Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

FOR THE YEARS
1939 and 1940

CLAUDE T. RENO, *Attorney General*

Compiled by
FREDERIC E. RAY
Department of Justice
Harrisburg

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OFFICIAL OPINIONS

1939-1940

* Voided by Dauphin County Court of Common Pleas in July, 1940, on grounds, inter alia, that Insurance Department practices for long period of years established contra interpretation.

OFFICIAL OPINIONS
1939 - 1940

OPINION No. 271

Labor—Minimum wages for women and minors—Act of May 27, 1937—Applicability to employes in hospital laundry—Operation solely for laundering materials used in institution—Operation on commercial basis.

Whenever a hospital not conducted for private or corporate gain operates a laundry used solely for laundering materials for use in such institution, such operation constitutes an element of its charitable activities, and, therefore, the employes engaged therein are not within the provisions of the Act of May 27, 1937, P. L. 917, which regulates minimum fair wages for women and minors; but where a hospital conducts its laundry on a commercial basis and derives revenue from it for the services performed, the hospital, as to such operation, is governed by the provisions of the said act as to its employes engaged in such operation.

Harrisburg, Pa., January 4, 1939.

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

Sir: We have your request to be advised as to whether or not the employes of a laundry operated by a hospital fall within the provisions of the Act of May 27, 1937, P. L. 917, which regulates minimum fair wages for women and minors.

Under paragraph (2) of section 7 of the act cited, the Department of Labor and Industry is empowered to make directory orders which shall define minimum fair wage rates.

Paragraph (6) of section 2 of the act cited provides:

> "Occupation" shall mean an industry, trade, business or class of work in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer, or services in a religious community or charitable institution, or labor on a farm, or boys lawfully employed in the sale and delivery of newspapers and magazines.

In Episcopal Academy *v.* Philadelphia, 150 Pa. 565 (1892), it is held that whatever is done or given gratuitously in relief of the public burdens or for the advancement of the public good is a public charity. In every case where the public is the beneficiary, the charity is a public charity.

The history of legislation in Pennsylvania discloses a well-defined policy on the part of the Commonwealth to relieve charitable institu-

tions from the burdens of government, or to modify in favor of such organizations its general social regulations, when their activities are conducted for purely charitable purposes. There are substantial reasons for such a policy, since one of the duties of government is to assist those who, for various causes, are unable to help themselves. Any institution which, by its charitable activities, relieves the government of part of this burden, confers a pecuniary benefit upon the State, and the State, in granting such institutions exemption from taxation, is merely giving consideration for the services which it otherwise would be required to provide.

It is manifest that a hospital not conducted for profit or corporate gain, but for the purpose of administering to the sick and maimed, is a charity within the definition above given. There remains to consider whether the maintenance and operation of a laundry in connection with the hospital is within the exception contained in paragraph (6) of section 2 of the act cited.

It is the settled law of Pennsylvania that as long as a charitable institution keeps within the ambit of its charitable activities and uses its property directly for charitable uses, it retains its charitable character, but whenever the organization engages in trade or a commercial activity for the purpose of increasing its revenue or making any part of its operation self-supporting, the trade features of its activities are subject to taxation, as they ought to be, and this is true even though the revenue derived from the business is devoted to the support of the charity: Y. M. C. A. of Germantown *v.* Philadelphia, 323 Pa. 401 (1936).

Therefore, if the laundry connected with the hospital is operated solely for the purpose of laundering materials used in the hospital, the operation is not commercial in character. It constitutes an element of the charitable activity of the organization, and, as such, would not fall within the provisions of the act under consideration; but if such institution engages in the business of conducting a laundry on a commercial basis for the purpose of increasing its revenue or making a part of its activities self-supporting, it is, with respect to such operation, not a charity, even though the income derived therefrom be devoted to a charitable purpose.

Therefore, you are advised that whenever a hospital not conducted for private or corporate gain operates a laundry used solely for laundering materials for use in such institution, such operation constitutes an element of its charitable activities, and, therefore, the employes engaged therein are not within the provisions of the Act of May 27, 1937, P. L. 917; but where a hospital conducts its laundry on a commercial basis and derives revenue from it for the services per-

formed, the hospital, as to such operation, is governed by the provisions of the said act as to its employes engaged in such operation.

Very truly yours,

DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

JOHN T. DUFF, JR.,
Deputy Attorney General.

OPINION No. 272

Banks and banking—Right of bank to purchase own stock—Banking Code of 1933, sec. 1011—Purchase of stock held as collateral from pledgee.

A bank is prohibited by section 1011 of the Banking Code of May 15, 1933, P. L. 624, from purchasing its own stock from one who holds it as collateral to secure the debt of a third party who is in turn indebted to the bank, since such action in no way prevents loss on a debt previously contracted in good faith, but is at best an effort to speculate in its own stock, hoping to use the profits therefrom to recoup a loss already suffered or to offset an anticipated loss; but the transaction is merely voidable and not void.

Harrisburg, Pa., January 6, 1939.

Honorable Irland McK. Beckman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You desire to be informed whether the People's Bank, Steelton, Pennsylvania, acquired legally three hundred shares of its capital stock and if the bank may hold them under the provisions of section 1011 of the Banking Code for a period of two years from date of acquisition. The stock was acquired in the following manner:

On December 17, 1937, the institution purchased three hundred shares of its own capital stock from the Philadelphia National Bank, Philadelphia. The latter institution originally held the stock as collateral security on a loan of W. H. Nell, the former president of the Steelton bank. Your recent report showed Mr. Nell indebted to the Steelton bank, and an appraisal by an examiner showed a certain amount of this indebtedness as a loss. You further state that, in view of the potential loss on this line of credit, the board of directors decided, after a conference by their attorney, Mr. Carl B. Shelley, with Examiner Summers of your department, held in December, 1937, to purchase this stock in order that through the purchase and resale of this stock profits may be derived to reduce the loss in the Nell account to the extent of the anticipated profits.

The stock was purchased for $9,500. According to the appraisals made by an examiner of your department, it has a book value of approximately $21,000.

Under the law I must advise you that the stock was acquired illegally and the People's Bank, Steelton, Pennsylvania, has no right to retain this stock for a period of two years from date of acquisition.

Section 1011 of the Banking Code (Act of May 15, 1933, P. L. 624) provides:

> Except as otherwise specifically provided in this act, a bank or a bank and trust company shall not grant any loan or discount on the security of shares of its own capital, nor be the purchaser or holder of any such shares for its own account, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Shares so purchased or acquired shall be disposed of within two years from the time of their purchase or acquisition, but the department may, upon application of a bank or a bank and trust company, grant to it in writing the power to hold such shares for a longer period.

There are various reasons for the prohibition against a bank dealing in its own stock. These institutions are created to subserve public purposes. One of these purposes is to keep the capital available for active use. If a bank would purchase its own stock, such capital would be withdrawn from its intended use: See Bank *v.* Lanier, 78 U. S. 369.

It is further manifest that such prohibition is to secure for the depositors the protection of the capital, and this protection would be seriously impaired by any pledge or purchase of its own shares. However, in realization that in certain instances the purchase by a bank of its own shares would have the effect of saving an institution from loss, and in reality from a decrease of capital, the legislature has authorized such purchase where "necessary to prevent loss upon a debt previously contracted in good faith."

When the directors of the institution in the instant case went into the open market and purchased shares of the bank's own capital they did nothing to *prevent* a loss by the bank upon a debt previously contracted in good faith.

The bank received no additional pledge of stock to be attached to the Nell loans as collateral security to prevent or diminish the loss.

The bank did not purchase this stock from Nell or his nominee in such a manner as to give additional security and therefore prevent a further loss on the Nell loans.

What the bank did was to purchase 300 shares of its own capital in the market. For this stock it paid $9,500 of funds belonging to the

bank hoping that the money so invested would yield a profit when the stock is sold.

This is ultra vires and illegal. It amounts to speculation and does not come within the exception permitted in section 1011 of the Banking Code.

The transaction by which the Steelton bank purchased its own stock from the Philadelphia National Bank was a separate independent transaction and could have no connection whatever with the Nell loans, either before or after the loans were made, or before or after the bank stock was purchased.

At best it was en effort to speculate in its own stock hoping to use the profits therefrom to *recoup* a loss already suffered, or to *offset* a loss anticipated, but in no way could it "*prevent* loss upon a debt previously contracted."

To hold otherwise, would permit banks whenever they had suffered, or anticipated, a loss on a loan to go in the open market and purchase some of their own stock, whenever in the judgment of the directors a profit could be made to recoup or offset the loss suffered in a loan. This is not the law.

The bank's assets of $9,500 were applied in such a manner as to reduce by that amount the funds to which depositors may look for payment of their claims. That your department appraised the book value at $21,000 does not alter the situation.

It is the market value that is controlling in such a situation, and there is never any positive assurance that the market value of any stock will be higher or lower in the future than it has been in the past.

In being forced to arrive at the above conclusion, I am certain that the directors of the bank acted in good faith. You say they acted only after being advised to do so by their counsel and after conferring with the Chief Bank Examiner of your department.

The authorization of, or acquiescence in, an illegal transaction by an examiner does not make it legal. However, the transaction by which the bank purchased this stock is not void but merely voidable and the act can only be invoked against the transaction by the State: Richards *v.* Intergity Trust Company, 317 Pa. 513 (1935). See discussion of this principle as applied to a similar statute pertaining to National Banks in National Bank of Xenia *v.* Stewart, 107 U. S. 676.

Since the directors acted in good faith under the circumstances recited above the purchase of its own stock ultra vires does not render its subsequent sale of such stock to another unlawful, or the stock void in the hands of the purchaser: Lantry *v.* Wallace, 182 U. S. 536.

You are, therefore, advised that under the provisions of section 1011 of the Banking Code it was not legal for the People's Bank of Steelton, Pennsylvania, to acquire the 300 shares of stock in the manner they did nor will it be legal to hold it for a period of two years from the date of acquisition. You are further advised that it is your duty to notify the directors of the People's Bank, Steelton, Pennsylvania, to arrange for the disposition of these shares at a price not less than was paid for them and to dispose of them as promptly as possible consistent with sufficient time to enable the bank to realize the fair market price of these shares of stock.

Very truly yours,

DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

OPINION No. 273

Mines and mining—Mine foremen and assistant mine foremen—Right to delegate duties—Act of May 31, 1923, as amended—Necessity for constant presence during making of fall—Act of June 9, 1911, as amended.

1. Only those who have duly qualified to act as mine foremen or assistant mine foremen under the Act of May 31, 1923, P. L. 481, as amended by the Act of July 1, 1937, P. L. 2479, may act as such, and they may not, therefore, delegate to other persons the authority and responsibility placed upon them.

2. It is not necessary, under article IV, sec. 10, of the Act of June 9, 1911, P L. 756, as amended by the Act of July 1, 1937, P. L. 2486, that a mine foreman or assistant mine foreman be constantly present when pillars are being drawn or falls being made, but they may supervise the work involved in more than one such operation at the same time.

Harrisburg, Pa., January 16, 1939.

P. F. Nairn, Deputy Secretary of Mines, Bituminous Division, 3021 Zephyr Avenue, Pittsburgh, Pa.

Sir: We have your letter of July 20, 1938 in which you asked to be advised concerning the liability and responsibility of mine foremen and assistant mine foremen in the bituminous mines of Pennsylvania.

Two questions are involved in your request, as follows:

1. Can the mine foreman or the assistant mine foreman delegate the authority and responsibility placed upon him to other persons?

2. Can the mine foreman or the assistant mine foreman supervise the work involved in making more than one fall at the same

time, or must he remain in one particular place until all necessary work in making the fall in that place has been completed?

We shall first answer question No. 1.

The Act of May 31, 1923, P. L. 481 provides for the appointment of a board of examiners to examine applicants for certificates of qualification of mine foremen, assistant mine foremen and fire bosses in the bituminous coal mines of the Commonwealth.

Section 6 of the Act of July 1, 1937, P. L. 2479, provides as follows:

> Applicants for certificates of qualification as mine foremen, assistant mine foremen, and fire bosses shall be citizens of the United States, of good moral character and of known temperate habits, at least twenty-three years of age, and shall have had an aggregate of at least five years' practical experience, after sixteen years of age, as miners or mining engineers, or men of general work inside of the bituminous mines of Pennsylvania: Provided, That graduates in the coal mining course of a recognized institution of learning may, after examination, be granted certificates of qualification by the examining board as mine foremen, assistant mine foremen, and fire bosses, if possessed of an aggregate of not less than three years' practical experience as miners or men of general work inside of the bituminous mines of Pennsylvania. Applicants for certificates of qualification as first grade mine foremen, first grade assistant mine foremen, and fire bosses shall also have had experience in bituminous mines in Pennsylvania that generate explosive gas.
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> * * * * *
>
> Certificates of qualification as mine foremen shall be of two grades, namely: Certificates of first grade shall be granted to persons who have given to the examining board satisfactory evidence of their ability to perform the duties of mine foremen in gaseous mines, and who shall have received an average of at least eighty per centum in each examination. Certicates of second grade shall be granted to persons who have given to the examining board satisfactory evidence of their ability to perform the duties of mine foremen in nongaseous mines, and who shall have received at least eighty per centum in the second grade examination.
>
> Certificates of qualification as second grade assistant mine foremen shall be granted to persons who have given to the examining board satisfactory evidence of their ability to perform the duties of assistant mine foremen in nongaseous mines, and who shall have received at least seventy per centum of the second grade examination.
>
> Certificates of qualification as fire bosses shall be granted to persons who have given to the examining board satisfactory evidence of their ability to perform the duties of fire bosses in gaseous mines, and who shall have received an

> average of at least seventy-five per centum in the examination: Provided, however, That all applicants who have passed a satisfactory written examination shall also pass a satisfactory oral examination, but the examining board shall have authority to exempt any applicant from the oral examination for justifiable reasons.

Section 2 of the same act, provides as follows:

> It shall be unlawful for any operator, manager, or superintendent to employ as mine foreman in a bituminous mine, or as assistant mine foreman in a bituminous mine, any person who has not obtained the proper certificate of qualification required by this act: Provided, That certificates of qualification or service heretofore granted shall have equal value with certificates of qualification granted under this act. And it shall be unlawful for any operator, manager, superintendent, or mine foreman to employ as fire boss in a bituminous mine any person who has not obtained the proper certificate of qualification under this act: Provided: That certificates of qualification as fire boss granted under the acts of June nine, one thousand nine hundred and eleven (Pamphlet Laws, seven hundred and fifty-six), and May fifteen, one thousand eight hundred and ninety-three (Pamphlet Laws, fifty-two), shall have equal value with certificates of qualification granted under this act: Provided, however, That in an emergency, the mine foreman may deputize temporarily a competent person or persons to act as assistant mine foremen or fire bosses, but this authority shall not be exercised by the mine foreman so long as certified assistant foremen or certified fire bosses are available in the mine.

