmental administrative boards, commissions, or offices, as the case may be, in the respective administrative departments mentioned in the preceding section, as follows:

* * * * *

In the Department of Labor and Industry, Workmen's Compensation Board, Workmen's Compensation Referees, State Workmen's Insurance Board, Industrial Board;

Section 503 of The Administrative Code (71 PS 183) provides as follows with reference to departmental administrative boards and offices:

Except as otherwise provided in this act, departmental administrative bodies, boards, and commissions, within the several administrative departments, shall exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected, but, in all matters involving the expenditure of money, all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected. Such departments shall, in all cases, have the right to make such examinations of the books, records, and accounts of their respective departmental administrative boards and commissions, as may be necessary to enable them to pass upon the necessity and propriety of any expenditure or proposed expenditure.

Under section 2208 of The Administrative Code (71 PS 568), it is provided that the Department of Labor and Industry shall have the power and its duty shall be to administer and enforce the

laws of this Commonwealth relating to workmen's compensation. However, in subsection (a) of this section, the following proviso appears:

* * * Provided, however, That the Workmen's Compensation Board and the Workmen's Compensation Referees *shall perform their respective duties independently of the Secretary of Labor and Industry*, or any other official of the department, except that all clerical, stenographic and other assistance required by the Workmen's Compensation Board and the several Workmen's Compensation Referees shall be appointed by the department as provided in this act;" (Italics ours)

In view of these provisions, it is clear that the Workmen's Compensation Board performs its primary functions independently of the Secretary of Labor and Industry and not subject to his direction or supervision.

An additional indication that this was the intent of the legislature is found in section 441 of The Administrative Code (71 PS 151) which provides, in part, as follows:

The Workmen's Compensation Board shall consist of three members, of whom the Governor shall designate one as chairman. *The Secretary of Labor and Industry shall be, ex officio, a member of the board.* * * * (Italics ours)

The purpose of the legislature in thus designating the Secretary of Labor and Industry as an ex officio member of the Workmen's Compensation Board was undoubtedly to enable him to influence, to the extent permitted by such membership, the policies of the Workmen's Compensation Board, and this would not have been done if the Secretary had general supervisory powers over the board under other statutory provisions.

We feel that the Secretary's control over the general functions of the board is limited to the influence which he may exert as an ex officio member thereof, and that it is only with reference to financial matters that the board is subject to his supervision.

It should be kept in mind, however, that section 501 of The Administrative Code (71 PS 181), imposes upon all departments, boards and commissions, the duty of coordinating their respective functions in so far as possible.

With respect to Workmen's Compensation Referees, section 442 of The Administrative Code (71 PS 152) provides as follows:

There shall be, in the Department of Labor and Industry, as many Workmen's Compensation Referees as, in the judgment of the Governor and of the Secretary of

Labor and Industry, shall be necessary properly to administer the workmen's compensation laws of the Commonwealth. *Such referees shall be subject to the direction and control of the Workmen's Compensation Board.* The board shall assign them to the various workmen's compensation districts, and shall prescribe from time to time the duties to be performed by them. (*Italics ours*)

Section 2213 of The Administrative Code (71 PS 573) provides as follows:

Subject to any inconsistent provisions in this act contained, each Workmen's Compensation Referee shall have the power, and his duty shall be, to hear such claims for compensation as shall be assigned to him by the Workmen's Compensation Board, and to perform such other duties as shall be required of him by the Workmen's Compensation Board, or imposed upon him by law.

Under these sections of The Administrative Code, Workmen's Compensation Referees are made primarily responsible to the Workmen's Compensation Board.

2. To whom are the Workmen's Compensation Board and the Workmen's Compensation Referees accountable for the proper discharge of their duties, and to whom should they respectively report?

Section 504 of The Administrative Code (71 PS 184) provides, in part, as follows:

* * * Each departmental administrative board and commission, and each advisory board and commission, shall, not later than September first of each even-numbered year, report in writing to the head of the department of which such board or commission is a part. All such reports shall be attached as exhibits to the report made by the head of the department to the Governor.

As we have indicated above, the Secretary of Labor and Industry has no power to supervise or direct the activities of the Workmen's Compensation Board or Workmen's Compensation Referees except with regard to financial matters. Under section 504, however, the Secretary of Labor and Industry is authorized to require a biennial report of the activities of the Workmen's Compensation Board and the Workmen's Compensation Referees, which report he must attach to the biennial report made by him to the Governor. The fact that this report must be made to the Secretary of Labor and Industry does not indicate that the Workmen's Compensation Board and the Workmen's Compensation Referees are accountable to him for the proper discharge of their duties, for

The Administrative Code specifically states that the Workmen's Compensation Board is to perform its functions independently, and that the Workmen's Compensation Referees are to be subject to the direction of the Workmen's Compensation Board.

In the final analysis, both the board and the referees are accountable only to the Governor for the proper discharge of their duties, for, under section 202 (71 PS 62) and section 207 (71 PS 67) of The Administrative Code, the members of the Workmen's Compensation Board and Workmen's Compensation Referees are appointed by him.

3. Who determines the number and classification of clerical, stenographic or other assistance required by the board or the referees in the performance of their duties?

Section 2208 of The Administrative Code (71 PS 568) provides, in part, as follows:

* * * all clerical, stenographic and other assistance required by the Workmen's Compensation Board and the several Workmen's Compensation Referees shall be appointed by the department as provided in this act;

Section 214 of The Administrative Code (71 PS 74) contains, among others, the following provision:

* * * Except as otherwise provided in this act, the heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers, and other assistants, as may be required for the proper conduct of the work of any departmental administrative bodies, boards, commissions, or officers, and of any advisory boards or commissions established in their respective departments.

Under these provisions it is the function of the Secretary of Labor and Industry to make the actual appointment of persons to furnish stenographic and clerical assistance to the board and to the referees. However, since such employes are to assist in functions which, as indicated above, are in large part independent of the Secretary of Labor and Industry, it is primarily the function of the board and the referees to determine the number and type of employes needed.

4. Are the members of the Workmen's Compensation Board employes of the Department of Labor and Industry so as to come within the scope of instructions issued by the Secretary governing the conduct of the employes of that department?

It is impossible to answer this question in the absence of a description of the particular type of instructions involved. However, as indicated by the sections of The Administrative Code quoted in answer to the first question you submitted, the Workmen's Compensation Board operates independently and is only subject to the supervision of the Secretary of Labor and Industry with respect to financial matters.

5. Upon whom is the duty imposed by law of providing the members of the board with suitable and adequate quarters for the discharge of their official duties?

Under the provisions of section 2413 of The Administrative Code (71 PS 643) it is the duty of the Board of Commissioners of Public Grounds and Buildings to assign rooms to the various administrative departments, boards and commissions, both within and outside the capital city.

With respect to departmental offices, however, section 220 of The Administrative Code provides as follows (71 PS 80) :

* * * The *head of any department*, or any independent administrative board or commission, *may, with the approval of the Governor*, establish and maintain, at places other than Harrisburg, in quarters assigned by the Board of Commissioners of Public Grounds and Buildings, branch offices for the conduct of any one or more functions of such department, board, or commission, or of any departmental administrative or advisory board or commission in such department. (Italics ours)

Under this provision the Secretary of Labor and Industry is empowered to decide whether or not branch offices should be established and maintained for the Workmen's Compensation Board. Moreover, the rental for such branch quarters is paid from the appropriation made to the Department of Labor and Industry, and any disbursements from that appropriation are subject to the approval of the Secretary of Labor and Industry.

6. Is section 16 of the Act of July 21, 1919, P. L. 1077, still in full force and effect?

Section 16 of the Act of 1919, P. L. 1077 (77 PS 112), provides as follows:

It shall be the duty of the board to make all proper and necessary rules and regulations for the legal and judicial procedure of the bureau, and to promptly hear and determine all petitions and appeals, and to perform such other duties as shall be required.

This provision of the act of 1919 has never been expressly repealed.

You are advised, therefore, as follows:

1. The Secretary of Labor and Industry has no supervisory powers over the Workmen's Compensation Board and the Workmen's Compensation Referees except as to those matters which involve the expenditure of money.

2. The Workmen's Compensation Referees are, in the first instance, accountable to the Workmen's Compensation Board, and both the Workmen's Compensation Board and the Workmen's Compensation Referees are, in the final analysis, accountable only to the Governor for the proper discharge of their duties.

3. Although the Secretary of Labor and Industry is authorized to make the actual appointment of clerical, stenographic and other assistance required by the Workmen's Compensation Board and the Workmen's Compensation Referees, the number and classification of such employes is primarily a matter for the board and the referees to determine.

4. It is the duty of the Board of Commissioners of Public Grounds and Buildings to assign rooms to the Workmen's Compensation Board, both within and outside the capital city. The Secretary of Labor and Industry is, however, authorized to decide whether or not branch offices shall be established and maintained for the Workmen's Compensation Board.

5. The Act of 1919, P. L. 1077 (77 PS 112) has not been expressly repealed.

Very truly yours,

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

OPINION No. 234

The General State Authority—Extent of powers—Borrowing money—Issuance of ad interim certificates—Lease of property to Commonwealth—Liability of Commonwealth for rentals—Preferred status of appropriations therefor—Right of State Employes' Retirement Board and Public School Employes' Retirement Board to invest in General State Authority bonds—General State Authority Act of June 28, 1935, as amended by the Act of May 18, 1937.

1. The General State Authority is legally authorized by the Act of May 18, 1937, P. L. 676, amending the Act of June 28, 1935, P. L. 452. to construct those improvements or projects listed herein.

2. The General State Authority is legally authorized by section 1 of the Act of May 18, 1937, P. L. 676, to borrow money and issue any form of evidence of indebtedness or obligation therefor.

3. The Commonwealth of Pennsylvania, acting through the Department of Property and Supplies, is legally authorized by section 2 of the Act of May 18, 1937, P. L. 676, to enter into contracts to lease and leases with The General State Authority, and is liable for the payment of rentals provided for in such lease.

4. Rentals which the State may obligate itself to pay under leases with The General State Authority, if for the use and occupation of buildings, improvements and facilities necessary and incident to the proper functioning of the various departments of the State government, will constitute ordinary and current expenses of the State government, and appropriations for the payment of such rentals will therefore be preferred appropriations of the Commonwealth.

5. The General State Authority is legally authorized to pay its bonds at maturity.

6. The General State Authority may issue ad interim certificates during the progress of construction of projects, which ad interim certificates are exchangeable for definitive bonds of the Authority upon completion of the specific projects for which the money is advanced.

7. Funds of the State Employees' Retirement Board and the Public School Employees' Retirement Board may properly be invested in bonds of The General State Authority.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., December 15, 1937.

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

Sir: We have for consideration your recent request that the Public School Employees' Retirement Board and the State Employees' Retirement Board of the Commonwealth of Pennsylvania be advised on certain questions growing out of a proposed loan to be made by the said boards to The General State Authority.

The State Employees' Retirement Board and the Public School Employees' Retirement Board are about to enter into an agreement with The General State Authority, whereby they are to advance certain moneys on certain specified projects during the course of construction of said projects and receive therefor ad interim certificates, which, upon completion of the work, are to be exchanged for definitive bonds of The General State Authority.

Before entering into this agreement, the said boards desire to be advised as to whether The General State Authority is legally empowered and authorized to (a), erect and construct, under the provisions of existing law, the particular improvement or project for which advances are to be made, and (b), to borrow money

for such purposes, and (c), that the Commonwealth or any other entity involved, is legally authorized and empowered to enter into contracts to lease and leases with the said authority for the particular project or improvement, and liable for the payment of the rentals to be specified in said lease, and (d), whether appropriations for the payment of said rentals are preferred appropriations of the Commonwealth. Also whether the authority will have the legal and financial capacity to pay its bonds. These questions will be answered in order.

Is The General State Authority legally empowered and authorized to erect and construct, under the provisions of existing law, the particular improvement or project for which the advances are to be made?

The answer to this question is "Yes". Section 4 of Act of May 18, 1937, P. L. 676, which amends section 4 of the Act of June 28, 1935, P. L. 452, known as The General State Authority Act of 1935, defines the purposes of The State Authority to be as follows:

The Authority is created for the purpose of constructing, improving, maintaining, and operating sewers, sewer systems, and sewage treatment works for State institutions of every kind and character (heretofore or hereafter constructed), public buildings for the use of the Commonwealth, State arsenals, armories, and military reserves, State airports and landing fields, State institutions of every kind and character (heretofore or hereafter constructed), additions and improvements to land grant colleges, State highways, and bridges, tunnels, and traffic circles on State highways, swimming pools, and lakes on State land, and dams and improvements to river embankments (any and all the foregoing being herein called "projects"); * * *

The term "project" is also defined in section 1 (c) of The General State Authority Act of 1935, P. L. 452, as follows:

The term "project" shall mean any structure, facility, or undertaking which the Authority is authorized to construct, improve, maintain, or operate under the provisions of this act.

The Supreme Court in the case of *Kelley v. Earle*, et al, 325 Pa. 337 (1937), in which it passed upon all phases of the General State Authority Act of 1935, in answer to objections as to the indefiniteness of the meaning of the word "projects", as used in the act, stated as follows:

* * * However, as the word "projects" appears in the title of the Act, its intended meaning is perfectly clear to any reader. During the past five years it has been a recognized designation for public works and improvements. * * *

We have examined the character of all of the projects set forth in the list attached hereto, and find that not only do they come within the clear provisions of the acts of 1935 and 1937, but have been specifically declared constitutional in the case of *Kelley v. Earle*, supra, wherein the court, after enumerating and discussing the various classes of projects, set forth in section 4 of the act of 1935, which is almost identical with section 4 of the act of 1937, held that the act was constitutional, and in its final and concluding statement said:

Having decided that the General State Authority Act and the undertakings in pursuance of it are constitutional, it follows that the bill of complaint must be dismissed.

We therefore conclude that the General State Authority is legally empowered and authorized to erect and construct, under the provisions of existing law, all of the projects set forth in the list attached hereto.

Is the General State Authority legally empowered and authorized to borrow moneys for the purpose of erecting and constructing the projects in question?

The answer to this question is "Yes." Section 1 of the Act of May 18, 1937, P. L. 676, amending, inter alia, section 4 of the act of 1935, clearly gives the authority the right to borrow money and issue any form of evidence of indebtedness or obligation. The act provides as follows:

(i) To borrow money, make and issue negotiable notes, bonds, and other evidences of indebtedness or obligations (herein called "bonds") of the Authority, and to secure the payment of such bonds, or any part thereof, by pledge or deed of trust of all or any of its revenues, rentals, and receipts, and to make such agreements with the purchasers or holders of such bonds or with others in connection with any such bonds, whether issued or to be issued, as the Authority shall deem advisable, and in general to provide for the security for said bonds and the rights of the holders thereof.

Is the Commonwealth or any other entity involved, legally authorized and empowered to enter into contracts to lease and/or leases with the General State Authority for the particular proj-

ects or improvements, and liable for the payment of the rentals to be specified in said lease or leases?

This question is answered squarely and clearly by section 2 of the Act of May 18, 1937, P. L. 676 supplementing and adding to the act of 1935, section 9.1, which is as follows:

Contracts to Lease and Leases by Department from Authority.—The department shall have power and authority, with the approval of the Governor, to enter into contracts with the Authority, to lease as lessee from the Authority any or all of the projects undertaken by the Authority for a term, with respect to each project constructed, not exceeding thirty (30) years, at such rental or rentals as may be determined by the Authority, and upon the completion of the said projects, the department shall have power and authority, with the approval of the Governor, to lease as lessee any or all of the projects completed by the Authority for a term, with respect to each project leased, not exceeding thirty (30) years, at such rental or rentals as may be determined by the Authority.

The “department” referred to in the amendatory section above quoted is defined in the General State Authority Act of 1935, Section 2 (b), as follows:

The term “Department” shall mean the Department of Property and Supplies as the same exists under The Administrative Code of one thousand nine hundred and twenty-nine, or as it may exist by amendment of said code.

In addition to the provisions of the acts of 1935 and 1937, quoted above, the power to enter into contracts for the leasing of proper and adequate offices, rooms and other accommodations, outside of the capitol buildings, for any department, board or commission, or agency of the State government, is specifically vested in the Department of Property and Supplies by the provisions of sections 2401 and 2402 of The Administrative Code of 1929, as amended. Subsection (d) of section 2402 of The Administrative Code provides as follows:

* * * It shall be unlawful for any other department, board, commission, or agency of the State Government to enter into any leases but the Department of Property and Supplies shall act only as agent in executing leases for departments, boards, and commissions, the expenses of which are paid wholly or mainly out of special funds, and, in such cases the rentals shall be paid out of such special funds.

The Commonwealth, therefore, through the Department of Property and Supplies, is legally authorized to enter into contracts to lease and/or leases with The General State Authority for all of the projects set forth in the list attached hereto.

As to the Commonwealth's liability for the payment of rentals, to be specified in said lease or leases, generally the authority to incur an obligation carries with it a liability to meet that obligation. Especially is this so in the case of rentals provided in the contemplated leases, which, as more at length discussed below, are current and ordinary expenses of the State government. Not only is the Commonwealth liable for the payment of the rents, but these rentals enjoy a priority and preference over and above all other appropriations and debts.

Are appropriations for the payment of said rentals preferred appropriations of the Commonwealth?

The answer to this question is "Yes". In *Commonwealth ex rel. Schnader v. Liveright et al*, 308 Pa. 35 (1932), the Supreme Court, in discussing and passing upon the question of preferred appropriations, stated as follows:

* * * The control of the State's finances is entirely in the legislature, subject only to these constitutional limitations; and, except as thus restricted, is absolute. * * *

Among the constitutional requirements are the provisions (article IX, section 12) that "The moneys of the State, over and above the necessary reserve, shall be used in the payment of the debt of the State, either directly or through the sinking fund," and, by article IX, section 13, that "The moneys held as necessary reserve shall be limited by law to the amount required for current expenses." We had a State debt when the Constitution was adopted and the money required to pay that debt, or any State debt, was supplied, inter alia, by the assignment to the sinking fund of any part of the revenue over and above ordinary and current expenses of government. A survey of the Constitution would indicate that the ordinary current expenses of government would be the expenses of the executive, judicial and legislative departments of government, and of public schools. It was the intention of the framers of the fundamental law to safeguard and protect these ordinary expenses, that the government might exist as such. Therefore, they have a preference or prior claim on all moneys of the Commonwealth over all other expenditures, expenses, debts, or appropriations. We have so held with regard to such expenses of municipalities. "Current expenses have first claim on ordinary revenues and contemplate operating expenses": *Georges Twp. v. Union Trust Co.*, 293 Pa. 364, 370. The Constitution requires a reserve to be set up sufficient to take care of these preferred claims, and

that such reserve be limited by law; but if the legislature fails to so limit it, it is the duty of the fiscal officers to safeguard the ordinary current monthly expenses of government.

Unquestionably, therefore, the rentals which the State government obligates itself to pay under the leases that it will execute with the General State Authority are for the use and occupation of buildings, improvements, and facilities necessary and incidental to the proper functioning of the various departments of the State government, and, therefore, constitute "ordinary" and "current" expenses of the State government. Further, in the recent case of *Kelley v. Earle, et al*, 325 Pa. 337 (1937), the Supreme Court, in discussing and differentiating between debts and current expenses of the State, held as follows:

It was conceded at the argument that contracts or leases to meet recurrent needs, the obligation of which is to be met by the Commonwealth from current revenues extending beyond the biennium, are not within the constitutional limitation. * * *

* * * "Any expense that recurs with regularity and certainty and is necessary for [its] existence . . . or for the health, comfort and perhaps convenience of the inhabitants may well be called an ordinary expense": *Brown v. City of Corry*, 175 Pa. 528. What condition is more recurring than the perennial obligation of this Commonwealth to care for helpless, indigent, epileptic, feeble-minded, blind, tubercular and other patients or inmates that overflow the institutions named in the Act? Wherein are the objects to be attained by the Act by the building program a new burden? These conditions are with us always and recur with an oppressive regularity.

Will the General State Authority have the legal and financial capability to pay its bonds?

This last question is one of mixed law and fact. The authority undoubtedly has the legal capacity to pay its bonds, but as to whether it will be financially capable will depend upon whether its receipts for the rental of the projects to the State government will be sufficient to pay interest on the bonds, costs of administration, and the accumulation of a fund sufficient to pay the principal of the bonds at maturity. Undoubtedly, in fixing the amount of the rentals for the projects to be leased to the Commonwealth, the General State Authority will take into consideration the amount invested for the erection of the projects, the costs of administration of the State authority, the interest payments on said bonds, and the payment of the principal of the said bonds at maturity, and will fix a rental sufficient to meet these obligations.

We have stated above, and based our statements upon a construction of the acts of assembly in each case involved, that the General State Authority is legally empowered and authorized to construct and erect the projects, borrow money for the same, issue its obligations for said borrowed money, and enter into all necessary contracts to effectuate its purposes.

The basic act of 1935, better known as the General State Authority Act, to which the act of 1937 is an amendment, has been passed upon by the Supreme Court as to its constitutionality in the case of *Kelley v. Earle, et al*, 325 Pa. 337 (1937), wherein the Supreme Court, in an opinion clearly outlined the purpose for which the General State Authority was erected, and after a discussion of the various questions involving the constitutionality of the act, held that the act was constitutional. The court in part held as follows:

In considering the question of constitutionality, due regard must be had to the Commonwealth's position, the projects to be undertaken, the character of the contract and the parties with whom it is made. To enforce a harsh, literal interpretation of the Constitution when considering the legality of the leases of the projects herein mentioned, which are essential to the life of the State and the comfort, health or security of its people, a construction opposed to all business concepts, would violate all rules of interpretation and cause loss of the respect necessary to the life of that document. While it is the duty of the courts to uphold the Constitution, it is likewise their duty not to declare an act unconstitutional unless it is imperatively necessary to do so. * * *

While the question was not raised by your inquiry, we might add that in formal opinion dated November 22, 1937, No. 231, we advised the General State Authority that bonds of the authority are legal investments for trust funds under the provisions of the Act of May 28, 1937, No. 284, which amends the Fiduciaries Act of 1917, and the Act of July 1, 1937, No. 539, and which specifically provides that:

* * * Any departmental administrative board and commission, or other agency of the Commonwealth, shall have power to invest funds and moneys in his or its possession and control in bonds issued by the General State Authority in which the full faith and credit of The Authority is pledged, and such bonds shall be deemed legal investments for all such purposes.

Therefore, funds of the State Employees' Retirement Board and of the Public School Employees' Retirement Board may legally be invested in bonds of the General State Authority.

In conclusion we are of the opinion, and you are so advised, that:

(1) The General State Authority is legally empowered and authorized to erect and construct, under the provisions of existing law, the particular improvements or projects set forth in the list attached hereto;

(2) That the General State Authority is legally empowered and authorized to borrow moneys for such purposes;

(3) That the Commonwealth or any other entity involved is legally authorized and empowered to enter into contracts to lease and/or leases with the said authority for the particular project or improvement set forth in the list attached hereto, and that the Commonwealth is liable for the payment of the rentals provided for in said contracts to lease and/or leases;

(4) That all appropriations for the payment of said rentals are preferred appropriations of the Commonwealth;

(5) That the General State Authority is legally empowered and authorized to pay its bonds at maturity;

(6) That the General State Authority is legally authorized and empowered to issue ad interim certificates during the progress of construction of the projects, which ad interim certificates are to be exchanged for definitive bonds of the authority upon completion of the specific projects for which the money is advanced;

(7) That the State Employees' Retirement Board and the Public School Employees' Retirement Board are legally empowered and authorized to purchase the bonds of the General State Authority.

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

GENERAL STATE AUTHORITY COMPARATIVE CONSTRUCTION ALLOCATIONS

WELFARE DEPARTMENT

Docket No. Pa.	Mental Institutions	Actual	Financial
1812	Allentown State Hospital....	\$ 1,387,925	\$ 1,388,000
1875	Danville State Hospital.....	1,151,074.94	1,151,000
1801	Farview State Hospital.....	1,267,000	1,267,000
1838	Harrisburg State Hospital....	1,390,375	1,391,000
1811	Laurelton State Village.....	1,225,000	1,225,000
1805	Norristown State Hospital....	2,182,050	2,183,000
1842	Pennhurst State School....	1,418,000	1,418,000
1824	Polk State School.....	980,000	980,000
1809	Selinsgrove State Colony....	1,997,000	1,997,000
1802	Torrance State Hospital....	1,939,000	1,940,000
1879	Warren State Hospital.....	1,730,700	1,731,000
1818	Wernersville State Hospital..	673,750	674,000
Total		\$17,342,780.94	\$17,345,000

Medical Institutions		Actual	Financial
Docket No. Pa.			
1865	Ashland State Hospital.....	83,300	84,000
1843	Blossburg State Hospital.....	140,874	141,000
1813	Coaldale State Hospital.....	48,836.58	49,000
1839	Connellsville State Hospital..	79,625	80,000
1834	Hazleton State Hospital.....	490,000	490,000
1814	Locust Mt. State Hospital....	96,225	97,000
1815	Nanticoke State Hospital.....	67,375	68,000
1870	Philipsburg State Hospital...	135,000	135,000
1825	Psychiatric Hospital	2,847,000	2,847,000
1827	Scranton State Hospital.....	1,042,000	1,042,000
1817	Shamokin State Hospital....	47,228.41	48,000
Total		\$ 5,077,463.99	\$ 5,081,000

Correctional Institutions			
1878	Ind. School for Boys.....	2,756,250	2,757,000
1816	Penna. Ind. School.....	381,060.68	382,000
1826	Penna. Training School		
	Morganza	283,000	283,000
1806	State Ind. Home for Women		
	Muncy	380,000	380,000
Total		\$ 3,800,310.68	\$ 3,802,000

Penal Institutions			
1877	East. State Pen., Graterford..	618,745.66	619,000
1868	East. State Pen., Philadelphia	229,629.40	230,000
1862	Maximum Security Prison....	2,474,500	2,475,000
1845	West. State Pen., Pittsburgh..	594,175	595,000
1846	Western State Pen. Rockview	253,000	253,000
Total		\$ 4,170,050.06	\$ 4,172,000

Department of Military Affairs			
1847	Allentown Armory	129,000	129,000
1841	Altoona Armory	96,400	97,000
1849	Canonsburg Armory	96,400	97,000
1810	Clearfield Armory	97,000	97,000
1850	Coraopolis Armory	116,400	117,000
1859	Gettysburg Armory	55,700	56,000
1840	Hamburg Armory	72,250	73,000
1804	Harrisburg Administra. Bldg.	120,040	121,000
1807	Harrisburg Battery A-107 F.A.	96,240	97,000
1830	Huntingdon Armory	49,000	49,000
1876	Indiantown Gap (Sew. Disp.)	104,000	104,000
1832	Lancaster Armory	72,250	73,000
1852	Lewisburg Armory	96,400	97,000
1853	Lewistown Armory	96,400	97,000
1835	Ligonier Armory	73,000	73,000
1831	Phila. Armory, 108 F.A....	133,000	133,000
1858	Phila. Armory, Special Troop	151,000	151,000
1848	Phoenixville Armory	48,200	49,000
1851	Sunbury Armory	96,400	97,000
1829	Tunkhannock Armory	97,000	97,000
1821	Waynesboro Armory	96,161.57	97,000
1822	Williamsport Armory	48,200	49,000
Total		\$ 2,040,441.57	\$ 2,050,000

Department of Public Instruction

Docket No. Pa.		Actual	Financial
1869	Bloomsburg State Teach. Col.	577,700	578,000
1844	California State Teach. Col...	613,300	614,000
1864	Cheyney Training School....	466,300	467,000
1819	Clarion State Teachers College	397,499	398,000
1855	E. Stroudsburg State Teachers College	654,200	655,000
1856	Edinboro State Teach. College	741,900	742,000
1820	Indiana State Teachers College	735,582	736,000
1866	Kutztown State Teach. Col...	605,790	606,000
1857	Lock Haven State Teach. Col..	646,600	647,000
1867	Mansfield State Teach. College	572,400	573,000
1833	Millersville State Teach. Col.	669,000	669,000
1803	Shippensburg State Teach. Col.	675,230	676,000
1828	Slippery Rock State Teach. Col.	842,000	842,000
1836	Scotland Orphan School	743,000	743,000
1837	Scranton Oral School.....	424,000	424,000
1863	Thaddeus Stevens Ind. School	159,000	159,000
1873	West Chester State Teach. Col.	780,000	780,000
Total		\$10,303,491	\$10,309,000

Penna. Historical Commission

1871	Pennsbury House	217,300	218,000
1872	Old Economy, Ambridge	37,100	38,000
Total \$		254,400	\$ 256,000

Department of Health

1808	Elizabethtown Crippled Children's Hospital	600,000	600,000
1854	Hamburg Sanatorium	630,000	630,000
1861	Mont Alto Sanatorium.....	4,765,000	4,765,000
1860	New Tuberculosis Hospital...	2,645,000	2,645,000
Total \$		8,640,000	\$ 8,640,000

Miscellaneous

1823	Farm Show Arena.....	1,250,000	1,250,000
1800	Financial Building	7,095,000	7,095,000
1874	Pennsylvania State College...	5,000,000	5,000,000
Total		\$13,345,000	\$13,345,000

GENERAL STATE AUTHORITY COMPARATIVE
CONSTRUCTION ALLOCATIONS

SUMMARY

Department of Welfare.....	\$30,390,605.67	\$30,400,000
Department of Military Affairs.....	2,040,441.57	2,050,000
Department of Public Instruction.....	10,303,491.00	10,309,000
Department of Public Instruction.....	254,400.00	256,000
Department of Health.....	8,640,000.00	8,640,000
Farm Show Arena.....	1,250,000.00	1,250,000
Finance Building.....	7,095,000.00	7,095,000
Pennsylvania State College.....	5,000,000.00	5,000,000
	<hr/>	<hr/>
Grand Total	\$64,973,938.24	\$65,000,000

OPINION No. 235

Incompetents—Liability for care of indigents—Department of Public Assistance—Institutional districts—Department of Welfare—Act of June 24, 1937—Attack on constitutionality of law by poor district—Obtaining supersedeas.

Under the Act of June 24, 1937, P. L. 2017, the Department of Public Assistance will, as of January 1, 1938, be vested with responsibility for the maintenance of the poor, exclusive of such responsibilities as are imposed by law upon the institutional districts and Department of Welfare of the Commonwealth for maintaining their wards, with the exception of the indigent inhabitants of any poor district which shall, by legal proceedings, be questioning the constitutionality of the act and shall have obtained an order under which the appeal acts as a supersedeas.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., December 15, 1937

Honorable Karl de Schweinitz, Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your letter of November 24, 1937, in which you ask the Department of Justice for a formal opinion as to whether or not the Department of Public Assistance will be obligated by law to take care of poor relief cases after January 1, 1938.

Your letter further indicates that an appeal of the Managers for the Relief and Employment of the Poor of the Township of Germantown; questioning the constitutionality of Act No. 396, is now pending before the Supreme Court of our Commonwealth, and that the case will not be called for argument until January 3, 1938.

You indicate that the opinion sought desires to place the responsibility for the care of poor persons from January 1, 1938 until the time the court finally disposes of the constitutionality of Act No. 396.

Section 601 of Act No. 396, approved June 24, 1937, abolishes all poor districts and terminates the powers and duties of directors, overseers, guardians and managers of the poor as of December 31, 1937, and substitutes for such poor districts, institutional districts for the several counties of our Commonwealth, except in cities of the first and second classes, where a Department of Welfare is set up to take care of the responsibilities heretofore assumed under the laws by directors, overseers, guardians and managers of the poor.

Common Pleas Court No. 3 of Philadelphia, recently rendered a lengthy, exhaustive and learned opinion upholding the constitutionality of Act No. 396 in question. It is our belief that the

Supreme Court of our Commonwealth will feel constrained, under liberal rules of construction, to uphold the constitutionality of Act No. 396 of the General Assembly and under these circumstances we look forward with the belief that our Supreme Court will uphold this humane, constructive and most essential legislation.

It would be well to state that as of November 17, 1937, the authorities of the poor district of Germantown presented a petition to the Supreme Court, seeking an order under which their appeal would act as a supersedeas. This order was made by the Supreme Court on November 22, 1937, and the poor authorities of Germantown will continue to be clothed with the responsibility and authority of maintaining the poor of their district after January 1, 1938, until the Supreme Court disposes of the constitutionality of Act No. 396.

Therefore, as to this particular district, Act No. 396 will not apply between January 1, 1938 and the day of the decision of our Supreme Court.

We know of no other instance where any poor district within our Commonwealth has procured a similar order.

Our conclusion is, and you are accordingly advised, that the Department of Public Assistance, as of January 1, 1938, will be vested with the responsibility for the maintenance of the poor, exclusive of such responsibilities as are imposed by law upon the institutional districts and departments of welfare of our Commonwealth for maintaining their wards, with the exception of the indigent inhabitants of the poor district under the supervision and control of the Managers for the Relief and Employment of the Poor of the Township of Germantown.

Very truly yours,

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

OPINION No. 236

Alcoholic beverages—Alcohol—Right to sell other than through State Stores System—Taxation—Act of August 6, 1936—Applicability to alcohol sold through other than State Stores System.

1. Alcohol may be sold and purchased within the Commonwealth of Pennsylvania independent of the Pennsylvania Liquor Control Board or of its State Stores System so long as such sales and purchases are made in accordance with the regulations of the board.

2. The tax on alcohol imposed by the Act of August 6, 1936, P. L. 92, which was in effect during the period from August 15, 1936, to May 31, 1937, inclusive, applies only to such alcohol as was delivered to the Pennsylvania Liquor Control Board for sale through its State Stores System and not to such alcohol as was sold and delivered under the regulations of the board, but not through the State Stores System.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., December 31, 1937.

Honorable Leo A. Crossen, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether, during the period it was in effect, the Act of August 6, 1936, P. L. 92, imposed a tax upon the delivery of all alcohol within the Commonwealth, or whether the act applied only to such alcohol as was delivered to the Pennsylvania Liquor Control Board for sale through its State Stores System.

Your inquiry necessarily raises two questions:

(1) Must all alcohol purchased in the Commonwealth be bought from, or through, the Pennsylvania Liquor Control Board?

(2) What alcohol was made taxable by the act under consideration?

In order properly to consider your inquiry, it is necessary to review the Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15, as reenacted and amended by the Act of July 18, 1935, P. L. 1246, and to endeavor to ascertain therefrom the intention of the legislature with reference to the sale and possession of alcohol within the Commonwealth of Pennsylvania.

The act in question was in effect during the period from August 15, 1936 to May 31, 1937, inclusive. Therefore, our answer to your inquiry will be confined to the state of the law during the time the act was in effect. Any changes in the law which may have been made subsequent to that time have no bearing upon the issues involved and will not be considered in this opinion.

* * * it is a cardinal rule of construction of statutes that effect must be given, if possible, to the whole statute and every part thereof. To this end it is the duty of the court, so far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible. * * * 59 C. J. 995, sec. 595.

The Pennsylvania Liquor Control Act of 1933, *supra*, did not define "alcohol", nor did the said act confer any specific authority upon the Pennsylvania Liquor Control Board to deal with alcohol.

In 1935, section 2 of article I of the Pennsylvania Liquor Control Act was amended to include a definition of "alcohol." Likewise, the definition of "liquor" was amended to include those liquors which are "intended for beverage purposes." Obviously, it was the intention of the legislature to treat "alcohol" and "liquor" as different subjects.

Section 201 of article II of the Pennsylvania Liquor Control Act, which defines the general powers and duties of the Pennsylvania Liquor Control Board, was amended in 1935 so as to authorize the board:

(b) To control the *manufacture*, possession, sale, consumption, *importation*, use and delivery of liquor and alcohol in accordance with the provisions of this act; and to fix the wholesale and retail prices at which liquors shall be sold at Pennsylvania liquor stores. * * * (Italics indicate amendment)

It is pertinent to note that while the board was given authority to control the manufacture, etc., of liquor and alcohol, its authority to fix wholesale and retail prices was confined solely to "liquors" which, as hereinbefore pointed out, were considered a subject separate and distinct from alcohol. If the legislature had intended to impose upon the Pennsylvania Liquor Control Board the duty to sell alcohol at the Pennsylvania Liquor Stores, it would have given the board the power, and imposed upon it the duty, to fix the wholesale and retail prices of such alcohol. By failing to grant such a power and impose such a duty, the legislature must have intended that the question whether alcohol should be sold at Pennsylvania Liquor Stores was one for determination by the board as a matter of policy, rather than by legislative direction.

By subsection (d) of section 201 of the Pennsylvania Liquor Control Act, as amended in 1935, the Pennsylvania Liquor Control Board was given authority:

To grant and issue liquor licenses, and to grant, issue, suspend or revoke alcohol permits, as provided in this act;

Section 203 of the Pennsylvania Liquor Control Act, as amended in 1935, prescribed certain specific subjects concerning which the board might make regulations. Those subsections which have to do with alcohol authorized the board to make regulations regarding:

(a) The equipment and management of Pennsylvania Liquor Stores and warehouses in which liquor and alcohol are kept or sold, and the books and records to be kept therein;

(c) The purchase of liquor and alcohol and its supply to Pennsylvania Liquor Stores;

* * * * *

(f) The sealing and labeling of liquor and alcohol sold under this act and of liquor and alcohol lawfully acquired by any person prior to January first, one thousand nine hundred and thirty-four;

* * * * *

(j) The issuance of alcohol permits.

That section did not impose any duty upon the board to make regulations, but merely gave the board the right to do so.

Section 301 of the Pennsylvania Liquor Control Act, as amended in 1935, authorized the sale of alcohol at Pennsylvania Liquor Stores.

Section 305 of that act, as amended in 1935, provided that:

Every Pennsylvania Liquor Store shall keep in stock for sale such classes, varieties, and brands of liquor and alcohol as the board shall prescribe. * * *

It also authorized the sale by the board of tax exempt:

* * * alcohol to the Commonwealth of Pennsylvania, and to persons to whom the board shall, by regulation to be promulgated by it, issue special permits for the purchase of such tax exempt alcohol.

Section 305 likewise provided that such permits might be issued to the United States or any governmental agency thereof, to any university or college of learning, to any laboratory for use exclusively in scientific research, etc. This provision of the act made clear the meaning of the term "alcohol permits," which were authorized to be issued under section 203 (j), above referred to.

While the Pennsylvania Liquor Control Act, as reenacted and amended in 1935, made it unlawful for any person to expose or keep for sale any liquor within the Commonwealth, except as provided in the act, the only prohibition with reference to "alcohol" was contained in section 601 (b) of the act, which made it:

* * * unlawful for any person to sell alcohol to any person, except in accordance with regulations promulgated by the board.

This section, which imposed restrictions on sales, did not make it unlawful for any person or agency other than the Pennsylvania Liquor Control Board to sell alcohol within the Commonwealth, but simply provided that alcohol could not be sold except in accordance with the regulations promulgated by the board. In referring to the sale of alcohol by one person to another, the act clearly

indicated the legislative intent that alcohol might be sold within the Commonwealth otherwise than through the Pennsylvania Liquor Control Board.

Section 606 of the Pennsylvania Liquor Control Act of 1933 provided as follows:

It shall be unlawful for any person, other than the board or the holder of a sacramental wine permit or of an importer's license, to import any liquor whatsoever into this Commonwealth, but this section shall not be construed to prohibit railroad and pullman companies from selling liquors purchased outside the Commonwealth in their dining, club and buffet cars, which are covered by public service liquor licenses, and which are operated in this Commonwealth.

In 1935 this section was amended to include the following paragraph:

It shall be unlawful for any person to import alcohol into this Commonwealth, except in accordance with regulations to be promulgated by the board.

This amendment is extremely enlightening on the subject here under discussion. It permitted alcohol to be imported within the Commonwealth subject to the regulations of the board; however, it did not make the same unqualified prohibition with reference to the importation of alcohol as it did with reference to the importation of liquor.

Here again there was a patent intention on the part of the legislature to treat alcohol in a class different and apart from liquor, and to exempt alcohol from that class of commodities which were required to be sold to, and through, the Pennsylvania Liquor Control Board.

Considering the Pennsylvania Liquor Control Act of 1933 as a whole, together with the amendments of 1935, it appears without any equivocation that the legislature intended to treat alcohol and liquor as two separate subjects. Furthermore, it is obvious that the legislature intended that the Pennsylvania Liquor Control Board should have the power and the authority to sell alcohol in Pennsylvania liquor stores, but that the sale of alcohol should not be restricted to the board alone. The legislature intended to put the control of alcohol in the board, in order to give the board power to make rules and regulations for its sale and disposition within the Commonwealth. Under the aforesaid act, as amended in 1935, the board could, if it saw fit, prescribe that alcohol should be sold only through the Pennsylvania Liquor Control Board and

through the Pennsylvania liquor stores. On the other hand, the board has the right to provide that alcohol may be sold by one person to another, so long as the vendor and vendee comply with the regulations of the board. Accordingly, the sale and purchase of all alcohol in Pennsylvania need not be made to or by the Pennsylvania Liquor Control Board, so long as the persons selling or purchasing the alcohol comply with the law and the regulations of the board.

We now come to the specific question whether all alcohol delivered within the Commonwealth of Pennsylvania during the period the Act of August 6, 1936, *supra*, was in effect was subject to the tax imposed by the act, or whether during that period the said tax applied only to that alcohol which was delivered to the Pennsylvania Liquor Control Board for sale through the State Stores System.

As a general rule revenue laws, * * * operate to impose burdens upon the public, or to restrict them in the enjoyment of their property and the pursuit of their occupations, and, when they are ambiguous or doubtful, will be construed strictly in favor of the taxpayer and against the taxing power. * * * In order to sustain the tax, it must come clearly within the letter of the statute * * * So, too, they should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. * * * 59 C. J. 1131, Section 670.

Section 1 of the act of 1936 included in its definition of distilled spirits any:

* * * alcohol, other than denatured alcohol unfit for beverage purposes * * *.

Section 2 of that act provided:

An excise tax is hereby imposed upon the delivery of all distilled, rectified, and blended spirits to the board for sale in this Commonwealth, at the rate of four per cent (4%) * * *.

It is evident that the tax imposed by the act of 1936 was upon such distilled spirits as were delivered to the board for sale within the Commonwealth. Therefore, the tax imposed was an excise tax upon the privilege of delivering alcohol to the board. Accordingly, if the law did not require all alcohol sold within the Commonwealth to be delivered to the Pennsylvania Liquor Control Board for sale by the board through the State Stores System, the tax would not apply to that alcohol which was not delivered to the board for sale through the State Stores System.

Since we have concluded that the Pennsylvania Liquor Control Board may permit alcohol to be sold by one person to another, subject to its regulations, without the necessity of such alcohol having been purchased by the board, it is clear that the tax imposed by the act of 1936 did not apply to all alcohol dealt with within the Commonwealth. Furthermore, a study of the act of 1936, and of the facts leading up to its passage, clearly indicates that the tax under consideration was not intended to apply to all alcohol delivered within the Commonwealth, but only to such alcohol as was delivered to the board for sale through the Pennsylvania liquor stores.

Inasmuch as sales of alcohol are made by the Pennsylvania Liquor Control Board through the State Stores System, it was necessary to include "alcohol" within the scope of the subjects taxable under the act of 1936. However, alcohol which is used for rectifying, blending, and manufacturing nonbeverage products, and that which is used by hospitals, eleemosynary institutions, etc., is sold, under the regulations of the board, directly by the vendor to the consumer, and not through the Pennsylvania Liquor Control Board.

It has been suggested that, so long as alcohol is sold within the Commonwealth subject to the regulations of the Pennsylvania Liquor Control Board, and since the board can require all sales to be made through the State Stores System, delivery to the ultimate consumer should be construed as delivery to the board's agent. However, the act of 1936 imposed a tax only upon such alcohol as was delivered to the board for sale within the Commonwealth. Alcohol which was delivered to the board or its agent for further processing within the Commonwealth clearly was not a subject of the tax, because it was not intended "for sale in this Commonwealth."

While ordinarily it is not proper to go outside the body of a taxing statute in order to determine its meaning, nevertheless we feel that in this case a reference to the purpose and intent of the legislature in enacting the act of 1936 is entirely relevant and proper.

The act of 1936 was enacted as a means of providing approximately \$1,400,000 in revenue. At the time it was under consideration, and in order to determine the rate at which the tax should be assessed, the sponsor of the bill requested the Pennsylvania Liquor Control Board to furnish an estimate of its anticipated purchases of liquor and alcohol for sale within the Commonwealth for the balance of the biennial period. The Pennsylvania Liquor Control Board advised that it anticipated purchases of between

\$35,000,000 and \$40,000,000 for the said period. Accordingly, it was determined that a four percent tax would be ample to provide the required revenue. We are advised that in arriving at the figures of \$35,000,000 or \$40,000,000, the Pennsylvania Liquor Control Board took into consideration only those liquors and that alcohol which it anticipated would be sold through the Pennsylvania liquor stores, and in no way considered alcohol which would be used in manufacturing nonbeverage products or for blending. We are further advised that if all alcohol which it was anticipated would be purchased within the Commonwealth during the period in question had been included in the estimate submitted by the board, the figure would have amounted to \$50,000,000, which, if taxed at the rate of four percent, would have yielded \$2,000,000 in revenue. In other words, if all alcohol had been included in the board's estimate, the rate of tax could, and no doubt would, have been reduced to approximately three percent.

Therefore, since the estimate of anticipated purchases of liquor and alcohol by the Pennsylvania Liquor Control Board for sale through its State Stores System did not comprehend the purchase of all alcohol to be used in the Commonwealth, and since, by the inclusion of all alcohol the estimate of the board, and the yield of the tax, would have been far greater than the amounts anticipated or required, it is clear that alcohol not purchased for sale through the Pennsylvania liquor stores was not intended to be included.

In order to provide the revenue required, it was at first proposed to impose a tax of five cents a gallon on all liquor manufactured within the Commonwealth of Pennsylvania, and House Bill No. 169 (Special Session of 1936), providing for such a tax, was introduced. However, the said bill was opposed on the ground that, if enacted into law, its enforcement would impose a hardship upon Pennsylvania manufacturers, and that, by reason of the additional cost of their product, they would be put to a disadvantage in competing with out-of-state vendors. Accordingly, in order to eliminate this discriminatory feature, the said bill was amended and enacted in its amended form.

If, during the period it was in effect, the act of 1936 imposed a tax upon alcohol sold to blenders and rectifiers of whiskey in Pennsylvania, the same competitive disadvantage accrued to them as would have resulted had House Bill No. 169 been enacted in its original form. Therefore, it is clear that the legislature did not intend the tax in question to affect manufacturers and blenders of alcohol until such alcohol was delivered to the Pennsylvania

Liquor Control Board for sale within the Commonwealth through the Pennsylvania liquor stores.

Therefore, you are advised that alcohol may be sold and purchased within the Commonwealth of Pennsylvania, independently of the Pennsylvania Liquor Control Board or of its State Stores System, so long as such sales and purchases are made in accordance with the regulations of the board.

You are likewise advised that the tax imposed by the Act of August 6, 1936 (Special Session of 1936, P. L. 92), during the period it was in effect, applied only to that alcohol which was delivered to the Pennsylvania Liquor Control Board for sale through its State Stores System, and not to that alcohol which was sold and delivered under the regulations of the board, but not through its State Stores System.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,

Attorney General.

OPINION No. 237

State government—Right to create debt—Casual deficiencies in revenue—Constitution, art. IX, sec. 4—Necessity for legislative action—Right of State to lend to political subdivision or other governmental instrumentality—Loan to School District of Philadelphia.

1. A casual deficiency in revenue, within the meaning of article IX, sec. 4, of the Constitution, authorizing the creation of a State debt to supply such deficiencies, means one arising from some unforeseen cause and does not include the borrowing of money to meet current expenses.

2. Only the legislature can create a State debt under article IX, sec. 4, of the Constitution, and before the proceeds of such debt can be utilized, an appropriation act is necessary.

3. The State cannot lend money to any political subdivision or any other governmental instrumentality.

4. Unexpended portions of the appropriation of \$2,000,000 made by the Act of July 2, 1937 (No. 86-A), to the Department of Public Instruction for the aid of financially handicapped and distressed school districts, are available to assist the School District of Philadelphia to meet its most urgent need in such amount as will not prejudice the rights of other financially handicapped and distressed school districts.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., January 25, 1938

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

Sir: We have your request to be advised regarding your authority, as Governor of the Commonwealth of Pennsylvania, to

pledge the credit of the Commonwealth as security for a loan of one million dollars, which money is to be lent to the School District of Philadelphia in order to supply a deficiency in its revenue.

You inquire whether that section of the Constitution which permits the creation of a debt to supply casual deficiencies in revenue in the amount of one million dollars would authorize such action on your part.

You further inquire whether, if the Commonwealth cannot render assistance to the School District of Philadelphia in the manner suggested, there is any other way in which the Commonwealth could meet the emergency which exists.

Your inquiry arises out of the fact that the School District of Philadelphia is in a serious dilemma, due to lack of funds, which shortage seriously impairs the proper performance of its functions.

We are advised by counsel for the School District of Philadelphia that the sum of two hundred fifty thousand dollars would take care of, and supply, those items which most vitally affect the children attending school within the said school district.

The section of the Constitution to which you refer is section 4 of article IX, which provides, in part, as follows:

No debt shall be created by or on behalf of the State, *except to supply casual deficiencies of revenue*, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; *and the debt created to supply deficiencies in revenue shall never exceed, in the aggregate at any one time, one million dollars * * *.* (Italics ours)

The above section of the Constitution authorizes the creation of a debt to supply deficiencies in revenue, provided that such debt shall never exceed, in the aggregate, at any one time, one million dollars.

The above section of the Constitution was construed in *Commonwealth ex rel. Schnader v. Liveright*, 308 Pa. 35 (1932), in which the court stated as follows, at page 66:

** * * Under the Constitution, neither the legislature, the officers or agents of the State, nor all combined, can create a debt or incur an obligation for or on behalf of the State, except to the amount and in the manner provided for in the fundamental law. This section was intended to restrict legislative acts which incurred obligations or permitted engagements on the credit of the State beyond revenue in hand or anticipated through a biennium, and establishes the principle that we must keep within current revenue and \$1,000,000. * * **

* * * *The control of the state's finances is entirely in the legislature, subject only to these constitutional limitations; and except as thus restricted, is absolute.* * * *
(Italics ours)

A casual deficiency in revenue means one arising from some unforeseen or unexpected cause, or from an insufficiency of funds to meet some unforeseen and necessary expense, and does not include the borrowing of money to meet current expenses. The word "casual" means that which happens by accident. See *Williams v. Sumter County*, 94 S. E. 913, 21 Ga. App. 716.

A casual deficiency occurs only when the State's revenue is insufficient to meet the expenses of the State for a fiscal period. A loan to take care of a casual deficiency is not authorized because the funds on hand are not sufficient to meet current expenses. Therefore, the only type of deficiency which was contemplated by the framers of the Constitution, and which can be supplied by a loan, is a deficiency which arises by reason of an unanticipated shortage in revenue to provide for the regular expenses of the State government.

It is clear that the authority of the Commonwealth to incur a debt in the amount of one million dollars to supply casual deficiencies in revenue is confined strictly, as to method. A deficiency can be accomplished only by appropriation of the legislature. The type of debt you suggest obviously would not be a debt to supply a casual deficiency, but would be a debt which was deliberately created. A deficiency which is deliberately created is not one which occurs accidentally.

Even though the Constitution could be construed to authorize the borrowing of moneys up to the sum of one million dollars, under the authority granted by section 4 of article IX, nevertheless, this could be accomplished only through legislative action. This was clearly set forth in *Montgomery, Jr. v. Martin, et al.*, 294 Pa. 25 (1928), in which the court stated as follows, at page 33:

* * * When the constitutional provision against State debts was adopted, the people erected a wall between their inherent right to borrow money for state purposes and their agent, the legislature, *which must authorize the actual borrowing*. This structure consists of the restrictive provision that "no debt shall be created." In it, however, the people left five gates, as it were, through which, by way of exception to the restriction, the legislature could pass and impose on them certain money obligations. These gates we may mark respectively, "Except to [1st] supply casual deficiencies in revenue,

[2d] repel invasion, [3d] suppress insurrection, [4th] defend the State in war, [5th] pay existing debts.”
(Italics ours)

Thus, we have a situation where the legislature cannot, by statute, directly and intentionally create a debt. It only can borrow to supply a casual deficiency after such deficiency has occurred. We have the further situation that even though the legislature could create a debt, it could do so only by legislative enactment. This would require the legislature to be called into session. As has been pointed out, such a call would be futile, because of the legislature's lack of authority to create a debt.

If such a debt could be incurred without legislative action, before the proceeds of such debt could be utilized, an appropriation act would be required, which also would necessitate the convening of the General Assembly. Section 16 of article III of the Constitution prescribes that no money shall be paid out of the State Treasury except upon appropriations made by law.

Even though all other requirements were met, the State could not lend money to any political subdivision or other governmental instrumentality. Before the Commonwealth could engage in the business of lending money, a constitutional amendment would be necessary.

Therefore, it is clear that there is no authority in you, in any other public officer, or in the General Assembly, to borrow the sum of one million dollars to be, in turn, lent to the School District of Philadelphia under the authority of that portion of section 4 of article IX of the Constitution of the Commonwealth of Pennsylvania which authorizes the incurring of a debt in the sum of one million dollars to supply casual deficiencies in revenue.

In answer to your second inquiry, I am pleased to advise that a method exists whereby funds can be provided for the School District of Philadelphia. At the last session of the legislature, Act No. 86-A was enacted, which made an appropriation of two million dollars to the Department of Public Instruction for financially handicapped and distressed school districts. At least one and one-half million dollars of that appropriation are still available. Obviously, the School District of Philadelphia would fall within the meaning of the term “financially handicapped and distressed school districts”. Therefore, there is no doubt that that appropriation is available for the relief of the School District of Philadelphia and is a solution of its problem. This is a matter for the discretion of the Superintendent of Public Instruction.

Philadelphia has at least one fifth of the population of the Commonwealth of Pennsylvania. It is only fair and proper that in this great emergency the School District of Philadelphia receive its equitable share of the appropriation referred to above.

I would recommend that there be allocated immediately to the School District of Philadelphia the sum of two hundred fifty thousand dollars to meet its most urgent need, and that such other sum be made available to that school district as will not prejudice the rights of the other financially handicapped and distressed school districts of the Commonwealth.

You are, therefore, advised that there is no authority in you, as Governor, to borrow money under any provision of the Constitution or the laws of this Commonwealth.

You are likewise advised that moneys cannot be paid out of the State Treasury without a specific appropriation therefor.

You are further advised that, by virtue of Act No. 86-A of 1937, there is available an appropriation for financially handicapped and distressed school districts, from which appropriation funds can be allocated to the School District of Philadelphia to relieve the present emergency which exists in that school district.

Very truly yours,

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

OPINION No. 238

Records of Division of Unemployment Compensation and Employment Service—Right to disclose information contained therein to Department of Public Assistance—Limitations—Administrative Code of 1929, secs. 501 and 502—Unemployment Compensation Law of December 5, 1936, P. L. (1937) 2897, sec. 206.

The Division of Unemployment Compensation and Employment Service of the Department of Labor and Industry should, in accordance with sections 501 and 502 of The Administrative Code of April 9, 1929, P. L. 177, disclose to the Department of Public Assistance, in answer to a specific request in the case of each client, his or her name, eligibility to benefits under the Unemployment Compensation Law, as well as the date, amount, and duration of any payments thereunder, but such information should be based solely upon the record of awards made by the Unemployment Compensation Division and not from any records in the department procured under section 206 of the Unemployment Compensation Law, or furnished to the department by the Federal Social Security Board, nor should any information be given to other persons or agencies.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., January 28, 1938

Honorable Ralph M. Bashore, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: You request advice as to whether the Division of Unemployment Compensation and Employment Service may disclose to the Department of Public Assistance the compensation records of those receiving unemployment compensation. The specific information which the Department of Public Assistance desires is: (1) A list of names of persons receiving unemployment compensation; (2) The amount of compensation being paid to a claimant; and (3) The approximate date either of past payments or when payments are being made. The Department of Public Assistance requests this information in order properly to determine whether certain persons are eligible for relief.

The Department of Public Assistance is a new department of the State government, created by Act No. 395 of the General Assembly, approved June 24, 1937. Its general powers and duties are set forth as follows:

Section 2502-A. Powers and Duties of the Department of Public Assistance.—The Department of Public Assistance shall have power, and its duty shall be—

(a) To administer and carry out the provisions of the Public Assistance Law, and in so doing, to supervise local boards and to allocate to them on the basis of need and, as may be required for blind pensions, funds with which to provide assistance and funds for administrative expenses.

(b) To take any other action authorized or required by this or any other law.

The Public Assistance Law is Act No. 399 of the General Assembly, approved June 24, 1937. By section 4 of said act the Department of Public Assistance is required, *inter alia*:

(a) To allocate to the local boards, on the basis of need * * * funds with which to provide assistance * * * and as may be needed, from time to time, *to keep a reasonable emergency fund in the hands of local boards, which shall be used by the executive director for the furnishing of assistance in emergency cases, upon application to him, or under the direction of any member of the local board.* (Italics ours)

Section 14 of the Public Assistance Law abolishes the State Emergency Relief Board, which previously administered direct

relief, and provides that the Department of Public Assistance shall thereafter exercise the powers and discharge the duties of the State Emergency Relief Board through the present county relief boards, or otherwise, until a County Board of Assistance is set up in the county, and then through such County Board of Assistance.

Section 9 of the Public Assistance Law points out who shall be eligible to receive assistance. Subdivision (d) of said section provides for the granting to those who have resided in the Commonwealth for at least one year immediately preceding the date of their application "assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living." The "emergency" cases for which the Department of Public Assistance is required to provide a fund under section 4 (a) of the act, so that assistance may be given to eligible residents of the Commonwealth to enable them to maintain a decent and healthful standard of living, has reference, among other things, to those cases arising from widespread unemployment. This is direct relief. Thus, direct relief to those who may be in need because of unemployment, and who are not able to qualify for some other form of public grant, is now administered through the Department of Public Assistance.

By Act No. 1 of the General Assembly, approved December 5, 1936, a system of unemployment compensation to be administered by the Department of Labor and Industry and its existing and newly created agencies was established. This act is known as the Unemployment Compensation Law and was passed to make available to the citizens of this Commonwealth the benefits of the Federal Social Security Act, and to provide for its administration in the State. The purpose of its passage is set forth therein as follows:

Section 3. Declaration of Public Policy.—Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth. Involuntary unemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivisions in the form of poor relief assistance. Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employes during periods when they become unemployed through no fault of their own. The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need

of protection against the hazards of unemployment and indigency. The Legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this Commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

Here we are dealing with two departments of the State government. Accordingly, any pertinent provisions of The Administrative Code would apply to this situation. Section 501 of The Administrative Code provides, in part, as follows:

“Coordination of Work.—The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for co-operation 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. * * *

Obviously, the type of information requested is important in determining whether or not a person is eligible for relief. If it cannot be furnished by the Department of Labor and Industry, then the Department of Public Assistance will be required to make its own investigation to determine the facts. This would involve a duplication of time and expense which cannot be justified.

Section 502 of The Administrative Code provides as follows:

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

There is nothing in the Unemployment Compensation Law which prohibits your department from furnishing the particular type of information required by the Department of Public Assistance. Sections 206 and 207 (b) apply to the furnishing of certain types of information which does not fall within the scope of the present inquiry.

The declared public policy which prompted the passage of the Unemployment Compensation Law as expressed in section 3 of the act is to provide protection against the hazards of unemploy-

ment and the spread of indigency by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employes during periods when they become unemployed through no fault of their own. Thus, the payment of unemployment compensation provided for by the Unemployment Compensation Law and the furnishing of assistance in "emergency" cases under the Public Assistance Law arise from the same cause, involuntary unemployment. Both acts aim to provide protection against the hazards of involuntary unemployment and its resultant spread of indigency. To this extent they occupy the same field. They are in *pari materia* and must be construed together. It follows that your department should furnish to the Department of Public Assistance any data or information in its possession which it is not prohibited by law from giving, unless it was the legislative intent that a person may be given assistance in the form of direct relief and receive unemployment compensation payments at the same time.

The information requested of your department by the Department of Public Assistance is entirely different from that which may not be made public or open to public inspection. It is similar to that which your department is required to furnish to any agency of the United States charged with the administration of public works or assistance through public employment under clause (b) of section 207 of the Unemployment Compensation Law to enable such agency of the United States to avoid giving work relief during the time unemployment compensation is being paid. The disclosure of this information by your department to the Department of Public Assistance will serve a similar purpose, in that it will enable that department to suspend or discontinue direct relief during the time such person is receiving unemployment compensation. The inclusion of a section giving direct authority to furnish the information requested was not necessary, since it is the duty of the various departments of the State government to cooperate and coordinate their activities.

Therefore, it is entirely proper for your department to furnish the information requested by the Department of Public Assistance. Good policy and common sense dictate that such information should be given. It is the duty of the State to provide for the needy, the hungry, and all those who, through no fault of their own, are unable to care for themselves. The rights of no one should be sacrificed, but at the same time the Commonwealth should administer relief adequately at the lowest possible cost to

the taxpayers. Chiseling must be eliminated. If there is a question as to whether a certain individual is entitled to relief, the doubt should be resolved in favor of the individual. However, the Commonwealth ever must be on the alert to prevent persons who are not in need from receiving relief. Such chisellers not only harm the Commonwealth, but deprive the needy of those benefits which they are entitled to receive.

It is the duty of the various departments of the State government to cooperate, to the end that there shall be no chiseling. The needy must be provided for adequately. At the same time, the State must be protected from fraud and unfounded claims. It would be a violent presumption to suppose the legislature intended that those receiving unemployment compensation payments could at the same time receive cash grants from public funds in the nature of direct relief. This would be the inevitable result if your department were held to be prohibited from disclosing to the Department of Public Assistance the information which it has requested, so long as this may be done without detriment to the worker and without bringing the unemployment compensation agency of the Commonwealth into disrepute.