Therefore, it is clear that before a person can serve in the capacity of mine foreman, assistant foreman or fire boss, he shall possess certain necessary qualifications and be the holder of a certificate issued by the board of examiners evidencing these facts. The Act of July 1, 1937, P. L. 2479 prescribing the qualifications of mine foremen, assistant mine foremen and fire bosses, was intended to guarantee to the bituminous coal industry men with sufficient knowledge and experience to protect the mine workers, and the property, with the view that the mines would be operated so as to protect human life and property, and must be strictly construed to carry out its primary purpose. It, therefore, necessarily follows that only those possessing the necessary qualifications shall act as mine foremen, assistant mine foremen and fire bosses, and that a mine foreman or assistant mine foreman cannot delegate to other persons the authority and responsibility placed upon him.

We shall now proceed to answer your second question:

Can the mine foreman or the assistant mine foreman supervise

the work involved in making more than one fall at the same time, or must he remain in one particular place until all necessary work in making the fall in that place has been completed?

Section 10, Paragraph 2 of Article IX of the Bituminous Mining Law provides:

> In all mines the mine foreman shall employ a sufficient number of assistants to insure a visit to each working place during each shift, either by himself or by his assistants while the employes are at work, and in all mines or portions of mines in which fire bosses are not regularly employed, the mine foreman shall, if in the judgment of the inspector of the district the roof conditions require extraordinary supervision, employ a sufficient number of assistants to insure two visits to each working place during each shift, either by himself or his assistants, while the employes are at work in such mines or portions of mines, and in all mines the interval of time between visits shall be arranged so as to secure the most efficient and effective supervision. In addition thereto, the mine foreman or the assistant mine foreman shall give special care, oversight, and attention to the men drawing pillars, particularly when falls are thereby being made. * * *

In this paragraph, the mine foreman is required to employ a sufficient number of assistants to insure at least one visit to each working place during each shift, either by himself or his assistants, while the employes are at work; and in mines where fire bosses are not regularly employed, the mine foreman shall, if in the judgment of the inspector of the district, the roof conditions require extraordinary supervision, employ a sufficient number of assistants to insure two visits during each shift; and when pillars are being drawn, in addition to the required visits by foremen and assistant foremen, special care, oversight and attention are required to be made by the foreman and assistants.

It is a fair inference that the legislature intended that greater care and more careful supervision be given the places when great danger exists, such as when pillars are being drawn and falls are thereby being made. The law requires that when the roof condition is dangerous, the inspector may require two visits per shift and in extreme cases, as when pillars are being drawn, in addition to two visits per shift, special care and attention be given to the work by the foreman and assistants. In our opinion this does not mean that a foreman or assistant shall be present at all times when falls are being made as it would have said so in express language if it was so intended. We believe the legislature intended that when falls are occurring in addition to two visits per shifts, special care and attention be given to the work.

We are of the opinion, therefore, that the foremen or assistant foremen can supervise the work involved in making more than one fall at one and the same time.

It is our opinion, and you are therefore advised, that a mine foreman or assistant mine foreman may not delegate the authority and responsibility placed upon him to other persons. You are further advised that a mine foreman or assistant mine foreman may supervise the work involved in making more than one fall at one and the same time and is not required to be present all of the time.

Very truly yours,

DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

JOHN R. REAP,
Deputy Attorney General.

OPINION No. 274

Master and servant—Industrial home workers—Servant or independent contractor—Workmen's compensation—Social security—Workmen's Compensation Act of June 2, 1915, as reënacted and amended—Unemployment Compensation Law of December 5, 1936.

In general, where work is let out to be done on the worker's own premises, he using his own equipment and doing the work according to his own methods and without direction from the employer as to the manner in which the work shall be done, and not being required to devote his whole time to the performance of the contract, the worker is not an employe but an independent contractor and does not, therefore, fall within the provisions either of the Workmen's Compensation Act of June 2, 1915, P. L. 736, as reënacted and amended by the Act of June 4, 1937, P. L. 1552, or of the Unemployment Compensation Law of December 5, 1936, P. L. (1937) 2897.

Harrisburg, Pa., January 16, 1939.

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

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

> 1. Is an employer of industrial home workers (Act 176 of 1937) required to carry workmen's compensation insurance on home workers under the requirements of the Workmen's Compensation Act (Act 338 of 1915 as reenacted and amended by Act 323, June 4, 1937)?

Subsection (c) of section 3 of the Industrial Homework Law (Act of May 18, 1937, P. L. 665), defines an employer as follows:

> (c) "Employer." Any person who for his own account or benefit, directly or indirectly, or through an employe, agent, independent contractor, or any other person
>
> (1) Delivers, or causes to be delivered to another person, any articles or materials to be manufactured in a home and thereafter to be returned to him, not for the personal use of himself or of a member of his family, or thereafter to be disposed of otherwise in accordance with his directions, or
>
> (2) Sells to another person, any materials or articles for the purpose of having such articles or materials manufactured in a home and of then rebuying such materials or articles after such manufacture, either by himself, or by someone designated by him.

The Workmen's Compensation Act (Act of June 2, 1915, P. L. 736), as re-enacted and amended by the Act of June 4, 1937, P. L. 1552, defines the term "employer" as follows:

> Section 103. 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. Whenever used in any clause prescribing and imposing a fine or imprisonment, or both, the term "employer," as applied to partnerships or joint-stock companies or corporations, shall mean the partners or the executive officers, or local managers thereof.

The same statute defines the term "employe," inter alia, as follows:

> Section 104. The term "employe," as used in this act is declared to be synonymous with servant, and includes
>
> (a) All natural persons, including minors, who perform services of any kind, except agricultural services or domestic services performed in a private home, for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer.

When a person procures the performance of services by another, two legal relations may result: one, that of employer and employe; and two, that of employer and independent contractor. In the former relationship, the employer has the actual or potential control at all times, both of the manner and means of performing the services, and of the result to be accomplished. In the latter relationship, the in-

dependent contractor is obliged to follow the will of his employer only as to the result of the work in hand, and not as to the means by which it is to be accomplished.

In determining whether home workers are employes within the scope of the act under consideration, the inquiry should relate to whether the worker may perform the work according to his own methods and without direction from the employer, save as to the result, and whether the time which he devotes to the execution of the work is within his own control. Where these factors are present, it is uniformly held that the one who is so engaged is an independent contractor and not an employe.

While the courts are not solicitous to put a claimant in the position of an independent contractor, when a reasonable view of the relationship warrants the finding that the injured person was an employe, it must be remembered that the law is applicable to one only when he occupies the status of an employe.

In general, where work is let out to be done on the worker's own premises, he using his own equipment and doing the work according to his own methods and without direction from the employer as to the manner in which the work shall be done, and not being required to devote his whole time to the performance of the contract, the worker in such case is not an employe but an independent contractor, who does not fall within the provisions of the Workmen's Compensation Act, cited above.

> 2. Is an employer of industrial home workers (Act 176 of 1937) required to carry unemployment compensation insurance and Federal old age pension under State and Federal social security laws?

Subdivision (h) of section 4 of the Unemployment Compensation Law (Act of December 5, 1936, Pamphlet Laws of 1937, Page 2897), provides as follows:

> (h) "Employe" means every individual, whether male, female, citizen, alien or minor who is performing or subsequent to January first, one thousand nine hundred thirty-six, has performed services for an employer in an employment subject to this act.

Subdivision (i) of section 4 of the said act, as amended by the Act of May 18, 1937, P. L. 658, defines "employer," inter alia, as follows:

> (i) "Employer" means every—(1) individual, (2) copartnership, (3) association, (4) corporation (domestic or foreign), (5) the legal representative, trustee in bankruptcy, receiver or trustee of any individual, copartnership, association, or corporation, or (6) the legal representative

> of a deceased person, (I) who or which employed or employs any employe (whether or not the same employe) in employment subject to this act for some portion of each of some twenty (20) days during the calendar year one thousand nine hundred thirty-six, or any calendar year thereafter, each day being in a different week, or (II) who or which has elected to become fully subject to this act, and whose election remains in force.

What has been said above in reply to the first question applies with equal force to this question. While the language of the above-quoted definitions is comprehensive enough to include a home worker, a perusal of the entire act indicates the legislative intent to restrict its benefits to the vast army of workers who are employes in the strict legal sense, and to exclude from its operation those workers who perform their services in their homes at such times and seasons as suits their fancy.

Where the home worker performs the services according to his own methods, and upon his own time, free of control therein by his employer, except as to the result of his work, he is not an employe but an independent contractor in law, and, as such, does not fall within the provisions of the Unemployment Compensation Law, above cited.

To summarize, you are advised that where a home worker is an independent contractor within the test above indicated, he is not:

(1) An employe within the meaning of The Workmen's Compensation Act, and, therefore, the employer is not required to carry workmen's compensation insurance covering him, under The Workmen's Compensation Act, cited above; and

(2) An employe within the meaning of the Unemployment Compensation Law, and, therefore, the employer is not required to carry unemployment compensation insurance covering him, pursuant to the provisions of the Unemployment Compensation Law, cited above.

Very truly yours,
DEPARTMENT OF JUSTICE,
GUY K. BARD,
Attorney General.

(OPINION No. 275 CANCELLED)

OPINION No. 276

Public officers—Resignation—Necessity for acceptance—Member of House of Representatives—Implied acceptance—Resignation made under mistake of law.

1. It seems that the resignation of a member of the State House of Representatives, directed to the speaker and received by him, is effective without the

necessity of having it accepted, and the speaker should issue a special writ for the filling of the vacancy in the district previously occupied by the resigned member; and certainly it may be considered accepted where received without protest by the speaker and secretary of the house and signified by the member's absenting himself.

2. The resignation of a public officer is valid and binding even though made under a mistake of law.

Harrisburg, Pa., March 3, 1939.

Honorable Samuel S. Lewis, Lieutenant Governor, **Harrisburg,** Pennsylvania.

Sir: We have your request to be advised as to the present status of Senator P. J. Henney, of the Forty-Fifth Senatorial District of Allegheny County, and also as to your duties as President of the Senate in reference thereto.

You have also submitted for our consideration an extract from the Legislative Journal of February 6, 1939, page 274, in which the formal resignation of Senator Henney was set forth as follows:

IN THE

SUPREME COURT OF PENNSYLVANIA

THE COMMONWEALTH OF PENNSYLVANIA EX

RELATIONE ANNA P. ELKINS

v.

P. J. HENNEY

Miscellaneous Docket No. 1026

To: THE SENATE OF PENNSYLVANIA:

HONORABLE THOMAS KENNEDY, LIEUTENANT-GOVERNOR: AND HONORABLE JOHN MORLOCK, SECRETARY OF THE SENATE.

I, Patrick J. Henney, hereby resign as a Senator representing the Forty-Fifth Senatorial District, effective immediately.

December 24, 1938

PATRICK J. HENNEY
P. J. HENNEY

Witness:
Frederick G. Van Denbergh, Jr.

It further appears from the Legislative Journal that this resignation had previously been received and placed in the official files of the Secretary of the Senate.

It has likewise been called to our attention that Senator Henney

has been absent from his post in the Senate since the date of his resignation. We also can take official notice that the resignation contains as its caption the case pending before the Supreme Court of Pennsylvania, wherein the right of Senator Henney to hold office was being challenged in quo warranto proceedings.

An almost identical set of facts was passed upon by former Attorney General Carson in an opinion dated November 16, 1905, and reported in Official Opinions of the Attorney General (1905-06) page 376; and also reported in 14 Pa. Dist. 832 31 Pa. Co. Ct. 601; 8 Dauph. 216. The Attorney General there advised the Speaker of the House of Representatives that a resignation of a member of the House, directed to the Speaker and received by him, was effective, and that the Speaker should issue a special writ for the filling of the vacancy in the district previously represented by the resigned member.

While we do not necessarily affirm all of the reasoning in Attorney General Carson's opinion, nevertheless, the advice contained in that opinion is sound and should be followed by you in the present situation. We cannot agree with the former Attorney General that in Pennsylvania we should follow the rule that a resignation of a public officer is not effective until accepted by the proper authorities, since there is eminent authority for the reverse of this proposition. In the absence of a ruling by our Supreme Court on this question, we are of the opinion that public officers in Pennsylvania may resign effectively without the necessity of having such resignation accepted.

Nevertheless, the former Attorney General correctly points out that, even if acceptance of the resignation was required, the receipt of this resignation by the Speaker of the House and the subsequent action of the resigned member resulted in the resignation having been properly accepted. In the case now before us for consideration, we are of the opinion that the receipt of Senator Henney's resignation by former Lieutenant Governor Kennedy and former Secretary of the Senate Morlock is sufficient acceptance of the resignation.

The fact that Senator Henney may have resigned under the allegedly mistaken belief that he had been required to do so by the Supreme Court is of little moment for the purposes of this opinion. In State *v.* Dart, 57 Minn., 261, it was held that an officer may resign pending removal proceedings, and in Commonwealth ex rel. *v.* Donoghue, 31 D. & C. 105, the court decided that a resignation made under a mistake of law was nevertheless valid and binding.

In 46 C. J. 980, section 134, the rule as to the acceptance of resignations is stated thus:

> Where no particular mode of accepting a resignation is specifically provided by constitution or statute, no formal

> mode of acceptance is necessary, and it may be by parol, or it may be shown by performance of an official act which could not legally be performed unless the resignation was accepted. Thus the acceptance may be manifested by the election or appointment of a successor by the office or body authorized to fill vacancies, *or by calling an election for that purpose.* (Italics ours.)

In view of all these circumstances, you are advised that you may regard the resignation which Senator Henney submitted to your predecessor in office as terminating and vacating his office as Senator of the Forty-Fifth Senatorial District, whereupon it becomes your duty under Article II, Section 2 of the Constitution of Pennsylvania to issue a formal writ of election by reason of such vacancy.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

OPINION No. 277

Milk control—Federal Order No. 27—New York Milk Marketing Area—Effect of voluntary compliance by dealers who, in the absence of such regulation, would be subject to the Milk Control Law of Pennsylvania.

It is within the discretion of the commission to determine that its own price regulations will not be applied to milk dealers who enter into legally binding agreements with their Pennsylvania producers (or producers' agents or agency) to conform with the terms of the Federal order by paying such producers the prices therein prescribed for milk sold in New York, pending appeal taken to the Supreme Court of the United States from a decision declaring said order to be unenforceable.

Harrisburg, Pa., March 13, 1939.

Honorable Howard G. Eisaman, Chairman, Milk Control Commission, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your inquiry as to the effect of voluntary compliance with Federal Order No. 27, promulgated for the New York Milk Marketing Area, by those dealers who, in the absence of such Federal regulation, would be subject to the Milk Control Law of Pennsylvania.

In the case of Milk Control Board *v.* Eisenberg Farm Products, Inc., the Supreme Court of the United States, on February 27, 1939, held that a milk dealer buying milk in Pennsylvania for shipment to New York City was subject to all provisions of the Milk Control Law

of Pennsylvania, Act of April 28, 1937, P. L. 417, (including price orders issued thereunder) until the provisions thereof were superseded by Federal regulation. This case was instituted prior to the exercise of any authority respecting New York by the Secretary of Agriculture of the United States under the Act of Congress, June 3, 1937, 7 U. S. C. A., Section 601. At the time that the case was finally decided the record did not show whether this Federal authority had been exercised, whether the dealer involved fell within or without any exercise thereof, or whether any exercise thereof conflicted with State regulation and therefore superseded it.