In view of the fact that the information requested by the Department of Public Assistance may be lawfully disclosed by your department, it becomes your duty under section 502 of The Administrative Code to comply with its request.

Therefore, we are of the opinion:

(1) That you are authorized under the law and it becomes your duty to disclose to the Department of Public Assistance, in answer to a specific request in the case of each client, his or her name, eligibility to benefits under the Unemployment Compensation Law, as well as the date, amount, and duration of any payments thereunder; said information to be based solely upon the record of awards made by the Unemployment Compensation Division and not from any records or reports in the department procured under section 206 of the Unemployment Compensation Law, or furnished to the department by the Federal Social Security Board.

(2) The authority herein contained to disclose information shall be confined strictly to furnishing the same to the Department of Public Assistance, or any officer or employe of said department

in the performance of his public duties, and shall not be disclosed to any other person or agency.

Very truly yours,

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

OPINION No. 239

Optometry—Advertising of price for services—Act of March 30, 1917, sec. 4 as amended by Act of May 25, 1937—Right to advertise at unspecified “low” price.

Section 4 of the Act of March 30, 1917, P. L. 21, as last amended by the Act of May 25, 1937, P. L. 795, prohibiting the advertising of prices for professional services, glasses or other appurtenances used in the practice of the profession of optometry, applies only to the advertising of specific prices and does not include within such prohibition the advertising of services, glasses or other appurtenances at “low cost” or “low prices.”

DEPARTMENT OF JUSTICE

Harrisburg, Pa., January 28, 1938

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

Sir: You have requested an opinion as to whether the advertising of services, glasses or other appurtenances at “low cost” or “low prices” by an optometrist violates the Optometry Law.

The Act of March 30, 1917, P. L. 21, section 4, as finally amended, May 25, 1937, P. L. 795, being the Optometry Law, provides as follows:

* * * The State Board of Optometrical Examiners shall refuse to grant a certificate of licensure to any applicant, and may cancel, revoke, or suspend, the operation of any certificate by it granted, for any or all of the following reasons, to wit: * * * the advertising of prices for professional services, glasses, or other appurtenances, used in the practice of the profession of optometry. * * *

You advise us that some question has arisen as to whether the prohibition of advertising of prices for professional services, glasses, or other appurtenances is violated by the use of the expressions “low cost” or “low prices”, in advertisements.

In view of the fact that this prohibition is in derogation of common law rights, and is, therefore, penal in nature, it must be strictly construed. 59 C. J. 1110, 1124.

The act specifically prohibits the advertising of prices. It contemplates this particular type of advertising and no other.

The word "price" is defined to mean the amount at which a commodity is valued or sold in the market; the sum for which anything may be bought. 49 C. J. 1344.

The word "price" has further been defined in *Williamson's Estate*, 302 Pa. 462, 468, where the court, citing Webster's New International Dictionary, defines "price", "as the amount of money given or set, as the amount that will be given or received in exchange for anything."

Applying the definition to the act in question, it is obvious that the act prohibits the advertising of the price at which services, glasses, or other appurtenances may be purchased. It prohibits specifically any mentioning of the price in advertisements. It refers only to such advertising as mentions the sum of money for which services, glasses, or other appurtenances may be bought.

Obviously, the expressions "low cost" or "low prices" do not denote any specific price. The individual who reads an advertisement containing such expressions is not led to believe that he can purchase glasses for any particular price.

That part of the Optometrical Law under consideration was adopted in order to prevent unscrupulous optometrists from advertising glasses, services, and other appurtenances at such a price as to induce the public to patronize their establishments. Such price was specifically mentioned in the advertising. However, when the customer sought to purchase merchandise at the price advertised, he usually found that it was not available at the price advertised and he was sold merchandise and services at a price higher than advertised. It was not intended to prohibit all types of advertising which in any way reflected the cost of the service to be rendered so long as such services, glasses, or other appurtenances were not offered for a specific named price.

The public must be protected against misleading or dishonest advertising. The advertising herein described cannot be so classified. The terms used are descriptive but not specific.

Accordingly, we are of the opinion, and you are advised, that the prohibition contained in the amendatory act of 1937, which prohibits the advertising of prices, applies only to the advertising of specific prices and does not include within such prohibition, the advertising of services, glasses, or other appurtenances at "low cost" or "low prices." Such advertising is not misleading or de-

ceptive and does not violate the Optometry Law. If the use of these terms in advertising is undesirable, that situation should be corrected by proper legislation.

Very truly yours,

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

OPINION No. 240

Incompetents—Eligibility for public assistance—Residence—Moving into Pennsylvania—Necessity for maintaining selves for over one year—County Institution District Law of June 24, 1937, sec. 501(d)—Public Assistance Law of June 24, 1937, sec. 9.

No person can acquire a bona fide residence in the Commonwealth of Pennsylvania as a citizen thereof within the meaning of section 501(d) of the County Institution District Law of June 24, 1937, P. L. 2017, and within the meaning of the Public Assistance Law of June 24, 1937, P. L. 2051, sec. 9, unless he has resided within the confines of Pennsylvania over a period of one year upon his own resources, through income derived from property holdings or earnings, and without becoming a public charge at any time during that period.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., March 11, 1938.

Honorable Arthur W. Howe, Jr., Secretary, Department of Public Assistance, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether a person may gain a residence within the provisions of the Public Assistance Law Act of June 24, 1937, P. L. 2051, by coming bona fide to establish a permanent abode in the Commonwealth and continuing to reside there for one year, if such person receives assistance during a part of that year as a nonresident.

Section 501(d) of the Act of June 24, 1937, P. L. 2017, contains the following language:

Except as hereinafter otherwise provided, every adult and every emancipated minor, whether married or single, legitimate or illegitimate, may acquire a new settlement in any institution district of this Commonwealth or in the Commonwealth by coming bona fide to establish a permanent abode therein and continuing to reside therein for one whole year, if such person or minor is of sufficient mental ability to make a bargain, and is not or does not become a public charge during said year.

Section 9 (d) of the Public Assistance Law, *supra*, reads as follows:

Other persons who have resided in Pennsylvania for at least one year immediately preceding the date of application for assistance, and need assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living.

A reading of the sections just quoted leads unalterably to the conclusion that whenever one desires to establish a bona fide residence in the Commonwealth of Pennsylvania, he must satisfy the authorities that he has not been a public charge at any time during such period, but that he has lived within our Commonwealth and maintained himself upon his own resources through income derived from property holdings or earnings.

Any other conclusion would tend to attract the dependents of other states to our Commonwealth. The attraction of the dependents of other states would not only burden the taxpayers of our Commonwealth with individuals who should not be our wards, but such condition would likewise tend to reduce the efficiency and economical well-being of all persons within the confines of our Commonwealth.

You are advised, therefore, that no person can acquire a bona fide residence in the Commonwealth of Pennsylvania as a citizen thereof, within the provisions of the statutes referred to above, unless he has resided within the confines of our State over a period of one year upon his own resources.

Very truly yours,

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

OPINION No. 241

Workmen's compensation—Workmen's Compensation Act of June 2, 1915, as amended, secs. 301, 302(a) and 305—Applicability to City of Philadelphia—Failure to comply with act—Remedy—Fines—Mandamus.

Under the provisions of the Workmen's Compensation Act of June 2, 1915, P. L. 736, secs. 301, 302(a) and 305, as amended, the City of Philadelphia must either carry workmen's compensation insurance or procure an exemption from the necessity of carrying such insurance, and if it fails to do so, it is subject to the fines provided for in the act and also to mandamus proceedings to compel proper action.

DEPARTMENT OF JUSTICE
Harrisburg, Pa., March 11, 1938

Honorable Ralph M. Bashore, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the procedure which should be adopted in order to insure that the City of Philadelphia shall comply with certain provisions of The Workmen's Compensation Act of June 2, 1915, P. L. 756, as amended. You state that the City of Philadelphia has consistently refused, since 1917, to comply with various provisions of that act, and that the city has neither insured its liability with an insurance carrier nor procured an exemption from the necessity of carrying such insurance.

Section 103 of The Workmen's Compensation Act, as amended by Act of June 4, 1937, P. L. 1552, provides as follows:

The term "employer," as used in this act, is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it. * * *

Section 302 (a) of The Workmen's Compensation Act, as amended, provides in part as follows:

* * * It shall not be lawful for any officer or agent of this Commonwealth, or for any county, city, borough, town, or township therein, or for any officer or agent thereof, or for any other governmental authority created by the laws of this Commonwealth, to give such notice of rejection of the provisions of this article, to any employe of the Commonwealth or of such governmental agency.

Section 305 of The Workmen's Compensation Act, as amended, provides in part as follows:

Every employer liable under this act to pay compensation shall insure the payment of compensation in the State Workmen's Insurance Fund, or in any insurance company, or mutual association or company, authorized to insure such liability in this Commonwealth, unless such employer shall be exempted by the department from such insurance. * * *

If any employer fails to comply with the provisions of this section *with respect to insuring or securing an exemption from insurance*, or, in any applications filed under this section, shall furnish the department with a false or fraudulent statement of outstanding incurred

liability for compensation or any other false or fraudulent statement, such employer, upon conviction thereof in a summary proceeding, shall for every such failure or false or fraudulent statement, be sentenced to pay a fine of not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300), and costs of prosecution, and upon failure to pay such fine and costs shall be sentenced to undergo imprisonment for a period of not more than three months. Every day's violation and every false or fraudulent statement shall constitute a separate offense. It shall be the duty of the department to enforce the provisions of this section; and it shall investigate all violations that are brought to its notice and shall institute prosecutions for violations thereof.

In any proceeding against an employer under this section, a certificate of non-insurance issued by the official Workmen's Compensation Rating and Inspection Bureau, and a certificate of the department showing that the defendant has not been exempted from obtaining insurance under this section, shall be *prima facie* evidence of the facts therein stated. (*Italics ours*)

In view of these sections, it is clear that the City of Philadelphia must either procure workmen's compensation insurance or an exemption from the necessity of carrying such insurance. If the city has done neither it becomes liable to the penalties provided in the above-quoted portion of section 305. A municipal corporation is subject to fine for violations of the law to the same extent as individuals, and a criminal prosecution may be instituted against such corporations in the same manner as against individuals.

As an alternative, mandamus proceedings could probably be brought to compel the proper city officials to comply with the provisions of The Workmen's Compensation Act.

You are advised, therefore, that under the provisions of The Workmen's Compensation Act of 1915, as amended, the City of Philadelphia must either carry workmen's compensation insurance or procure an exemption from the necessity of carrying such insurance. You are also advised that the failure of the City of Philadelphia to comply with these provisions subjects it to the fines provided for in the act, and that such failure would also justify the institution of mandamus proceedings to compel the proper city officials to act according to law.

Very truly yours,

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

OPINION No. 242

Department of Public Assistance—Right to lease properties from members of local boards—Right to pay accrued rental.

It is at least bad practice, if not unlawful, for the Department of Public Assistance to lease from members of local county boards premises in which they are interested as owners or as stockholders or officers of a corporation, and the department should cancel any leases into which it has entered with such members, but, there being no specific prohibition against such leases, the department may properly pay accrued rentals.

DEPARTMENT OF JUSTICE

Harrisburg, Pa. March 18, 1938

Honorable Arthur W. Howe, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your letter of March 9, 1938, in which you ask for an opinion as to whether the Department of Public Assistance may enter into business relations with a member of a county board of assistance, or with a corporation, one of whose members is also a member of a county board of assistance.

You indicate that upon the recommendation of several county boards of assistance your department has leased space for administrative offices from a member of a county board who owns the property. These leases provide that monthly rentals shall be paid to a member of the board.

You further desire to be advised whether, if in our opinion such contracts are held to be invalid, your department may pay accrued rentals covering the period during which the county board of assistance has occupied such leased premises.

Section 516 of The Administrative Code, as amended, dealing with contracts, reads as follows:

No member or officer of any department of the government shall be in any way interested in any contract for furnishing stationery, printing, paper, fuel, furniture, materials, or supplies, to the State Government, or for the printing, binding, and distributing of the laws, journals, department reports, or any other printing and binding, or for the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees.

The laws of our Commonwealth have always frowned upon the thought that a public official should in any way be interested in any contract awarded by him, or by any department, board or

commission with which he may be affiliated in his official capacity. Numerous laws have been passed prohibiting such practices. It is important that such laws exist in order that fraud or special privilege may at all times be avoided in the expenditure of the public moneys.

It is, therefore, our conclusion and you are accordingly advised that it is at least bad practice, if not unlawful, for your department to lease from members of the local county board premises in which they are interested as owners or as stockholders or officers of a corporation owning the leased premises. For this reason you are advised to cancel any leases in which your department has entered involving members of local county boards, either in an individual capacity or as officers or stockholders in corporations.

Advising further relative to the payment of accrued rentals. A careful reading of the section of The Administrative Code above referred to does not indicate in that many words that an officer or member of any department of the State government may not lease his premises to a State agency with which he may be connected. Because there is no specific prohibition on this subject relative to leased premises, we are advising you that your department may pay the accrued rentals in all instances.

Very truly yours,

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

OPINION No. 243

Public employes—Political assessments—Acts of June 13, 1883, and July 15, 1897—Repeal by Election Code of June 3, 1937, sec. 1901—Constitutionality of repealer—Sufficiency of title.

1. Section 1901 of the Pennsylvania Election Code of June 3, 1937, P. L. 1333, is unconstitutional and void insofar as it purports to repeal the Acts of June 13, 1883, P. L. 96, and July 15, 1897, P. L. 275, which prohibit the collection of political assessments from public employes, in that the title to of Act of 1937 does not sufficiently indicate that it deals with political assessments.

2. The subject of political assessments is not one germane to the general subject of elections.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 6, 1938.

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

Sir: It has come to our attention that a portion of section 1901 of the recently adopted Pennsylvania Election Code of June 3, 1937, P. L. 1333; (25 PS 2601) has given rise in some quarters to the impression that it has effected a repeal of the Acts of June 13, 1883, P. L. 96 (18 PS 1741), and July 15, 1897, P. L. 275 (18 PS 1743), which prohibit the collection of political assessments from public employes. In view of this fact, and because you, as Secretary of the Commonwealth, are the chief election official of the Commonwealth of Pennsylvania, we have deemed it our duty to advise you that the aforesaid statutes are in full force and effect at the present time.

Section 1901 of the Pennsylvania Election Code reads, in part, as follows:

The following acts and parts of acts of Assembly are hereby repealed as particularly set forth;

* * * * *

The act approved the thirteenth day of June, one thousand eight hundred and eighty-three (Pamphlet Laws, ninety-six), entitled "An act to prohibit political parties, committees, or members thereof from assessing upon or demanding from public officials contributions for political purposes, in the several counties of this Commonwealth," absolutely.

* * * * *

The act approved the fifteenth day of July, one thousand eight hundred and ninety-seven (Pamphlet Laws, two hundred seventy-five), entitled "An act to prohibit assessments of and demands for contributions from the officers and employes of this Commonwealth, and of any county or city therein, and providing penalties therefor," absolutely.

These provisions were clearly designed to effect a repeal of the long-existing statutes prohibiting the collection of political assessments from public employes. However, because of certain provisions of the Constitution of the Commonwealth of Pennsylvania, the above-quoted portions of section 1901 of the Pennsylvania Election Code are rendered ineffective.

Article III, section 3, of the Pennsylvania Constitution provides that:

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

It is too well established to require any citations of authority that one of the purposes of this constitutional provision was to require that the title of contemplated legislation should give notice of its nature to the members of the legislature and others who might be interested. Thus it prevents legislation upon unknown and alien subjects which might be hidden within the provisions of a bill.

The title to the Pennsylvania Election Code provides as follows:

An act concerning elections, including general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests; creating and defining membership of county boards of elections; imposing duties upon the Secretary of the Commonwealth, courts, county boards of elections, county commissioners; imposing penalties for violation of the act, and codifying, revising and consolidating the laws relating thereto; and repealing certain acts and parts of acts relating to elections.

This title contains absolutely no reference to political assessments, nor are those matters germane to the general subject of elections. The only part of this title which has any connection with the repeal of legislation is that portion which states that the statute repeals "certain acts and parts of acts relating to elections." It may be argued that this portion of the title should stimulate an inquiring mind to deduce that the statute described might include a repeal of legislation prohibiting political assessments. Such a conclusion, however, would require an extremely strained construction of the provisions of the title, and inferences which must be drawn from knowledge dehors the language used in a title may not be relied upon to validate it.

Political assessments are customarily imposed, collected and expended for a great variety of purposes, none of which may have any substantial connection with the general subject of elections. It is true, of course, that elections are always accompanied by campaigns and that political assessments are usually disbursed in payment of campaign expenses, but this fact certainly does not link political assessments and elections together as a single sub-

ject. The complete lack of identity between political assessments and elections is emphasized by the respective titles of the acts of 1883 and 1897, *supra*, which titles have been quoted above. Each of those titles is as silent with respect to elections as the title of the Pennsylvania Election Code is silent concerning political assessments.

It is our opinion that in so far as section 1901 of the Pennsylvania Election Code purports to repeal legislation prohibiting political assessments, its title is so misleading that neither the members of the legislature nor others interested in the bill were adequately advised of the repeal of such unrelated legislation. The seriousness of this defect in the title of the election code is emphasized by the fact that section 1901 contains more than two hundred paragraphs repealing acts and parts of acts relating to elections, and extends over approximately forty pages in the pamphlet laws.

It might be pointed out that even if the title of the Pennsylvania Election Code did contain an indication that legislation prohibiting political assessments was repealed by the act, its constitutionality would be extremely doubtful. Article III, section 3, of the Pennsylvania Constitution quoted above prohibits the passage of bills containing more than one subject, and, since elections and political assessments are separate and distinct matters, a statute purporting to deal with both of them would be unconstitutional as a whole.

You are advised, therefore, that the Acts of June 13, 1883, P. L. 96 (18 PS 1741), and July 15, 1897, P. L. 275 (18 PS 1743), which prohibit the collection of political assessments from public employes, are still in full force and effect, and that the provisions of section 1901 of the Pennsylvania Election Code of June 3, 1937, P. L. 1333, which purport to repeal said statutes, are unconstitutional and void.

Very truly yours,

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

OPINION No. 244

Motor vehicles—Uniform Automobile Liability Security Act of May 15, 1933, as amended—Commercial operators—Sufficiency of liability insurance carried by employer.

The Department of Revenue should, if furnished with a certificate from an insurance carrier certifying that certain vehicles are covered by insurance,

issue a restricted license to a commercial operator authorizing him to operate such vehicles under section 25 of the Uniform Automobile Liability Security Act of May 15, 1933, P. L. 553, as amended by the Act of June 25, 1937, P. L. 2097, for the requirements of section 2 of the act are fully satisfied if the employer of a commercial operator carries liability insurance protecting the public against damage resulting from the operation of his vehicles, even though the operator himself may not carry insurance.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 11, 1938.

Honorable J. Griffith Boardman, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: It has been called to our attention that your Department, in applying the Act of May 15, 1933, P. L. 553, as amended by the Act of June 25, 1937, P. L. 2097, has been requiring proof of general financial responsibility of commercial drivers who are subject to the provisions thereof. We are advised that it has been the policy of your department, not to issue restricted licenses to such commercial drivers when the owners of the vehicles which they operate in the course of their employment, are insured, and where such insurance covers the operator of the vehicle. This policy is not justified by law.

Commercial drivers are individuals whose employment involves the operation of a motor vehicle. They include taxi drivers, bus drivers, truck drivers or any other person whose livelihood depends wholly or in part upon his ability to operate a motor vehicle. Obviously, a rigid interpretation of the law would deprive those who earn their livelihood through the operation of motor vehicles of their sole means of support, consequently increasing unemployment and adding to the relief rolls. The intention of the legislature in enacting The Financial Responsibility Law was to protect the public generally. This object can be accomplished by the issuance of restricted licenses covering only such vehicles as are specified in the license.

In the majority of cases where a commercial driver becomes subject to the provisions of The Financial Responsibility Law, his employer carries liability insurance which covers the operators of all vehicles owned by him. Consequently, if such commercial driver were required to carry a separate liability insurance policy, the vehicle operated by him would be covered by double insurance. Such double insurance is unnecessary and unjustifiable. So long as the commercial driver's authority to operate is restricted to particular vehicles covered by insurance, the policy of the law is satisfied.

The legislature recognized the necessity for the permission of such restricted operating privileges by the amendment of the act in 1937. Section 2 of the act of 1937 adds to the type of insurance required to be issued to the operator or for his benefit, "a motor vehicle liability policy."

Section 25 is added to the act. That section provides:

Restrictions to Be Stated on Operator's Card; Removal of Restrictions; Penalty.—(a) When a certificate of a motor vehicle liability policy of insurance has been furnished as compliance with the requirements of proof of financial responsibility as prescribed in this act, and such liability policy extends only to designated vehicles, the operator shall surrender his operator's card to the secretary, and the secretary shall designate, by explicit description or appropriate reference, the vehicle described or identified in such certificate of motor vehicle liability policy upon the operator's license card of the person whose operator's privilege is so limited, and return such card to the operator. * * *

A commercial driver is therefore financially responsible if the motor vehicle which he operates is covered by liability insurance. Therefore, if such commercial driver's employer carries liability insurance covering his motor vehicles, his employees are financially responsible while operating such motor vehicles. So long as the insurance coverage extends to the operator, the public is protected and no further financial responsibility is necessary.

A certificate from an insurance carrier, certifying that a certain motor vehicle or motor vehicles are covered by liability insurance is sufficient authority for you to issue a license restricting the operating privileges of the operator named therein, to the vehicle or vehicles so covered.

You are therefore advised that the requirements of The Financial Responsibility Act are fully satisfied if the employer of a commercial operator carries liability insurance protecting the public against damages resulting from the operation of such vehicles. If you are furnished with a certificate from an insurance carrier certifying that certain vehicles are covered by insurance, it is your duty to issue a restricted license to the operator, authorizing him to operate the particular vehicles so insured.

Very truly yours,

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

OPINION No. 245

Employees of Division of Unemployment Compensation of the Department of Labor and Industry—Civil service requirements—Unemployment Compensation Law of December 5, 1936, sec. 208(c)—Failure to replace provisional employees in accordance with law—Right to payment for services rendered.

1. Under the provisions of section 208(c) of the Unemployment Compensation Law of December 5, 1936, P. L. 2897 (1937), provisional employees of the Division of Unemployment Compensation of the Department of Labor and Industry should have been replaced by civil service employees not later than January 31, 1938, and, to the extent such replacement has not already been made, it should be effected immediately.

2. Provisional employees of the Division of Unemployment Compensation of the Department of Labor and Industry who have continued in employment since January 31, 1938, are entitled to the compensation they have earned since that time and to any compensation which they may earn until they are replaced by civil service employees.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 11, 1938.

Honorable F. Clair Ross, State Treasurer, Harrisburg Pennsylvania.

Sir: We have your request for advice as to the legality of the present employment of provisional employees by the Division of Unemployment Compensation of the Department of Labor and Industry, as distinguished from civil service employees.

You inquire whether you may legally continue the payment of wages and salaries to such provisional employees, who have not been appointed under the civil service provisions of the Unemployment Compensation Law.

Your inquiry undoubtedly arises under section 208 of the Unemployment Compensation Law, which provides that the employees required to administer the law shall be appointed on the basis of merit, as determined by competitive examinations.

Under the provisions of that section, the Secretary of Labor and Industry, by rules and regulations, is required to classify the various positions required for the administration of the act; to establish reasonable grades in each class; to prescribe a salary range for each grade; and to prescribe the qualifications to be possessed by persons desiring employment in the various grades. The qualifications are required to be such as will best permit the most efficient administration of the act.

Persons desiring employment are required to file an application with the Unemployment Compensation Board of Review,—a departmental administrative board within the Department of Labor and Industry.

The board is required to conduct competitive examinations for applicants. Examination papers are required to be marked by a committee designated by the board, with the approval of the Governor, consisting of school teachers in this Commonwealth. The board is required to certify to the Secretary of Labor and Industry lists of names of persons receiving a passing mark, and to rank such persons in the order of magnitude commensurate with the highest rating for the specified grade of employment. The Secretary of Labor and Industry is required to request lists of eligibles to be certified to him by the board, and to make appointments therefrom.

We are advised that since August, 1937, thirty-five competitive examinations have been held; that approximately 55,000 persons took the examinations; that, notwithstanding this fact, between 4,500 and 5,000 provisional employes are still employed by the Division of Unemployment Compensation; and that, to date, only 136 of the applicants who qualified for positions by examination have been appointed.

Paragraph (c) of section 208 is particularly involved in your inquiry, and reads as follows:

(c) Until such time as the board certifies lists of eligibles for any grade of employment, but in no event later than January first, one thousand nine hundred thirty-eight, the secretary is hereby authorized to make provisional appointments, without examinations, in such grades of employment for which no lists of eligibles have been certified, provided that a person so appointed shall cease to be so employed within thirty days after a list of eligibles has been certified by the board to the secretary for the grade of employment in which he or she is employed, unless reappointed from such list of eligibles as provided in this section.

Under the provisions of the above paragraph, it is clear that, prior to January 1, 1938, the Secretary of Labor and Industry was authorized to make provisional appointments to any grade of employment for which the Unemployment Compensation Board of Review had not certified a list of eligibles, and that, under no circumstances, could provisional appointments be made by the Secretary of Labor and Industry after January 1, 1938. The act does not specify a definite time for the complete inauguration of civil service. However, the intention and expectation of the legislature as to when civil service should go into full force and effect is manifest.

The obvious purpose of paragraph (c) was to specify a deadline for the complete inauguration of the civil service system, and at the same time provide for the administration of the act by provisional employees prior to that time. The act became effective December 5, 1936. The legislature allowed approximately thirteen months for the complete inauguration of the civil service system prescribed in the law.

As we have indicated, the power of the Secretary of Labor and Industry to make provisional appointments expired January 1, 1938. The question immediately presents itself whether the employment of provisional employees appointed prior to that date may lawfully continue until lists of eligibles are certified by the Unemployment Compensation Board of Review. In this connection, it should be noted that the law provides that the employment of provisional employees in a particular grade of employment expires within thirty days after a list of eligibles for that grade has been certified to the secretary by the board.

Reading section 208 as a whole, we are of the opinion that the legislature clearly intended that all provisional employment should cease thirty days after January 1, 1938, or on January 31, 1938, and that it was incumbent on the secretary to request the board to certify lists of eligibles for all grades of employment not later than January 1, 1938, in order to effectuate this obvious purpose of the legislature. The legislature intended that the transition from provisional employment to civil service employment should take place as quickly as possible. It did not intend that no effort should be made to certify lists of eligibles until January 1, 1938. On the contrary, the legislature intended that, beginning with the effective date of the act, the Secretary of Labor and Industry and the Unemployment Compensation Board of Review should immediately begin to make an honest and efficient attempt to promulgate the civil service examinations and appointments, in order to effect a complete transition from provisional employment to civil service employment by January 1, 1938.

In other words, it is our opinion that the section under consideration requires the Unemployment Compensation Board of Review to certify lists of eligibles for each grade of employment no later than January 1, 1938. Any other construction of the act would place in the hands of a dishonest or politically-minded secretary or board the power to completely nullify the provisions of the law requiring civil service. It would enable such officials to

continue political appointees in office indefinitely. Such an interpretation would do violence to the intent of the legislature.

We are advised by the Chairman of the Unemployment Compensation Board of Review and the Secretary of Labor and Industry that, inasmuch as examinations were not held until August, 1937, which examinations were completed in December, 1937, it was impossible to fully comply with the civil service requirements of the law by January 1, 1938. The board failed to hold such examinations until a time when it was manifestly impossible to comply with the law and have all certifications made by January 1, 1938.

The underlying purpose of civil service laws, and the regulations adopted pursuant thereto, is to establish fitness and efficiency as the basis upon which appointments are made in the public service, and to eliminate the making of appointments based primarily upon political considerations, which usually result in inefficiency and extravagance in the public service.

As was stated in 5 R. C. L., at page 608:

The civil service laws, a recent development in government, were designed to eradicate the system of making appointments primarily from political considerations with all its attendant evils of inefficiency and extravagance, and in its place to establish a merit system of fitness and efficiency as the basis upon which appointments to the civil service should be made. Such laws substitute for the uncontrolled will of the appointing officer the results of competitive examinations, and require that appointments to office be made from among those who have shown themselves by examination to be best qualified for positions in the civil service, and, as might be supposed, result generally in improvement in the public service from the experience and proficiency acquired through merit, and in a tenure of office which is independent of political favor. * * *

In view of the humanitarian principles behind the Unemployment Compensation Law, and the function that this law is designed to perform, it is of the highest importance that it be administered as effectively as possible. The legislature recognized this necessity and incorporated the civil service provisions into the law in order to effectuate this type of administration. The legislative intention is plain, and no interpretation may be placed upon the law to defeat this purpose.

Not only has the law been disregarded, but also the rights of the 55,000 persons who took the examinations and those of that number who passed them.

Civil service laws, and regulations adopted pursuant thereto, are regarded not merely as limitations upon the appointing power, *but also as conferring rights upon those who have passed the required examinations, of which rights they may not be deprived by the action of administrative officers taken in violation of such laws and regulations.* 46 C. J. 957 (Section 76) (Italics ours)

In view of the foregoing, it follows that the employment of provisional employes should have ceased as of February 1, 1938. Accordingly, replacement of provisional employes by civil service employes should be effectuated immediately by the Secretary of Labor and Industry and the Unemployment Compensation Board of Review.

Although the employment of provisional employes at the present time is unlawful, nevertheless, because of the failure of the proper authorities to comply with the law, lists of eligible appointees are not available at the present time. Therefore, in order that the Unemployment Compensation Law may be administered, it is necessary to continue this unlawful employment. However, such employment should be terminated as soon as possible.

Provisional employes who have continued in employment are in the nature of de facto employes, and, as such, they are entitled to be paid for services actually rendered by them, and may be paid for such services until they are promptly replaced by civil service employes.

Accordingly, you are advised that, under the provisions of paragraph (c) of section 208 of the Unemployment Compensation Law, provisional employes should have been replaced by civil service employes not later than January 31, 1938, and to the extent such replacement has not already been made, it should be effected immediately. Provisional employes who have continued in employment since January 31, 1938, are in the nature of de facto employes, and are entitled to the compensation they have earned since that time and to any compensation which they may earn until they are replaced by civil service employes as expeditiously as possible.

Very truly yours,

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

OPINION No. 246

Elections—Political committees—State-wide committees—Local committees—Filing of authorizations—Right of same committee to represent State-wide and local candidates—Employment of agents—Necessity that treasurer account for all funds—Election Code of June 3, 1937.

1. A State-wide candidate may, under sections 1601(c) and 1603 of the Election Code of June 3, 1937, P. L. 1333, authorize a central political committee functioning over the entire State to receive contributions and incur indebtedness in his behalf, and may in addition so authorize local committees in each of the counties of the Commonwealth.

2. The authorizations of committees required by section 1603 of the Election Code of June 3, 1937, P. L. 1333, must, if the candidate is one to be voted for by the electors of the State at large, be filed in the office of the Secretary of the Commonwealth, although the committees may function only over a limited territory.

3. The same committee may, under the Election Code of June 3, 1937, P. L. 1333, lawfully represent both State-wide and local candidates.

4. Candidates and political committees may, under the Election Code of June 3, 1937, P. L. 1333, use agents, but moneys received by agents of a committee must, under section 1602 of the code, be transferred to the treasurer and pass through his hands and he must account for their proper expenditure.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 19, 1938.

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

Sir: We are in receipt of your letter of April 5, 1938, wherein you request our opinion on the proper procedure which candidates and political committees must pursue in the receipt of funds for primary expenses, their disbursement, and the accounting therefor.

Your inquiry arises under sections 1601 to 1613, inclusive, of the Pennsylvania Election Code (25 PS 3221, et seq.). In brief, those provisions govern the subject of election contributions and expenditures. With exceptions hereinafter noted, they are a substantial reenactment of "The Corrupt Practices Act" of 1906. The reason for, and the purpose of, this act have been described in *Bechtel's Election Expenses*, 39 Pa. Super. Ct., 292 (1909), on pages 302 and 303:

* * * It was enacted at a special session of the legislature summoned by the governor, and was the legislative response to a vigorous demand by the people, that a remedy be found to stop the corruption fast becoming an

incident of our popular elections which, if unchecked, would soon destroy the free and honest expression of the will of the people. * * *

* * * * *

Manifestly the purpose of this enactment was to compel the candidate to place upon the public records such clear and detailed information, described in the foregoing language, as would enable the people to determine, after an inspection of his account with the accompanying vouchers, whether he had obeyed or violated the mandates of the law in which they were so vitally interested. * * *

The provisions are remedial legislation, and so, must be liberally interpreted in order to effectuate their purpose. With these preliminary considerations set out, we shall proceed to discuss your specific questions.

1. May a State-wide candidate authorize a central political committee, functioning over the entire State, to receive contributions and incur indebtedness in his behalf, and, in addition, may he so authorize local committees in each of the sixty-seven counties of the Commonwealth?

This question must be answered in the affirmative. Section 1601 of the Code, in so far as pertinent to the present inquiry, defines a political committee to include:

* * * every two or more persons who shall be elected, appointed or chosen, or who shall have associated themselves or cooperated for the purpose, wholly or in part, of raising, collecting or disbursing money, or of controlling or directing the raising, collection or disbursement of money for primary or election expenses.

Primary or election expenses are defined, inter alia, by the same section to include all expenditures of money or other valuable things, and liabilities incurred, in furtherance of or in respect to the candidacy of any candidate. Section 1603 of the Code provides:

(a) No treasurer of any political committee shall receive or disburse any money or incur any liability for primary expenses in furtherance of the candidacy of any candidate for nomination, until such political committee shall have been authorized in writing by the candidate to receive and disburse money and incur liability for his primary expenses, and a copy of such written authorization shall have been filed in the office of the Secretary

of the Commonwealth, in the case of State-wide committees, or in the office of the county board of elections of the county in which such treasurer maintains his office, in the case of other committees.

(b) No treasurer of any political committee shall receive or disburse any money or incur any liability for election expenses in furtherance of the candidacy of any candidate for election, until such political committee shall have been authorized in writing by the candidate to receive and disburse money and incur liability for his election expenses, and a copy of such written authorization shall have been filed in the office of the Secretary of the Commonwealth, in the case of State-wide committees, or in the office of the county board of elections of the county in which such treasurer maintains his office, in the case of other committees: Provided, however, That the treasurer of any State, county, city, borough, township, ward or other regularly constituted party committee of any political party or political body, is hereby authorized to receive and disburse money and incur liability for the election expenses of the candidates of such political party or political body, without special written authorization from such candidates.

These provisions without necessity of our further elaboration on the subject, provide expressly that the authorization to a State-wide committee is lawful. Further, they do not prohibit a candidate from utilizing the services of more than one committee. Since the act of 1906 a candidate has been permitted to use more than one committee, and, as the legislature has not seen fit to forbid this practice, it has, in effect, adopted the administrative construction.

While it is true that the provisions of section 1603, requiring the candidate to authorize a political committee to act for him, are new, they do not show any intent to depart from the past law. They merely provide that where a political committee is going to act, written authority must be received from the candidate and filed in the proper office. Each committee under the provisions of section 1602 must have a treasurer and he must file an account. Hence the purpose of the act to secure full publicity is carried out whether one treasurer files an account or many. The public then has the same means of knowledge to determine whether or not illegal expenditures have been made.

2. Where must the authorization to a local political committee, given by a candidate for an office to be elected by the electors of the State at large, be filed?

As noted above, section 1603, *supra*, providing for the candidate's authorization, is a new provision of law. Under this section it is provided that the written authorization of the candidate to the committee must be filed, in so far as now pertinent, "in the office of the Secretary of the Commonwealth, in the case of State-wide committees, or in the office of the county board of elections of the county in which such treasurer maintains his office, in the case of other committees."

To ascertain where an authorization by a candidate to an office to be voted for by the electors of the State at large must be filed, we must determine the meaning of "State-wide committees." We are aided in this determination by several factors. As we point out later, the only persons who may file an account are the candidate or the treasurer of a political committee. Hence, there would be no authority for the filing officer to receive accounts from any other persons. The receipt of an authorization by him enables him to determine that the person who later files the account, had the right to collect funds, incur expenses and make disbursements, and is the proper person to file the account. Therefore, that the authorization should be filed in the same office as the account would be consonant with reason. Section 1603 of the Code prescribes the places for filing accounts. It provides *inter alia*:

Every such account concerning primary or election expenses incurred by or in regard to candidates for offices to be voted for by the electors of the State at large shall be filed with the Secretary of the Commonwealth and every such account concerning expenses incurred by or in regard to candidates for other offices shall be filed with the county board of elections of the county wherein the candidate resides: * * * .

State-wide committees thus are those who have incurred expenses in behalf of candidates to be voted for by the electors of the state at large. Authorizations to such committees must be filed in the office of the Secretary of the Commonwealth, although they may function only over a limited territory.

3. May a State-wide candidate authorize political committees, who also function for local candidates, to act for him?

Again, the past practice is an aid in reaching our conclusion. Since the act of 1906, slates have been popularly used, and one committee has functioned for all types of party candidates, local and State-wide. The legislature has not seen fit to forbid this

practice under the Code. On the contrary, implied recognition is given to the practice by section 1608, *supra*, which states, “ * * * if any *account* concerns expenses in regards to *candidates* who do not all reside in the same county * * * ”, a duplicate of such account shall be filed in the office of the county board of elections in which any such candidate (not State-wide) resides. The “*account*” may be for “*candidates*” in various counties. Accounts and authorizations, however, must be filed both in the office of the Secretary of the Commonwealth, because the committee acted for a State-wide candidate, and in the office of the board of elections of the proper county, with respect to the local candidates.

4. May the treasurer of a State-wide political committee, whose authorization by a State-wide candidate has been filed in the office of the Secretary of the Commonwealth, properly designate distributing agents in each of the sixty-seven counties, who may, in the name of the State-wide central committee receive contributions, incur expenses, and without transmitting the funds to the treasurer of the State-wide committee, disburse such funds subject to the duty of the treasurer to account for all such funds?

To answer this question several fundamental facts must first be stated.

A candidate may use agents to receive funds, incur expenses, and expend his money. *Bechtel's Election Expenses*, *supra*, expressly recognizes the right of a candidate to use such agents. It is he who is the recipient of contributions and who makes the expenditures, although they may be the means through which he operates. It would be impossible for him, in the majority of cases, to perform every function himself. However, *he* must make the accounting. So too, a political committee may use agents, but here again, the treasurer is solely responsible for their proper disbursement.

Section 1602 of the Code provides:

Every political committee shall appoint and constantly maintain a treasurer to receive, keep and disburse all sums of money which may be collected or received by such committee, or by any of its members for primary or election expenses; and unless such treasurer is first appointed and thereafter maintained, it shall be unlawful for a political committee or any of its members to collect, receive or disburse money or incur liability for any such purpose. *All money collected or received by any political committee, or by any of its members for pri-*

mary or election expenses, shall be paid over and made to pass through the hands of the treasurer of such committee and shall be disbursed by him; and it shall be unlawful for any political committee, or any of its members, to disburse any money for primary or election expenses, unless such money shall have passed through the hands of the treasurer. (Italics ours)

Under this section the committee can have only one treasurer. There can be no subtreasurers. All money collected must "pass through the hands of the treasurer" and be disbursed by him. In other words, when the committee or its agents collects funds, they must be physically transmitted to the treasurer. He in turn may allot them to various agents in lump sums, but, *he* must account for their expenditure in the manner set out by the act. Agents have no right to receive funds and disburse them without the mechanism of this physical transfer to the treasurer. Any other result could lead to violation of the act, in that funds may not be properly accounted for and may be improperly expended.

The act of 1906, *supra*, contained, in so far as now pertinent, the same language as section 1602. In *Bechtel's Election Expenses*, *supra*, the Superior Court discussed the right of one who was neither the candidate nor the treasurer of a political committee to receive and disburse funds. It stated at page 306:

It is conceded that Nichter was himself neither a candidate nor the treasurer of any political committee. It was impossible, therefore, that he could lawfully expend any money for "election expenses." The third section of the act, hereinbefore quoted, flatly forbade his doing so. All that he was permitted to do with either his own money, or with money coming to him from any source, was to turn it over to a candidate or to some committee whose treasurer could lawfully expend it.

Again, in the case of *Alter's Account*, 21 District Reports, 374 (1912), Judge Shafer of the Court of Quarter Sessions of Allegheny County, stated at page 376:

* * * It is argued by petitioners' counsel that if the substitution of Mr. Alter for Mr. Little should be declared lawful, it would authorize the elected treasurer of a political committee to appoint a treasurer for every subdivision in the district as acting treasurer to receive and disburse moneys. *This would not follow, however, because it is plain that there can be but one treasurer at a time for each political committee.*

* * * *The act does not require a candidate or treasurer to pay the money lawfully expended by him under the*

provisions of the act with his own hand to the person receiving it, as pointed out by the Superior Court in the case of Bechtel's Election, 39 Pa. Superior Ct. 292. This would be impossible, as the act applies equally to state and county elections. The person to whom money is paid is not the agent who carries it from the treasurer to the person receiving it, and there is nothing in the act which requires that the names of such persons should be set out. What is required is that the accountant shall show the person who received the money to perform a certain service, and whether the money was sent to him by a check, or paid cash, or carried by messenger, or paid by an agent of the treasurer or candidate, can make no difference. We are of opinion, therefore, that this manner of accounting is strictly correct and that which is called for by the act. (Italics ours)

Under the Code, as under the act of 1906, an individual can financially aid a candidate only in two ways: he may contribute (1) to the candidate, or (2) to a political committee. When money is received by a political committee, the treasurer is alone responsible for its lawful expenditure. As stated in the case of *Petition of Wilhelm*, 111 Pa. Superior Court, 133 (1933), at page 137:

When one contributes money either directly to a candidate or to the treasurer of a political committee, the candidate receiving the contribution or the treasurer of the committee is alone responsible for its lawful expenditure.

Finally, the right of a committee or a candidate to use agents and the responsibility for the strict accounting therefor by the candidate or the treasurer of the committee is found in *Umbel's Election*, 231 Pa. 94 (1911), wherein the Supreme Court affirmed the Superior Court and adopted the opinion of Rice, P. J., which stated, *inter alia*:

* * * Although the candidate for nomination may make expenditures for lawful purposes through an agent, "it is still he that acts and when he accounts he must account for all that he has done;" *Bechtel's Election Expenses*, 39 Pa. Superior Ct. 292. * * *

In conclusion, you are advised:

1. That a candidate for an office to be voted for by the electors of the State at large may authorize a central political committee to function over the entire State in his behalf, and may at the

same time so authorize local committees to function in each of the sixty-seven counties of the Commonwealth.

2. The authorization to act in behalf of the candidate must be filed by each political committee which functions for a State-wide candidate, in the office of the Secretary of the Commonwealth, regardless of the fact that the committee only operates in a particular county or district.

3. The same committee may lawfully represent both State-wide and local candidates.

4. Candidates and political committees may use agents. However, when moneys are received by agents of a political committee they must be transferred to the treasurer and must pass through his hands. It is he who must account for their proper expenditure.

Very truly yours,

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

OPINION No. 247

Social security—Benefits for dependent children living with relative other than mother—Resolution of State Board of Public Assistance of February 15, 1938.

The resolution of the Pennsylvania State Board of Public Assistance adopted at its meeting of February 15, 1938, providing that dependent children living with a relative other than their mother shall be classified in the same category as groups applying for or receiving aid to dependent children under the Public Assistance Law for the purpose of obtaining Federal reimbursement, is a proper one in view of section 9(a) of the Public Assistance Law of June 24, 1937, P. L. 2051, and section 401 of the Social Security Act of August 14, 1935, 49 Stat. at L. 620.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 19, 1938.

Honorable Arthur W. Howe, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your letter of March 17, 1938, in which you state that the Federal Social Security Board has requested your department to obtain a formal opinion relative to a resolution passed by the State Board of Public Assistance at its meeting of February 15, 1938 providing that dependent children living with a relative other than their mother

shall be classified in the same category as groups applying for or receiving aid to dependent children under the public assistance laws. The resolution reads as follows:

Resolved, That applicant or assistance groups containing dependent children as defined in the Social Security Act be classified in the same category as groups applying for or receiving Aid to Dependent Children under the Public Assistance Law; and that they be submitted for Federal reimbursement; and that persons sixty-five years to seventy years of age be classified in the same category as persons seventy years of age and over for the purpose of obtaining Federal reimbursement.

Section 9, subsection (a) of the Act of June 24, 1937, P. L. 2051 reads, in part, as follows:

(a) Dependent Children. A dependent child is defined as any child under the age of sixteen who (1) resides with his mother, and has been deprived of the support of his father by his father's death, continued absence from home, or physical or mental incapacity, * * *

Section 401 of the Social Security Law, approved August 14, 1935, is set out as follows:

Section 401. For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to needy dependent children, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of \$24,750,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Board, State plans for aid to dependent children.

While our State law defines a dependent child as one who resides with his mother and has been deprived of the support of his father by his father's death, continued absence from home, or physical or mental incapacity, the Federal appropriation in question provides for "needy dependent children." Presently our Department of Public Assistance is providing for dependent children whose fathers are without employment or income and are, therefore, unable to support such children.

The children of an unemployed father are just as worthy of public aid as children of a father who has passed away, absconded, or who is physically or mentally incapacitated.

The children of the former group are being maintained by our Department of Public Assistance without Federal aid. The Federal appropriation and the Social Security Act are broad enough to cover all classes of dependent children. This is humane legislation and should be liberally construed.

Your department was, therefore, justified in adopting the resolution in question classifying dependent children living with a relative other than their mother in the same category as groups applying for or receiving aid to dependent children under the Public Assistance Laws of our Commonwealth for the purpose of receiving Federal reimbursement and your action in this regard is accordingly approved.

Very truly yours,

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

OPINION No. 248

Social security—Old age benefits—Persons between ages of 65 and 70—Resolution of State Board of Public Assistance of February 15, 1938—Validity.

The resolution of the Pennsylvania State Board of Public Assistance adopted at its meeting of February 15, 1938, providing that persons between the ages of 65 and 70 be classified in the same category as persons of 70 years of age and over for the purpose of obtaining Federal reimbursement, is a proper one in view of section 9(b) of the Public Assistance Law of June 24, 1937, P. L. 2051, and section 1 of the Social Security Act of August 14, 1935, 49 Stat. at L. 620.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 19, 1938.

Honorable Arthur W. Howe, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania:

Sir: This will acknowledge receipt of your letter of March 17, 1938 in which you indicate that the Federal Social Security Board has requested your department to obtain a formal opinion relative to a resolution passed by the Pennsylvania State Board of Public Assistance at its meeting of February 15, 1938 which provides that persons between the ages of 65 and 70 years be

classified in the same category as persons seventy years of age and over for the purpose of obtaining Federal reimbursement. The resolution is set out as follows:

RESOLVED, That applicant or assistance groups containing dependent children as defined in the Social Security Act be classified in the same category as groups applying for or receiving Aid to Dependent Children under the Public Assistance Law; and that they be submitted for Federal reimbursement; and that persons sixty-five years to seventy years of age be classified in the same category as persons seventy years of age and over for the purpose of obtaining Federal reimbursement.

Section 9, subsection (b) Act of June 24, 1937, P. L. 2054, reads in part as follows:

(b) Aged Persons. An aged person is defined as one who (1) is seventy years of age, or more, or who, after December thirty-first, one thousand nine hundred thirty-nine, is sixty-five years of age, or more, * * *

Section 1 of the Federal Social Security Act, of August 14, 1935, 49 Stat. at L. 620 is set out as follows:

Section 1. For the purpose of enabling each State to furnish financial assistance, as far as practicable under the conditions in such State, to *aged needy individuals*, there is hereby authorized to be appropriated for the fiscal year ending June 30, 1936, the sum of \$49,750,000, and there is hereby authorized to be appropriated for each fiscal year thereafter a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Social Security Board established by Title VII (hereinafter referred to as the "Board"), State plans for old-age assistance. (*Italics ours*)

Our General Assembly in enacting the Public Assistance Law for the Commonwealth of Pennsylvania prepared its provisions so as to conform to the Social Security Act, approved August 14, 1935. This policy was scrupulously observed in order that our State could avail itself of Federal grants in every category in need of public aid.

Our present law provides that individuals between the ages of 65 and 70 years shall be recognized as being entitled to old age assistance but presently postpones their right to participate in

old age grants until January 1, 1940. In the meantime the Department of Public Assistance is aiding those between the ages of 65 and 70 years without Federal grants. Both the State and Federal laws place those above the age of 65 in the old age category. The Federal appropriation simply refers to "aged needy individuals".

Your department was, therefore, justified in adopting the resolution in question, classifying persons between the ages of 65 and 70 years in the same category as persons above the age of seventy years, for the purpose of obtaining Federal reimbursement, and your action is accordingly approved.

Very truly yours,

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

OPINION No. 249

Mines and mining—Inspection for explosive gases—Bituminous Mine Law of June 9, 1911, article V, sec. 1, as amended—Mine not in regular operation under shift system.

Article V, sec. 1 of the Bituminous Mine Law of June 9, 1911, P. L. 756, as last amended by the Act of July 1, 1937, P. L. 2486, requires that mines be examined for explosive gases under the circumstances therein set forth before any group of workmen enters them, whether or not they are in regular operation under a system of alternate shifts.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 20, 1938.

Honorable Michael J. Hartneady, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the proper interpretation of that portion of Article V, Section 1, of the Bituminous Mine Law of 1911, P. L. 756, as last amended by the Act of 1937, P. L. 2486 (52 PS 921), which provides as follows:

In such portions of a mine, wherein explosive gas has been generated within one year before the passage of this act, or shall be generated after the passage of this act, in sufficient quantities to be detected by an approved safety lamp, the mine foreman shall employ a fire boss or fire bosses, whose competency to act as such shall be evidenced by a certificate of qualification from the Department of Mines on the recommendation of the examining board, as provided for in section six, article twenty-four of this act. It shall be the duty of the fire

boss to examine carefully, *before each shift enters the mine*, every working place, without exception, all places adjacent to live workings, every roadway, and every unfenced road to abandoned workings and falls in the mines; but before proceeding with the examination, he shall see that the air current is traveling in its proper course. In making the examination he shall use no light other than that enclosed in an approved safety lamp. The examination shall begin within three hours prior to the appointed time for each shift to enter the mine. * * * (Italics ours)

You state that your inquiry is prompted by the fact that a majority of mine operators feels that the aforesaid examination need only be made when the mine is in actual operation. You also state that the interpretation of this provision which has been adopted by these operators arises out of the fact that the word "shift" is used therein.

It is true that the technical definition of the word "shift" is "a set of workmen who in turn work with other sets" (57 C. J. 1143), or "a set of workmen that relieves another set" (New Century Dictionary).

We do not feel, however, that the word "shift" as used in the above-quoted provision should be given such a narrow and technical interpretation. The title of the Act of 1911, P. L. 756, provides that it is:

An act to provide for the health and safety of persons employed in and about the bituminous coal-mines of Pennsylvania, and for the protection and preservation of property connected therewith.

A statute enacted for such laudable purposes as this should be liberally construed so as best to effectuate its aims. As is stated in section 51 of the Statutory Construction Act of May 28, 1937, P. L. 1019:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters—(1) the occasion and necessity for the law; (2) the circumstances under which it

was enacted; (3) the mischief to be remedied; (4) the object to be attained; (5) the former law, if any, including other laws upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such law.

It requires but a moment's thought to arrive at the conclusion that it would defeat one of the most important objectives in the statute if the above-quoted provision were so construed as to require inspection only while the mine is in actual operation and while groups of men are replacing each other at stated intervals within the technical interpretation of the word "shift."

It is after a mine has been idle for a period of time that accumulations of gas are most likely to be present and it is just before a group of men plans to enter a mine after a period of idleness that an inspection is most essential for their safety. As evidence of this it is only necessary to refer to the recent explosions in the Kramer mine and in the Harwick mine, each of which cost the lives of a number of miners, solely because the mines had not been examined for explosive gases before the men entered after a period of inactivity.

It is not plausible that the legislature, by using the word "shift," intended to permit that the precaution of examination should be relaxed at the very time when it is most essential.

Further support is given to our opinion that the above-quoted provision was not intended to apply only while the mine was in actual operation by section 2 of the Act of 1911, P. L. 756 (52 PS 922), which provides in part as follows:

A suitable record book shall be kept at the mine office, on the surface, of every mine wherein fire bosses are employed, and immediately after the examination of such mine or any portion thereof by a fire boss, whose duty it is to make such examination, he shall enter in said book, with ink, a record of such examination, and sign same. This record shall show the time taken in making the examination, and also clearly state the nature and location of any danger that may have been discovered in any room or entry or other place in the mine, and, if any danger or dangers have been discovered, the fire bosses shall immediately report the location thereof to the mine foreman. No person shall enter the mine until the fire bosses return to the mine office on the surface, or to a station located in the intake entry of the mine (where a record book as provided for in this section shall be kept and signed by the person making the examination), and

report to the mine foreman or the assistant mine foreman, by telephone or otherwise, that the mine is in safe condition for the men to enter. * * *

We feel, therefore, that it would violate every precept of caution and safety, as well as the spirit and intent of the Act of 1911, P. L. 756, as amended, to interpret the above-quoted portion of article V, section 1, so as to limit its applicability solely to those periods during which the mine is in regular operation under a system of shifts, as that term is used in its technical sense.

You are accordingly advised that section 1 of article V of the Act of 1911, P. L. 756, as last amended by the Act of 1937, P. L. 2486 (52 PS 921) requires that the examination referred to therein shall be made before any group of workmen enters a mine, whether or not the mine is in regular operation under a system of alternate shifts.

Very truly yours,

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

OPINION No. 250

*Pennsylvania State College—Change of name—Nonprofit corporation—
Charter amendment—Advertisement—Procedure.*

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., April 20, 1938.

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

Sir: You have asked to be advised as to the proper procedure which The Pennsylvania State College should follow for the purpose of changing its name.

The Pennsylvania State College is an incorporated educational institution. It is not owned by the Commonwealth, nor is it exclusively managed by the State.

It was originally incorporated as the "Farmers' High School of Pennsylvania" by the Act of February 22, 1855, P. L. 46 (24 PS 2531). By decree of the Court of Quarter Sessions of Centre County, entered on May 1, 1862, the name of the institution was changed to "The Agricultural College of Pennsylvania." By decree of the Court of Common Pleas of the same county, entered on

January 26, 1874, this name was changed to "The Pennsylvania State College."

Under its charter, as amended, you are empowered to appoint six trustees, and together with the Superintendent of Public Instruction, the Secretary of Agriculture and the President of the College, you are an ex-officio member of the board of trustees.

When the college was originally incorporated as the "Farmers' High School," the original trustees and their successors in office were declared to be "a body politic and corporate in law" with perpetual succession. Thus, the board of trustees constitutes the membership of the corporation.

Various acts of assembly have been passed prescribing rules and regulations for the institution. By the Act of May 20, 1857, P. L. 617, admissions to the institution from the several counties were proportioned according to the number of their taxables.

By the Act of April 1, 1863, P. L. 213, the school was designated as the proper college to be beneficiary of the provisions of the Land Grant Act of Congress (Act of July 2, 1862).

In an opinion by this department given to the Auditor General on December 21, 1921, The Pennsylvania State College was described as a State institution for the purpose of exemption from taxation. However, on February 7, 1929, the deputy auditor general was advised by this department that it was an incorporated educational institution, and in the class of semi-state institutions in so far as appropriations were concerned.

As an incorporated educational institution, the corporation is subject to the provisions of the Non-profit Corporation Law (Act of May 3, 1933, P. L. 289, as amended, 15 PS 2851—1, et sec.). Section 701 of this act, as last amended by the Act of July 17, 1935, P. L. 1130, permits a nonprofit corporation to amend its charter so as to adopt a new name. Sections 702 to 708, inclusive, set forth the procedure to effectuate such amendment.

In brief, they provide that an application to change the name be made to the Court of Common Pleas of the county wherein the registered office of the corporation is located; in the instant case, Centre County. Prior to this application, a resolution authorizing the proposed amendment shall be adopted by the affirmative vote by at least a majority of the members entitled to vote thereon at a regular or special meeting duly convened after at least ten days' written notice to all the members of this purpose: Section 702. Since the board of trustees is the membership, this action would require the approval of a majority of the board of trustees: Section 601.

After such resolution has been so approved, the articles of amendment are executed under the name and seal of the corporation, signed and verified by at least two duly authorized officers thereof: Section 703.

The proposed new name is registered with the Department of State: Section 704. Then, the articles of amendment, together with a certificate from the Department of State showing the registration of the proposed name, are filed in the prothonotary's office, wherein the registered office of the corporation is located: Section 705.

After advertisement, the application is made to the Court of Common Pleas for its approval of the change of name. If the court is satisfied as to the propriety of the amendment, it directs the prothonotary to transmit the amendment to the Superintendent of Public Instruction. This official must, within sixty days after the receipt of the articles, cause the State Council of Education to be convened, who thereupon consider the amendments. If the council approves the amendment, the court may consent to the amendment. If the council disapproves, the court must refuse the application. Hearings may be had for the purpose of determining objections to the proposed change of name: Section 707. After approval, the articles are recorded in the office of the recorder of deeds of the proper county (Centre). Thereupon, they are returned to the prothonotary and filed in his office.

To summarize, The Pennsylvania State College, being a non-profit corporation, is subject to the provisions of the Nonprofit Corporation Law in so far as the amending of its charter is concerned. A change of name of a corporation is a charter amendment. Thus, approval by a majority of the members of the board of trustees, by the Court of Common Pleas of Centre County, and the State Council of Education is necessary to consummate such change.

Very truly yours,

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

OPINION No. 251

State Government—The General State Authority—Award of contracts—Necessity for majority action of board—Delegation of power to executive committee—General State Authority Act of June 28, 1935, sec. 7, as amended.

The General State Authority may not delegate to its executive committee the power and duty of awarding contracts for its projects to the lowest

responsible bidders, but such contracts must, under section 7 of the General State Authority Act of June 28, 1935, P. L. 452, as amended by the Act of May 18, 1937, P. L. 676, be awarded by the affirmative vote of a majority of the members of the authority, unless a bylaw shall require a larger number.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 21, 1938.

Honorable Augustine S. Janeway, Executive Director, The General State Authority, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion, whether the board of The General State Authority may delegate to its executive committee, or a quorum thereof, the power and duty to award contracts to the lowest responsible bidder for projects of the authority. You state that under the bylaws of the authority the executive committee consists of five members, appointed by its president; and that some time ago the board of the authority adopted a resolution conferring upon its executive committee the power to award contracts for the projects of the authority, and directing that such duty shall be performed by said committee, or a quorum thereof.

The General State Authority was created by the Act of June 28, 1935, P. L. 452, as amended, known as the "General State Authority Act of one thousand nine hundred and thirty-five." Said act declares it to be "a body corporate and politic, constituting a public corporation and governmental instrumentality." Its membership is composed of the Governor, the State Treasurer, the Auditor General, the Secretary of Internal Affairs, the Secretary of Property and Supplies, the Speaker of the House of Representatives, and the President pro tempore of the Senate, and their respective successors in office, and three citizens of Pennsylvania to be appointed as therein provided.

The purposes and powers of the authority are prescribed by section 4 of said act which, in part, is as follows:

The Authority is created for the purpose of constructing, improving, maintaining, and operating sewers, sewer systems, and sewage treatment works for State institutions of every kind and character (heretofore or hereafter constructed), public buildings for the use of the Commonwealth, State arsenals, armories, and military reserves, State airports and landing fields, State institutions of every kind and character (heretofore or hereafter constructed), additions and improvements to land grant colleges, State highways, and bridges, tunnels, and

traffic circles on State highways, swimming pools, and lakes on State land, and dams and improvements to river embankments (any and all the foregoing being herein called "projects"); and the Authority is hereby granted and shall have and may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes, including, but without limiting the generality of the foregoing, the following rights and powers:

(a) To have perpetual existence as a corporation.

* * * * *

(e) To acquire by purchase, lease, or otherwise, and to construct, improve, maintain, repair, and operate projects.

(f) To make bylaws for the management and regulation of its affairs.

(g) To appoint officers, agents, employes, and servants; to prescribe their duties and to fix their compensation.

* * * * *

(j) To make contracts of every name and nature, and to execute all instruments necessary or convenient for the carrying on of its business.

* * * * *

(l) To have the power of eminent domain.

* * * * *

(n) To do all acts and things necessary or convenient to carry out the powers granted to it by this act or any other acts.

* * * * *

In addition to the foregoing, the act confers upon the authority many other powers. Subdivision (d) of section 4 gives the authority power to acquire, purchase, hold and lease as lessee, real or personal property, tangible or intangible, or any interest therein, and to lease the same as lessor to the Commonwealth, or any of its departments or agencies, or to any land grant college, or to any city, county or other political subdivision of the Commonwealth. Subdivision (h) of said section gives the authority power to fix, alter, charge and collect rates, rentals and other charges for the use of its facilities, its services, or its projects, "to be determined by it," so that it may pay its expenses, pay for the construction, improvement, repair, maintenance and operation of its facilities and properties, as well as pay its obligations. Subdivision (i) authorizes it to borrow money, make and issue bonds, and to secure the payment of such bonds by a pledge or deed of trust of all or any of its revenues, rentals, and receipts, "as the authority shall deem advisable."

If the board of the authority by resolution may delegate to its executive committee the power and duty of awarding contracts for its projects to the lowest responsible bidder, it may delegate in a similar manner to such committee any or all of the other powers conferred upon it by the statute; and it may, in like manner, delegate these powers to one of its members, since the manner of such delegation is immaterial. The question here involved is whether the authority has the power of delegation with reference to the awarding of contracts, and not to whom such power may be delegated, or the manner in which it is done.