On September 1, 1938, the Secretary of Agriculture of the United States, acting pursuant to the aforesaid Act of Congress, made effective Order No. 27 respecting the New York milk marketing area. On February 23, 1939, in the case of United States *v.* Rock Royal Cooperative, Inc. et al., United States District Court for the Northern District of New York held this order unenforceable. You advise that there immediately arose a demand on the part of milk producers adversely affected by this decision that milk dealers (or milk handlers) voluntarily conform to the provisions of said order No. 27 pending appeal taken by the government to the Supreme Court of the United States; that the economic conditions surrounding the dairy industry in New York make such voluntary compliance highly desirable at this time; that such compliance is being achieved by contracts entered into between dealers and producers or producer associations and their agents identical with order No. 27 in their terms, respecting milk of Pennsylvania producers which is sold in New York.

Both the State and the Federal statutes make it clear that the respective authorities are to cooperate with each other to achieve a uniform price structure for milk sold in any given area: Pennsylvania Act of April 28, 1937, P. L. 417, Sections 311 and 808; Act of Congress, June 3, 1937, c. 296; 7 U. S. C. A., Section 610 (i).

The question now to be resolved is whether such voluntary compliance, whereby milk dealers by contract subject themselves to the terms of order No. 27, may be deemed Federal regulation to the extent that your commission would be within its discretion in determining that State regulation need not be applied to dealers so complying, pending the appeal.

Order No. 27 has not been rescinded by the Secretary of Agriculture of the United States. The language and effect of the Rock Royal decision are simply that the order "should not be enforced." There is nothing in the decision which would forbid voluntary compliance therewith, whereby milk dealers subject themselves to its terms by so contracting with their producers.

If the appeal taken to the Supreme Court of the United States is decided favorably to the government, persons now not complying with order No. 27 will be required to conform therewith as of its effective date. Those now voluntarily complying with the order will be in the position of having acted pursuant to Federal regulation notwithstanding that at present they apparently have the alternative of complying voluntarily or risking noncompliance.

Under the circumstances, it is our opinion that it is within the discretion of the commission to determine that its own price regulations will not be applied to milk dealers who enter into legally binding agreements with their Pennsylvania producers (or producers' agents or agency) to conform with the terms of Federal Order No. 27 by paying such producers the prices therein prescribed for milk sold in New York, pending appeal taken to the Supreme Court of the United States from a decision declaring said order to be unenforceable.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

OPINION No. 278

Administrative law—Deposit of State funds—Security—Home Owners' Loan Corporation Bonds—Act of April 9, 1929, sec. 505, as amended.

The phrase "bonds of the United States" as used in section 505 of the Act of April 9, 1929, P. L. 343, as last amended by the Act of June 7, 1935, P. L. 283, providing that the deposit of State moneys may be secured, inter alia, by such bonds, means direct, immediate, and unconditional obligations of the United States itself and does not, therefore, include bonds of the Home Owners' Loan Corporation which, although unconditionally guaranteed by the Government both as to interest and principal, are not in the first instance its obligations.

Harrisburg, Pa., March 16, 1939.

Honorable F. Clair Ross, Chairman, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to whether the Board of Finance and Revenue may permit the use of bonds of the Home Owners' Loan Corporation as security for the deposit of State moneys.

Section 505 of the Act of April 9, 1929, P. L. 343, as last amended by the Act of June 7, 1935, P. L. 283, provides that "The Board of Finance and Revenue shall have the power, and its duty shall be,"

among other things, to select depositories for State moneys. At subsection 2 (a) of the same act and section, it is stated "That, in lieu of the surety bonds of surety companies or of individuals as aforesaid, the deposit of State moneys may be secured by the deposit with the State Treasurer of *bonds of the United States,* bonds of the Delaware River Joint Commission, bonds of this Commonwealth, or any municipal subdivision or county thereof * * *" (Italics ours.)

In Opinion No. 156, dated November 28, 1934, addressed to Honorable William D. Gordon, Secretary of Banking, this department held that Home Owners' Loan Corporation bonds were: (1) "Bonds or other interest bearing obligations of the United States," as that phrase was used in The Banking Code of May 15, 1933, P. L. 624; and, (2) legal investments for trust funds under the Act of June 7, 1917, P. L. 447, as amended, which provides such funds may be invested "in the stock or public debt of the United States." This opinion holds such bonds to be within the wording, as shown above, of these particular statutes. With these conclusions, we agree, for the unconditional guaranty as to interest and principal by the United States brings the bonds within the designated classifications.

This opinion, however, is not determinative of the question you have raised, for the opinion also states that the bonds are "not, in the first instance, obligations of the United States." We find the following pertinent statement regarding the interpretation of words at 59 C. J. 974, section 577:

> While the meaning to be given a word used in a statute will be determined from the character of its use, words in common use are to be given their natural, plain, ordinary and commonly understood meaning, in the absence of any statutory or well established technical meaning, unless it is plain from the statute that a different meaning was intended, or unless such construction would defeat the manifest intention of the legislature.

The legislature's intent and meaning must be ascertained primarily from the statute itself, and the literal construction of a statute has preference over judicial or other interpolation. In this instance, we believe that the words "bonds of the United States" must be given their ordinary meaning, as to do otherwise would be to enlarge upon the class of bonds acceptable according to the legislative standards, and we detect no intent to have these words extended beyond their usual comprehension.

We are constrained to conclude that "bonds of the United States" contemplate the direct, immediate and unconditional obligation of the United States itself and not the bonds, of whatsoever nature, of an instrumentality. In this opinion, we are borne out by an opinion

to the clerk to the Board of Revenue Commissioners, Harrisburg, Pennsylvania, on October 30, 1907, by this department, wherein it was held that "the word 'municipal' as used in the 7th section of the Act of 1906, (P. L. 45) has no qualifying words of any kind attached to it, and therefore, must be construed as referring to the bonds of a municipal corporation with the fullest and broadest powers of a municipality, and not to a subdivision with such limited powers as a school district." Therein the words of the statute, which act was repealed by the act now in question and which was worded similarly, are given a confined meaning, and certainly the instant case is analogous thereto and should be ruled accordingly.

The views hereinbefore expressed are substantiated by an opinion of the Attorney General of California, dated November 30, 1934, found at section 12,236.11, Prentice-Hall Federal Bank Service, wherein that officer held, in construing words similar to those in our statute that:

> It will be seen that strictly or literally the bonds of the Home Owners' Loan Corporation are not bonds of the United States. The fact that the United States guarantees both the principal and the interest of the bonds does not make them bonds of the United States.
>
> Although, in view of the guarantee, such bonds may be just as good as bonds of the United States, so far as constituting adequate security for the deposit of public funds, I believe you are bound by the strict letter of the statute and that you may not accept bonds of the Home Owners' Loan Corporation as security for the deposit of public funds.
>
> The Legislature may, of course, amend the statute so as to authorize the acceptance of such bonds, but until such amendment is made I feel obliged to advise you as above indicated.

We feel that the value of Home Owners' Loan Corporation bonds, in so far as their worth as security is concerned, rises to heights equal with United States bonds, in both instances the full faith and credit of the United States being guaranteed as to principal and interest. Under these circumstances, the legislature might well consider the advisability of bringing the bonds in question within the category of those bonds acceptable as security for State deposits in lieu of surety bonds.

Therefore, for the reasons which we have expressed, you are advised that bonds of the Home Owners' Loan Corporation are not "bonds of the United States" within the purview of Section 505 of the Act of April 9, 1929, P. L. 343, as last amended by the Act of

June 7, 1935, P. L. 283, and subject to approval by the Board of Finance and Revenue as security for deposits of State moneys.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRANK A. SINON,
Deputy Attorney General.

OPINION No. 279

Taxation—Municipal taxation—Commonwealth property—Property rented to private individuals—The General County Assessment Law May 22, 1933.

1. Municipal subdivisions such as counties, cities, boroughs and school districts have no inherent power to tax property within their territorial limits but only such power as is granted them by the sovereign state, and they may not therefore tax real property of the sovereign within their territorial limits, in the absence of language which expressly or by necessary implication confers such power, without regard to the use to which such property is put.

2. Property acquired by the Commonwealth at a sheriff's sale to satisfy a debt due by the owner to the Commonwealth, and rented by the Commonwealth to individuals for a residence, is not subject to local taxation under The General County Assessment Law of May 22, 1933, P. L. 853.

Harrisburg, Pa., March 20, 1939.

Honorable Roger W. Rowland, Secretary of Property and Supplies,
Harrisburg, Pennsylvania.

Sir: We have your request for an opinion, whether a single dwelling acquired by the Commonwealth through the Department of Revenue and now rented by the Commonwealth to individuals for a residence may be taxed by the school district and the borough of Langhorne. You advise that this property was acquired at sheriff's sale in 1937 to satisfy a debt due by the owner to the Commonwealth, and that it has been assessed for the year 1938 for school and borough purposes. The tax collector is demanding payment of the school and borough taxes from the Commonwealth, claiming that since "This property is being used and rented for residence purpose (it is to be) therefore classed as a commercial item which is a taxable property."

Article IX of the Constitution of Pennsylvania provides, so far as pertinent to the question here involved, as follows:

> Section 1. Taxes to be uniform; exemptions. All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, institutions of purely public charity, and real and personal property owned, occupied, and used by any branch, post, or camp of honorable discharged soldiers, sailors, and marines.
>
> * * * * *
>
> Section 2. Exemption from taxation limited. All laws exempting property from taxation, other than the property above enumerated shall be void.

In County of Erie *v.* City of Erie, 113 Pa. 360, 367, Mr. Justice Green, in discussing the above quoted provisions of the Constitution, said:

> * * * This section does not declare that all property whether public or private shall be subject to taxation nor does it contain any equivalent provision. It does however direct that "all taxes * * * shall be levied and collected under general laws." This certainly means that the legislative power of the Commonwealth shall provide the necessary legislation for levying and collecting all taxes: * * *

Carrying out the constitutional mandate, the legislature has passed a succession of statutes, culminating in the General County Assessment Law of May 22, 1933, P. L. 853, the relevant provisions of which are:

> Section 201. Subjects of Taxation enumerated.—The following subjects and property shall, as hereinafter provided, be valued and assessed, and subject to taxation for all county, city, borough, town, township, school and poor purposes at the annual rate:
>
> (a) All real estate, to wit: Houses, lands, lots of ground and ground rents, mills and manufactories of all kinds, furnaces, forges, bloomeries, distilleries, sugar houses, malt houses, breweries, tan yards, fisheries, and ferries, wharves, and all other real estate not exempt by law from taxation.
>
> * * * * *
>
> Section 204. Exemptions from Taxation.—The following property shall be exempt from all county, city, borough, town, township, road, poor and school tax, to wit:
>
> * * * * *
>
> (g) All other public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same;

Does this Act of Assembly authorize the taxing authorities of municipalities to levy and assess taxes for local purposes against real property within their boundaries owned by the Commonwealth without regard to the use to which the Commonwealth puts it? We think not.

It is a well settled principle that the sovereign is not within the laws laid down for the government of its subjects, unless it is specifically named in such statutes. In Jones *v.* Tatham, 20 Pa. 398, 411, it was said:

> * * * Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily applied * * *

In Endlich on the Interpretation of Statutes, section 161, the controlling principle of law in this case is stated as follows:

> On probably similar grounds rests the rule commonly stated in the form that the crown is not bound by a statute unless named in it. It has been said that the law is prima facie presumed to be made for subjects only: that the general business of the legislative powers is to establish laws for individuals, not for the sovereign. At all events, the crown is not reached except by express words, or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the legislature does not intend to deprive the crown of any prerogative right or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. Where, therefore, the language of the statute is general and in its wide and natural sense would divest or take away any prerogative or right, title or interest from the crown it is construed so as to exclude that effect.

To the same effect see Pittsburgh *v.* Subdistrict School, 204 Pa. 635, 641; Puloka *v.* Commonwealth, 43 Dauphin County Reports, 112; County of Erie *v.* City of Erie, supra; Baker *v.* Kirschnek et al., 317 Pa. 225; Directors of the Poor of Schuylkill County *v.* School Directors of North Manheim Township, 42 Pa. 21, 25, where it was said:

> * * * The public is never subject to tax laws, and no portion of it can be without express statute. No exemption law is needed for any public property, held as such. * * *

The taxing power is an attribute of sovereignty. Municipal subdivisions, such as counties, cities, boroughs and school districts, have

no inherent power to tax property within their territory, but all such power as they possess was obtained by grant from the sovereign. It would be an anomaly, to say the least, if a grant by the sovereign to one of its creatures, such as a borough, to tax the property of the subjects of the sovereign within such borough, were recognized as a grant to tax the property of the sovereign, in the absence of language which expressly, or by necessary implication, confers such power. The General County Assessment Law contains no such language and cannot be so construed.

Assuming for the sake of argument that the General County Assessment Law confers upon municipalities the power to tax real estate owned by the Commonwealth, still this property could not be taxed under clause (g) of the act exempting "all other public property used for public purposes" from taxation by municipalities. It is a governmental function, and therefore a public purpose, to care for the indigent and mentally defective: Commonwealth ex rel. Schnader *v.* Liveright et al., 308 Pa. 35. This property is simply substituted for the time being for the public funds expended for a public purpose, namely, the maintenance and support of an indigent person, and the fact that the Commonwealth for the time being receives rent for the property instead of interest on the fund which the property now represents does not change the situation.

However, we do not rest our conclusion on the ground that this property is exempt from taxation under the statute, but on the firmer ground of want of power in any municipality to tax real property of the State under the law as it now stands, without regard to the use to which such property is put. All such assessments are ultra vires and void.

We are of the opinion, and you are accordingly advised, that the assessment of the property of the Commonwealth by the school district and the borough of Langhorne is void and imposes no liability upon the property or upon the Commonwealth to pay the taxes claimed, and payment thereof should be refused.

Very truly yours,
DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

OPINION No. 280

Public officers—Members of Delaware River Joint Commission—Appointment by Governor—Removal—Act of June 12, 1931—Constitution, art. VI, sec. 4.

Members of the Delaware River Joint Commission who have been appointed by the Governor pursuant to article II of the Act of June 12, 1931, P. L. 575,

may, under article VI, sec. 4, of the Constitution, be removed by him or his successor in office.

Harrisburg, Pa., March 24, 1939.

Honorable Arthur H. James, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: Recently you requested me to inquire into your authority to remove the members of the Delaware River Joint Commission.

This Commission was created by agreement between the Commonwealth of Pennsylvania and the State of New Jersey. The Governor of the Commonwealth was authorized to enter into said compact or agreement on behalf of this Commonwealth by the Act of June 12, 1931, P. L. 575 (36 PS § 3503). The agreement provides, in part, as follows:

Article I.

> There is hereby created a body corporate and politic to be known as The Delaware River Joint Commission (hereinafter in this agreement called the "Commission"), which shall constitute the public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey for the following public purposes, and which shall be deemed to be exercising an essential governmental function in effectuating such purposes, to wit: * * *

Article II.

> The commission shall consist of sixteen commissioners, eight resident voters of the Commonwealth of Pennsylvania, and eight resident voters of the State of New Jersey, who shall serve without compensation.
>
> The first eight commissioners for the Commonwealth of Pennsylvania shall be the Governor of the Commonwealth, the Auditor General, the State Treasurer, the Mayor of the City of Philadelphia, and the four additional persons now serving as members of the Pennsylvania Commission, existing by virtue of act number three hundred thirty-eight of the Commonwealth of Pennsylvania, approved July ninth, one thousand nine hundred and nineteen (Pamphlet Laws, eight hundred fourteen), and act amendatory thereof and supplementary thereto.
>
> * * * * *
>
> For the Commonwealth of Pennsylvania, the Governor, the Auditor General, the State Treasurer, and the executive head of the City of Philadelphia, in office at the time, shall always be members of the commission, and, in addition thereto, there shall be four members appointed by the Governor, who shall be known as appointive members. Whenever a vacancy occurs in the appointive membership of the

> commission, the Governor shall appoint a member to serve for a term of five years from the date of his appointment.
>
> * * * * *
>
> All commissioners shall continue to hold office after the expiration of the terms for which they are appointed or elected unless and until their respective successors are appointed and qualified, but no period during which any commissioner shall hold over shall be deemed to be an extension of his term of office for the purpose of computing the date on which his successor's term expires.

Thus, the statute designates eight resident voters of Pennsylvania as members of the Commission, describing four of them by the titles of their respective offices, and the other four, by reference to their membership in an existing body theretofore created. The act also provides that, as to Pennsylvania, the holders, from time to time, of the four offices designated, should always be members of the Commission, and that in addition thereto there should be four members appointed by the Governor, who shall be known as appointive members. Provision was made for filling vacancies in the appointive membership, authorizing appointment by the Governor for the term of five years from the date of appointment. Concerning the four persons holding the designated public offices, I assume that there is no question in respect of their right to continue as members of the Commission. This discussion will be confined to your right to dismiss the four appointive members.

Article VI, section 4 of the Constitution (PS Constitution 348) provides as follows:

> All officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

In Commonwealth *v.* Likeley, 267 Pa. 310, the Supreme Court said:

> This section provides for three methods of removal of public officers other than by formal impeachment by the House of Representatives before the Senate, * * * viz., on conviction of misbehavior or crime, at the pleasure of the appointing power, and for reasonable cause on the address

> of two-thirds of the Senate, and all officers are subject to the first kind, *appointed officers to the second,* and elected officers to the third, regardless of the classification of the officers into state, county, and municipal. (Italics ours.)

See also In re Georges Township School Directors, 286 Pa. 129, wherein it is held that appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. And it has been held that under the common law the appointing power may remove ministerial officers at pleasure, either for cause, or without cause, and of its own motion where such appointive officers are not included or covered by constitutional provision (Glessner's Case, 289 Pa. 86).

The tenure of the members of this Commission has already been before the Supreme Court of Pennsylvania in Commonwealth ex rel. Smith et al. *v.* Clark et al., 331 Pa. 405.

Messrs. Thomas B. Smith and Richard Weglein of Philadelphia were members of the Pennsylvania commission at the time the act of 1935, supra, was enacted, *and, pursuant to its provisions,* they became appointive members of the Delaware River Joint Commission. They were serving as members of the joint commission at the time Governor Earle took office and on December 10, 1936, were removed by him. In their stead, Governor Earle appointed James P. Clark and George Gordon Meade. Quo warranto proceedings were instituted by Messrs. Smith and Weglein against James P. Clark and George Gordon Meade. The Court of Common Pleas of Philadelphia County held that the relators were appointed officers, as referred to in article VI, section 4 of the Constitution, supra, and could therefore be removed by the Governor. In addition to Governor Earle's removal of Messrs. Smith and Weglein, the General Assembly passed a resolution stating that Smith and Weglein "are not appointees of the General Assembly," that they had been properly removed by the Governor and that they no longer held office as members of the Commission.

The Supreme Court held that these two men had been appointed by legislative designation or appointment and that consequently were not within the category of public officers referred to in article VI, section 4 of the Constitution. At page 412 the opinion of the Supreme Court is as follows:

> * * * We cannot see the slightest difficulty in understanding that provision to be a legislative designation or appointment by accurate description of the eight members by reference to offices then held by them. The appointment was complete; the Governor could add nothing to it; he could

> take nothing from it; the appointees were clearly described. He could have vetoed the bill; instead, he approved it, but his approval was not the selection of members of the commission, because that had already been done by the legislature.

With respect to the contention of Messrs. Clark and Meade that the resolution of the General Assembly above referred to had clearly designated a legislative intent that Smith and Weglein were not lgislative appointees, the court, at page 414, held:

> It is the duty of the courts to determine what the Act of 1931 means; the legislature has no power by resolution to determine how that statute shall be interpreted in its application to a past transaction or that appellants "were lawfully removed as members of the (Commission) and that they no longer hold office as such": Reiser *v.* William Tell Saving Fund Assn., 39 Pa. 137. The duty of determining the legality of the alleged removal was and is in the courts; at this point the doctrine of the separation of powers operates against appellees.

The Supreme Court, as stated, ruled that Messrs. Smith and Weglein were legislative appointees and consequently could not be removed by the Governor. Whereupon the General Assembly enacted the Act of September 22, 1938 (Special Session), P. L. 37, removing them as members of the Commission. Subsequently the Governor appointed Messrs. Clark and Meade and they continued to hold office as members of the commission. Governor Earle also appointed John B. Kelly and John A. McCarthy to fill two other existing vacancies. Hence, the four so-called "appointive members" of the commission are all holding their present office by virtue of appointments by the Governor of the Commonwealth.

And since they have been appointed by the Governor, they are subject to the provisions of article VI, section 4 of the Constitution, supra, and can be removed by you. Having removed the four appointive members, or any of them, you may, under the terms of the act creating the commission fill the vacancies then existing by appointment for a term of five years.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 281

Beauty culture—Necessity for obtaining license—Act of May 3, 1933—Performing services in own home for gratuity—Necessity for affiliation with registered beauty shop—Rules of Department of Public Instruction—Exemption of domestic administration without compensation—Scope.

1. Persons who, although they do not operate a beauty parlor, voluntarily set hair for anyone in the community who comes to their homes, and who accept donations for their services, although they do not make a charge therefor. are practicing beauty culture for compensation within the meaning of the Act of May 3, 1933, P. L. 242, and must therefore be licensed to do so.

2. Under the rules of the Department of Public Instruction promulgated pursuant to section 14 of the Act of May 3, 1933, P. L. 242, even a licensed operator must be affiliated with a registered beauty shop before she may practice beauty culture from house to house, and must maintain a registered beauty shop at home before serving patrons there.

3. The exception contained in section 17 of the Act of May 3, 1933, P. L. 242, prohibiting the practice of beauty culture without a license, that the requirement shall not apply to "domestic administration without compensation" applies only to practice by unprofessional persons in their own families and does not include persons who perform services for gratuities for anyone who comes to their homes.

Harrisburg, Pa., March 28, 1939.

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

Sir: We have before us for our consideration the question which you submitted involving the Beauty Culture Law. Your question involves following facts:

There are two or three girls in Ellwood City, Pennsylvania, who, although they do not operate out of a beauty parlor, voluntarily set hair for anyone in the community who comes to their homes. These girls do not charge for their services but they do accept donations. The memorandum raises the question of whether or not these girls are operating illegally, contrary to the Beauty Culture Law. This opinion will apply whether such operators are licensed or unlicensed.

There does not seem to be any question as to whether or not these girls are practicing beauty culture as defined in section 1 of the Act of May 3, 1933, P. L. 242. Section 2 of the act provides, in part, as follows:

> It shall be unlawful for any person to practice, * * * or use or maintain any place for the practice * * * of beauty culture for compensation unless he or she shall have first obtained from the department a certificate of registration as provided for in this act * * *

If these girls are not licensed and are doing the things covered by the act then they would be violating the act unless the receiving of donations shall not be construed as compensation.

Compensation is defined as "that which is given or received as an equivalent for services." Century Dictionary and Cyclopedia.

These girls accept a donation as an equivalent for their services and it is just not good common sense to say that they do not expect such donation in every case.

Accordingly, if they are not licensed and are operating as beauty culture operators and receive donations for the services rendered, they are violating the Beauty Culture Law.

However, it may be that these girls are licensed operators and, therefore, we must go further in our discussion to determine whether or not they are breaking the law.

Section 8 of the act provides:

> It shall be unlawful for any person to practice beauty culture for pay in any place other than a registered beauty shop: Provided, That a registered operator may furnish beauty culture treatments to persons in residences of such persons by appointment.

You have advised us that the department has established the rule that persons who do house to house beauty culture work must be affiliated with a beauty shop.

Section 14 of the act authorizes the department to make sanitary rules for the practice of beauty culture. We quote the section in full:

> The department shall prescribe such sanitary rules as it may deem necessary, with particular reference to the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases; and it shall be unlawful for the owner or manager of any beauty shop or school of beauty culture to permit any person to sleep in or use for residential purposes any room used wholly or in part as a beauty shop or school of beauty culture.

We take it that the department has established the rule just referred to in connection with section 8 by reason of the authority as contained in section 14.

So, even a licensed operator must be affiliated with a registered beauty shop before she may practice from house to house, and she must maintain a registered beauty shop at home before serving patrons there.

Section 17 of the act furnishes us with a much more serious problem. This section, in part, provides as follows:

> Nothing in this act shall prohibit * * * domestic administration without compensation * * *

Do these girls come within the exception of this section?

We cannot find that domestic administration as such has been defined in the dictionary. Administer is defined "to give or apply; make application of: as to administer medicine, punishment, counsel, etc."

Domestic as an adjective has been defined as "home-made." For example, domestic medicine is medicine as practiced by unprofessional persons in their own families.

We believe that the expression "domestic administration" as used in the act is intended to cover the application of beauty culture as defind in the act in the same way as domestic medicine is defined, that is, by unprofessional persons in their own families. A mother or daughter or sister or friends of the family in the home no doubt would come under the exemption as intended in section 17. These girls do not.

Accordingly, we are of the opinion that practitioners of beauty culture are not permitted to practice beauty culture in their own homes unless they set up therein a beauty parlor that meets the sanitary rules and regulations of the department. This is true even though such practitioners do not make a charge for these services, but do accept donations.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

OPINION No. 282

Public officers—Members of Unemployment Compensation Board of Review—Removal—Governor—Unemployment Compensation Law of December 5. 1936, sec. 203—Constitution, art. VI, sec. 4.

The work of the Unemployment Compensation Board of Review being administrative in character, and it being an instrument of the executive branch of the Government, its members may, under article VI, sec. 4 of the Constitution, be removed by the Governor, the power appointing them under section 203 of the Unemployment Compensation Law of December 5, 1936, P. L. (1937) 2897, even though the advice and consent of two thirds of all the members of the Senate is required in making the appointment.

Harrisburg, Pa., March 30, 1939.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to whether or not the

Unemployment Compensation Board of Review can be replaced by new appointees of the Governor. A single legal question is presented: Has the Governor the power of removal?

This board was created by Act No. 1 of the General Assembly, approved December 5, 1936, which provides in section 203 as follows:

> There is hereby created in the department an Unemployment Compensation Board of Review. The board shall consist of three members nominated and appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate, for terms of six years each, and until their successors shall have been appointed and qualified, except that the terms of the members first taking office shall expire on July first, one thousand nine hundred thirty-nine; and July first, one thousand nine hundred forty-one; and July first, one thousand nine hundred forty-three, respectively, as designated by the Governor at the time of appointment and until their successors shall have been appointed and qualified. The Governor shall designate one of the members as chairman. Vacancies in said board shall be filled for the unexpired terms. The chairman of the board shall receive a salary at the rate of nine thousand dollars per annum. The other members of the board shall receive salaries at the rate of eight thousand five hundred dollars per annum. Such salaries shall be paid from the Administration Fund. Two members of the board shall be a quorum, and no action of the board shall be valid unless it shall have the concurrence of at least two members. A vacancy on the board shall not impair the right of a quorum to exercise all the rights and perform all the duties of the board.
>
> (b) The board may appoint a secretary to hold office at its pleasure. Such secretary, if appointed, shall have such powers and shall perform such duties, not contrary to law, as the board shall prescribe, and shall receive such compensation as the board, with the approval of the Governor, shall determine.
>
> (c) The board shall be a departmental administrative board, and shall have all the powers and perform all the duties, generally vested in, and imposed upon, departmental administrative boards and commissions by The Administrative Code of one thousand nine hundred twenty-nine and its amendments.
>
> (d) It shall be the duty of the board to hear appeals arising from claims for compensation, adopt, amend or rescind such rules of procedure, undertake such investigations, and take such action required for the hearing and disposition of appeals as it deems necessary and consistent with this act. Such rules of procedure shall be effective in such manner as the board shall prescribe and shall not be inconsistent with this act. Any investigation, hearing or

appeal which the board has power to undertake, hold, hear or determine, may be undertaken, held or heard by or before any one or more of the members of the board, but any determination, ruling or order of a member or members upon any such investigation, hearing or appeal undertaken, held or heard by him or them, shall not become and be effective until approved and confirmed by at least a quorum of the board. The chairman of the board, or his representative, shall have the power as often as he may deem the work of the board requires to designate the time and place for the conducting of investigations, hearings and appeals, and to assign cases to a member or members for such purposes.

(e) The Governor shall appoint and fix the compensation of such referees as may be deemed necessary with power to take testimony in any appeals coming before the board.

(f) The board shall submit to the department a biennial report concerning the performance of its powers and duties and shall make such recommendations for the improvement of its service and the amendment of this act as it deems proper.

It is clear that the statute designates that the three members of the Board of Review shall be nominated and appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. There appears to be no provision for removal in the act.

Article VI, section 4 of the Constitution (PS 348) provides as follows:

All officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate.

In Commonwealth *v.* Likeley, 267 Pa. 310 the Supreme Court stated that the above section of the Constitution provides for three methods of removal of public officers:

* * * on conviction of misbehavior or crime, at the pleasure of the appointing power, and for reasonable cause on the address of two-thirds of the senate. All officers are subject to the first kind, *appointed officers to the second,* and elected officers to the third. * * * (Italics ours)

In Georges Township School Directors, 286 Pa. 129, it was held that "in so far as appointive officers are concerned, there is the right, under the provision cited [Constitution Art. VI, Sec. 4] on the part of the one selecting to remove at his own pleasure."

The question arises as to whether or not the members of the Board of Review come under the category of "appointive officers" that "may be removed at the pleasure of the power by which they shall have been appointed."

It seems pertinent to differentiate between legislative, judicial, ministerial, executive and administrative authority or power.

"Legislative authority" is made use of for the purpose of announcing the law applicable to future cases: (Words and Phrases, 4th Series, Volume 2, page 556).

Inquiry as to whether rates which have been charged and collected are reasonable constitutes a "judicial act," while prescribing rates which shall be charged in the future constitutes a "legislative act": (Words and Phrases, supra, page 483).