Section 7 of the act creating the authority provides how its powers shall be exercised, as follows:

The powers of the Authority shall be exercised by a governing body consisting of the members of the Authority acting as a board. * * *

Six members shall constitute a quorum of the board for the purpose of organizing the Authority and conducting the business thereof and for all other purposes, and all action shall only be taken by vote of a majority of the members of the Authority, unless in any case the by-laws shall require a larger number. * * *

The powers of a corporation, like its corporate existence, are derived from a grant by the State or other sovereignty creating it. It has no powers except such as are expressly or impliedly conferred by its charter or the statute creating it. *Citizens' Electric Illuminating Co. v. Lackawanna and Wyoming Valley Railroad Company*, 255 Pa. 176. If the charter requires the powers conferred to be exercised in a particular manner, or by particular officers or agents, the corporation cannot legally exercise them otherwise than in the mode pointed out. Corporations, both for their powers and the mode of exercising them, depend upon the statute creating them. *Fowler v. First National Bank of Pittsburgh*, 72 Pa. 456; *Bank of Kentucky v. Schuylkill Bank*, 1 Parsons, 180.

A corporation has no natural rights, such as an individual or partnership; and if a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter, or in the present case, in the statute creating it and which is the charter of the authority, or the power does not exist. *Commonwealth v. Railroad Co.*, 27 Pa. 339; *Citizens' Electric Illuminating Co. v. Lackawanna & Wyoming Valley Railroad Co.*, supra; *American Transfer Company's Petition*, 237 Pa. 241. If a particular power is omitted from those enumerated in the

charter it is to be taken as a prohibition against its exercise, unless there is an imperative implication of its inclusion. *Groff's Appeal*, 128 Pa. 624; *Railway Company v. Markelton Hotel Company*, 247 Pa. 565.

It is to be noted the legislature expressly provided that the powers of the authority shall be exercised by the "members of the authority acting as a board"; that "six members shall constitute a quorum of the board for * * * conducting the business" of the authority, and that "all action shall only be taken by vote of a majority of the members of the Authority." Nowhere in the statute does it appear directly or by necessary implication that the board of the authority may delegate any of the powers or duties imposed upon it; and to hold that it may do so would be in the teeth of the express provisions of section 7 of the act, above quoted.

It is not without significance that, while the board of directors of a business corporation, by the express provisions of subdivision (6) of section 402 of the Act of May 5, 1933, P. L. 364, may delegate to an executive committee the authority of the board in the management of the business of the corporation, this power has not been given to the board of the authority. Keeping in mind that the authority is declared to be "a public corporation and governmental instrumentality," as well as the public character and public importance of its primary corporate functions, it is reasonable to assume the legislature intended that these powers, including the awarding of contracts for its projects, which is one of its primary corporate functions, should be exercised only by the affirmative vote of a quorum of the board, or six members, and not by a vote of a quorum of any committee, however constituted, which would mean by the vote of only three members of the authority. In such case the action would not be "by a vote of a majority of the members of the Authority," as the statute requires.

It has been held that a corporation whose charter vests the management of its affairs in a board of directors cannot, by a bylaw, substitute an executive committee for such board. In *Tempel v. Dodge*, et al., 89 Texas, 69, 32 S. W. 514, the Supreme Court of Texas said, (515);

Upon this statement the question arises, can the board of directors of a corporation, under a charter which imposes upon it the entire management of its affairs, confer that authority upon an executive committee, to be appointed by the president of the company? Undoubtedly, the board of directors can appoint agents, whether in

the form of committees or as single agents, to transact the ordinary business of the corporation; but we believe that the rule is well settled by authority, and sustained by sound principle, that a board of directors cannot confer upon others the power to discharge duties imposed upon them which involve the exercise of judgment and discretion, except in the transaction of the ordinary business of the corporation, unless authorized so to do by the charter. *Thomp. Corp.* Section 3944 et seq.; *Green's Brice, Ultra Vires*, pp. 490-492; *Railroad Co. v. Richie*, 40 Me. 425; *Tippets v. Walker*, 4 Mass. 595; *Weidenfeld v. Railroad Co.*, 38 Fed. 615. The by-laws in express terms substituted the executive committee, to be appointed by the president, for the board of directors, and attempted to confer upon that committee all of the powers given by the charter to the board of directors. Such a provision in the by-laws is so palpably in conflict with the charter under which the corporation was organized that there could scarcely be a question that the bylaw would be absolutely null. * * *

Although by subdivision (f) of the statute creating it, the authority is expressly given the power "to make by-laws for the management and regulation of its affairs," this conferred upon it no power it did not already possess. The power to make bylaws is a necessary incident of any corporation. *Lovell v. Women's Pa. SOC. P. C. A.*, 235 Pa. 601; *Alters v. Bricklayer's Association*, 19 Pa. Supr. Ct. 272. It necessarily follows that the powers of a corporation cannot be enlarged or extended by bylaws beyond the scope authorized by its charter. Nor, on the other hand, can a bylaw detract from the powers of a corporation. It can merely affect the management of its business and control its officers and agents. 14-a C. J., Sec. 2077, and cases cited; *Hays v. German Beneficial Union*, 35 Pa. Superior Ct., 142.

While the power to make bylaws is inherent in every corporation, its exercise is not without restriction or limitation. Bylaws of a corporation which are contrary to or inconsistent with its charter, or governing statute, are ultra vires and void, even though they may have been unanimously adopted by the members of the corporation. They must be consistent both with the terms and with the spirit and intent of the corporation's charter or its governing statute. *Lutz v. Webster*, 249 Pa. 226; *Arbour v. Trade Association*, 44 Pa. Superior Ct., 240; *Commonwealth v. Fisher*, 7 Phila. 264.

So far as the bylaws of the authority seek to create an executive committee, its action may be sustained. But when the board of the authority attempts to delegate to such committee, or a

quorum thereof, any of the powers and duties imposed upon it by the statute, it must point to the language which authorizes it, either expressly or by necessary implication. We find no such language in the act.

It is of no moment that in the present case such delegation is attempted by a resolution of the board of the authority, instead of by a bylaw; if the board possesses such power, it may be accomplished by either method. The only particular in which the board of the authority may vary the provisions of the statute is that it may, by a bylaw, require all action to be taken by vote of more than a majority of the members, instead of by a vote of a majority, as the statute provides. This express provision excludes any implied power to authorize action of the authority by less than a majority; and if by the words "all action" the legislature intended to include the awarding of contracts for projects, and we think it did, then clearly all such contracts must be awarded by a vote of six members of the authority, unless by a bylaw it shall require a larger number. The doctrine of implied power is not to be stretched to permit that to be done by a corporation which the legislature has previously said shall not be done. *Pittsburgh Railways Co. v. Pittsburgh*, 226 Pa. 498.

We are of the opinion the board of The General State Authority may not delegate to its executive committee the power and duty of awarding contracts for its projects to the lowest responsible bidder, but that such contracts must be awarded by the affirmative vote of a majority of the members of said authority, which would be six, in accord with section 7 of the act of assembly creating it, unless by a bylaw it shall require a larger member.

Very truly yours,

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

OPINION No. 252

Plumbing—Woodwork around sinks—Use in private dwelling—Act of June 7, 1901, sec. 43, as amended—Rules of statutory construction.

Section 43 of the Act of June 7, 1901, P. L. 493, as amended by the Act of March 31, 1937, P. L. 168, prohibiting any enclosing woodwork in connection with sinks in tenement houses and lodging houses, is not applicable to sinks installed in other types of buildings: any other construction must be rejected under rules of statutory construction to the effect that every law is to be construed, if possible, to give effect to all its provisions, that penal statutes

must be strictly construed and that when the words of the law are not explicit, the legislative intention may be ascertained by considering, *inter alia*, administrative interpretation thereof.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 27, 1938.

Honorable Edith MacBride-Dexter, Secretary of Health, Harrisburg, Pennsylvania.

Madam: You have asked to be advised whether section 43 of the Plumbing Code of 1901, P. L. 493, as amended by the Act of 1937, P. L. 168, prohibits the use of enclosing woodwork in connection with sinks installed in dwellings.

Section 43 of the Plumbing Code, as amended, provides as follows:

The closet and all other fixtures must be set open, and free from all enclosing wood work. In tenement-houses and lodging-houses, sinks must be entirely open, set on iron legs or brackets, without any enclosing wood work. Iron enameled water-proof cabinets are permissible under sinks and lavatories.

This section is ambiguous to a certain extent, so it is appropriate to refer to rules of statutory construction in order to ascertain its proper interpretation. One of the best established of all such rules is that which is set forth as follows in 59 C. J. 984:

In accordance with the maxim, "*expressio unius est exclusio alterius*," where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; * * *

It is our opinion that section 43 of the Plumbing Code clearly falls within the above-quoted rule of statutory construction. This section states that sinks in tenement-houses and lodginghouses must be free of enclosing woodwork, thus implying that sinks in other buildings, such as dwellings, are not governed by such restriction. If section 43 is interpreted as a general prohibition against enclosing woodwork around all sinks wherever they may be situated, the reference made in that section to tenement-houses and lodginghouses is rendered meaningless, for it would have been useless to prohibit specifically wooden sink enclosures in tenement-houses and lodginghouses if the remainder of the section already prohibited wooden enclosures in connection with

any sink. In this connection, it is to be remembered, as stated in the Statutory Construction Act of 1937, P. L. 1019, that “* * * Every law shall be construed, if possible to give effect to all its provisions.”

It is true that a portion of section 43 of the Plumbing Code states that iron enameled waterproof cabinets are permissible under sinks and lavatories. It is clear, however, that this permissive provision refers to the sinks in tenement-houses and lodging-houses described in the preceding sentence of the section. If this statement had been intended to prohibit the use of wooden enclosures beneath any sink whatsoever, the specific provision of wooden construction in connection with tenement-houses and lodginghouses would have been meaningless, and we have already indicated that every provision of a law must be given effect, if possible.

Furthermore, section 71 of the Plumbing Code, as amended, provides penalties for violations of the rules and regulations set forth in the act regarding the construction of plumbing. In this respect, the statute is a penal one and such statutes must be strictly construed in favor of persons who may be charged with violations thereof.

Finally, it appears that section 43 of the Plumbing Code of 1901, P. L. 493, has existed practically unchanged since it was first enacted. This section, as set forth in the Act of 1937, P. L. 168, reads in part as follows:

The closet and all other fixtures must be set open, and free from all enclosing wood [or other] work. [Where water-closets will not support a rim-seat, the seat must be supported on galvanized iron legs, and a drip tray must be used, which tray must be porcelain, enameled on both sides and secured in place.] In tenement-houses and lodginghouses, sinks must be entirely open, set on iron legs or brackets, without any enclosing wood [or other] work. *Iron enameled water-proof cabinets are permissible under sinks and lavatories.*

(The portion italicized has been added to the original section, and the portion in parentheses has been deleted.)

It is obvious that the section, as originally drafted, was not substantially different from its present amended form in so far as it related to enclosing woodwork in connection with sinks. It appears, however, that in many of the cities subject to the original Plumbing Code of 1901, section 43 was never interpreted so as to prohibit enclosing woodwork around sinks installed in dwell-

ing houses. Section 51 of the Statutory Construction Act of 1937, P. L. 1019, provides that “* * * When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering, among other matters * * * administrative interpretations of such law.”

You are accordingly advised that section 43 of the Plumbing Code of 1901, P. L. 493, as amended by the Act of 1937, P. L. 168, which prohibits any enclosing woodwork in connection with sinks in tenement-houses and lodginghouses, is not applicable to sinks installed in other types of buildings.

Very truly yours,

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

OPINION No. 253

Banks and banking—Building and loan associations—Right to retain real estate—Permission of Secretary of Banking—Necessity for applying for permission—Banking Code of May 15, 1933, sec. 1014-B—Building and Loan Code of May 5, 1933, sec. 804-B.

Under section 1014-B of the Banking Code of May 15, 1933, P. L. 624, and section 804-B of the Building and Loan Code of May 5, 1933, P. L. 457, the Secretary of Banking may issue a written authorization to banks, bank and trust companies, trust companies and building and loan associations, to hold all real properties they may have acquired prior to November 30, 1934, until November 30, 1939, without application first being made for such permission.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., April 27, 1938.

Honorable Irland McK. Beckman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether you may issue written authorizations to banking institutions and building and loan associations to retain until November 30, 1939, such real estate as they may have acquired prior to November 30, 1934, without a specific request from them to hold such realty.

Since the provisions of the Banking Code and the Building and Loan Code are similar, in so far as this question is concerned, the construction which we place upon the Banking Code will accordingly govern the case of building and loan associations. Section 1014-B of the Banking Code provides as follows:

A bank, a bank and trust company, or a trust company shall not own or hold any real property, other than such real property as it occupies, or intends to occupy, for its accommodation in the transaction of its business, or such real property as it partly so occupies and partly leases to others, pursuant to the provisions of this act, for a period longer than five years after the acquisition of such real property, or five years after the effective date of this act, *But the Department may, upon application of a bank, a bank and trust company, or a trust company, grant to it in writing the power to hold such real property for a longer period.* This section shall not be constructed to prevent any bank and trust company, or trust company from making improvements to properties owned, but not occupied by the bank, the bank and trust company, or the trust company, for the purposes of sale or lease. (*Italics ours.*)

The Banking Code (Act of May 15, 1933, P. L. 624) became effective on July 3, 1933. Hence, all real estate owned by banking institutions prior to that date must be disposed of before July 3, 1938, unless proper authorization is granted to such institutions by you. However, only the Commonwealth may object if they retain such realty without authority.

Whether or not you may grant such authorization without an application first being made by the bank, bank and trust company, or the trust company, depends upon the construction of the italicized language above. If such language is not mandatory, but is merely directory, then full authority exists for you to grant such permission without an application being made.

If a provision in a statute is mandatory, an omission to follow it renders the proceedings to which it relates illegal and void, while a directory provision is one whose observance is not necessary to the validity of the provisions. In order to determine whether a provision is mandatory or directory, the primary object is to ascertain the legislative intent.

The policy of the law in permitting banks to hold real estate only for a limited period may be said to be based upon three reasons: (1) To prevent lands coming into mortmain; (2) to preclude speculative ventures in real estate, and (3) to keep banking funds in the ordinary channels of commerce.

While realizing the necessity and wisdom for such limitation, the legislature, through past experience, knew that in certain cases conditions arose over which banks had no control. Hence, it was necessary that Acts of Assembly be passed permitting the institutions to hold real estate beyond the statutory period. Thus,

the Act of May 6, 1915, P. L. 271, allowed banking companies to continue to hold real estate for a further period of five years from the enactment of that law, because they had been unable to sell such real estate due to a depression in prices.

As an alternative to amending the law in order to permit realty to be held beyond the statutory period, the legislature has granted the power to the Secretary of Banking to authorize such holding. In order that he may be acquainted with such facts as will insure the purposes of the holding period limitation being maintained, and so that the business of the Department of Banking, in enforcing the law, may proceed in a prompt and orderly method, section 1014-B provides for the application. In 59 C. J. 1074, the following statement appears:

* * * when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition, * * *

When the Secretary of Banking is in possession of relevant facts, there would be no need for the application. It is well known that the present recession prevents the sale of real estate at fair values. The same conditions have arisen which led to the act of 1915, *supra*. Since the Secretary of Banking, as a member of the general public, and in addition, in his official capacity, has knowledge of these conditions, there would appear to be no necessity that a bank must make application to him and acquaint him with such facts. If applications were necessary as a condition precedent to your action, there is grave danger that you could not act on all such applications before July 3, 1938. Thus, institutions would be law violators through no fault of their own.

If it were mandatory that an application be made, certainly the legislature would have prescribed the form thereof, as written or oral, and the conditions and investigation necessary for its approval. Further, the fact that the provision does not contain negative words is an additional indication that it is merely directory in so far as making an application is concerned.

To summarize, you are advised that under the provisions of section 1014-B of the Banking Code, and under the provisions of section 804-B of the Building and Loan Code, you may issue a written authorization to banks, bank and trust companies, trust companies, and building and loan associations, to hold all real

properties they may have acquired prior to November 30, 1934, until November 30, 1939, without any application therefor.

Very truly yours,

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

OPINION No. 254

Securities—Securities Act of April 13, 1927—Applicability to whisky certificates—Applicability to vendors thereof—Undertaking to dispose of securities of public in order to obtain funds for purchase of certificates.

1. A whisky certificate is merely evidence of ownership of specific personal property and is not, therefore, a security within the meaning of The Securities Act of April 13, 1927, P. L. 273; and the Pennsylvania Securities Commission is, therefore, without authority to regulate the offer and sale of such certificates.

2. If vendors of whisky certificates, in order to obtain funds for their purchase, undertake to dispose of, invite inquiries about, or deal in any manner with the securities of the members of the public who are the prospective vendees, they are dealing in securities within the meaning of section 2 of The Securities Act of April 13, 1927, P. L. 273, and are obliged to register under section 3 thereof and comply with its provisions.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., May 27, 1938.

Honorable Colley S. Baker, Chairman, The Pennsylvania Securities Commission, Harrisburg, Pennsylvania.

Sir: You have asked to be advised on the following two questions:

1. Whether whiskey certificates, also known as warehouse receipts for distilled spirits in bond, come within the definition of securities in the Pennsylvania Securities Act, and whether the Pennsylvania Securities Commission has control over the offering for sale of such whiskey certificates within the State of Pennsylvania?

II. Whether the activities of vendors of whiskey certificates, who solicit security owners to induce and effect a switching of their securities for whiskey certificates, also known as warehouse receipts for distilled spirits in bond, make such vendors dealers in, or salesmen of, securities in the State of Pennsylvania?

Section 2, subsection (a) of the Act of April 13, 1927, P. L. 273, known as the Pennsylvania Securities Act, defines a "security" as follows:

(a) "Security" or "securities."—The terms "security" or "securities" shall include any bond, stock certificate under a voting trust agreement, treasury stock, note, debenture, certificate in or under a profit-sharing or participation agreement, subscription or reorganization certificate, oil, gas or mining lease or certificate of any interest in or under the same, evidence of indebtedness, or any certificate or instrument representing or secured by an interest in the capital, assets or property of any corporation, unincorporated organization, association, trust or public corporation or body, or any other instrument commonly known as a security.

Whiskey certificates, also known as warehouse receipts for distilled spirits in bond, are issued by distillers as a means of financing their operations. These certificates are generally recognized in commercial transactions and by the courts as efficacious to transfer title to the specific whiskey described therein. We have no statute in Pennsylvania expressly making whiskey certificates negotiable instruments, and title to the specific whiskey described in the certificate passes at the time of delivery of the certificate for a valuable consideration: See *Taney v. Penn National Bank of Reading*, 187 Fed. Rep. 691, and sustained on appeal by the Supreme Court in 232 U. S. 174.

In the case of *Moore v. Thomas Moore Distilling Co.*, 247 Pa. 312 (1915), the Supreme Court sustained the lower court in holding that whiskey certificates for whiskey stored in bond in a distiller's warehouse are not the equivalent of warehouse receipts within the meaning of the Acts of September 24, 1866, P. L. 1363 and March 31, 1909, P. L. 19, relating to warehousemen.

A whiskey certificate is merely an evidence of ownership of specific personal property and, therefore, cannot be held a security under the provisions of the Act of April 13, 1927, P. L. 273, known as the Pennsylvania Securities Act. If the legislature had intended to include these certificates, also known as warehouse receipts for distilled spirits in bond, in the category of securities, it should have provided therefor in unmistakable language, which it failed to do.

This conclusion places upon the General Assembly the responsibility of defining these certificates as securities, or providing adequate legislation for their sale and distribution under supervision of the Pennsylvania Liquor Control Board.

Since a whiskey certificate is not a security within the meaning of the Securities Act, it follows that the Pennsylvania Securities

Commission is without authority to regulate the offer and sale of such certificates.

II. Whether the activities of vendors of whiskey certificates, who solicit security owners to induce and effect a switching of their securities for whiskey certificates, also known as warehouse receipts for distilled spirits in bond, make such vendors dealers in, or salesmen of, securities in the State of Pennsylvania?

We are mindful of the limitless possibilities for the use of these certificates as instruments of fraud in the hands of unscrupulous persons. You inform us that these certificates have been indiscriminately sold to purchasers who have little or no knowledge of what they are purchasing, or the trouble or obligations attendant upon the securing of possession of the whiskey. These certificates have been offered to the public in Pennsylvania at highly inflated prices, ranging from \$65.00 to \$100.00 a barrel for whiskey worth at the outside \$30.00 a barrel. The vendors of these certificates operate from lists of security owners who are the holders of securities for the most part in corporations which have had financial difficulties and have reduced the payment of dividends. The holders of these securities are solicited by the vendors of whiskey certificates, the value of their securities are discussed and ways and means of recouping losses are explained as being made effective by permitting the vendor to dispose of the securities and using the proceeds to purchase warehouse certificates. Fabulous future profits in the enhancement of the value of the whiskey certificates are assured the holders of securities as an inducement to prevail upon the prospective victims to convert their securities. The vendor of the whiskey certificates receives the securities from his victim and arranges for their disposition, crediting the account of his victim with the cash realized from the sale of the securities in payment for the whiskey certificates.

Section 2, subsection (c) of the Act of April 13, 1927, P. L. 273, known as the Pennsylvania Securities Act, defines "dealer" as follows:

The term "dealer" shall include every person or entity, other than a salesman who engages in this State either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery, or soliciting subscriptions to, or orders for, or undertaking to dispose of, or to invite offers for, or inquiries about, or dealing in, any manner in any security or securities within this State, including securities issued by such entity.

Section 2, subsection 14, clause (d) of the Pennsylvania Securities Act defines "salesman" in the following language:

The term "salesman" shall, except as provided in section four, include every person or company employed or appointed or authorized by a dealer to sell, offer for sale or delivery, or solicit subscriptions to or orders for, or dispose of inquiries about, or deal in any manner in, securities within this State, whether by direct act or through subagents.

Section 2, subsection 14, clause (f) of the Pennsylvania Securities Act defines "fraud" as follows:

The terms "fraud," "fraudulent," "fraudulent practice," shall include any misrepresentation, in any manner, of a relevant fact not made honestly and in good faith; any promise or representation or predication as to the future not made honestly and in good faith, or an intentional failure to disclose a material fact, the gaining, directly or indirectly through the sale of any security, of an underwriting or promotion fee or profit, selling or managing commission or profit so gross and exorbitant as to be unconscionable and fraudulent; and any scheme, device or other artifice to obtain such a profit, fee, or commission: Provided, however, That nothing herein shall limit or diminish the full meaning of the terms "fraud" and "fraudulent" as applied or accepted in courts of law or equity.

Section 3 of the Pennsylvania Securities Act requires dealers and salesmen to be registered and is here quoted:

No dealer shall, by direct solicitation, or through agents or salesmen, or by letter, telephone, telegraph, circular, or advertising, sell, offer for sale, tender for sale or delivery, or solicit subscriptions to, or orders for, or dispose or undertake to dispose of, or invite offers for or inquiries about, any securities within this State, without first being registered as in this act provided. No salesman or agent shall, in behalf of any dealer, sell, offer for sale, tender for sale or delivery, or solicit subscriptions to or orders for, or dispose or undertake to dispose of, or invite offers for or inquiries about, any securities within this State, unless registered as a salesman or agent of a dealer under the provisions of this act. The list of dealers, agents or salesmen registered under the provisions of this act, shall at all times be open to the public.

Section 22 of the Pennsylvania Securities Act provides for violations as follows:

Section 22. Any dealer, agent, salesman, principal, officer, or employe, who shall, within this State, sell,

offer for sale or delivery, solicit subscriptions to or orders for, dispose of, invite offers for or inquiries about, or who shall deal in any manner in, any security or securities, without being registered as in this act provided, or who makes any false statement of fact in any statement or matter of information required by this act to be filed with the commission, or any advertisement, prospectus, letter, telegram, circular, or in any other document, containing an offer to sell or to dispose of, or in or by verbal or written solicitation to purchase, or in any commendatory matter concerning any securities, with intent to aid in the disposal or purchase of the same, or who makes any false statement or representation concerning any registration made under the provision of this act, or who is guilty of any fraud or fraudulent practice, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than five thousand dollars (\$5,000.00), or imprisonment for not more than two years, or both. Any dealer, officer, agent, salesman, principal, officer, or employe who shall commit, in whole or in part any other act declared unlawful by this statute, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars (\$1,000.00), or imprisonment for not more than one year, or both.

In *Commonwealth v. Moore*, reported in 5 D. & C. 738, the court, in discussing the Securities Act, said:

The purpose of the Securities Act is to regulate the business of dealing in stocks, bonds and other securities defined therein for the protection of the public against fraud. It is a police regulation of the same general class with statutes regulating the practice of the profession, the business of insurance, peddling, ticket selling, etc., which have been from time to time sustained as valid exercises of the police power of the State. * * *

The securities of the public which vendors of whiskey certificates undertake to dispose of to effect exchange for whiskey certificates are securities within the definition of section 2 (a) of the Securities Act.

These vendors of whiskey certificates, in undertaking to dispose of, inviting inquiries about, or dealing in any manner with the securities of the public of Pennsylvania in order to provide cash for the payment of whiskey certificates, also known as warehouse receipts for distilled spirits in bond, are dealing in securities within the meaning of the Pennsylvania Securities Act and such dealers and their salesmen are obliged to register

and comply with the provisions of the Act of April 13, 1927, P. L. 273, known as the Pennsylvania Securities Act.

Very truly yours,

DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

OPINION No. 255

Highways—State highway system—Relocation of State highway within municipality—Construction of new street—Act of June 22, 1931, as amended—Extent of State liability for maintenance—Curb lines—Absence of established curb lines—Act of May 4, 1933—Gutter lines—Effect of change of municipality from borough to city—Right of State department to correct drainage conditions.

1. The Department of Highways may, under section 7 of the Act of June 22, 1931, P. L. 720, as amended by section 3 of the Act of July 12, 1935, P. L. 793, expend its funds for the engineering and construction of a new street to be used as a relocation of a State highway within a city, if the street has been laid out by appropriate city ordinance, even though the city has not actually constructed and opened a new street for use by the public.

2. While it is doubtful whether section 5 of the Act of May 4, 1933, P. L. 268, providing that the obligation of the Commonwealth in the construction and maintenance of a city street added to the system of State highways shall be limited to that part of the street between curb lines "as established at the time of passage of this act", applies in the case of subsequent additions to the State highway system, nevertheless, if it does apply, the curb lines which are the limits of responsibility are those in existence at the time the streets are added to the system, and if no curb is actually in existence or any curb line ordained at such time, the department would be justified in relying upon a subsequent ordinance ordaining curb lines or, in the absence thereof, may maintain the traveled portion of the street, and, if necessary, extend its maintenance to the gutter lines.

3. Once a particular stretch of road has been adopted as a State highway, it continues thereafter to be a State highway until removed from the system by the legislature or by abandonment or vacation procedure: a borough street taken over as part of the State highway system continues thereafter to be a State highway, even though the borough becomes a third class city.

4. Since section 10 of the Sproul Act of May 31, 1911, P. L. 468, as last amended by the Act of June 1, 1933, P. L. 1402, places no limitation upon the extent of maintenance of State highways but places the extent thereof within the discretion of the Secretary of Highways, the Department of Highways has authority to correct drainage conditions along such highways within the right-of-way limits, whether or not curb lines have been ordained by the borough, but if it becomes necessary to construct drainage ditches beyond

the right-of-way limits, this can be accomplished only under the provisions of the Act of April 29, 1925, P. L. 360.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., July 5, 1938

Honorable Roy E. Brownmiller, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning certain powers and obligations of the Department of Highways with reference to State highways in cities and boroughs. We shall consider separately the questions raised by you.

You first desire to be advised as to whether the Department of Highways may expend its funds to construct a new street and to assist in the engineering thereof to be used as a relocation of a State highway within a city, even though the city has not actually constructed and opened the new street for use by the public.

The Act of June 22, 1931, P. L. 720, provides for the taking over as State highways in cities other than cities of the first class certain enumerated streets. Section 7 of the act, as amended by Section 3 of the Act of July 12, 1935, P. L. 793, permits the Department of Highways, with the consent of the city, to relocate any State highway route which is found to be too dangerous or too expensive. The relocation is "to pass over existing streets or new streets, laid out and opened by the city."

Under your first inquiry, it must be determined whether a new street laid out and opened by the city must be a street physically opened or whether it is sufficient to have such new street laid out and opened by an appropriate city ordinance.

We are of the opinion that the act intended to require the city only to lay out and open such a new street by ordinance. The legislature has authorized the Secretary of Highways to relocate the State highway route either on such a new street or on an "existing" street. If the city were required to open physically the new street, it would then become an existing street and the language in the act referring to new streets would be surplusage and meaningless. It is fundamental that the legislature does not intend to do a vain thing, and that, therefore, all words contained in a statute must be given some meaning, if possible. We are of the opinion that the language in section 7 of the act referring to new streets can mean only new streets laid out and opened by city ordinance, and not those actually physically opened.

Your second inquiry concerns the responsibility of the Department of Highways for a city street properly added to the State highway system, but which had no existing curb lines when the act became effective.

The particular street in question is Route No. 60022, in the city of Franklin, which became a part of the State highway system by the Act of June 3, 1933, P. L. 1492, No. 326. In that act, the street is appropriately described, but no reference is made to the width or the curbs thereof. The present question arises because of section 5 of the act of 1931, referred to supra, taking over as State highways certain streets in all cities except Philadelphia. Section 5 was amended by the Act of May 4, 1933, P. L. 268, to read as follows:

* * * The obligation of the Commonwealth in the construction, reconstruction, resurfacing or maintenance, as hereinbefore provided, shall be limited to that part of the street, or section thereof, between curb lines, as established at the time of passage of this act * * *

It is difficult to ascertain the exact time as of which this language operates, because various streets were added by a later act of 1933 and also in 1935 and 1937 to those established as State highways by the act of 1931. As to the streets added in 1933, 1935, and 1937, this language concerning established curb lines can have no effect as of May 4, 1933. There is considerable doubt as to whether this provision has any effect on the subsequent additions. Nevertheless, if we assume that, as to the 1933, 1935, and 1937 additions, the curb lines are the limits of responsibility, (which is the only interpretation giving any significance to the act of May 4, 1933), then we believe that the provision applies as of the time the respective acts of 1933, 1935, and 1937, adding streets to the State highway system are effective.

You state as to Route 60022, in the city of Franklin, there was no curb actually in existence, nor any curb line ordained on June 3, 1933, the date that this route was added to the State highway system. It must therefore be determined whether this street became a portion of the State highway system at all, in view of the express limitation upon the responsibility of the department imposed by section 5 of the act of 1931, as amended.

Nevertheless, in spite of this limitation, we are of the opinion that it was the legislative intent to add this street to the system of State highways, and such intent cannot be defeated by a limitation on the obligation of the Commonwealth with respect to the construction or maintenance thereof. Clearly, Route 60022 is a State

highway, and your department has the obligation of constructing and maintaining it. The limit of such responsibility must be considered to be the same as if curb lines actually existed, and, to this extent, your department would be justified in relying upon a subsequent ordinance of the city ordaining curb lines. Otherwise, we must revert to the dictionary definition of a curb as, "a vertical member along the edge of a street to form part of a gutter for the purpose of drainage and for confining vehicular traffic to the street." In other words, a curb serves as a gutter and as a boundary.

Certainly the Department of Highways is authorized under the act of 1931, as amended, to maintain the traveled portion of the street, and, if necessary, to extend such maintenance to the gutter lines in the absence of well-defined curb lines.