In general "judicial authority" is exercised for the purpose of determining the rights or liabilities of parties according to law, with respect to transactions already had between them: (Words and Phrases, supra, page 484).

In other words, the legislature announces the law and policy *for the future* while the judiciary interprets law *already in existence.*

"Judicial authority" is distinguished from "ministerial" as follows:

Official action is "judicial" where it is the result of judgment or discretion, and is "ministerial" when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes the time, manner and execution of its performance with such certainty that nothing remains for judgment or discretion: (Words and Phrases, supra, page 483).

In other words a "ministerial act" is one in which there is an absence of judgment or discretion.

In considering "executive authority," we find:

> * * * In government "executive" is distinguished from "legislative" and "judicial"; "legislative" being applied to the order, or organs, or government, which makes the law; "judicial" to that which interprets and applies the laws; "executive" to that which carries them into effect. * * * (Words and Phrases, Volume 3, page 2567).

The "executive" power is the power to execute the laws and is vested in the Governor and the administrative officers of the State and of the subdivisions thereof: (Words and Phrases, 3d Series, Volume 3, page 4191).

> Officers that are neither judicial nor legislative necessarily belong to the executive department of the government and are "executive" or "administrative" officers; those terms are equivalent and, since the general scope of the duties of the county commissioners is the administration of the county affairs, they are "administrative officers" rather than judicial or legislative officers. (Words and Phrases, 3d Series, Volume 1, page 277).

The words "executive" and "administrative" are used as synonymous or interchangeable terms: (Words and Phrases, 4th Series, Volume 1, page 101).

Industrial Commission created to administer the Workmen's Compensation Act is an "administrative body": (Words and Phrases, supra, page 101).

The board members and the reviewing board, created by the Workmen's Compensation Act, do not constitute courts, but only administrative tribunals: Ahmed's Case, (Mass.) 179 N. E. 684, 686; (Words and Phrases, supra, page 101).

This differentiation is important.

In Commonwealth ex rel Attorney General *v.* Benn, 284 Pa. 421, the act of 1913 provided for the appointment of members of The Public Service Commission by the Governor, by and with the advice and consent of the Senate, and for removal by the Governor and with the consent of the Senate. It was held that because The Public Service Commission was "an administrative arm of the Legislature," or a committee of the legislature, since its function of rate making was legislative in character, that the members of the Commission were appointed by the legislature, and the legislature, by statute, had the right to prescribe the method of removal. Since the Public Service Commissioners were representatives of the legislature, and not of the executive, in his appointing power the Governor was an agent of the legislature.

Consider also Commonwealth ex rel Smith *v.* Clark, 331 Pa. 405, (Bridge Commission case).

The crux of the Benn case is based on the point that The Public Service Commission is an arm of the legislature. The Board of Review, by no stretch of the imagination, could be considered to be an arm of the legislature.

It has been held that under the common law, the appointing power may remove ministerial officers at pleasure, either for cause or without cause, and of its own motion, where such appointive officers are not included or covered by the constitutional provision: Glessner's Case, 289 Pa. 86.

In Lane *v.* Commonwealth, 103 Pa. 481, there was an attempt

by the legislature to control the right of removal. Appellant there contended that since, under the act in question, the Governor could appoint only by and with the advice of the Senate, the latter body on general principles was part of the appointing power, without regard to the character of the office involved; this broad contention was negatived. The particular office in controversy in the Lane case belonged to a branch of government separate and distinct from the legislature itself; therefore, when the latter authorized the Governor to fill the position, he was made the appointing power, and the constitutional provision as to the right of removal at the pleasure of the appointing power immediately applied.

The fact that, in designating the Governor as the appointing power, the statute for that purpose used the phrase "by and with the advice and consent of the Senate" when viewed in connection with the office there involved indicated no purpose on the part of the legislature to reserve in any sense, the appointing power to itself, for the office with which the statute dealt was not one connected in any way with the work of the General Assembly.

In Commonwealth ex rel. Kelley *v.* Clarke, 327 Pa. 181, the Philadelphia Civil Service Commission was appointed by the City Council. The act of 1937 created a new council of five members, two of whom were to be appointed by the Mayor, two by the City Controller, and the fifth by these four members. Quo warranto proceedings were commenced and an assignment of ouster entered against the new commission. The assignment of ouster was affirmed. The court held (page 188):

> * * * The right to remove "appointed officers" (and civil service commissioners "elected" by city council fall within that classification: See Com. ex rel. v. Likeley, 267 Pa. 310) is conferred, not upon the appointing power, but upon "the power by which they shall have been appointed." That the constitutional method of removal provided in Article VI, Section 4, is exclusive and prohibitory of any other mode which the legislature may deem better or more convenient is no longer open to question (Bowman's Case, 225 Pa. 364; Com. ex rel. v. Hoyt, 254 Pa. 45; Com. ex rel. v. Reid, 265 Pa. 328; Com. ex rel. v. Benn, 284 Pa. 421; Com. ex rel. v. Kelly, 322 Pa. 178), except where the legislature in creating the office prescribes a different method: Georges Township School Directors, 286 Pa. 129; Milford Township Supervisors' Removal, 291 Pa. 46. * * *

In Words and Phrases Judicially Defined, Volume 3, page 2567, we find this principle stated:

> Generally the appointment to an office is an executive function. If the General Assembly should create an office

> by statute duly passed by it, providing that it should be filled by appointment, the act of filling such office is a partial execution of the law. It is not, however, every appointment to office which involves the exercise of executive functions; as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointment made by the general assembly of officers necessary to enable it properly to discharge its duties as an independent legislative body and the like. Such appointments by the several departments of the state government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch. The appointment to an office where it is in no manner connected with the discharge of legislative duties involves the exercise of executive functions, which cannot be exercised by the legislative or judicial departments.

The Unemployment Compensation Act calls the Board of Review a departmental administrative board: [section 203 (c)]. Its services obviously are administrative in character. As a part of the Department of Labor and Industry, it is an instrument of the executive, and the executive is, in fact, the power by which members have been appointed; by article VI, section 4, Constitution, supra, his discretion as to removal must govern. As stated above, there is no provision in the unemployment compensation statute regarding removal; even if there were such a provision, it is doubtful if it would govern since the Board of Review is not by any stretch of the imagination an arm of the legislature, but is definitely an administrative body. For the same reason, the period or term of service designated in the act does not govern, but the Constitution, article VI, section 4 does govern. The Governor is the power by which the members of the board have been appointed and, therefore, they can be removed at his pleasure or discretion.

We are of the opinion, therefore, that the members of the Board of Review are subject to the provisions of article VI, section 4 of the Constitution, supra, and can be removed by the Governor on his own motion and replaced by new appointees.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 283

Evidence—Department of Public Assistance—Right to withhold records—Right of visitors to refuse to testify concerning facts learned in official capacity.

1. Visitors from the Department of Public Assistance can be compelled to testify in civil proceedings concerning facts of which they have personal knowledge, even though the knowledge was gained in their capacity as representatives of the department.

2. The records of the Department of Public Assistance being of a confidential nature, may, if subpoenaed, be withheld, and it would be lawful for the Secretary of the Department of Public Assistance to delegate to the county boards of assistance authority to make decisions on the advisability of submitting or withholding subpoenaed records in particular instances, though such boards should be governed by general rules promulgated by the State department.

Harrisburg, Pa., April 21, 1939.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to necessity of testifying in civil proceedings and advisability of withholding subpoenaed records. You ask two questions, which we shall present and answer seriatim.

> 1. Whether a visitor from your department would be compelled to testify in civil proceedings concerning facts of which she has personal knowledge, even though this knowledge was gained in her capacity as a representative of the department.

According to Marks' Appeal, 121 Pa. Super. Ct. 181, which cites at length authorities in this field, the answer would be in the affirmative. In this case the court said (page 184):

> * * * The party who made the examination may be subpoenaed and required to testify as to the results of such examination, and such testimony is better evidence than the record would be in the absence of the party who made it. * * *

Quoting Judge Hargest, the court said (page 183):

> * * * "The physician in charge of a dispensary of the Depart- of Health is like any other physician in charge of any other institution. He is subject to subpoena, by a proper tribunal and must obey such subpoena. When he responds he must testify as any other witness to any relevant, competent matter within his knowledge. The fact that this information was obtained through his employment as a physician in charge of a State institution does not render him exempt from testifying, or seal his lips as to the knowledge which

> he has obtained. I know of no statute which excuses the physician in charge of a State dispensary from testifying as to such facts. * * *

Since visitors represent those who investigate eligibility and continued eligibility for assistance, they must testify concerning facts of which they have knowledge, though such facts were gained in their official capacity.

> 2. Whether it would be lawful for you, as Secretary, to delegate to the County Boards of Assistance the authority to make decisions on the advisability of submitting or withholding subpoenaed records in particular instances.

According to Marks' Appeal, supra, the answer is in the affirmative. The court there said (page 181):

> In the absence of statutory provision to the contrary, the department of health of a municipality may not be required, upon subpoena of a private litigant in an action at law, to produce for inspection records and reports under its control relative to communicable diseases or the treatment of persons suffering from such diseases, where the production of such records and reports is against public policy.
>
> Whether such records and reports are proper for publication or general inspection or whether they should be withheld in the public interest is a matter for determination of the officer in charge.

There is no doubt that the records of the Health Department regarding diseases represent information of a confidential nature. The authorities are also clear that the administrative officer in charge of the records shall be the judge as to whether or not they are confidential and whether publication in open court would be inimical to the public interest.

Cases and decisions are agreed that the Governor, the Chief Executive, represents a coordinating branch of the government with the judiciary, and that this always applies to subordinate agencies of the Chief Executive.

Note Opinions of the Attorney General, 1923-1924, page 187, where it is stated:

> * * *" where officers of your department, being a branch of the executive authority of the State government, are subpoenaed to appear and bring with them certain confidential records procured solely in their official capacity, you shall judge, in the first instance, whether or not the production of such records would be inimical to the public welfare; that, having so determined, you shall act accordingly, and if, in your judgment, such records should not be

> produced, you should make respectful presentation to the court of your opinion in the matter, expressly disavowing any disrespect for the dignity and authority of said court, but setting forth your conviction that you must determine, in the first instance, from your knowledge of the records, whether or not they are such as should be made public.

The court in Marks' Appeal, supra, emphasized this point (page 185):

> * * * the question whether their production would be so injurious must be determined, not by the judge, but by the head of the department having the custody of the documents; for, the Chief Baron [Pollock] said: "The judge would be unable to determine it [that is, the question whether production of the document would be injurious to the public service] without ascertaining what the document was, and why publication would be injurious to the public service—an inquiry which cannot take place in private and which taking place in public may do all the mischief which it is supposed to guard against.

The court further said (page 192):

> * * * These records are in no true sense of the words "public records"; they are departmental records. * * *

It is seen that all the cases and opinions involve records of the health Departments regarding disease. Public policy behind the decisions is readily seen from this excerpt from the excellent opinion in the Marks' Case (page 187):

> * * * Persons suffering from contagious or infectious diseases, including sufferers from tuberculosis, must be assured of the greatest secrecy in dealing with their cases before their full co-operation with the public health authorities can be expected. * * *

Is this not analogous to the situation in the Department of Public Assistance? We feel that it is, for public assistance records contain data fully as confidential as those of the Department of Health: see Pennsylvania Federation for the Blind *v.* State Council, 29 D. & C. 424, 425.

We are of the opinion, that visitors from your department can be compelled to testify in proceedings concerning facts of which they have personal knowledge, even though the knowledge was gained in their capacity as a representative of the department; also that subpoenaed records of your department can be withheld and that it would be lawful for you, as Secretary of the Department of Public Assistance, to delegate to the county boards of assistance authority

to make decisions on the advisability of submitting or withholding subpoenaed records in particular instances, though local boards should be governed by general rules promulgated by the Department of Public Assistance.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 284

Mines and mining—Inspection of boilers—Neccssity for semiannual inspection—Act of June 2, 1891, art. V, sec. 1—Repeal by implication—Act of May 27, 1937.

The Act of June 2, 1891, P. L. 176, art. V, sec. 1, providing that boilers used in and about mines and collieries must be inspected every six months, being one relating to a particular subject, is not repealed by implication by the Act of May 27, 1937, P. L. 912, requiring boilers generally to be inspected every 12 months.

Harrisburg, Pa., May 2, 1939.

Honorable John Ira Thomas, Secretary of Mines, Harrisburg, Pennsylvania.

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

Are coal companies required to comply with the terms of section 1, article V of the Act of June 2, 1891, P. L. 176, which requires inspection of their boilers every six months, or with the Act of May 27, 1937, P. L. 912, which requires inspections every twelve months?

Section 1 of article V of the Act of June 2, 1891, supra, reads as follows:

> All boilers used for generating steam in and about mines and collieries shall be kept in good order, and the owner, operator or superintendent shall have them examined and inspected by a qualified person as often as once in six months, and oftener if needed. The result of such examination, under oath, shall be certified in writing to the inspector for the district within thirty (30) days thereafter.

The Act of May 2, 1929, P. L. 1513, regulates the construction, equipment, maintenance, operation and inspection of boilers, grants authority to and imposes certain duties upon the Department of

Labor and Industry and repeals all acts or parts of acts inconsistent therewith. Sections 1, 8, 11 and 13 of the act of 1929 were amended by the Act of May 27, 1937, P. L. 912. Section 8 which is pertinent to your inquiry provides, inter alia, as follows:

> Every boiler shall be inspected both internally and externally, while not under pressure, at least once in every twelve months, and while under operating conditions at least once in every twelve months. Miniature boilers shall be inspected at least once in every twelve months. Unfired pressure vessels shall be inspected as required by the rules and regulations of the department, except that in no case shall regular inspections be required more than once in every twelve months.

Section 19 provides for the repeal of section 19 of the Act of May 2, 1905, P. L. 352, entitled: "An act to regulate the employment in all kinds of industrial employment of women and children * * *" and its amendments, and all other acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

It is now necessary to determine whether the Act of June 2, 1891, P. L. 176, is still in force.

The act of 1891, supra, regulates the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and provides for the protection and preservation of property connected therewith. This act is special and applies only to the anthracite coal mines in which ten or more persons are employed. Practically the entire law governing anthracite mines and mining is contained therein. Section 1, article V, relates only to boilers used to generate steam in and about the anthracite coal mines of Pennsylvania.

Does the Act of May 2, 1929, P. L. 1513, as amended by the Act of May 27, 1937, P. L. 912, clearly set forth the intentions of the legislature to repeal by implication, the provisions relating to inspection of boilers in and about the anthracite coal regions as contained in the act of 1891?

Certain general rules relating to the repeal of statutes by implication must be considered:

> * * * It is a reasonable presumption that all laws are passed with a knowledge of those already existing and that the legislature does not intend to repeal a statute without so declaring. (Sutherland Statutory Construction (2d ed.) Section 267)
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> * * * * *
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> * * * It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although

> latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions. * * * (Sutherland Statutory Construction (2d ed.) Section 274)
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> * * * that a general statute without negative words does not repeal a previous statute which is particular, even though the provisions of one be different from the other. Rymer *v.* Luzerne County, 142 Pa. 113; Commonwealth *v.* Lloyd, 2 Pa. Super Ct., 6, 17.