You next wish to be advised concerning the effect upon State highways within a borough when such borough becomes a third class city.

This situation is presented by the fact that, on January 1, 1938, the borough of Jeannette became a third class city.

While it is true that, in the development of the State highway system in Pennsylvania, the chronological order of the adoption of State highway was first in townships, second, in boroughs, and, last, in cities, nevertheless, the statutes adopting the various roads as State highway routes described such routes specifically so that a particular piece of road or street was referred to. Thenceforth, such road or street was a State highway and the responsibility of the Department of Highways. There does not appear to be any act of assembly indicating any method of removing a State highway from the system, save through the vacation and abandonment procedure. Consequently, we are of the opinion that, once a particular stretch of road has been adopted as a State highway, it continues thereafter to be a State highway until removed from the system by the legislature or by abandonment or vacation procedure.

For this reason, we are of the opinion that the State highways, in what was formerly the borough of Jeannette, continue to be State highways maintained by the Department of Highways after January 1, 1938, even though on that day the borough of Jeannette became a third class city.

In connection with this query, we have examined the provisions of the Act of May 1, 1929, P. L. 1054, No. 409, which provides for the construction and improvement of streets in third class cities as continuations of State highways. This act provides for the im-

provement of highways not a part of the State highway system, and if the State highways in Jeannette were not on the system, this act would be available to the department to assist the city officials in the maintenance of the particular streets involved. Nevertheless, we are of the opinion that such agreement under the act of 1929 is unnecessary because the particular streets in question continued to be State highways.

Finally, you request our advice as to whether the Department of Highways has any authority to correct drainage conditions along State highways within boroughs where the borough has not ordained the width between curbs.

Section 10 of the Sproul Act of May 31, 1911, P. L. 468, regulates the State highways in boroughs. That section as last amended by the act of June 1, 1933, P. L. 1402, provides in part, as follows:

* * * Provided, That all improvements, reconstruction, and maintenance of any road, street, or highway in boroughs or incorporated towns shall be of such *width and type as may be determined by the Secretary of Highways*. (Italics ours).

This language was construed in Informal Opinion No. 764, under date of August 26, 1936, to Honorable Warren Van Dyke, then Secretary of Highways as follows:

"We believe that this provision places within the discretion of the Secretary of Highways the determination of the extent of the maintenance to be performed, and upon what portions of the street. To decide otherwise would be to deprive the word 'width' of all significance."

Since section 10 of the Sproul act places no limitation upon the extent of maintenance of State highways and boroughs but places the extent of such maintenance within the discretion of the Secretary of Highways, we are of the opinion that the Department of Highways has the power to take such steps as are necessary to preserve the travelled portion of any State highway within a borough. Whether or not curb lines have been ordained by the borough is immaterial as long as the work performed by the department is within the right-of-way limits of the highway. However, if it becomes necessary to construct drainage ditches beyond the right-of-way limits, this can be accomplished only under the provisions of the act of April 29, 1925, P. L. 360, as amended. Under that act damages for the construction of drainage ditches would be payable in the same manner as are land damages resulting from the improvement of State highways in boroughs.

To summarize, you are advised as follows:

1. The Department of Highways may expend its funds for the engineering and constructing of a new street to be used as a relocation of a State highway within a city, if the street has been laid out by appropriate city ordinance, even though the city has not actually constructed and opened a new street for use by the public.

2. The Department of Highways is not relieved of responsibility for the maintenance of a city street added to the system of State highways, even though no curb lines are in existence at the time the street became a State highway. The department is authorized to maintain the traveled portion of such street and, if necessary, to extend its maintenance to the gutter lines in the absence of curb lines.

3. When a borough becomes a third class city all State highways within the former borough continue as State highways within the city, even though not specifically described in a statute as State highway routes within a city.

4. The Department of Highways has authority to correct drainage conditions along State highways within boroughs, even though the borough has not ordained the width between curbs.

Very truly yours,

DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

OPINION No. 256

Public utilities—Tunnel under Delaware River—Permit for construction—Act of December 22, 1933—Expiration of permit—Right to grant new one.

The Pennsylvania Public Utility Commission has authority, under the Act of December 22, 1933, P. L. 108, to grant a tunnel construction permit to an applicant to which a prior permit has been granted and which had failed to begin actual construction within a period of two years from the date of the prior permit, so that it had become void.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 12, 1938

Honorable D. J. Driscoll, Chairman, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning whether the Pennsylvania Public Utility Commission has authority under the

Act of December 22, 1933, P. L. (Special Session) 108, to grant a permit to an applicant to which a prior permit had been granted, and which failed to begin actual construction within a period of two years from the date of the prior permit.

The act made possible the construction and operation of tunnels under the Delaware River, connecting Pennsylvania with New Jersey, and required as a prerequisite for anyone desiring to construct such a tunnel that a permit be secured from The Public Service Commission authorizing such construction. Section 5 of the act provides:

Any permit granted hereunder shall be void unless actual construction of the tunnel covered by the permit shall have been begun within a period of two years from the date of the issuance therefor.

You state that in 1936, The Public Service Commission granted a permit to the Delaware River Tunnel Corporation, which failed to commence construction during the ensuing two years. This applicant, recognizing that its permit has become void, has now filed with the Pennsylvania Public Utility Commission an application for a new permit.

A careful examination of the act does not reveal any provision restricting the number of permits which any applicant may secure, provided the applicant meets the conditions specifically imposed by the act. Admittedly, there is no machinery provided for the renewal of an existing permit, presumably because the conditions established as prerequisites by the act may materially change after a lapse of more than two years. Nevertheless, we are of the opinion that the application by the Delaware River Tunnel Corporation for a new permit should be granted, if the applicant has satisfied all the statutory prerequisites.

Accordingly, you are advised that the Pennsylvania Public Utility Commission has authority, under the Act of December 22, 1933, P. L. (Special Session) 108 to grant a permit to an applicant to which a prior permit has been granted, and which failed to begin actual construction within a period of two years from the date of the prior permit.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

OPINION No. 257

State Government—Public assistance employes—Right to retain provisional employe beyond 90 days—Administrative Code of 1929, sec. 2504-A(d), added by Act of June 24, 1937—Impossibility of making permanent appointments within required time—Right of provisional employes to vacation. Administrative Code of 1929, sec. 222, as amended by Act of June 21, 1937—Right to retain provisional employes to train permanent personnel.

1. The provision of section 2504-A(d) of The Administrative Code of April 9, 1929, P. L. 177, added by the Act of June 24, 1937, P. L. 2003, providing that provisional employes of the Department of Public Assistance and county boards may serve for only 90 days, is mandatory, but where because of administrative difficulties in preparing certified lists of persons eligible for permanent employment, it has proved impossible as a practical matter to make permanent appointments, provisional employes may be continued for such period of time as is absolutely necessary in order to prevent a serious breakdown in administrative efficiency, but such employes must be replaced at the earliest possible moment.

2. The fact that the period of service of provisional employes of the Department of Public Assistance and county boards is limited by statute, does not deprive such employes of their vacation privilege provided by section 222 of The Administrative Code of 1929, as amended by the Act of June 21, 1937, P. L. 1865, but such employes should be allowed a day and a quarter's leave of absence with full pay for each month of service.

3. No matter how desirable it might be to retain provisional employes of the Department of Public Assistance and county boards for a brief period after permanent appointments from the certified lists in order that they may train the new and inexperienced personnel, section 2504-A(d) of The Administrative Code of 1929, as added by the Act of June 24, 1937, P. L. 2003, prohibits the retention of provisional employes after the full quota has been appointed from the certified lists.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 14, 1938.

Honorable Arthur W. Howe, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: You have asked for our advice upon several problems which have arisen in connection with the civil service provisions for the administration of the Public Assistance Law (Act of June 24, 1937, P. L. 2051).

When the General Assembly of the Commonwealth of Pennsylvania revised the procedure whereby relief had been administered to aged, blind, indigent and dependent residents of the Commonwealth, it delegated the newly created Department of Public Assistance and county boards of assistance, the duty of administering the new public assistance legislation. At the same time the General Assembly provided for the appointment of an employment

board and empowered and directed it to conduct examinations of persons desiring employment with the department or the county boards and to prepare lists of eligibles based upon such examinations.

The General Assembly then provided as follows in subdivision (d) of Section 2504-A of The Administrative Code, which was added by the Act of June 24, 1937, P. L. 2003 (71 PS 667) :

(d) The Secretary of Public Assistance and local boards shall have power to appoint provisional employes for the purpose of carrying on the work of the Department of Public Assistance and of local boards, until such time as appointees have been qualified by examination, and have been appointed under the provisions of this act; but such provisional appointments shall not be continued in employment after March first, one thousand nine hundred and thirty-eight, unless theretofore qualified by examination conducted by the employment board, as herein provided. Thereafter all employes, except special examiners appointed by the Employment Board, shall be appointed from a list of eligibles who have passed the required examinations. Such lists shall be used and the names on them shall be placed in an order fixed by the rules of the Employment Board: Provided, however, That no name shall remain on such list longer than two years. In an emergency, if there is no such list, an employer may, with the approval of the Employment Board, nominate a person for non-competitive examination, and may appoint him provisionally if he passes the required examination. After the first day of June, one thousand nine hundred and thirty-eight, no such provisional appointment or successive appointment (in the aggregate) shall be valid for more than ninety days.

You have submitted for our consideration three questions which have arisen in connection with this phase of your activities. These questions will be set forth and answered seriatim :

1. Can the Department and the County Boards continue in employment provisional appointments who may have served the ninety days allowed by the Act until such time as lists of eligibles have been certified by the Employment Board?

The above quoted portion of Section 2504-A (d) of The Administrative Code, which prohibits longer than a ninety day period of provisional employment, clearly requires a mandatory rather than a directory construction. This is particularly true in view of the humanitarian and beneficial nature of the public assistance legislation and the desirability of having its administration freed from the effects of political influences.

It appears, however, that the Employment Board has been unable to certify sufficient lists of persons eligible for employment to permit the replacement of all provisional employes, before September 1, with persons selected from such lists. (It might be noted in this connection that the delay in the certification of lists of eligibles is due in part to the fact that a legislative sub-committee requested the Employment Board to cease certifying such lists). It also appears that the replacement of provisional employes with persons selected from certified lists is proceeding at a rapid rate and will be completed in the near future. In addition, you state that the efficiency of the administration of public assistance will be seriously impaired if you are required to discharge immediately all provisional employes.

The legislature exercised great care in the preparation and enactment of this statute, and every effort was made to foresee and provide for the many difficulties which invariably arise when the Commonwealth enters into a new field of administrative activity. In providing that provisional employes could be retained for a period of ninety days after June 1, 1938, the legislature evidently felt that ample time had been allowed for the appointment of all required employes from certified lists. However, as often happens, when the administration of a new and untried statute is inaugurated, the practical problems which confronted the executive branch of the government rendered an immediate complete compliance with every detail of the statute impossible.

Under such circumstances, the legislature certainly did not intend the executive agencies charged with the duty of inaugurating the new system of Public Assistance to abandon a great portion of the progress which has been made toward the prompt establishment of an efficient organization by discharging every provisional employe on August 31. Such a step would seriously hinder the administration of the public assistance laws, and the disadvantages which would accrue from it would far outweigh any possible advantage.

We feel, therefore, that in view of the unexpected obstacles which have delayed the appointment of employes from lists of eligibles, the provisional employes which the Department of Public Assistance and the county boards have been compelled to retain after August 31 in order to prevent a serious breakdown in administrative efficiency, may properly be paid their regular compensation for such periods of time as they have respectively served since August 31, 1938.

You are also advised that the retention of provisional employes may only be continued for such period of time as is absolutely necessary, and that such employes must be replaced at the earliest possible moment with employes appointed from certified lists of eligibles.

2. In case it is your decision that provisional appointees, as above described, can be kept in employment after September 1, will it be permissible at the time of their eventual discharge to allow the earned annual leave provided by the Administrative Code?

The provisional employes obtained by the Department of Public Assistance and the county boards occupy the same status as all other employes of the Commonwealth and the mere fact that their period of service is limited by statute should not deprive them of the privileges which are allowed to other State employes. Section 222 of The Administrative Code, as amended by the Act of June 21, 1937, P. L. 1865 (71 PS 82), provides in part as follows:

Work-Hours and Vacations.—Each employe of an administrative department, of an independent administrative board or commission, or of a departmental administrative board or commission, if employed for continuous service, shall work during such hours as the head of the department or the board or commission shall require but not less than thirty-five hours per week. Such employe shall be entitled, during each calendar year, to fifteen days' leave of absence, with full pay, * * *.

It is customary in cases where an employe has been retained by the Commonwealth for a period less than a year to allow vacation on a pro rata basis. We feel, therefore, that the provisional employes of the Department of Public Assistance should be allowed a day and a quarter's leave of absence with full pay for each month of service.

3. In instances where there is a press of work and also a large proportion of new and inexperienced personnel brought about by the operation of the examination system, will it be permissible after September 1 to continue in employment, for a limited time, provisional persons with experience, even though the lists have been certified and selections for the regular staff made and appointed? This is desirable as a means of training the new and inexperienced personnel and, at the same time, keeping up with the large number of applications and other volume of work which the department currently has.

We have already indicated that section 2504-A, subdivision (d) of The Administrative Code must be construed as mandatory and

that the only excuse for noncompliance with its provisions is administrative impossibility. Consequently, no matter how desirable it might be to retain provisional employes after the selections from the certified list have been made, we feel that such action is clearly prohibited by the above mentioned provision of The Administrative Code and that no provisional employes may be retained after the full quota of persons has been appointed from the certified lists.

Very truly yours,

DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

OPINION No. 258

Minors—Hours of employment—Female minors—Women's Labor Laws of July 25, 1913, as amended by Act of June 4, 1937—Child Labor Law of May 13, 1915, as amended.

Insofar as hours of employment of minor female employes are concerned, the provisions of the Women's Labor Law of July 25, 1913, P. L. 1024, sec. 3, as last amended by the Act of June 4, 1937, P. L. 1547, prevail, but the other provisions of the Child Labor Law of May 13, 1915, P. L. 286, as amended, relating to conditions of employment, certificates, etc., are unaffected by the Women's Labor Act.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 19, 1938

Honorable Ralph M. Bashore, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: We have the request of Honorable James S. Arnold, Secretary of the Industrial Board, Department of Labor and Industry, asking for an opinion as to whether female minors under the age of eighteen years are subject to the hour provisions of the Women's Labor Law or to the provisions of the Child Labor Law.

Section 3 of the Women's Labor Law (Act of July 25, 1913, P. L. 1024), as last amended by the Act of June 4, 1937, P. L. 1547, provides as follows:

Except as hereinafter provided, no female shall be employed or permitted to work in, or in connection with, any establishment for more than five and one-half days in any one week or more than forty-four hours in any one week, or more than eight hours in any one day: Provided, That one day of the rest may be subdivided into two days of twelve hours each for women employes in hotels,

boardinghouses, and in charitable, educational and religious institutions, at the discretion of the Department of Labor and Industry, with the approval of the Industrial Board.

Section 4 of the Child Labor Law (Act of May 13, 1915, P. L. 286), as amended by the Act of July 19, 1935, P. L. 1335, provides in part as follows :

No minor under eighteen years of age shall be employed or permitted to work in, about, or in connection with any establishment, or in any occupation, for more than six consecutive days in any one week, or more than forty-four hours in any one week, or more than eight hours in any one day except messenger boys employed by telegraph companies at offices where only one such minor is employed as a messenger in which case such minor shall not be employed for more than six consecutive days in any one week, or more than fifty-one hours in any one week, or more than nine hours in any one day.

It is to be noted that the provisions of the act of 1937, above cited, are general in their operation, with certain exceptions expressed in the act, none of which is material here.

Where there is a repugnancy between two laws passed at different sessions of the legislature, the law latest in date of final enactment shall prevail (Section 66 of the Statutory Construction Act of 1937, P. L. 1019). Applying the statutory rule of construction to the facts here, the directions of the act of 1937 supersede such provisions of the Act of 1915, P. L. 286, as amended, as are irreconcilable therewith.

Furthermore, it is not to be presumed that the legislature intended that a female of twenty-one years of age might lawfully be employed for no more than five and one-half days in one week, while a female minor of the age of seventeen years could lawfully be employed for six days in the same period ; particularly in view of the history of child labor legislation in Pennsylvania which has ever manifested a settled policy to limit the hours of employment of minors to periods less than those allowed to adults.

These considerations lead us to the opinion, and we so advise you, that in so far as the employment of female minors is concerned, the act of 1937, above cited, prevails. The other provisions

of the Child Labor Law relating to conditions of employment, certificates, etc., are unaffected by the act of 1937.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

JOHN T. DUFF, JR.,
Deputy Attorney General.

OPINION No. 259

Mines and mining—Storage of explosives pending distribution to miners—Applicability of regulations imposed by Act of July 1, 1937—Exemption of temporary storage of day's supply—Statutory purpose.

1. A mine operator's temporary storage of a day's supply of explosives pending distribution to its miners for use in its own mines is, by virtue of section 1 of the Act of July 1, 1937, P. L. 2681, regulating the manufacture, storage and possession of explosives, exempt from the provision of that act, but the possession and storage of larger amounts of explosives for longer periods of time, even though intended for eventual distribution to its employees, is subject to the provisions of the statute.

2. The primary objective of the Act of July 1, 1937, P. L. 2681, was to require, for the safety of the public, that explosives be stored in suitable magazines insofar as is reasonable and practicable, and the act is to be construed to effect the legislative purpose.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., September 15, 1938.

Honorable Joseph J. Walsh, Deputy Secretary of Mines, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the extent to which mine operators are exempt from the provisions of the Act of July 1, 1937, P. L., 2681, 73 PS 151 et seq., which regulates the manufacture, storing and possession of explosives.

It appears that many mine operators have comparatively large supplies of explosives constantly available for distribution to and use by the miners employed by them. It is the contention of certain of these operators that all explosives possessed or stored by them pending distribution are in actual use in legitimate and lawful coal mining operations, and that they are consequently exempt from the provisions of the Act of 1937, P. L. 2681, by virtue

of the proviso contained in section 1 of that act which reads as follows:

* * * Provided, That nothing contained in this act shall be construed to apply to the *actual use* of explosives in legitimate and lawful coal mining operations, agricultural work, or to the military and naval forces of the United States, or to the transportation of explosives upon vessels or railroad cars when in conformity with the rules of the Interstate Commerce Commission. (Italics ours).

In ascertaining the proper meaning of the phrase "actual use in legitimate and lawful coal mining operations," it is appropriate to refer to certain well established rules of statutory construction. Section 51 of the Statutory Construction Act of 1937, P. L. 1019, provides in part as follows:

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters—(1) the occasion and necessity for the law; * * * (3) the mischief to be remedied; (4) the object to be attained; * * * (6) the consequences of a particular interpretation; * * *

The Act of 1937, P. L. 2681, is a proper exercise of the police power on the part of the General Assembly of the Commonwealth of Pennsylvania, and its primary objective is to require, for the safety of the public, that explosives be stored in suitable magazines in so far as is reasonable and practicable. To adopt the broad exemption urged by certain mine operators would be to condone the very type of hazard which this statute was designed to abolish and would render its provisions ineffective to a considerable extent. It is our opinion that, if the proviso of section 1 be construed in accordance with the aforementioned rules of statutory construction, the conclusion is inescapable that the legislature did not intend to exempt all explosives possessed or stored by mine operators from the safeguards prescribed by the act. Furthermore, if the legislature had intended to enact an exemption broad enough to exclude the mere possession and storage of explosives by mine operators, it would have been much more simple and expeditious to provide merely that the statute should not apply to explosives in the possession of mine operators. In limiting the operation of the proviso to explosives in actual use, the legislature has clearly indicated that it is not to be construed so broadly as to exempt mine operators completely from the requirements of the statute.

A somewhat analogous situation was involved in the case of *Board of Equalization v. Carter Oil Company*, 3 Pac. (2d) 816, 77

A. L. R. 1060 (1931). This case involved the interpretation of a statute of the State of Oklahoma which relieved from the burden of ad valorem taxation:

* * * appliances and equipment *used in and around* any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid *and actually used in the operation of such well or mine*; * * *. (Italics by the court).

A portion of the property involved in this case consisted of a warehouse and its contents which included material, equipment and supplies concentrated therein for the purpose of being used in and around the producing oil wells of the Carter Oil Company. The court held that this property was not within the statutory exemption quoted above, making the following comment:

We consider first the item of the warehouse and its contents consisting of material, equipment, and supplies concentrated therein for the purpose of *being used* in and around the producing oil wells of the Carter Oil Company. This property is not in actual use, but it is stored in a central location for convenience and intended for future use in the operation of leases belonging to the company and for the production of oil. This item is not exempt from ad valorem taxation. * * *. (Italics by the court).

Similarly, the mere possession and storage of explosives by mine operators does not bring them within the exemption set forth in section 1 of the Act of 1937, P. L. 2681, and in this connection it is appropriate to refer to section 52 of the Statutory Construction Act of 1937, P. L. 1019, which provides in part as follows:

In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions among others:

* * * *

(5) That the Legislature intends to favor the public interest as against any private interest.

Having arrived at the conclusion that the storage of explosives by mine operators is not entirely exempt from the requirements of the Act of 1937, P. L. 2681, we are immediately confronted with the problem as to when explosives may fairly be said to be in actual use in legitimate and lawful coal mining operations. This, of course, is a practical question for which no universally applicable answer can be devised. In each case the answer depends upon the peculiar circumstances involved. We can do no

more than set forth certain general rules to aid you in determining whether or not the Act of 1937, P. L. 2681, is applicable to explosives owned and stored by any particular coal company, and indicate certain circumstances in which we feel the act is clearly applicable or inapplicable, as the case may be.

As has already been indicated, we feel that the mere storage and possession of explosives by a mine operator is not exempt from the provisions of this statute, and that a storage of a comparatively large amount of such explosives awaiting future distribution to the miners is only permissible under the conditions prescribed therein. On the other hand, small quantities of explosives destined for immediate use in mining operations must be stored temporarily at various places outside the mine pending distribution to the miners, and it would be impracticable and unreasonable to subject each such storage of explosives to the requirements of the Act of 1937, P. L. 2681. We feel that it was this type of situation which the legislature had in mind when it provided that nothing contained in the statute should be construed as applying to the actual use of explosives in legitimate and lawful coal mining operations.

You are advised, therefore, that a mine operator's temporary storage of a day's supply of explosives pending distribution to its miners for use in its own mines is exempt from the provisions of the Act of July 1, 1937, P. L. 2681, but that the possession and storage of larger amounts of explosives for longer periods of time is subject to the provisions of that statute.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

WILLIAM H. WOOD,
Special Deputy Attorney General.

OPINION No. 260

Officers—Resignation—Necessity for acceptance—Judge—Mailing resignation—Death before receipt by Governor.

1. In the absence of statutory provision to the contrary, in order for a resignation to be effective, it must be accepted by that person or body which has the power to appoint a successor.

2. Where a common pleas judge mails a letter of resignation to the Governor and dies before the letter is received by the Governor, the resignation

is ineffective and the public records should indicate that the judge died in office, rather than that he resigned.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 16, 1938:

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

Sir: You have requested our advice as to the proper notation to be placed on official records of the Commonwealth with respect to the late Honorable William McKeen.

Judge McKeen, then President Judge of the Court of Common Pleas of the Third Judicial District, addressed a letter of resignation to you on July 9, 1938, "to take effect immediately." The letter was mailed on July 11, 1938, and later, on the same day, Judge McKeen died. The letter of resignation was received in your office on July 12.

The question here presented is an interesting one, involving the determination of whether or not a resignation of a public official must be accepted in order for such resignation to be effective. If acceptance is necessary, then, since Judge McKeen died prior to the date that the resignation was actually received in your office, and prior to its acceptance, no resignation was effected, and your official records would be marked "died July 11, 1938."

However, if a public officer may merely tender his letter of resignation, and no power can intervene to deprive him of the right to remove himself from public office, then your records would be marked "resigned."

In the case of *Steel v. Commonwealth*, 18 Pa. 451 (1852) the question arose whether or not a letter of resignation submitted by a prothonotary and filed in the office of the Secretary of the Commonwealth was effectual to bring about the resignation of the officer. Chief Justice Black, speaking for the Supreme Court stated on page 454:

* * * A resignation, which never practically took effect in the retirement of the officer, and was never accepted by the executive, is no resignation at all. * * *

In the case of *Jennings v. Beale*, 146 Pa. 125 (1892), involving the question of resignation of a corporate officer, the conclusions of law of a Master were affirmed by the lower court and by the Supreme Court. On page 131 appears the following language:

* * * The mere tendering of his resignation did not put him out. "At common law, as offices are held at the will of both parties, if the resignation of an officer be not accepted, he remains in office:" Bouvier's Law D.; *Edwards v. United States*, 13 Otto 471; *Steele v. Commonwealth*, 18 Pa. 451. * * *

Perhaps the leading authority for the proposition that the resignation of a public officer must be accepted by the appointing power in order for such resignation to be effective in the case of *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314. Mr. Justice Bradley, in developing the court's position that the common law which required a resignation to be accepted before it becomes effective, was the proper rule, stated his reasons on page 474:

As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound, in the interest of the community of good government, to bear. And from this it followed of course that, after an office was conferred and assumed, it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. See 1 Kyd, Corp., ch. 3, sec. 4; Willcock, Corp., pp. 129, 238, 239; Grant, Corp., pp. 221, 223, 268; 1 Dillon, Mun. Corp., sec. 163; *Rex v. Bower*, 1 Barn. & C., 585; *Rev v. Burder*, 4 T. R., 778; *Rex v. Lone*, 2 Str., 920, *Rex v. Jones*, 2 Str., 1146; *Hoke v. Henderson*, 4 Dev., 1; *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; *State v. Ferguson*, 31 N. J. L., 107. This acceptance may be manifested either by a formal declaration, or by the appointment of a successor. "To complete a resignation," says Mr. Willcock, "it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant." Willcock, Corp., 239.

A well considered opinion of one of our lower courts appears in the case of *Commonwealth of Pennsylvania*, ex rel. *District Attorney v. Hess*, 2 D. & C. 530 (1922). Judge Hassler of the Court of Common Pleas of Lancaster County there had before

him the question of a resignation of a school director. On page 531 he stated:

Under the common law, a public officer cannot resign his office without the consent of the body which appointed him or which has power to fill a vacancy. This consent may be either by express acceptance of the resignation or by the appointment of another to the office vacated: *Rex v. Lane*, 2 L. R. A. 1304; *Van Orsdale v. Hazard*, 3 Hill (NY), 243; *Edwards v. United States*, 103 U. S. 427. There is no statute in this State changing the rule of the common law.

There are cases in some of the states that, under the peculiar circumstances of each case, decide that a resignation creates a vacancy as soon as received by the proper authorities. In most of these cases I find that only the people were authorized to fill the vacancies in the offices, although the law required the resignation to be sent to certain officers.

There can be no question but that the weight of judicial authority is that the resignation of a public officer is ineffective until accepted by the appointing power. Of course, statutes may change this rule of law. Thus, in Pennsylvania, a State employe who has reached the age of sixty years may retire for superannuation by filing with the retirement board a prescribed application: Act of June 27, 1933, P. L. 858, as last amended by the Act of May 18, 1937, P. L. 683. Under the provisions of this act, the retirement of the public officer, who is also a State employe, and a contributor to the retirement system, and who complies with the act, becomes effective without the consent of the power which appoints the successor to the retiring officer. However, in the instant case, there was no retirement effected under the act of 1923. Hence that act does not change the common law rule in this case.

Thus, we are led to the following conclusion: In the absence of a statute, in order for a resignation to be effective, it must be accepted by that person or body which has the power to appoint a successor. Judge McKeen's resignation was received in your office after the time of his death. Hence, he was not a public officer in being, whose resignation could be accepted by you. You, of course, could not accept the resignation of an officer, which acceptance would remove him from office, when death had removed the officer from his public position. Therefore, you are advised that your records should be marked "died July 11, 1938".

This opinion in no way rules upon the question of the retirement allowance of Judge McKeen.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,

Attorney General.

OLIVER C. COHEN,

Deputy Attorney General.

OPINION No. 261

Real property—Real estate brokers—Real estate auctioneers—Licenses—Limitations of privileges—Act of June 26, 1873, as amended by Act of May 5, 1921—Real Estate Brokers License Act of July 2, 1937—Exemptions.

1. Section 2(a) of the Real Estate Brokers License Act of July 2, 1937, P. L. 2811, providing that the term "real estate broker" shall include all real estate auctioneers, does not repeal directly or by implication the Act of June 26, 1873, P. L. [1874] 332, providing for the payment by auctioneers of a license tax and no other, so that if an applicant wishes to engage only in auctioneering, as distinguished from brokering generally, of real estate, he may do so if properly licensed under the Act of 1873, as amended by the Act of May 5, 1921, P. L. 406, without obtaining a license under the Act of 1937.

2. If an applicant wishes to become licensed as a real estate broker and to do all acts provided for in the Real Estate Brokers Act of May 1, 1929, P. L. 1216, as last amended by the Act of July 2, 1937, P. L. 2811, he may obtain a license under that act and, as incident to such licensure, may perform the activities of a real estate auctioneer.

3. Under section 2(c) of the Real Estate Brokers License Act of July 2, 1937, P. L. 2811, any administrator or executor or any other person or corporation acting under the appointment or order of any court, need not be licensed under the act in order to engage in auctioneering within the scope of his duties.

4. Under section 6 of the Real Estate Brokers License Act of July 2, 1937, P. L. 2811, an auctioneer licensed under the Act of June 26, 1873, P. L. [1874] 332, for a period of 2 years immediately preceding the effective date of the Act of 1937, could have qualified as a real estate broker within 90 days after the effective date of the act without examination, but at the expiration of the 90-day period, the privilege expired.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., December 26, 1938.

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

Sir: I have before me your request to be advised as to whether auctioneers who pay a county license tax must obtain a state real

estate broker's license to engage in, or carry on the business, or act in the capacity of real estate auctioneer.

You have submitted for my attention a clipping from the "New Era", a newspaper published at Lancaster, Pennsylvania, which is captioned "Autocratic Government", and consists of a letter sent by a H. Frank Eshelman to the editor of that paper. The clipping states, in part, as follows:

Our country auctioneers who have been selling real estate in settlement of estates or generally, must have a real estate brokers license, or a real estate salesman's license. Auctioneer's license will not do. Formerly it was held by Deputy Attorney General Schnader that this act did not include auctioneers. See 13 County and District Reports 439. He held they could auction real estate without license other than auctioneer's license.

You also attach to your request a letter from H. Frank Eshelman, Attorney at Law, Lancaster, Pennsylvania, dated July 7, 1938. I quote the entire first paragraph of Mr. Eshelman's letter.

A considerable heat and excitement has been created here among attorneys for executors and administrators, etc., in the settlement of estates by reason of the Department refusing auctioneers the right to call auctions of real estate unless they have a real estate salesman license under the Act of 1929, P. L. 1216. There surely must be a distinction between a real estate salesman and an ordinary auctioneer.

You also enclose a letter from Albert E. Enck, Hopeland, Pennsylvania, dated August 17, 1938. I quote in part from Mr. Enck's letter.