The Act of June 2, 1891, P. L. 176, relates to a particular subject. The legislature having in this act dealt with a particular class of boilers, "it is not to be presumed that any later legislation should repeal this act unless it is so declared in explicit language or unless the two acts are irreconcilable or repugnant to each other." Such a construction does not exist in the reading of the act of 1891 and the act of 1929, as amended by the act of 1937. The act of 1891 relates to all boilers used for generating steam in and about mines and collieries and prohibits their location under or nearer than one hundred feet to any breaker or other building in which persons are employed in the preparation of coal and places their supervision under the mine inspectors of the district in which they are located.

The care of boilers used in the mining of anthracite coal is so vital and important to the health and safety of those employed therein and to the preservation of property, that we are impelled to say that the legislature would not remove this safeguard from our statutes and take it out of the hands of mine inspectors appointed to supervise the safety of mines without definitely saying so. The act of 1929 as amended by the act of 1937 is silent as to the necessity of reporting to mine inspectors and gives the Department of Labor and Industry the right to examine and authorize inspectors to inspect boilers in the Commonwealth, or boilers destined for use in this Commonwealth. Exception is made of boilers carrying a pressure of not more than fifteen pounds per square inch, which are equipped with safety devices, approved by the department, nor to boilers in municipalities wherein provision is now made by ordinance for their inspection, nor to boilers subject to Federal inspection and control on steam locomotives, railroad cars, or steamboats, nor to equipment used in connection with the operation of trains, nor to boilers on other common carriers, nor to boilers used in the operation of oil wells.

Having established that both the Act of June 2, 1891, P. L. 176, and the Act of May 2, 1929, P. L. 1513, and the amending Act of May 27, 1937, P. L. 912, are still in force, the remaining question

is whether coal companies in the anthracite coal fields must comply with the Act of June 2, 1891, P. L. 176, or the Act of May 2, 1929, P. L. 1513, as amended by the Act of May 27, 1937, P. L. 912.

In the light of the law laid down in the cases and authorities referred to above, we are convinced that the Act of June 2, 1891, P. L. 176, must be complied with by coal companies in the anthracite regions by having their boilers inspected once in every six months.

Therefore, we are of the opinion, that all boilers used for generating steam in and about the anthracite coal mines and collieries shall be kept in good order and inspected by a qualified person as often as once in every six months and that the result of said examination under oath, shall be certified in writing to the inspector for the district within thirty (30) days thereafter.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

JOHN R. REAP,
Deputy Attorney General.

OPINION No. 285

State government—Delinquent accounts owing Department of Forests and Waters—Procedure for collection—The Administrative Code of April 9, 1929, secs. 512 and 903—Cooperation with Department of Justice—Use of local credit agencies—Obtaining credit reports on prospective tenants in advance.

1. It is the duty of the Department of Forests and Waters under sections 512 and 903 of The Administrative Code of April 9, 1929, P. L. 177, to turn over to the Department of Justice for collection accounts which have remained delinquent for a period of 90 days, and thereafter it is exonerated from any further liability, the matter being within the jurisdiction of the Department of Justice.

2. Where sums owed the Department of Forests and Waters are comparatively large and the prospects of reimbursement are favorable, the department, having handed over the accounts to the Department of Justice for collection, should have its employes make an examination in the local counties of the tenants' real estate holdings and likewise have brief mortgage and judgment searches made to aid the Department of Justice in making collections, rather than retain local credit agencies: where the amounts involved are very small or the chances of collection negligible, recommendations thereon should be made to the Department of Justice at the time of forwarding them for collection, and the Department of Justice may then advise the Department of Forests and Waters whether to charge the items off as uncollectible.

Harrisburg, Pa., May 11, 1939.

Honorable G. Albert Stewart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You have requested an opinion from this department relative to the expenditure of your funds for obtaining credit reports on accounts delinquent.

You have advised us that your department has many small accounts such as in the amounts of $5.00 or $10.00 and that the information required by the Department of Justice to assist it in collecting these sums cannot be furnished by your employes.

Section 512 of The Administrative Code of 1929 (71 PS 192) inter alia, is as follows:

> * * * whenever any taxes or other accounts of any kind whatever due the Commonwealth remain overdue and unpaid for a period of ninety days, it shall be the duty of such department, board, commission, or officer, to refer the same to the Department of Justice.
>
> It shall be the duty of any department, board, commission, or officer, having requested and received legal advice from the Department of Justice regarding the official duty of such department, board, commission, or officer, to follow the same, and, when any officer shall follow the advice given him by the Department of Justice, he shall not be in any way liable for so doing, upon his official bond or otherwise.
>
> * * * * *
>
> It shall be unlawful for any department, board, commission, or officer of the Commonwealth, to engage any attorney to represent such department, board, commission, or officer, in any matter or thing relating to the public business of such department, board, commission, or officer, without the approval in writing of the Attorney General.

Another reference to the collection of accounts will be found in section 903 of The Administrative Code of 1929 (71 PS 293). The pertinent provision of this section is as follows:

> Litigation.—The Department of Justice shall have the power, and its duty shall be:
>
> (a) To collect, by suit or otherwise, all debts, taxes, and accounts, due the Commonwealth, which shall be placed with the department for collection by any department, board, or commission. The department shall keep a proper docket or dockets, duly indexed, in which it shall make and preserve memoranda of all such claims, showing whether they are in litigation and their nature and condition;

The aforementioned provision is a mere reiteration of the powers and duties of the Department of Justice which existed prior to the enactment of The Administrative Code of 1929.

It is pertinent at this time to call your attention to the well known case of Commonwealth ex rel. Woodruff *v.* Lewis, 282 Pa. 306 (1925).

In that case, the Supreme Court, after interpreting provisions similar to those set forth above, which were incorporated in The Administrative Code of 1923, stated that the department which voluntarily seeks the assistance of the Attorney General, or compulsorily because of the provisions of the act, is bound by the assistance or advice given in regard to administrative matters. This case is cited solely for the proposition that in the event that you hand over an account to the Department of Justice, your connection therewith ceases and the responsibility of collection remains with the Department of Justice alone. You cannot enlist the aid of any credit association after the ninety-day period has elapsed.

Construing the above section of the Code, in the light of the Lewis case, supra, it is evident that in the event that your department is unsuccessful in realizing upon the accounts within the ninety-day period, it is incumbent upon your department to forward the same to the Department of Justice for collection. Thereafter, the matter falls within the jurisdiction of the Department of Justice and your department is exonerated from any liability arising thereunder.

The objection which you have advanced to a compliance with The Administrative Code, briefly, is that due to the smallness of the account, it is expensive for the Department of Justice to set in motion its collection activities.

In order to circumvent this difficulty, in the future, as a matter of policy, may we suggest that prior to the execution of any lease, you authorize a brief examination and investigation of the assets, liabilities and reputation of your proposed tenant. To assist you, you may have a credit report as you suggest. Thereupon you, if satisfied of his qualifications, should then demand in *advance,* the rent guaranteed by the provisions of the lease. You will thereby anticipate any possible defalcations and obviate the necessity of attempting to collect that which is uncollectible.

However, in regard to those cases which *now* vex you because of the delinquency of the accounts, if you are of the opinion that the amounts are sufficiently large and that the same may possibly be collected by this department, may we suggest that you follow the procedure as exacted by the Department of Justice, to wit: send a responsible employe of your department to the courthouse of the county in which the tenant resides and have him make a brief search as to what property is owned by the tenant and what mort-

gages or judgments are entered of record against him. This is not difficult and can be done with the aid of the local courthouse officials.

In these cases, it would be unavailing to utilize local credit agencies as you suggest because of two reasons:

1. The agencies merely advise you of the person's credit rating and do not reveal the amount or quantity of his assets.

2. You are sending good money after bad money which is not a good policy.

On the other hand, if, after a review of the delinquent accounts, you are of the opinion that the amounts involved are too minute, we then suggest that you follow your regular procedure and forward these accounts to this department with your recommendations and we will then advise you whether you should charge them off as uncollectible.

We entertain no doubt that the expenditure for a credit report prior to the execution of the lease is a proper and legitimate expense in connection with the powers and duties of your department. Sections 1802, 1803 and 1806 of The Administrative Code of 1929, as amended, authorize the leasing of State property under the jurisdiction of your department. These powers and duties do not countenance the leasing of State property to impecunious persons which will later necessitate legal proceedings. To satisfy yourself of the financial responsibility of your proposed tenants is a necessary and proper incident to the power and duty to lease.

As a recapitulation, therefore, we are of the opinion and so advise you that:

1. Before you enter into leases with prospective tenants who may, or probably will, cause you difficulty, you may have a credit rating made by local authorities. The expenditure therefor is a proper item.

2. In the event you decide to lease State premises to these proposed tenants, have them pay in advance, in accordance with the terms of your lease and do not permit them to default on renewals.

3. In those cases in which the sum or sums of money owed is comparatively large and from your experience with these individuals you are of the opinion that the prospects of being reimbursed are favorable, then, after the account has been handed over to this department for collection, comply with our recommendations and have your employes make an examination in the local counties of the tenants' real estate holdings and, likewise, have a brief mortgage and judgment search made.

4. In those cases in which the amount of delinquencies involved is a very small amount and for reasons disclosed by your investigation the chance of collecting the delinquent accounts has been re-

duced to a negligible quantity, forward these items to this department with your recommendations on the matter and we will then advise you whether to charge these items from your records as uncollectible.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

MARSHALL M. COHEN,
Special Deputy Attorney General.

OPINION No. 286

Criminal procedure—Application for parole—Factors to be taken into consideration by boards of trustees or inspectors—Nature of review by Board of Pardons—Procedure—Acts of May 11, 1901, May 10, 1909, and June 19, 1911.

1. The boards of trustees or inspectors of penitentiaries and county jails, when acting upon petitions under the Acts of May 11, 1901, P. L. 166, May 10, 1909, P. L. 495, and June 19, 1911, P. L. 1055, for paroles by prisoners who have served their minimum sentences must consider not only their behavior records while in prison, but also the nature and circumstances of the crimes for which the prisoners were committed, their personal histories and habits prior to commitment, including previous criminal records, and the nature and circumstances of such prior crimes, from all of which factors they are to determine whether or not there is a reasonable probability that the applicants will live and remain at liberty without again violating the law.

2. The Board of Pardons must, pursuant to the duty imposed upon it by article IV, sec. 9, of the Constitution, and the Acts of May 11, 1901, P. L. 166, May 10, 1909, P. L. 495, and June 19, 1911, P. L. 1055, investigate and ascertain the facts in each case recommended by the boards of trustees and boards of inspectors for parole of convicts, review the action of the said boards and arrive at its own independent conclusion as to whether the recommendations are proper and warranted by the facts, taking into consideration all relevant factors, and the Governor cannot grant a parole except upon recommendation of the Board of Pardons.

3. It seems that the present procedure of the Board of Pardons does not satisfy the requirement of section 5 of the Act of May 11, 1901, P. L. 166, and sections 15 of the Acts of May 10, 1909, P. L. 495, and June 19, 1911, P. L. 1055, providing that the Board of Pardons shall act, in recommending parole or commutation, "after full hearing, upon due public notice and in open session, according to such rules as they shall provide," and that the board should adopt such rules as will prescribe a procedure in compliance with the statute.

Harrisburg, Pa., May 17, 1939.

Honorable Samuel S. Lewis, Lieutenant Governor of Pennsylvania, Chairman of the Board of Pardons, Harrisburg, Pennsylvania.

Sir: You have asked to be advised as to the duties and powers of the boards of trustees of state penitentiaries and the boards of inspectors of the various county jails and the Board of Pardons in recommending to the Governor the release of convicts on parole.

The first question submitted is as follows:

> (a) Whether the Boards of Trustees or Inspectors of the penitentiaries and jails are required, when acting upon petitions for paroles by prisoners who have served their minimum sentences, to consider not only their behavior records while in jail but also other factors (such as their previous criminal records) in determining whether such petitioners may be released with the assurance that they will not engage in an offensive course of conduct;

Commutations of sentences and parole of convicts are governed and regulated by the Act of May 11, 1901, P. L. 166; the Act of May 10, 1909, P. L. 495; and the Act of June 19, 1911, P. L. 1055.

The act of 1901, supra, provides for the commutation of sentences for good behavior of convicts in prisons, penitentiaries, workhouses and county jails in this State. Where a person is convicted and sentenced to a term or terms equal to or exceeding one year, the act provides that the convict may, by his good behavior, earn himself a deduction in his sentence of two months for the first year, three months for the second year, four months each for the third and fourth years, and five months for each subsequent year. This deduction or allowance is commonly called "good time" commutation.

The act of 1909, supra, authorizes the release on probation of certain convicts instead of imposing sentences and the appointment of probation officers, regulates the manner of sentencing convicts in certain cases and provides for their release on parole. Optional imposition of minimum and maximum sentences is permitted by the act, but where the court does not impose a minimum and a maximum sentence, the act provides that the sentence shall be calculated to read as a minimum and maximum sentence in which the minimum shall be fixed at one-fourth of the maximum sentence. At the expiration of the minimum sentence, the convict is eligible for his release on parole provided the board of inspectors or the board of trustees, as the case may be, so recommends, and the Board of Pardons also recommends to the Governor that he be released on parole.

The act of 1911, supra, is in effect a reenactment and an extension of the provisions of the act of 1909. It provides for the release on probation of certain convicts instead of imposing sentences, the appointment of probation and parole officers and the fixing of their salaries and expenses, regulates the manner of sentencing convicts

in certain cases, provides for their release on parole and imposes additional penalties for commission of crime during parole *and* the rearrest and reconviction for breach of parole rules; it indicates also the powers and duties of the board of prison inspectors of penitentiaries.

While under the provisions of the act of 1901, the only prerequisite for the allowance of commutation is the convict's good behavior while confined, the acts of 1909 and 1911 provide that the recommendation for the release on parole is conditioned upon a finding and determination by the board of trustees or the board of inspectors "that there is a reasonable probability that such applicant [convict] will live and remain at liberty without violating the law."

The question, therefore, arises as to what facts and factors shall constitute the basis for a determination by the boards of trustees or boards of inspectors, as the case may be, that there is a reasonable probability that the convict will live and remain at liberty without violating the law.

We shall premise our discussion by stating, as the courts have repeatedly held, that the release of a prisoner on parole is not a right which the prisoner may assert and enforce, but is a matter of grace which the statutes have vested in the Governor upon recommendation by the boards of trustees or inspectors and the Board of Pardons: Commonwealth ex rel. Lynch *v.* Ashe, 320 Pa. 341 (1936).