* * * My business is an auctioneer, and I am licensed as an auctioneer in Lancaster County where I do auctioneering only; therefore according to the Act that you send me I do not need to register in your Bureau under Section B.2-C. I am only hired by the owner of the property to sell in public only to the highest bidder. Under this exception in the Act I do not see that I need another license to auctioneer in addition to the one I now have.

You also enclose a letter from Mr. Amos K. Waser, Manheim, Pennsylvania, dated August 11, 1938. I quote in part from Mr. Waser's letter.

* * * Why were not the auctioneers advised of the law and the exemption period Sep. 30, 1937? I doubt very much if one out of a hundred rural auctioneers know of this act which is now claimed to involve them.

Do you mean to say that no free holder can offer his property at public auction unless he employes a real estate broker, who in turn employes an auctioneer to sell the property for the property owner.

You also enclosed a letter from A. W. Reese, Attorney at Law, Lancaster, Pennsylvania, dated July 18, 1938. Mr. Reese asks advice about the Act of July 2, 1937, P. L. 2811. I quote in part from his letter.

* * * Most real estate sales are public sales of real estate sold under order of the Orphans' Court in the settlement of estates. * * *

You also enclosed a letter from Honorable Samuel E. Bertolet, Attorney at Law, Reading, Pennsylvania, dated August 3, 1938. I quote in part from Mr. Bertolet's letter.

* * * He is one of the old style country auctioneers who cries public sales of farm stocks and farms, when requested.

Mr. Goodhart takes out a license as auctioneer every year, paying the legal fee therefor. This is under the Act of June 26, 1873, P. L. (1874) 332, Sec. 1; and the Act of May 5, 1921, P. L. 406, Sec. 1.

Now comes the Act of July 2, 1937, P. L. 2811 (Act No. 590), Section 2 (a), amending Sec. 2 of the Act of May 1, 1929, P. L. 1216, in which the term "real estate broker" is defined to include "all real estate auctioneers, and real estate appraisers."

As stated in the letters above referred to this question involves an interpretation of the amendment to the Real Estate Brokers Act made July 2, 1937, P. L. 2811, section 2 (a), amending section 2 of the Act of May 1, 1929, P. L. 1216, in which the term "real estate broker" is defined to include real estate auctioneers. I quote more fully that part of the section with which we are concerned.

The term "real estate broker" shall also include * * * all real estate auctioneers, * * *

Reference is made in the letters to the sale of real estate in the Orphans' Court by the order of that court. Section 2 (c) of the act provides as follows:

Neither of the said terms "real estate broker" or "real estate salesman" shall be held to include within the meaning of this act * * * in any way, attorneys at law and justices of the peace, nor shall they be held to include any receiver, trustee in bankruptcy, administrator or executor, or any other person or corporation acting under the

appointment or order of any court, or as trustees under the authority of a will or deed of trust where only the transactions pertaining thereto are involved. * * *

The Act of June 26, 1873, (1874), P. L. 332, referred to in the letters provides in part as follows:

* * * auctioneers shall be rated with merchandise brokers, and in lieu of all commissions heretofore directed to be paid by them, shall pay, in the same manner as brokers, a license tax similar to that paid by said brokers, and no other. * * *

The act of 1873 was amended May 5, 1921, P. L. 406, section 1 by inserting the following proviso:

* * * nothing in this act contained shall be construed to require the licensing of or the payment of a license tax by any auctioneer for selling live stock or farm implements.

The clipping from the "New Era" makes reference to the case of "Real Estate Brokers' Licenses", an opinion by Special Deputy Attorney General Schnader, under date of January 2, 1930, and reported in 13 D & C, 439. We quote that part of the opinion which is pertinent to this discussion.

1. Does an auctioneer who occasionally sells real estate, as an auctioneer, require a broker's license?

Auctioneers must be licensed under the Act of May 5, 1921, P. L. 406. Having been thus licensed, they may, in our opinion, sell at auction property of any character without any further license. This includes real estate as well as personal property.

The Real Estate Broker's License Act does not specifically mention auctioneers, and, in our judgment, they do not come within the definition of "real estate brokers" contained in section 2 (a) of the act, if their transactions in connection with real estate are confined to sales at auction. If, however, they sell real estate or offer it for sale otherwise than at auction, they come within the purview of the act.

The exemption referred to in one of the letters concerns section 6 of the act of 1937, which provides as follows:

Any person who has for a period of two years immediately preceding the effective date of this act, engaged in any business or occupation not heretofore required to be licensed as a real estate broker, and who is under the provisions of these amendments required to be so licensed, shall be issued a real estate broker's

license by the Department of Public Instruction, without requiring him or her to submit to an examination as required by the act to which this is an amendment and its amendments: Provided, That such person makes application for such license within ninety days after the effective date of this act and pays the fee prescribed by law for such license.

The act of 1937 does not directly repeal the act of 1873, nor do we believe it does so by implication. The rule of statutory construction as to an implied repeal by a later law provides that a later law shall not be construed to repeal an earlier law unless the two laws be irreconcilable, unless the later law is a general law which purports to establish a uniform and mandatory system covering a class of subjects.

Before the passage of the act of 1937 auctioneering of real estate was not an authorized activity of a real estate broker. The only act which covered such activity was the act of 1873. Now a real estate broker is authorized to engage in auctioneering of real estate without first becoming licensed under the act of 1873.

Both laws are, therefore, on the statute books and must be read together; and if so read the term "all real estate auctioneers" in the act of 1937 cannot be said to include those covered by the act of 1873; otherwise the earlier act would be nullified. Auctioneers licensed under the act of 1873 are a long and well defined and well established body of men in Pennsylvania. They make no pretense at being real estate brokers. The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed if possible, to give effect to all its provisions.

From the foregoing, we are of the opinion,

1. That if an applicant wishes to engage only in auctioneering, as distinguished from brokering generally of real estate he may become licensed under the act of 1873 (amended in 1921) as such an auctioneer and pay the license fee provided for by the said act. He is then limited to engage in business only as an auctioneer of real estate, throughout the Commonwealth and it is not necessary to obtain a license under the act of 1937;

2. If the applicant wishes to become licensed as a real estate broker and do all of the acts as provided for in the Real Estate Brokers Act, amended by the act of 1937, he shall make an application to become licensed as a real estate broker and as incident to such licensure, he may perform the activities of an auctioneer;

3. It should be noted in connection with the act of 1937 that the term "real estate broker" and "real estate salesman" shall not be held to include any administrator or executor or any other person or corporation acting under the appointment or order of any court, and even if such person in the performance of his duties as such engages in auctioneering he is not required to be licensed under the act of 1937 to perform such duties.

4. The act of 1937 added auctioneering to the activities of a real estate broker. An auctioneer could have qualified also as a real estate broker under the exemption provision of that act, within ninety days after its enactment. Having failed to do so, he has now lost such privilege. However, he has not lost his right to act as an auctioneer only under the act of 1873.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

JAMES H. THOMPSON,
Special Deputy Attorney General.

OPINION No. 262

Escheats—Unclaimed funds of Pennsylvania corporations—Deposit outside Commonwealth—Conflict of laws—Act of June 25, 1937—Right to require reports.

1. Unclaimed funds of Pennsylvania corporations consisting of inactive deposits maintained for the sole purpose of covering possible claims for dividends, debts, interest on debts, customers' deposits, proceeds, dividends or surrender value of insurance policies, or stock, constitute intangible personal property and are, therefore, subject to the escheat laws of Pennsylvania, although kept on deposit in other states.

2. A corporation can be compelled to report unclaimed funds to the Commonwealth of Pennsylvania under the Act of June 25, 1937, P. L. 2063, only if the Commonwealth has jurisdiction to compel the payment of such funds into the State Treasury.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 21, 1938.

Honorable J. Griffith Boardman, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the Act of June 25, 1937, P. L. 2063, 27 PS 434 et seq., which requires corporations to make reports of various types of unclaimed funds to the De-

partment of Revenue, and which provides a procedure for the payment of such funds into the State Treasury, is applicable to funds of the type enumerated in the statute if they are kept on deposit in other states by Pennsylvania corporations. This act applies to dividends; debts; interest on debts; customers' deposits; proceeds, dividends or surrender values of insurance policies; and stock, which have been unclaimed for six or more successive years.

The problem which you have presented raises an unusual question of conflict of laws, and a search of the digests has failed to reveal any case in which this exact issue has been raised or determined. It becomes necessary, therefore, to approach the matter through a consideration of the fundamental theory which underlies such statutes, and through an analysis of the available decisions involving somewhat analogous situations.

It should be noted at the outset that it is impossible to consider the filing of reports with the Department of Revenue and the actual payment of funds into the State Treasury as entirely dissociated problems. In other words, we do not feel that the corporations in question could be compelled to report the unclaimed funds held by them on deposit in other states unless the Commonwealth has jurisdiction to compel the payment of such funds into the State Treasury.

In this connection we refer to the case of *Germantown Trust Company et al. v. Powell*, 260 Pa. 181 (1918). This case involved the Act of 1915, P. L. 878, which provided a comprehensive method for requiring reports to be made to the Auditor General by persons or corporations having money on deposit or property in their possession for a long period of time belonging to other persons, and which prescribed the circumstances under which such property might be escheated and the proceedings therefor. When the Auditor General demanded from the plaintiffs the reports required by this act, they filed bills in equity praying that it be declared unconstitutional. The lower court in effect ruled that the plaintiffs were obliged to file reports with the Auditor General even though the act might ultimately be declared invalid.

The Supreme Court reversed the ruling of the lower court, making the following comment on page 184:

* * * Of course, in the exercise of its right of visitation, for purposes of taxation and regulation, or to facilitate the accomplishment of any other proper end, the State has power to compel corporations to render it

reports; but it cannot do this for the avowed purpose of enabling one of its officials to do something which the Constitution forbids or, even to accomplish a proper end, in a manner prohibited by the organic law.

Accordingly, we feel that the corporations here involved can only be compelled to report under the Act of 1937, P. L. 2063, those funds which the Commonwealth of Pennsylvania has jurisdiction to require to be paid into the State Treasury.

Considering now the jurisdiction of the Commonwealth of Pennsylvania to require the payment into the State Treasury of unclaimed funds on deposit in other states, it is well established, as was held by the Supreme Court in the case of *Commonwealth v. Dollar Savings Bank*, 259 Pa. 138 (1917), "that every sovereign state has jurisdiction to take charge of apparently abandoned or unclaimed property". This right to take possession of or escheat unclaimed personal property, is not a question of succession, but an incident of sovereignty. Such right, as it exists in this country, is descended from the ancient prerogative of the King of England to seize all unclaimed goods, long known as "bona vacantia".

Accordingly, it would seem that unclaimed tangible personalty should only be seized by the jurisdiction within which it is located. Intangible personal property should be subject to similar requirements, and in the present case it remains to be determined whether or not the intangible personalty involved has its situs within the Commonwealth of Pennsylvania.

In considering this question, it is appropriate to refer to certain decisions involving jurisdiction for the purposes of taxation, for the right to impose taxes is an attribute of sovereignty just as is the right to take possession of unclaimed personalty. It is well established that intangible personal property, the ownership of which is in a domestic corporation, has a situs for the purpose of taxation in the state of incorporation. Thus, in the case of *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234, 81 L. ed. 1061 (1937), Mr. Justice Stone, in delivering the opinion of the court, made the following comment:

Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles, see *Cream of Wheat Co. v. Grand Forks County*, 253 U. S. 325, 328, 64 L. ed. 931, 933, 40 S. Ct. 558; *Johnson Oil Ref. Co. v. Oklahoma*, 290 U. S. 158, 161, 78 L. ed. 238, 241, 54 S. Ct. 152; *Virginia v. Imperial Coal Sales Co.*, 293 U. S. 15, 19, 79

L. ed. 171, 174, 55 S. Ct. 12, at least in the absence of activities identifying them with some other place as their "business situs". * * *

In accordance with this principle, unclaimed funds of Pennsylvania corporations, although kept on deposit in other states, may be deemed to have their situs here and to be subject to the provisions of the Act of 1937, P. L. 2063. There is nothing to indicate that such funds have acquired a business situs in any other jurisdiction, and their very nature indicates that they are nothing more than inactive deposits maintained for the sole purpose of covering possible claims.

An analogous principle was relied upon in the case of *Guthrie v. Pittsburgh, Cincinnati & St. Louis Ry.*, 158 Pa. 433 (1893). This case involved the estate of a resident of the District of Columbia who appointed, by will, a citizen and resident of Pennsylvania as trustee of his estate. The trustee kept the securities of the estate on deposit with a trust company in the City of Washington, D. C. It was held that certain bonds which were among the securities of the estate were subject to taxation by the State of Pennsylvania. In the course of the opinion of the court below, which was affirmed, the following comment appears:

It was held, however, in the case of *Foreign-Held Bonds*, 15 Wallace, 300, that when such bonds as these now under consideration are held by non-residents of the state, it is beyond the power of the state to tax them, and it is maintained that the situs of this trust is Washington, D. C., and therefore that these are in law "foreign-held bonds".

It certainly seems well settled that the situs of such property for the purpose of taxation is in that state where the trustee in whom is vested the legal title and ownership is domiciled: *West Chester School Dist. v. Darlington*, 38 Pa. 157; *Carlisle v. Marshall*, 36 Pa. 397; *Price v. Hunter*, 21 W. N. 306, U. S. C. C., East. Dist. of Pa. (These are cases under the Act of 1846, but, so far as the present case is concerned, the acts are practically identical.) See also: *People v. Assessors of Albany*, 40 N. Y. 154; *Dorr v. Boston*, 6 Gray, 131. "Property held in trust should be assessed to the trustee where he resides. . . . The trustees are the representatives of the fund and it should be assessed at their residences." *Desty on Taxation*, page 337.

These comments are particularly pertinent in the present situation, for the underlying theory upon which the Act of June 25, 1937, P. L. 2063, is based, is that unclaimed funds of the type

described therein are trust funds which were held for the benefit of persons whose whereabouts have become unknown.

Similarly, in the case of *Commonwealth v. Traction Company*, 233 Pa. 79 (1911), there was involved the taxability of bonds owned by residents of the Commonwealth of Pennsylvania but delivered by them to and held by corporations and individuals of the State of New York as collateral security for money borrowed by the former from the latter residents. In this case the opinion of the lower court was affirmed and in that opinion the following comment appears:

The fact that the bonds were physically out of the state cannot affect the question of their taxability. The owners were domiciled in this state and the bonds had their situs here also: Cooley on Taxation (3d ed.), 86, 87 and notes.

The principles established in the foregoing cases are applicable to bank deposits as well to other types of intangible personal property, and it is an accepted principle of law that such deposits, if they have not acquired a business situs elsewhere, have a situs for the purposes of taxation at the domicile of their owner. *Fidelity and Columbia Trust Company v. City of Louisville*, 245 U. S. 54, 62 L. ed. 145 (1917); *Baldwin v. Missouri*, 281 U. S. 586, 74 L. ed. 1056 (1930).

It is our opinion that the theory upon which intangible personal property is given a situs at the domicile of the owner for the purposes of taxation should be equally applicable to situations involving unclaimed intangible personal property. No cases have been found in which the precise question here involved was raised, but in two closely analogous situations it has been ruled that jurisdiction to take possession of unclaimed intangible personalty is vested in the state of the owner's domicile.

In the case of *In re Lyons' Estate*, 26 Pac. (2d) 615 (1933) (Wash.), a resident of Alaska died intestate and without heirs and having on deposit in a bank in the State of Washington a sum of approximately \$6,200. The petition of the State of Washington for the escheat to it of this sum was denied and the state thereupon took an appeal. The Supreme Court of Washington ruled that the money was not escheatable to the State of Washington. In this opinion the following statement appears:

The debt owing by the Seattle bank was a credit belonging to the decedent Lyons before and at the time of his death, and, applying the rule *mobilia sequuntur personam*, the situs of this property was at the domi-

cile of its owner and therefore it was not property within this state at the time of his death and not subject to escheat under our statute.

Similarly, in Volume 32 of the Opinions of the Attorney General of the United States, page 268, it was ruled that United States registered bonds escheat to the state of domicile of the deceased registered payee.

In this connection the recent decision of the Supreme Court of Pennsylvania in the case of *In re Escheat of Moneys in Custody of United States Treasury*, 322 Pa. 481 (1936), is illuminating. This case involved funds that had been found due and payable to certain described bondholders in equity proceedings in the District Court of the United States for the Eastern District of Pennsylvania. Some of the bondholders who were found to be entitled to the funds in question failed to claim payment and the court thereupon directed that such unclaimed funds should be paid into its registry. After the lapse of five years these unclaimed moneys were deposited to the credit of the Treasury of the United States.

Under an Act of Congress any person entitled to such funds could procure them by obtaining a court order directing their payment to him. The Commonwealth of Pennsylvania, claiming that these funds escheated to it, filed a petition in the district court for an order directing payment as an escheat to the Commonwealth. This petition was dismissed for want of jurisdiction and without prejudice. The Commonwealth then instituted proceedings in the Court of Common Pleas of Philadelphia County averring that a decree of escheat was necessary to qualify its escheator in order that the claim of the Commonwealth could be properly presented.

It was claimed inter alia, by the attorney for the United States that the funds sought to be escheated were in the Treasury of the United States and not within the jurisdiction of the courts of Pennsylvania. The Commonwealth's petition was dismissed by the Court of Common Pleas of Philadelphia County and an appeal was taken. The Supreme Court reversed the decision of the lower court, making the following comments:

* * * The property under discussion is a debt payable by a debtor who deposited the money for distribution pursuant to a decree in an equity proceeding pending in the district court. The money is still held under its control, pursuant to the Act of Congress, for the purpose for which it was paid. "That the debt due the absentee by the School District, resulting from the establishment

of her dower, was within the jurisdiction of the state authority, is clear": *Cunnius v. Reading Sch. Dist.*, 198 U. S. 458, 467. As the Commonwealth merely asks for a declaration of escheat and does not desire an order of payment directed to any federal agency there would seem to be no objection to considering the proceedings as in personam: cf. *Security Bank v. California*, 263 U. S. 282, 287.

* * * It may be conceded that the state cannot take possession of property in the custody of the federal government, but that fact need not prevent the judicial determination by the State of the succession to unclaimed property within its borders. * * *

The unclaimed funds placed on deposit in other states by Pennsylvania corporations are credits owing to such corporations and they may be deemed to have their situs within the Commonwealth of Pennsylvania in so far as the Act of 1937, P. L. 2063, is concerned. It is true that these unclaimed funds may be considered as trust funds but as between the Pennsylvania corporation and the banks in which they are on deposit, the Pennsylvania corporation is the legal owner of such bonds and has the right to control their disposition.

You are advised, therefore, that the Act of June 25, 1937, P. L. 2063, 27 PS 434 et seq., which requires corporations to report certain unclaimed funds to the Secretary of Revenue and which prescribes a procedure for the payment of such funds into the State Treasury, is applicable to Pennsylvania corporations having funds of the type named in the statute on deposit in other states.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

WILLIAM H. WOOD,
Special Deputy Attorney General.

OPINION No. 263

Banks and banking—State deposits—Security therefor—Turnpike revenue bonds.

Since section 8 of the Act of May 21, 1937, P. L. 774, places bonds to be issued by the Pennsylvania Turnpike Commission on a par with Commonwealth bonds insofar as they are legal security for deposits of public funds, and since section 505(a)2 of the Fiscal Code of 1929, as amended by the Act of June 7, 1935, P. L. 283, authorizes the State Treasurer to accept

Commonwealth bonds as security for State deposits, the State Treasurer may accept Pennsylvania Turnpike Commission bonds as security for State deposits in banks and trust companies throughout the Commonwealth in lieu of surety bonds.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., October 5, 1938.

Honorable Walter A. Jones, Chairman, Pennsylvania Turnpike Commission, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning whether turnpike revenue bonds of the Commonwealth to be issued by the Pennsylvania Turnpike Commission pursuant to the Act of May 21, 1937, P. L. 774, may be used by Pennsylvania banks and trust companies in lieu of surety bonds to be filed with the State Treasurer as security for deposits of State funds.

Section 8 of the act provides in part as follows concerning the bonds to be issued by the Commission:

* * * and said bonds or other securities or obligations are hereby made securities which may properly and legally be deposited with and received by any State or municipal officers or agency of the Commonwealth *for any purpose for which the deposit of bonds or other obligations of the Commonwealth is now or may hereafter be authorized by law.* (Italics ours.)

By this provision the legislature has specifically placed the bonds to be issued by the Pennsylvania Turnpike Commission on a par with Commonwealth bonds insofar as they are legal security for deposits of public funds. Therefore, if the State Treasurer may accept bonds of this Commonwealth in lieu of surety bonds as security for State funds, it follows that he may also accept bonds of the Pennsylvania Turnpike Commission.

Section 7 of the Act of February 17, 1906, P. L. 45, permitted a deposit of "United States, municipal, or county bonds" properly approved, with the State Treasurer in lieu of surety bonds as security for a deposit of State moneys. Substantially the same provision was adopted in section 505 (a) 2 of The Fiscal Code, as amended by the Act of May 22, 1935, P. L. 230. Neither statute expressly referred to bonds of the Commonwealth.

However, since the amendatory act of June 7, 1935, P. L. 283, Section 505 (a) 2 of The Fiscal Code reads in part as follows:

* * * in lieu of the surety bonds of surety companies or of individuals as aforesaid, the deposit of State moneys may be secured by the deposit with the State Treasurer

of bonds of the United States, bonds of the Delaware River Joint Commission, *bonds of this Commonwealth*, or any municipal subdivision or county thereof, to be approved by the board [Board of Finance and Revenue], in an amount measured by their actual market value equal to the amount of deposit so secured and twenty per centum in addition thereto. * * * (Bracketed insert and italics ours.)

Since this section is the latest legislative expression on this subject, and is thus determinative of the question here being decided, we are of the opinion that the State Treasurer now has the statutory authority to accept bonds of the Commonwealth as security for State deposits.

Banks and trust companies are given the power to make deposits by section 1004 of the Banking Code, as amended by the Act of June 21, 1935, P. L. 369.

Since banks and trust companies have the power to deposit bonds of the Commonwealth with the State Treasurer as security for State deposits, and since the State Treasurer is empowered to accept such bonds as security in lieu of surety bonds, we are of the opinion that the State Treasurer has authority to accept bonds to be issued by the Pennsylvania Turnpike Commission as security for State deposits in banks and trust companies throughout the Commonwealth in lieu of surety bonds.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION No. 264

Administrative law—Housing authority bonds—Approval by Department of Internal Affairs—Necessity for payment of fee—Act of March 31, 1927, as amended by Act of April 28, 1933—Housing Authorities Law of May 28, 1937, sec. 18.

The provision of the Act of April 28, 1933, P. L. 97, amending the Act of March 31, 1927, P. L. 91, requiring the Department of Internal Affairs to approve municipal bond issues, by imposing a fee in connection with such approval, does not apply to bonds issued under the Housing Authorities Law of May 28, 1937, P. L. 955, since the provision of section 18 of that act relating to the approval of housing authority bonds by the department and

requiring the submission of a complete and accurate copy of the proceedings had for the issuance thereof, similar to that required for municipal bond issues, omits to impose any fee.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., October 19, 1938.

Honorable Thomas A. Logue, Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the Act of April 28, 1933, P. L. 97, is applicable to bonds issued under the Housing Authorities Law, Act of May 28, 1937, P. L. 955.

In order to answer your question it is necessary to refer to the Act of March 31, 1927, P. L. 91, which act first gave the Department of Internal Affairs jurisdiction over the approval of municipal bonds. The title of that act is as follows:

An act relating to municipal indebtedness; imposing certain powers and duties upon the Department of Internal Affairs, and the officers of counties, cities of the third class, boroughs, towns, townships, school districts of the second, third and fourth classes and poor districts, in connection with proceedings to incur and increase indebtedness; * * *

Section 1 of the act of 1927 provides:

That the word "Municipality", as used in this act, shall mean any county, city of the third class, borough, town, township, school district of the second, third, and fourth class, and poor districts.

Thus it can be seen that the act of 1927 included only such political subdivisions of the State as were in existence and known at the time of the passage of said act. Subsequent to the passage of the act of 1927 the legislature, by Act of April 28, 1933, P. L. 97, amended the Act of 1927, P. L. 91, by providing as follows:

The mayor of each city of the third class, the burgess of each borough or town, the president of the board of county commissioners of each county, the president of the township commissioners of each first class township, the chairman of the board of township supervisors of each second class township, the president of each school board, and the president or chairman of the board of poor directors or overseers of each poor district, which shall have any proceedings for the incurring or increasing of indebtedness, except notes issued in anticipation of revenue for not more than one year, shall, before any bonds or evidence of indebtedness are actually issued and sold, certify to the Department of Internal Affairs

a complete and accurate copy of the proceedings had for such incurring or increasing of indebtedness, together with the assessed valuation of the property subject to taxation within the respective municipality, the total amount of the existing indebtedness, the several amounts claimed as permitted deductions in ascertaining the real indebtedness of such municipality, and a fee of ten dollars (\$10.00), plus an additional fee of one-half of one mill on each dollar of the aggregate par value of bonds, certificates, or evidences of indebtedness to be issued and sold by such municipality. All fees received hereunder shall be paid by the Department of Internal Affairs into the State Treasury, through the Department of Revenue. (Italics ours.)

It will be noted that under the two acts above referred to no mention is made of any housing authority. The acts specifically enumerate those political subdivisions which must do certain things before issuing bonds, certificates of indebtedness, or other evidence of indebtedness. Those named do not include housing authorities.

By Act of May 28, 1937, P. L. 955, the legislature provided for the setting up of housing authorities and the issuing of bonds, secured only by the revenue from the buildings constructed. These obligations are not in any sense municipal obligations for the reason that the municipality cannot be called upon to pay the housing bonds when they become due. The only security back of the payment of the bonds is the rental which will be received by the housing authorities for the use of said buildings.

After the Housing Authority Act of 1937 was drafted, a provision was inserted in section 18 as follows:

Before any bonds may be sold in pursuance of any resolution of any Authority the chairman or secretary of such Authority shall certify to the Department of Internal Affairs a complete and accurate copy of the proceedings had for the issuance of the bonds which are to be sold in the manner now or hereafter provided for the certification to said department of the proceedings relating to the issuance of bonds of the municipalities of this Commonwealth. Upon receiving a certificate of approval of the proceedings from the Department of Internal Affairs, the Authority may proceed with the sale of the bonds.

The question which arises at this point is whether the legislature, being aware that all bond proceedings approved by the Department of Internal Affairs were subject to a filing and examination fee, intended that the housing bonds would be subject

to the same fee, or whether the legislature intended no fee should be charged because of the fact that the act does not so state. From the wording of the act of 1937 it would seem that all of the provisions of the Act of 1927, P. L. 91, would have to be carried out insofar as they are practical, viz., that the authority shall furnish the Department of Internal Affairs with a complete and accurate copy of the proceedings had for the incurring or increasing of said indebtedness, together with the assessed valuation of the property subject to taxation within the district, the total amount of existing indebtedness and the amounts claimed as permitted deductions. No provision would be required under the housing authority bonds for a tax levy as would be required by bonds of a municipality for the reason that the municipality, in the case of the housing bonds, would not levy any tax to pay the bonds.

Therefore, we are of the opinion that the Housing Authority Act of 1937, P. L. 955, merely provides that the proceedings must be submitted to the Department of Internal Affairs for approval, without providing that the fee which other political subdivisions must pay in submitting bonds for approval, must be paid by the housing authority.

Therefore, you are advised that the Act of April 28, 1933, P. L. 97, is not applicable to bonds or bond proceedings submitted to the Department of Internal Affairs by housing authorities under the act of May 28, 1937.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

A. LEE EDWARDS,
Deputy Attorney General.

OPINION No. 265

Banks and banking—Bank directors—Election—Increase in number—Right of directors to elect additional members to serve until next shareholders' meeting—Banking Code of May 15, 1933, secs. 501 and 502(b), as amended.

1. Since section 502(b) of the Banking Code of May 15, 1933, P. L. 624, as last amended by the Act of April 22, 1937, P. L. 349, requires that directors shall be elected by shareholders except as otherwise provided in the act for the filling of vacancies, and since the directors' only authority to fill vacancies is contained in section 501 of the code, as last amended by the Act of June 21, 1935, P. L. 369, which provides that they may fill vacancies

caused by "death, resignation, disqualification, or otherwise", the only vacancies which members of the board of directors may fill by their own action are those which are the result of an unexpired term of a former member of the board, and the shareholders may not delegate to them the power to elect additional members of the board, caused by an increase in the number thereof, to serve until the next shareholders' meeting.

2. The words "or otherwise" as used in section 501 of the Banking Code of May 15, 1933, P. L. 624, as last amended by the Act of June 21, 1935, P. L. 369, providing that vacancies in a board of directors caused by "death, resignation, disqualification, or otherwise, may be filled by the remaining members of the board", must, under the doctrine of *eiusdem generis*, be confined to vacancies of a nature similar to those enumerated: that is, vacancies caused in an existing term, such as by removal by shareholders or by a court, or the existence of a vacancy by declaration of the board of directors.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., October 20, 1938.

Honorable Irland McK. Beckman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether a bylaw of a banking institution may authorize the board of directors, upon an increase in their number, to elect the additional members to serve until the next shareholders' meeting, or whether such election is solely within the non-delegable power of the shareholders.

Specifically, you refer to a proposed bylaw of the Germantown Trust Company, which provides as follows:

The board of directors by resolution may increase or diminish the number of directors from time to time within the limits prescribed above. In case of a vacancy occurring in any class *either by reason of any such increase or by death, resignation, disqualification or otherwise*, the board may fill such vacancy by electing a director to hold office until the next annual meeting of the stockholders. (*Italics ours.*)

Section 502-B of the Banking Code (Act of May 15, 1933, P. L. 624, as last amended by the Act of April 22, 1937, P. L. 349), provides, *inter alia*:

* * * Except as otherwise provided in this act for the filling of vacancies, directors, other than those constituting the first board of directors, shall be elected by the shareholders.

Under this provision, it is certain that only shareholders may elect directors, other than those constituting the first board, except where the code empowers the directors to fill a vacancy. The

directors' power to fill vacancies is set out in section 501, as last amended by the Act of June 21, 1935, P. L., 369, which provides, *inter alia*:

Except as otherwise provided in the articles or by-laws * * *

(3) Vacancies in the board of directors or in the board of trustees caused by *death, resignation, disqualification*, or otherwise, may be filled by the remaining members of the board, though less than a quorum, and each person so elected shall, in the case of a bank, a bank and trust company, or a trust company, be a director until his successor is elected by the shareholders, who may make such election at the next annual meeting of the shareholders, or at any special meeting duly called for that purpose and held prior thereto, * * * (*Italics ours.*)

The italicized words set out specific events whereby vacancies have occurred in the board of directors. It is evident that all refer to a vacancy caused in an existing term. The general words "or otherwise" must be confined to vacancies of a like nature.

In 59 C. J. 981, the following statement appears:

By the rule of construction known as "*ejusdem generis*", where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated, and this rule has been held especially applicable to penal statutes. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. *The rule is based on the obvious reason that if the legislature had intended the general words to be used in their unrestricted sense they would have made no mention of the particular classes.* * * * (*Italics ours.*)

Hence, "or otherwise" can refer only to situations where, for some reason, the term of a former director is unexpired. As examples of these situations, we may cite (1) vacancy upon removal of a director by shareholders: Section 510-A; (2) vacancy by declaration of the board of directors for the reasons permitted by Section 510-B; (3) vacancy by removal of a director by a competent court: Section 510-C.

Obviously, section 501 was enacted so as to permit the directors to fill a vacancy that arises unexpectedly, and was not intended to allow them by their deliberate action to create vacancies and fill them.

Our opinion is confirmed when we consider the fact that section 501 (3) states that "vacancies in the board of directors * * * may be filled by the *remaining* members of the board. * * *" "Remain. ing" involves the idea of continuance in the same state or position: 54 C. J. 105. Thus, the "remaining members" can be only those who continue to act as such, as distinguished from those who are no longer directors. Certainly, "remaining" cannot refer to the "existing" members of the board of directors where the number has been increased.

In the case of *Com. v. Dickert*, 195, Pa. 234 (1900), the Supreme Court affirmed an opinion of the Court of Common Pleas of Lackawanna County, which contained the following language (p. 241) :

* * * As to the meaning of the word "vacancy" we are not without some authority. The question was very learnedly and elaborately discussed in the case of *Walsh v. Commonwealth*, 89 Pa. 426. *In that case there was no dispute as to the ordinary signification of the word as applied to an office. An office which had been once filled and became vacant on account of the death or resignation of the incumbent created a vacancy.* This was a plain proposition requiring no argument to sustain it. But the Supreme Court went further and decided that the word "vacancy" "aptly and fitly described the condition of an office when it is first created and has been filled by no incumbent." The conditions confronting the court in the *Walsh* case induced them to extend the legal signification of the term "vacancy" beyond the popular conception of its meaning. *In the absence of peculiar conditions, the common acceptation of the use of the word must prevail.* * * * (Italics ours.)

In conclusion, you are advised that under the Banking Code, vacancies which members of the board of directors may fill by their own action, are those which are the result of an unexpired term of a former member of the board, provided the articles or bylaws have not removed this power. An increase in the number of directors does not create vacancies within the meaning of the Banking Code. Such new offices must be filled by the shareholders, and the shareholders cannot delegate this power to the board of directors.

Very truly yours,
DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.
OLIVER C. COHEN,
Deputy Attorney General.

OPINION NO. 266

Public officers—Members of Public Utility Commission—Rejection of appointment by Senate—Adjournment—Right of Governor to renominate—Act of March 31, 1937.

Since the Governor, in appointing members to the Pennsylvania Public Utility Commission created by the Act of March 31, 1937, P. L. 160, does so, not by reason of any inherent power vested in him, but rather as the agent of the Senate, he may not, following the adjournment of the Senate, make an ad interim appointment to the commission of a nominee whom the Senate had previously rejected, his authority being abridged to that extent; any such renomination would become effective only upon approval of the Senate.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 29, 1938.

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

Sir: You have requested our opinion as to whether you, as Governor, may, after an appointment of an individual as a member of the Pennsylvania Public Utility Commission has been rejected by the Senate, appoint the same individual, after adjournment of the Senate, to the unexpired residue of the term of the office.

The appointive powers of the Governor with respect to the office of member of the Pennsylvania Public Utility Commission are defined by the Act of March 31, 1937, P. L. 160, which provides, in part, as follows:

Section 1. (a) A commission to be known as the Pennsylvania Public Utility Commission is hereby created. The commission shall consist of five members who shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. The commissioners first appointed under this act, shall continue in office for terms of two, four, six, eight, and ten years, respectively, from the effective date of this act, and until their respective successors shall be duly appointed and shall be qualified, but their successors shall each be appointed for a term of ten years. * * *

Section 2. When a vacancy shall occur in the office of any commissioner, a commissioner shall, in the manner aforesaid, be appointed for the residue of the term. If the Senate shall not be in session when any vacancy occurs, any appointment made by the Governor to fill

the vacancy shall be subject to the approval of the Senate, when convened. No vacancy in the commission shall impair the right of a quorum of the commissioners to exercise all the rights and perform all the duties of the commission.

These powers are the same as were conferred upon the Governor by the Act of July 26, 1913, P. L. 1374, article IV, under which statute the Public Service Commission, the predecessor of the present commission, was created.

Section 10 of the Act of March 31, 1937, P. L. 160, provides as follows:

The Pennsylvania Public Utility Commission shall exercise the powers and perform the duties exercised and performed prior to the effective date of this act by The Public Service Commission of the Commonwealth of Pennsylvania, and any powers and duties subsequently vested in and imposed upon the Pennsylvania Public Utility Commission by law.

The principles of law applicable to this question, in so far as they concern the appointment of members of the Pennsylvania Public Utility Commission, have been enunciated in the cases of *Commonwealth v. Benn*, 284 Pa. 421 (1925); *Commonwealth v. Stewart*, 286 Pa. 511 (1926); and *Commonwealth v. King*, 312 Pa. 412 (1933).

In *Commonwealth v. Benn*, cited above, the Supreme Court ruled that the Public Service Commission, the predecessor of the present Pennsylvania Public Utility Commission, was an administrative arm of the legislature, since the services performed by it were predominately legislative in character; that the members were, therefore, instruments of the legislature; and that the Governor, in respect to the rights of appointment and discharge of the members, acted as the agent of the legislature, and hence was subject in the exercise of such powers to the control of the Senate, which, by the terms of statute, was, in fact, the real appointive power.

In *Commonwealth v. Stewart*, cited above, the Governor, while the Senate was not in session, in 1923, appointed Stewart to the Public Service Commission, and in January of 1925 submitted to the Senate the appointment of Stewart for the residue of the unexpired term, ending July 1, 1931. The Senate did not act upon the appointment, whereupon, after adjournment, on May 4, 1925,

the Governor reappointed Stewart to hold until the end of the next session of the Senate. The legislature having been convened in special session in 1926, the Governor submitted the nominations of three persons to serve as Public Service Commissioners for certain specified terms, but did not nominate Stewart, who was then actually serving as a member of the commission by the Governor's designation of May 4, 1925. The Senate acted upon the nomination of Stewart made May 4, 1925, and consented to, and approved, the appointment for the residue of the unexpired term. It was held by the Supreme Court that, inasmuch as the Governor, by the terms of the statute, could appoint only for the unexpired term, his attempted limitation of the term of his appointee to a lesser period might be ignored by the Senate, as was done.

In *Commonwealth v. King*, a vacancy having occurred in the summer of 1932 in the office of member of the Public Service Commission, while the Senate was not in session, the Governor appointed King to serve for the residue of the unexpired term. At the next session of the Senate, in 1933, the Governor submitted to the Senate the name of King for its approval. The Senate adjourned without having approved or rejected the appointee. After adjournment a quo warranto action was brought to test King's right to the office. The Supreme Court held that an appointment to fill a vacancy on the Public Service Commission, made by the Governor when the Senate is not in session, is subject to approval when the Senate has convened, and if not approved by the Senate at its next convened session, it is nugatory from and after final adjournment of that body.

It must be noted that none of these cases is decisive of the issue involved in your question, since no reappointment was made by the Governor after the action of the Senate.

In *Commonwealth ex rel. Lafean v. Snyder*, 261 Pa. 57 (1918), where the Senate rejected the nomination by the Governor to an office subject to his appointment (in this case Commissioner of Banking), it was held, . . . not, however, without vigorous dissent, . . . that the Governor may, under the authority of article IV, section 8, of the Constitution, after the adjournment of the Senate, appoint the rejected nominee until the end of the next session of the Senate, but that the Governor cannot make the appointment of such person for a full or unexpired term without the advice and consent of two-thirds of all the members of the Senate.

But this case is not necessarily determinative of the question here involved, since the office concerned therein was one which lay inherently within the appointive power of the Governor, whereas in the instant case the Governor appoints the member, not by reason of any inherent power vested in him, but rather, as determined in the Benn case, as the agent of the Senate.

Considering the nature of the appointive power of the Governor with respect to members of the Pennsylvania Public Utility Commission, we are forced to the conclusion, and you are accordingly advised, that the Governor may not make an ad interim appointment of the rejected appointee. The withholding of its consent by the Senate is a denial of the Governor's authority to reappoint the same individual. As to him the Governor's right of appointment has been taken away.

If it be contended that under this view such an appointee would effectually be barred from holding such office in the future, the answer is that no such result follows. The effect of the Senate's action of rejection is merely an abridgement of the Governor's authority; the power of the Senate yet remains. That body, upon renomination by the Governor, may give its consent and approval to the appointment of the rejected individual, but, in our opinion, until this is done, the appointment by the Governor would be ineffectual.

Very truly yours,
DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.
JOHN T. DUFF, JR.,
Deputy Attorney General.

OPINION No. 267

Incompatible offices—Member of the Legislature and member of the Pennsylvania Turnpike Commission—Art. II, sec. 6, of the Constitution.

A member of the present General Assembly may not be appointed as a member of the Pennsylvania Turnpike Commission until his term of office as Senator or Representative shall have expired.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., November 29, 1938.

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

Sir: We have your request to be advised concerning whether a member of the present General Assembly is eligible at this time

for appointment as a member of the Pennsylvania Turnpike Commission.

Article II, section 6 of the Pennsylvania Constitution provides that:

No Senator or Representative shall, during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth, * * *

Membership in the Pennsylvania Turnpike Commission is clearly a "civil office under this Commonwealth" within the meaning of this constitutional prohibition.

Section 4 of the Act of May 21, 1937, P. L. 774, creates the commission as an instrumentality of the Commonwealth and constitutes the exercise of its powers as an essential governmental function of the Commonwealth. Therefore, it follows that a member of the General Assembly may not be appointed as a member of the Pennsylvania Turnpike Commission during his term of office.

This conclusion is in accord with the formal opinion of this department rendered to former Governor Fisher under date of June 7, 1927, and reported in Official Opinions of the Attorney General, 1927-1928, page 86, wherein the Governor was advised that article II, section 6 of the Pennsylvania Constitution forbids the appointment of members of the General Assembly to membership on departmental administrative boards or commissions.

Article II, section 3 of the Pennsylvania Constitution provides that Senators shall be elected for a term of four years and Representatives for a term of two years. Section 2 of the same article provides that the term of service for members of the General Assembly shall begin on the first day of December next after their election. Consequently, the terms of the members of the present General Assembly who have not been reelected to office will expire December 1, 1938, the date when the terms of their successors will commence.

Accordingly, we are of the opinion that a member of the present General Assembly may not be appointed as a member of the Pennsylvania Turnpike Commission until his term of office as Senator or Representative shall have expired.

Very truly yours,
DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION No. 268

Public offices—Authority of Governor to appoint to membership in the Pennsylvania Turnpike Commission a person whose previous appointment has been rejected by the Senate—Act of May 21, 1937, P. L. 774; Art. IV, sec. 8 of the Constitution.

The Governor may appoint to membership in the Pennsylvania Turnpike Commission a person whose previous appointment to such office has been rejected by the Senate. The appointment cannot be made until the close of the present session of the Senate and should be for a term of office which will expire at the end of the next session of the Senate.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 29, 1938.

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

Sir: We have your request to be advised concerning whether you as Governor may appoint to membership in the Pennsylvania Turnpike Commission a person whose previous appointment to such office has been rejected by the Senate.

The Pennsylvania Turnpike Commission was established by the Act of May 21, 1937, P. L. 774. Section 4 of that act creates the Commission as an instrumentality of the Commonwealth. The Secretary of Highways is a member ex officio and the four remaining members are to be appointed by the Governor "by and with the advice and consent of two-thirds of the members of the Senate". The members were to serve for terms of four, six, eight and ten years from the dates of their appointment, and "until their respective successors shall be duly appointed and qualified". The successors were to be appointed for ten year terms, except in case of vacancies.

While The Administrative Code of 1929 was not amended so as to include within its scope the Pennsylvania Turnpike Commission as an administrative commission, nevertheless, the language in section 4 of the turnpike act pertaining to the appointment of members of the commission by the Governor "with the advice and consent of two-thirds of the members of the Senate" is substantially the same as that contained in section 207 of The Administrative Code which directs the Governor to appoint the various department heads "by and with the advice and consent of two-thirds of all the members of the Senate". Likewise the provisions in the turnpike act and section 208(c) of The Administrative Code are substantially similar in that the terms of ap-

pointees are for a certain fixed term and until their successors shall have been appointed and qualified.

Article IV, section 8 of the Pennsylvania Constitution provides, in part, as follows:

He (the Governor) * * * * shall have power to fill all vacancies that may happen in offices to which he may appoint, during the recess of the Senate, by granting commissions which shall expire at the end of their next session; * * *

The Supreme Court of Pennsylvania construed this constitutional provision in *Commonwealth ex rel Lafean v. Snyder*, 261 Pa. 57 (1918). In that case the Governor reappointed as Commissioner of Banking a person whose name had been rejected by the Senate for such office. The court decided that the Governor had the power to appoint such a rejected nominee after the adjournment of the Senate for a term of office until the end of the next session of the Senate, but that he may not appoint such a rejected nominee for the full or unexpired term.

The analogy between that case and the present situation is clear. The Commissioner of Banking was to be appointed by the Governor "by and with the advice and consent of the Senate"; and he was to hold his office for a term of four years and until his successor was duly qualified. Thus it is apparent that substantially the same statutory provisions were construed by the Supreme Court as are contained in section 4 of the turnpike act. Since this decision of the Supreme Court does not appear ever to have been modified or overruled we are bound to consider it as the law today, even though the majority opinion of the court was opposed by a vigorous dissenting opinion.

Accordingly, you are advised that you as Governor may reappoint to membership in the Pennsylvania Turnpike Commission a person whose previous appointment to such office has been rejected by the Senate. This appointment cannot be made until the close of the present session of the Senate and should be for a term of office which will expire at the end of the next session of the Senate.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General,

GEORGE W. KEITEL,
Assistant Deputy Attorney General,

OPINION No. 269

Public office—Authority of Governor to appoint to membership in the Pennsylvania Liquor Control Board a person whose previous appointment to such office has been rejected by the Senate.

The Governor may reappoint to membership in the Pennsylvania Liquor Control Board a person whose previous appointment to such office has been rejected by the Senate. The appointment cannot be made until the close of the present session of the Senate and should be for a term of office which will expire at the end of the next session of the Senate.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., November 29, 1938.

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

Sir: We have your request to be advised as to whether you as Governor may appoint to membership in the Pennsylvania Liquor Control Board a person whose previous appointment to such office has been rejected by the Senate.

The Pennsylvania Liquor Control Board was created by the Act of November 29, 1933, P. L. (Special Session) 13. Section 1 of the act provides that the board shall consist of three members "to be appointed by the Governor by and with the advice and consent of two-thirds of all the members of the Senate". The remaining provisions concerning tenure in office are substantially similar to those contained in the Act of May 21, 1937, P. L. 774, creating the Pennsylvania Turnpike Commission. Section 6 of the act makes the board subject to the provisions of The Administrative Code of 1929.

Except for the fact that members of the Pennsylvania Liquor Control Board are also subject to the provisions of The Administrative Code, the same reasoning and conclusions would be applicable to your power of reappointing rejected nominees to membership in that board as applied to a similar situation arising with reference to rejected appointees to membership in the Pennsylvania Turnpike Commission. In Formal Opinion No. 268 of this department issued November 29, 1938, you were advised that you had the power to reappoint to membership in the Pennsylvania Turnpike Commission a person whose previous appointment to such office had been rejected by the Senate. This decision was predicated upon the opinion of the Supreme Court in *Commonwealth ex rel. Lafean v. Snyder*, 261 Pa. 57 (1918).

For the same reasons you are advised that you may reappoint to membership in the Pennsylvania Liquor Control Board a person whose previous appointment to such office has been rejected by the Senate. This appointment cannot be made until the close of the present session of the Senate and should be for a term of office which will expire at the end of the next session of the Senate.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General,

GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION No. 270

Milk dealers and milk producers—Agreements—Legality—Applicability of Milk Control Law or orders of the Commission.

1. The Milk Control Law of 1937 confers upon the Milk Control Commission the power to fix the price or amount to be paid producers for milk, whether such milk is sold or consigned to milk dealers by milk producers.

2. The agreement under discussion, although purporting to be a consignment agreement, is at the most an agreement of sale.

3. Where an agreement of sale or of consignment results in milk producers receiving less than the minimum prices prescribed by the commission, such agreement is in violation of the Milk Control Law and unenforceable.

4. Any purported agreement between milk dealers and milk producers which causes such producers to receive less than the minimum prices prescribed by the Milk Control Commission, to which the producer automatically becomes bound by the mere continuing to ship milk, is void as contrary to public policy.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., December 12, 1938.

Honorable Howard G. Eisaman, Chairman, Milk Control Commission, Harrisburg, Pennsylvania.

Sir: Receipt is acknowledged of your recent inquiry, wherein you request our opinion as to the legality of a certain purported agreement between milk dealers and milk producers, and whether the Milk Control Law or orders of the Milk Control Commission issued thereunder are applicable to said agreement.

The purported agreement may be summarized as follows: The milk dealer, described in the agreement as a "factor", agrees to accept on consignment, for the purpose of processing and selling, any milk so consigned by producers. It is recited that the producer retains title to the milk, and reserves the right to take it back if he desires, although the "factor" is authorized to mix such milk with that of any other producer. The "factor" agrees to collect from ultimate purchasers for all milk sold, and to remit to the producer a stipulated amount out of the proceeds of such sales, guaranteeing the payment of such amount. The final two clauses of the agreement read as follows:

10. It is hereby definitely understood that this is an offer to receive on consignment for sale, and not an offer to buy milk from producers, and on and after the effective date hereof no milk shall be received by this dairy except on consignment.

11. Any producer who shall ship milk to the aforementioned dairy on or after October 1, 1938, shall be deemed to have accepted this offer, and to be acting in accordance with the terms hereof. This agreement, completed by acceptance as above, shall remain in full force and effect until altered, amended or cancelled by either party giving ten (10) days' written notice to the other of his intention so to do.

There is no doubt that this contract purports to be a consignment arrangement rather than a contract to buy and sell.

1. Apparently the milk dealers who are requiring their producers to enter into such an arrangement contemplate that the Milk Control Law, Act of April 28, 1937, P. L. 417, does not apply to milk consigned by producers to "factors", but only to milk sold to milk dealers. This position is untenable. The Milk Control Law, section 103, defines a milk dealer as follows:

"Milk dealer" means any person, including any store or subdealer, as hereinafter defined, who purchases or handles milk within the Commonwealth, for sale, shipment, storage, processing or manufacture, within or without the Commonwealth. * * * (Italics ours.)

It is significant to note that a milk dealer need not be one who "purchases" milk for sale, but may be one who "handles" milk for sale, including "Factors".

In *The Robin Gray*, 53 F. (2d) 1037 (1931), at 1041, it is held:

A "factor" is repeatedly defined as an agent employed to sell goods for a principal. Bouv. Law Dict. (3d Revision), vol. 2, p. 1176; Words and Phrases, Third Series, vol. 3, p. 496; In re Gulick (D. C.) 186 F. 350, 351.

See also 25 C. J. 340, *Commonwealth v. Shober*, 3 Pa. Super. 554 (1897).

It is clear that in the present case the mere labeling of the milk dealer as a "factor" does not make him such. The agreement itself recites that the "factor" is receiving the milk "for the purpose of processing, selling and distributing". These are not the functions of a factor, but of a milk dealer (although nothing prevents a factor from performing such functions).

Under section 301 of the act, the Milk Control Commission is given authority which extends far beyond mere agreements to buy and sell milk, it being vested with authority to "regulate the entire milk industry of this Commonwealth, including the production, transportation, disposal, manufacture, processing, storage, distribution, delivery and sale of milk and milk products in this Commonwealth".

Furthermore, section 801 of the Milk Control Law authorizes the Milk Control Commission to "maintain such prices for milk", and to issue orders "fixing prices to be charged or paid for milk". Section 803 provides as follows:

The commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: Provided, however, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission.

Nothing in these grants of authority limits the jurisdiction of the commission to contracts to buy and sell; the express authority is with respect to "prices to be paid". See also section 806, in which the commission is given authority to fix "the terms upon which milk dealers shall pay producers and others for milk".

True it is that section 807 specifies that it is "unlawful for a milk dealer or producer to sell or buy, or offer to sell or buy, milk at any price below the minimum price"; but this does not limit violations of the Milk Control Law to contracts of sale or purchase. Under sections 801 and 803 the important thing is the price paid to the producer, not the device, form or agreement by which the price is paid. This is rendered still clearer by the following paragraph of section 807:

It shall be unlawful for any milk dealer to sell any milk for which he has paid, or agreed to pay, a price

lower than fixed by the commission for milk of that class or grade.

Thus, the deciding factor is whether this agreement results in the milk dealer paying below a lawful price for the milk, rather than whether the agreement for such payment is a consignment arrangement as distinguished from a contract of purchase.

The word "price" is generally used in connection with agreements to buy and sell; however, any standard dictionary will show that the word may also be used synonymously with "sum", "value", or "worth". To this effect see especially 49 C. J. 1344, and *Paul v. Grimm*, 165 Pa. 139 (1895) at 143, 149. It is also often defined as "that which must be given, done, or undergone, in order to obtain a thing"; *Vol. 2, New Century Dictionary* (1936), 1390.

That the agreement herein under consideration used words "remit" and "proceeds" does not alter the fact that it is an agreement to pay money for milk, and as such within the above quoted price provisions of the Milk Control Law. We therefore conclude that the express language of the Milk Control Law authorizes the Milk Control Commission to fix prices to be paid to producers for milk, whether such payments are made by virtue of a contract of consignment or a contract of sale.

2. Since certain official general orders of the Milk Control Commission expressly refer to the sale of milk, it becomes pertinent to examine whether the purported agreement of consignment is in fact an agreement of sale. In our opinion the answer is in the affirmative.

The so-called "factor" is actually a milk dealer receiving the milk in the usual course of his business as a milk dealer, namely, as one who buys the raw product, processes and/or bottles it and then distributes to the ultimate consumer. The apparent reservation to the producers of a right to take back milk is a mere subterfuge, being an agreement which is incapable of fulfillment because of the highly perishable character of milk.

Since this contract was prepared by the dealer it will be construed most strongly against him: 13 C. J. 545.

The nature of the milk industry is described in the preamble of the Milk Control Law, wherein it is pointed out that the main purpose of this type of legislation is to procure for milk producers "the cost of sanitary production". The entire business is affected with a public interest: *Rohrer v. Milk Control Board*

322 Pa. 257 (1936); *Carolene Products Co. v. Harter et al*, 329 Pa. 49 (1937).

Under the circumstances it is clear that the public interest cannot be defeated by the mere wording of such an agreement, if the purpose thereof is to take the transaction outside the jurisdiction of the Milk Control Commission and its orders. Yet the present agreement could not have any other purpose because it does not change the actual dealings of the parties in the slightest respect. This renders the present contract entirely distinguishable from that in *First National Bank v. Kilbourne*, 127 Ill. 573, 20 N. E. 681 (1889), wherein the purpose of the agreement was to change possession and management of the farmers' plant.

A contract will not be construed as a contract of consignment if so to do will take the transaction out of the jurisdiction of the Milk Control Law and thereby injure the public or third parties. In *Commonwealth v. Crowl*, 245 Pa. 554 (1914) it was held, "It has been the policy of this State to legislate on the subject of milk and milk products. * * * The known disposition of some dealers to cheat and the opportunity afforded them by the absence of some regulation of the business is a justification of such legislation under the police power". There can be no question that if the only thing sought to be accomplished by this contract is an evasion of the Milk Control Law or any orders issued thereunder, the contract will not be construed in such manner as to give it this effect. Thus, in *Hughes v. Young*, 65 S. W. (2d) 858, (Tenn. 1933), it was held as follows, with respect to a lumber contract purporting to be one of consignment:

If, however, the course of dealing between the parties under the contract was intended to merely ostensibly but not really, be that of factor and principal, but in reality of seller and purchaser, then the true relationship would govern, regardless of the terms of the contract.

The court held admissible evidence which established that the purpose of the purported agreement of consignment entered into between the grantee of standing timber and the purchaser of manufactured lumber, was to defeat a certain lien.

It has been shown time and again that courts are concerned with the logic of realities rather than mere words. Thus, in *Taylor v. Fram*, 252 Fed. 465 (C.C.A., 1918), it was squarely held that a so-called consignment agreement was in fact a sale, notwithstanding its express terms, because of a lack of good faith in making the original contract. The court held as follows:

There are numerous cases which may be cited to show that such an agreement creates a bailment, and not a sale, and that the bailor is at liberty at any time to re-take his merchandise, irrespective of whether bankruptcy proceedings intervene or whether the debtor is solvent or not. All this we concede, and no citation of authorities is necessary. But the above doctrine only applies where the agreement is entered into in good faith, and without intent to hinder, delay, or defraud creditors. In the Ludvigh Case all the courts agreed that there was no actual fraud in the transaction. In the case at bar the District Judge was convinced that there was a lack of good faith in the making of the original contract. * * *

Carriers with contracts have been held to be common carriers by virtue of their actual dealings, regardless of the wording of such contracts: *Erb v. Public Service Commission*, 93 Pa. Super. 421 (1928).

If the present agreement is not one of purchase and sale in the usual dealer-producer relationship, it would necessarily follow that the producer is the dealer instead of the so-called "factor"; that the producer would therefore require a milk dealer's license; that the producer would suffer the loss in case of fire or theft at the dealer's plant; that the dealer or factor is not obligated to pay for milk which he does not sell (although there is no agreement for him to return any unsold milk). Not "purchasing" milk, the dealers would not have to file a bond for the protection of producers under section 501 of the Milk Control Law. The "factor" does not even agree to make any sales. As above stated, the producers' reservation of a right to take back milk is meaningless because of its perishable character. On the whole it is impossible, especially under the circumstances surrounding the milk industry, to construe the present arrangement as anything but a contract to buy and sell. The milk producers themselves would be most amazed to find that through this arrangement they converted themselves into milk dealers. You are therefore advised that the agreement under examination, if valid at all, is one of purchase and sale rather than one of consignment.

3. The next question is whether any kind of agreement between producers and dealers, whereby a certain sum of money is paid for milk below the minimum prices of the Milk Control Commission, is legal. The producer prices which the Milk Control Commission is authorized to prescribe, are minimum prices; therefore a contract for payment of a sum above the minimum is

lawful. A contract which results in a payment below the minimum is unlawful and unenforceable.

It has been squarely held with respect to contracts pertaining to milk that such "Contracts relating to matters clothed or affected with a public interest are subject to the police power of the State"; *Eisenhart v. Pennsylvania Milk Control Board*, 125 Pa. Super. 483 (1937).

Furthermore, the sale of milk procured by paying less than lawful prices is likewise a violation of the Milk Control Law under section 807, regardless of the type of contract under which such payment is made, and regardless of whether the dealer is described as a "factor", or otherwise.

This section reads:

It shall be unlawful for any milk dealer to sell any milk for which he has paid, or agreed to pay, a price lower than that fixed by the commission for milk of that class or grade.

See also section 807, condemning "any method or device" to evade the Milk Control Law.

4. Finally, your attention is called to clause 11 of this purported agreement, which renders it void in its inception as contrary to public policy. The clause quoted above is its own evidence of the duress attendant to the procuring of the present agreement. *Rohrer v. Milk Control Board*, 322 Pa. 257 (1936) held:

* * * These facts make the dairy farmer or producer dependent for his return on the use to which the dealer to whom he delivers it puts it. His commodity and the price he receives for it are so far out of his control that, as a matter of fact, his supposed freedom of contract is largely illusory and at the mercy of the dealer unless the legislature intervenes for his protection; not primarily for his benefit, but only secondarily or incidental to the main purpose of promoting the public welfare by seeing to it that an adequate supply of pure milk is available at a price reasonable to the public, the dealer and the producer. * * *

The Court of Common Pleas of Dauphin County, in *Harrisburg Dairies Inc. v. Eisaman et al*, decided September 6, 1938, held as follows:

Milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production; they suffer sub-

stantial losses, and, in the absence of governmental regulation of milk, would suffer still more.

The Milk Control Law, paragraph 4 of the preamble, states as follows:

Milk producers must make delivery of their highly perishable commodity immediately after it is produced, and must generally accept any market at any price. * * * The producers' lack of control over their market is aggravated by the trade custom of dealers in paying weeks after delivery, keeping producers obligated to continue delivery in order to receive payment for previous sales, and permitting dealers to operate on the producers' capital without giving security therefor. Hence, milk producers are subject to fraud and imposition, and do not possess the freedom of contract necessary for the procuring of cost of production.

The wording of clause 11, to the effect that "Any producer who shall ship milk to the aforementioned dairy on or after October 1, 1938, shall be deemed to have accepted this offer", is another way of saying that any producer who does not desire to be deemed as having accepted the offer shall not ship milk after said date. This is duress and compulsion within the very meaning of the language in the aforementioned cases, to the effect that producers do not have freedom of contract. Years ago it was held that economic compulsion does not constitute legal duress, but the law is otherwise today, at least with respect to the production of milk.

It is obvious that farmers to whom milk dealers may read this "agreement", are in an utterly helpless position. They have their choice of two evils: either to discontinue shipping milk to the dealer almost overnight, in which event they are deprived of their main source of income; or to continue shipping, at least while searching for another market, in which event they automatically become bound by virtue of clause 11. The Milk Control Law and its orders are expressly designed for the purpose of preventing milk dealers from foisting such agreements upon their producers. Where any such agreement is consummated under such circumstances, and its direct or indirect effect is to cause the producer to receive a lesser sum for his milk than the amount which the Milk Control Commission prescribes to be paid, the contract is void as contrary to public policy; and this is true whether the contract be deemed one of sale or consignment.

If, by concerted action, a number of dealers in an area are concurrently foisting this upon their farmers such farmers would

be particularly injured because probably any market they sought would be with a dealer who requested entry into a similar agreement. Such concerted action would appear to be a conspiracy in restraint of trade, contrary to the Act of March 31, 1860, P. L. 382, Sec. 128 (18 PS 2451). That they acted upon a lawyer's advice would not constitute a defense: 16 C. J. 85; *Weston v. Commonwealth*, 111 Pa. 251 (1885).

It is our opinion, and you are therefore advised:

(1) That the Milk Control Law of 1937 confers upon the Milk Control Commission the power to fix the price or amount to be paid producers for milk, whether such milk is sold or consigned to milk dealers by milk producers;

(2) That the agreement under discussion, although purporting to be a consignment agreement, is at the most an agreement of sale;

(3) That where an agreement of sale or of consignment results in milk producers receiving less than the minimum prices prescribed by the Milk Control Commission, such agreement is in violation of the Milk Control Law and unenforceable;

(4) That any purported agreement between milk dealers and milk producers which causes such producers to receive less than the minimum prices prescribed by the Milk Control Commission, to which the producer automatically becomes bound by the mere continuing to ship milk, is void as contrary to public policy.

Very truly yours,

DEPARTMENT OF JUSTICE,

GUY K. BARD,
Attorney General.

HARRY POLIKOFF,
Deputy Attorney General.

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