The powers of the boards of trustees and boards of inspectors, and for that matter the Board of Pardons and the Governor, are similar and analogous to the powers vested in and exercised by the courts in releasing prisoners on parole. Like the courts, they perform a judicial function and exercise a judicial discretion. In the exercise of this discretion, however, the boards, like the courts are charged with the duty of making a proper and conscientious appraisal of each individual prisoner in determining whether or not he merits and deserves to be released on parole. The rule to be followed in arriving at a determination of whether or not a prisoner should be recommended for release on parole is the one stated by the court in the case of Commonwealth *v.* Kimmel, 6 D. & C. 637, which is as follows:

> Paroles are grantable only when the court is convinced that the character of the prisoner and the circumstances of the case are such that he is not likely to engage again in an offensive course of conduct and that the public good does not require that he should suffer the penalty imposed by law: * * * The parole system, at best, is a grafting upon our jurisprudence and is so potential with inherent capacity for grave abuse that we shall not extend its operation be-

> yond the plain letter of the act. Under the acts, it is a matter of grace, not of right, and we will not be moved except for reasons that absolutely overcome our powers of resistance.

It is obvious, therefore, that before the boards of trustees and boards of inspectors can conscientiously and properly recommend a convict for release on parole, they must take into consideration the convict's behavior and attitude while in prison so as to determine whether he has sufficiently modified his outlook on life and freed himself from any criminal propensities; they must examine the nature and circumstances of the crime for which he was convicted; they must scrutinize the convict's history prior to his present confinement, his personal habits, inclinations and proclivities. The convict's criminal record, and the nature and circumstances of such previous crimes, is a sure index in the determination of whether he will probably live at liberty without violating the law. It cannot be conceived how an appraisal of a convict's fitness to be released on parole could be made without examining and without considering his prior criminal record.

It is clear, therefore, that the boards of trustees and the boards of inspectors, in arriving at a decision as to whether or not a convict should be recommended for release on parole on the expiration of his minimum sentence, must, of necessity, consider the convict's previous criminal record.

We come now to the consideration of your second question:

> (b) Whether the Board of Pardons may review the action of such Boards of Trustees and Inspectors and refuse to recommend to the Governor the granting of paroles upon the expiration of the minimum sentence of the Board in view of the previous criminal record of the prisoner and other relevant factors.

All three Acts of Assembly, to wit: The act of 1901, the act of 1909 and the act of 1911, contain the following provision:

> The Governor shall not, except in cases where only the payment of a fine is imposed as the penalty upon conviction, execute any of the rights or powers herein granted unto him, until the Lieutenant Governor, Secretary of the Commonwealth, Attorney General, and the Secretary of Internal Affairs, or any three of them, after full hearing, upon due public notice and in open session, according to such rules as they shall provide, shall have recommended the said commutations of sentence (section 15 of the act of 1909; section 15 of the act of 1911); (section 5 of the act of 1901).

The above quoted provision contained in the acts of 1901, 1909 and 1911, is in accordance with and almost a verbatim restatement

of the provisions of article IV, section 9 of the Constitution of Pennsylvania.

These officers constitute the Board of Pardons and, therefore, these provisions must be considered to mean that the Governor may only order the release of convicts on parole upon a favorable recommendation of at least three members of the Board of Pardons. If the Board of Pardons does not recommend the release of a convict on parole, there is no authority in the Governor to grant such parole despite the fact that said parole has been recommended, in the first instance, by the boards of trustees or boards of inspectors, as the case may be. The recommendation by the Board of Pardons becomes a prerequisite, therefore.

The Board of Pardons, in making recommendations, is governed by the same requirements imposed upon the boards of trustees in determining whether or not they should recommend a convict for release on parole. Fundamentally, the duty to recommend necessarily includes the duty and obligation to ascertain, examine and review all the facts that are the necessary and essential basis upon which a recommendation may be predicated.

In view of this duty imposed upon the Board of Pardons it follows that they may, if they so see fit and proper, refuse to recommend to the Governor the release of the convict even though the boards of trustees or boards of inspectors, as the case may be, have recommended the release. To hold otherwise would be to violate both the letter and spirit of the Acts of Assembly and substitute for a bona fide conscientious recommendation a mere pro forma and rubber stamp approval by the Board of Pardons of the recommendations of the boards of trustees.

In connection with your request, we have also examined the present practice and procedure in presenting and acting upon recommendations for the release of convicts on parole submitted to the Board of Pardons for action thereon. We find that these matters are submitted to the Board of Pardons with a signed recommendation containing the data required by the Acts of Assembly. In cases submitted by the Board of Trustees of the Eastern State Penitentiary, the recommendations are backed up by the previous criminal record of the convict. These recommendations are advertised by the respective boards of trustees or inspectors and a copy of the advertisement is attached thereto. They are printed in the calendar of the Board of Pardons in the following manner:

> Parole recommendations of Board of Pardons of Eastern State Penitentiary and Western State Penitentiary.
>
> Recommendations of Board of Inspectors, etc., of counties for the release of prisoners under the Act of May 11, 1901.

The question arises as to whether this procedure complies with the requirement contained in section 5 of the act of 1901 and sections 15 of the acts of 1909 and 1911 which provide that the Governor shall not exercise any of the rights to parole or commute sentences until the same is recommended by the Board of Pardons "after full hearing upon due public notice and in open session, according to such rules as they [Board of Pardons] shall provide."

We understand that the Board of Pardons has never adopted any rules governing or prescribing the method of complying with this requirement. It is our opinion that the present practice and procedure on recommendations for paroles submitted by the boards of trustees and the boards of inspectors does not conform with the above requirement, and we would suggest that the Board of Pardons adopt such rules as will prescribe a procedure that will comply with the requirement of a full hearing, due public notice and in open session, as provided by the Acts of Assembly.

In conclusion, it is our opinion, that:

(a) The boards of trustees or inspectors of the penitentiaries and county jails, when acting upon petitions for paroles by prisoners who have served their minimum sentence, must consider not only their behavior records while in prison, but also the nature and circumstances of the crime for which the prisoner was committed, his personal history and habits prior to his commitment, which personal history must include the consideration of his previous criminal record, the nature and circumstances of said prior crimes, from all of which factors they are to determine whether or not "there is reasonable probability that the applicant will live and remain at liberty without violating the law."

(b) The Board of Pardons may, and, we might say, must investigate and ascertain the facts in each case recommended by the boards of trustees and boards of inspectors for parole of convicts under the provisions of the acts of 1909 and 1911, review the action of said boards and arrive at its own independent conclusion as to whether they are satisfied that the recommendations of the boards are proper and warranted by the facts in each case. In arriving at its decision, the Board of Pardons must also take into consideration all relevant factors such as behavior, nature and circumstances of the crime, previous criminal record, nature and circumstances of previous crimes, etc., and if, upon consideration of all these factors, it is satisfied that there is "reasonable probability that the applicant [convict]

will live and remain at liberty without violating the law" it shall recommend to the Governor that the prisoner be released on parole.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

C. JAMES TODARO,
Deputy Attorney General.

OPINION No. 287

Taxation—Tax on entry of judgment—Act of April 6, 1830—Applicability to entry of judgment on bond by Department of Public Assistance—Noting tax on docket—Ultimate collection from obligor.

Prothonotaries may not require the Department of Public Assistance to pay the 50 cents tax imposed by the Act of April 6, 1830, P. L. 272, upon the entry of judgment on bonds, since it is not to be presumed that the Commonwealth intended to tax itself, but since the incidence of the tax falls on the obligor, the prothonotaries should note it on the docket and, if and when collection is made on the bond, the tax should be added to the other costs and paid by the obligor on the bond to the prothonotary, who should in turn pay it into the State Treasury.

Harrisburg, Pa., June 9, 1939.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether or not the State tax of fifty cents ($.50) should be collected by the prothonotary and subsequently paid to the Department of Revenue of the Commonwealth of Pennsylvania on the five thousand dollar ($5,000) bonds now being entered of record by the Department of Public Assistance of Pennsylvania in the office of the prothonotary of the courts of common pleas in the counties of Pennsylvania.

The Act of April 6, 1830, P. L. 272, Section 1 (72 PS 3171) provides:

> The officers hereinafter mentioned within this commonwealth are hereby authorized to demand and receive, in addition to the fees heretofore required by law, *the following sums for and on account of the commonwealth,* which shall be paid by the parties applying for the process or services mentioned, and which sum *shall be taxed in the bill of costs,* to abide the event of the suit and be paid by the losing party; the prothonotary of the supreme court, exercising appellate jurisdiction, shall demand and receive on every

writ of error issued or appeal entered by him, the sum of three dollars and fifty cents.

Section 3 of the said act (72 PS §3172) provides:

> The prothonotaries of the courts of common pleas and of the district courts, and the prothonotary of the supreme court having original jurisdiction and the court of nisi prius of this commonwealth shall demand and receive *on every original writ issued out of said courts* (except the writ of habeas corpus), and on the entry of every amicable action, the sum of fifty cents; on every writ of certiorari issued to remove the proceedings of a justice or justices of the peace, or alderman, the sum of fifty cents; *on every entry of a judgment by confession or otherwise*, where suit has not been previously commenced, the sum of fifty cents; and on every transcript of a judgment of a justice of the peace or alderman, the sum of twenty-five cents. (Italics ours)

The constitutionality of this act was upheld in the case of Cone *v.* Donaldson, 47 Pa. 363, where the court said:

> We hold the state taxes on original writs and other proceedings, imposed by the 3d section of the Act of April 6th, 1830, Brightly's Purd. 956, to be constitutional, and that the prothonotary having paid them, was entitled to sue for and recover them in this suit. * * *

This case also indicates that tax need not be collected at the time writ is issued or judgment entered, but may be noted and collected later.

Subsequent acts provide for monthly returns by the prothonotary to the Department of Revenue, with penalty for failure to make returns (The Fiscal Code, Sections 901-3, 1710-11).

The power of taxation is one of the three essential powers of sovereignty. A relinquishment of it cannot be presumed in the absence of an express stipulation: Bank of Pennsylvania *v.* Commonwealth, 19 Pa. 144; City of Philadelphia *v.* Union Passenger Railway Company, 2 W. N. C. 425.

Is there anything in the above act of 1830 which would show an intention on the part of the sovereign to tax itself? Is the sovereign taking the fund out of one pocket (the treasury) and putting it back into the same pocket (the treasury)? In the case of Commonwealth *v.* Pure Oil Co., 303 Pa. 112 (1931), municipalities of the State were held to be exempt from payment of the 1929 liquid fuels tax. The court held that exception or exemption in the case of the sovereign was unnecessary; that unless the act expressly stated that the sovereign should pay the tax, the sovereign was exempt. To quote from the decision:

> * * * We have many times said that while the State may, by a general statute, tax subordinate governmental agencies in matters affecting the performance of their governmental duties, the presumption is that this was not intended, and nothing short of an *expressed or necessarily implied purpose to tax them* will suffice to make them liable therefor. The legislature knew, for it was bound to know, of our oft-repeated statement to that effect; hence its failure to express its intention to impose the tax, in the act under consideration can only mean that it did not intend to impose it under the circumstances stated. That the presumption is as above expressed, so clearly appears in a number of cases, including Directors of the Poor of Schuylkill County *v.* School Directors of N. Manheim Twp., 42 Pa. 21, 24-5; County of Erie *v.* City of Erie, 113 Pa. 360; Pittsburgh *v.* Sterrett Subdistrict School, 204 Pa. 635; Wilkinsburg Boro. *v.* School District, 298 Pa. 193; Robb *v.* Phila., 25 Superior Ct. 343, and is so well known, that it is not necessary to quote from them. (Italics ours.)

At this point the case of Booth and Flynn, Ltd. *v.* Miller, 237 Pa. 297, 307, may be noticed:

> The general business of the legislative power is to establish law *for individuals, not for the sovereign;* and when the rights of the Commonwealth are to be *performed or affected,* the intention must be clearly expressed or necessarily implied. This rule of construction applies not only to statutes but also to constitutions. (Italics ours.)

and again:

> * * * The State cannot be deprived of its rights as a sovereign by inference, it must be done by appropriate constitutional or legislative action.

The present policy of the Department of Public Assistance is *to enter judgment on the bond only in cases where the recipient of assistance owns or becomes the owner of real estate.* In entering the bond, the Commonwealth would not really be paying the tax to the prothonotary, and hence through the Department of Revenue to the State Treasury, but would merely be advancing the tax to collect the debt, due by the recipient, plus interest and costs. In other words, the incidence of the tax falls on the obligor recipients who will ultimately pay the tax with the debt due to the Commonwealth. The payment would, however, be advanced by the Department of Public Assistance. This would involve an expenditure of State money for a tax which the Commonwealth is not legally required to pay; moreover it means the depletion in the appropriation to the Department of Public Assistance. On the payment of the bonds, the

fund is paid, not into the Department of Public Assistance, but into the General Fund of the State Treasury.

In view of the above, we are of the opinion, that the state tax of fifty cents ($.50) cannot be collected by the prothonotary from the Department of Public Assistance of the Commonwealth of Pennsylvania, the sovereign, and subsequently paid into the State Treasury through the Department of Revenue of the Commonwealth of Pennsylvania, on bonds which may be entered of record by the Department of Public Assistance in the office of the prothonotary of the courts of common pleas in the counties of Pennsylvania. However, since the incidence of the tax falls on the obligor, the prothonotary should note the tax on the docket. If and when collection is made on the bond, the tax should be added to the other costs and paid by the obligor on the bond to the prothonotary, the prothonotary to be exonerated from accounting for said tax until such time as amount due on the bond is collected.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 288

Motor vehicles—Borough ordinance requiring due care—Prosecution thereunder—Disposition of fines—Coverage of offenses by Vehicle Code—Vehicle Code of 1929, secs. 1001, 1008, 1012, 1013, 1212(b), and 1207(a), as amended.

Since all of the offenses set forth in a borough ordinance providing that vehicles shall proceed with due caution, especially when making turns, crossing streets and crosswalks and passing other vehicles, and that no driver shall so operate a vehicle as to endanger the life or safety of any person, are also offenses under sections 1001, 1008, 1012, and 1013 of The Vehicle Code of 1929, as amended, no prosecution may properly be brought under the ordinance, and if so brought, shall, under section 1212*(b)* of the code, as amended, be considered as having been brought under the code, and any fine or forfeiture imposed in the course of such a prosecution shall be disposed of in accordance with section 1207*(a)* of the code.

Harrisburg, Pa., June 13, 1939.

Honorable Warren R. Roberts, Auditor General, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your letter of February 15,

1939, in which you call attention to the fact that the council of the borough of McKees Rocks, Pennsylvania, as of November 2, 1923, enacted the following ordinance:

> All vehicles shall proceed with due caution especially in making turns, in crossing streets and crosswalks and in passing other vehicles, and no driver shall so operate any vehicle as to endanger the life or safety of any person.

In connection with said ordinance you ask to be advised whether fines collected upon prosecutions brought for violations of said ordinance must be remitted to the Department of Revenue by the magistrate or other officer imposing such fines, or whether such magistrate or other officer may lawfully pay such fines to the treasurer of the borough.

Section 1212 of the Motor Vehicle Code of 1929, as amended by the General Assembly of the Commonwealth of Pennsylvania on July 16, 1935, P. L. 1056, reads as follows:

> Section 1212. Enforcement of Local Ordinances.—
>
> (b) Prosecutions brought under any local ordinance, rule, regulation, or for common law offenses, which are based on a violation for which there is a specific penalty provided in this act, shall be deemed and considered as having been brought under this act, and the disposition of the fines and forfeitures shall be so governed.

A reading of the ordinance before us and sections 1001, 1008, 1012 and 1013 of the Motor Vehicle Code of the Commonwealth of Pennsylvania, enacted in 1929, together with its amendatory provisions, leads unalterably to the conclusion that the aforesaid sections of our Motor Vehicle Code cover every conceivable violation that a motorist could violate through failure to operate motor vehicles with due caution in making turns, in crossing streets and sidewalks, in passing other motor vehicles, or in operating any motor vehicle so as to endanger the life or safety of any person.

Under these circumstances any motorist who violates any of the provisions of the ordinance before us would have to be prosecuted under the aforesaid provisions of the Motor Vehicle Code of Pennsylvania.

Section 1207, subsection (a) of the Motor Vehicle Code of 1929, as amended by the General Assembly on June 29, 1937, reads as follows:

> Section 1207. Disposition of Fines and Forfeitures.—
> (a) All fines and penalties collected under the provisions of this act for violations of the same, and all bail forfeited, shall be paid to the department, and transmitted to the State

> Treasury, and credited to the "General Fund," except those collected for violations of the provisions of sections nine hundred and three (903), nine hundred and five (905), one thousand and two (1002), one thousand and eleven (1011), one thousand and fifteen (1015), one thousand and eighteen (1018), one thousand and twenty (1020), one thousand and twenty-six (1026), one thousand and twenty-eight (1028) of this act, committed within cities, *boroughs*, incorporated towns, and townships, which fines and penalties and all bail forfeited shall be paid to the treasurer of the city, borough, incorporated town, or township wherein the violation occurred, to be used by such city, borough, incorporated town, or township, for the construction, repair, and maintenance of the highways thereof: Provided, That all fines and penalties collected and all bail forfeited for violatoins of the provisions of section one thousand and sixteen (1016), committed within cities, boroughs, and incorporated towns, shall be paid to the treasury of the city, *borough*, or incorporated town wherein the violation occurred, to be used by such city, borough, incorporated town for the construction, repair, and maintenance of the highways thereof: And provided further, That all fines and penalties collected, and all bail forfeited for violations of the provisions of subsection (f) of section six hundred twenty (620), shall be paid to the treasury of the county wherein the violation occurred, to be used by such county for the payment of physicians' fees for the examination of persons accused of violating the provisions of the said section. Any balance remaining in the treasury of the county at the expiration of the calendar year, and not payable for physicians' services rendered, shall be used for county highway purposes. (Italics ours.)

In view of the conclusions above set forth, together with the amended provisions above quoted, you are advised that no prosecutions may lawfully be brought under the provisions of the ordinance above referred to, and that whenever prosecutions are erroneously brought under said ordinance they shall be considered as having been brought under, and in accordance with, the Pennsylvania Motor Vehicle Code, and fines shall be imposed in accordance with the appropriate section of the code, which fines shall be disposed of in accordance with section 1207, subsection (a) aforesaid.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

JOHN P. WANNER,
Deputy Attorney General.

OPINION No. 289

Deeds—Acknowledgment—Commonwealth deeds—Act of April 4, 1919, sec. 1.

Since section 1 of the Act of April 4, 1919, P. L. 49, provides that Commonwealth deeds and patents may be recorded without acknowledgment and that the records thereof, or duly certified copies thereof, shall be evidence in all cases wherein the original deeds or patents would be evidence, Commonwealth deeds need not be acknowledged by the Governor.

Harrisburg, Pa., June 29, 1939.

Honorable G. Albert Stewart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your letter of May 10, 1939, in which you set forth that, in connection with the exchange of lands, it is necessary for your department to have deeds prepared for the signature of the Governor, and that such deeds have always had attached a form of acknowledgment on the part of the Governor before a notary public. Your letter further states that the Governor's office takes exception to the acknowledgment of these deeds by the Governor, before a notary public, because it is contended that the signature of the Secretary of the Commonwealth has the same force and effect as a notarial acknowledgment, thereby rendering unnecessary acknowledgments of the Governor to the deeds in question.

Your letter concludes that, since such deeds always include a provision for a notarial acknowledgment, and are prepared under the direction of the Department of Justice, and bear the signature of a deputy attorney general, your department has assumed that it is the opinion of the Department of Justice that the Governor's signature must be formally acknowledged before a notary public. Under these circumstances, you have asked to be advised whether the acknowledgment of the Governor's signature to deeds before a notary public is necessary to establish the complete legal formality of such deeds.

Section 1 of an Act of the General Assembly, approved April 4, 1919, P. L. 49, reads in part as follows:

> All deeds and patents granted by the Commonwealth of Pennsylvania may be recorded in the office for recording deeds in the county where the lands lie, without acknowledgment; and the records thereof, or duly certified copies thereof, shall be evidence in all cases where the original deeds or patents would be evidence * * *

The provisions of the section of the statutory law just recited render quite obvious the answer to our problem, to the effect that deeds by the Commonwealth of Pennsylvania may be recorded without the formality of an acknowledgment on the part of the Governor. Since

the records of such recorded deeds, or duly certified copies thereof, shall be accepted as evidence in all cases where the original deeds would be evidence, acknowledgments to deeds executed by the Commonwealth would be superfluous.

It is, therefore, our opinion that deeds on the part of the Commonwealth may be lawfully executed without the formality of an acknowledgement by the Governor.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

JOHN P. WANNER,
Deputy Attorney General.

OPINION No. 290

Statutes—Construction—Effective date—Statutory Construction Act of May 28, 1937, art. I, sec. 4—Act of June 15, 1939, repealing Act of June 7, 1901, in part —Plumbers—Necessity for holding license from State Department of Health subsequent to September 1, 1939, in boroughs, incorporated towns and townships of the first class.

1. The Act of May 7, 1939, No. 78, repealing in part the Act of June 7, 1901, P. L. 493, as amended, becomes effective on September 1, 1939, under the provisions of article I, sec. 4, of the Statutory Construction Act of May 28, 1937, P. L. 1019.

2. Since, by reason of the repeal by the Act of May 17, 1939, No. 78, of the Act of June 7, 1901, P. L. 493, as amended by the Act of March 31, 1937, P. L. 168, it is not necessary after September 1, 1939, for plumbers in boroughs, incorporated towns and townships of the first class to be licensed by the State Secretary of Health, the State Department of Health should defer, if possible, examination of any plumbers prior to that date, and any license issued prior to that date will be ineffective thereafter.

Harrisburg, Pa., July 19, 1939.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication dated June 15, 1939, in which you requested an opinion concerning the effect of the Act of May 17, 1939, P. L. 151, upon licenses to plumbers issued heretofore, and the effect, if any, upon your procedure in arranging additional examinations for new applications for plumbing licenses.

The Act of May 17, 1939, provides that the Act of June 7, 1901,

P. L. 493, as amended, and extended to boroughs, incorporated towns and townships of the first class, by the Act of March 31, 1937, P. L. 168, is repealed in so far as it relates and applies to boroughs, incorporated towns and townships of the first class.

The nub of your difficulty lies in the fact that the act under consideration does not contain any effective date.

You have informed us that your department has issued registration cards to the successful applicants applying for the first time and to those who renewed their registrations for the year 1939. It appears that the license forms do not have any termination date while the registration cards bear the termination date of December 31, 1939.

The Statutory Construction Act, approved May 28, 1937, P. L. 1019, provides in article I, section 4, as follows:

> All laws hereafter enacted finally at a regular session of the Legislature, except laws making appropriations, shall be in full force and effect from and after the first day of September next following their final enactment, unless a different date is specified in the law itself.

The conclusion is inescapable that the repeal of the act of 1901, as amended, as it relates to boroughs, incorporated towns and townships of the first class, becomes effective on September 1, 1939.

Your problem is whether licenses and registration cards heretofore issued, or which may be issued between now and September 1, 1939, will continue in force and effect until the end of the current year or whether such credentials will be invalid on or after September 1, 1939.

The Act of June 7, 1901, P. L. 493, provided for the licensing of plumbers in cities of the second class. This act imposed a duty upon departments, boards or bureaus of health of these cities to issue licenses to persons engaged in the business or work of plumbing.

This act was held to be constitutional as within the police powers in Beltz *v.* City of Pittsburgh, 211 Pa. 561 (1905).

The act of 1901, supra, was amended by the Act of May 14, 1909, P. L. 840 and by the Act of May 21, 1913, P. L. 276. These amendments extended the provisions of the act of 1901 to cities of the third class. The act, as extended to third class cities was held constitutional in City of Newcastle *v.* Withers, 291 Pa. 216 (1927).

In short, therefore, any person engaged in the business of plumbing in second class and third class cities was compelled to apply to the appropriate department or board, or bureau of health of the city in which he lived. It is significant to note that no jurisdiction whatsoever was retained or imposed upon the Department of Health of the Commonwealth of Pennsylvania in regard to these limited applications.

These acts were amended in the 1937 session of the legislature by the Act of March 31, 1937, P. L. 168. The net result of that amendment was to extend the provisions of the former acts to boroughs, incorporated towns and townships of the first class.

One major distinction, however, was made by the 1937 act and that related to the creation of the Department of Health as the administrative agent in the prescribed territory outside of the cities. All applications made by plumbers in boroughs, incorporated towns and townships of the first class, must be made to the Department of Health of this Commonwealth.

The pertinent provision of the act of 1937 is as follows:

> All * * * persons, with three years or more practical experience, engaged * * * in the business * * * of plumbing, * * * shall apply in writing for such certificate or license, and in boroughs, incorporated towns and townships of the first class, such application shall be made to the Department of Health of this Commonwealth, or such department thereof, * * * as the said department shall designate; and if, after proper examination * * * such person or persons so applying shall be found competent, the same shall be certified * * * to the Department of Health of this Commonwealth in the case of boroughs and incorporated towns and townships of the first class, who shall thereupon issue a certificate or license to such person or persons, which shall, for the period of one calendar year or fractional part thereof next ensuing the date of such examination, entitle him * * * to engage in the * * * business of plumbing, * * *

Section 2 of the original act of 1901 as extended by the act of 1937 to boroughs, incorporated towns and townships of the first class, prohibits any person other than a registered master plumber, from carrying on the business of plumbing unless he shall have first secured a license or certificate from the Department of Health of the Commonwealth of Pennsylvania, or from any board of health of such municipality if there is any functioning.

This section provides as follows:

> At the expiration of each calendar year said certificate or license shall be null and void. A licensed master or journeyman plumber desiring to continue in, * * * the business of plumbing, * * * for the ensuing year, shall, between the first and thirty-first days of December of each and every year, surrender the said certificate or license to the department * * * who certified it, and re-register his, * * * address, upon such form or forms as may, from time to time, be furnished by the several departments. * * *

It is obvious that the duration of a license was one year, or a fractional part thereof. This undoubtedly was the basis for your policy of inserting the expiration date of December 31 of each year.

However, a different situation has arisen since the repeal contained in the act of May 17, 1939. Since a license has been rendered unnecessary subsequent to September 1, 1939, the legislature has reduced the importance of the expiration date to a moot question. This is apparent for the reason that no licenses are required in boroughs, towns, and townships of the first class subsequent to September 1, 1939 and, generally speaking, any rights which may have accrued prior thereto, have no tangible benefit for the licensee.

In fact, we are of the opinion, since the legislature has decreed that the Department of Health shall no longer exercise jurisdiction over plumbers in the specified localities subsequent to September 1, 1939, that any examination which shall be given before September 1, 1939, will be, more or less, a mere formality.

Circumstances may arise which may make it necessary to hold an examination for applicants who wish to be licensed prior to September 1, 1939. If such examination can be deferred, this should be done. If any examination must be held *prior* to September 1, 1939, you should advise the applicant that the license will expire September 1, 1939.

In view of the above, we are of the opinion that all licenses and registration cards heretofore issued between now and September 1, 1939 by your department, will be of tangible benefit to the licensees until September 1, 1939 and thereafter will be of no use to them. For this reason we suggest that you insert no registration date on the registration card.

Very truly yours,
DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

MARSHALL M. COHEN,
Special Deputy Attorney General.

OPINION No. 291

Elections—Municipal elections—Office of judge of court of record—Duties of Secretary of the Commonwealth—Act of June 3, 1939, P. L. 1333.

The Secretary of the Commonwealth may not after the tenth Tuesday preceding any primary designate by written notice the office of judge of a court of record as an office for which candidates are to be nominated in any election district at the ensuing primary and to be elected at the succeeding November election.

If the office of a judge of a court of record is not vacant on the tenth Tuesday preceding any primary in any odd-numbered year, and is not designated by the county board of election in a notice filed with the Secretary of the Commonwealth on or before the tenth Tuesday preceding a primary election in an odd-numbered year designate that office as one for which a candidate is to be nominated in the judicial district at the ensuing primary election, the Secretary of the Commonwealth may not lawfully receive and file a nomination petition for any candidate for that office in that year.

Harrisburg, Pa., July 21, 1939.

Honorable S. M. R. O'Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: This department is in receipt of your letter of recent date requesting an opinion upon the following statement of facts:

In this year a primary election will be held on September 12, 1939, for officers to be elected at a municipal election to be held November 7, 1939.

On July 5, 1939, (that being the tenth Tuesday preceding the primary election), pursuant to the provisions of Article IX, Section 905 of the Pennsylvania Election Code approved June 3, 1937, P. L. 1333 (25 PS §286 et seq.), the Secretary of the Commonwealth sent to the County Board of Elections in Fayette County a written notice designating all the offices for which candidates are to be nominated at the said primary election. This notice was preceded by a canvass by the Secretary of the Commonwealth and by the County Board of Elections of Fayette County as prescribed by section 903 and section 904, respectively, of the said code.

On July 6, 1939, Honorable Harry A. Cottom, Judge in the Fourteenth Judicial District, comprising Fayette County, died.

On July 10, 1939 the Secretary of the Commonwealth was requested to certify the office of a judge of a court of record in the fourteenth judicial district as an office for which nominees will be elected at the said primary election and by such certification permit the county board of elections to advertise that office as being open for nominations in the said primary election. This you refused to do.

Specifically, you desire to be advised whether you may lawfully rule as follows:

1. The Secretary of the Commonwealth may not, after the tenth Tuesday preceding any primary, designate by written notice the office of judge of a court of record as an office for which candidates are to be nominated in any election district at the ensuing primary and to be elected at the succeeding November election.

2. If the office of a judge of a court of record is not vacant on the tenth Tuesday preceding any primary in any odd-numbered year, and is not designated by the county board of elections in a notice

filed with the Secretary of the Commonwealth on or before the tenth Tuesday preceding the fall primary in an odd-numbered year, and further if the Secretary of the Commonwealth did not, on or before the tenth Tuesday preceding a primary election in an odd-numbered year, designate that office as one for which a candidate is to be nominated in the judicial district at the ensuing primary election, the Secretary of the Commonwealth may not lawfully receive and file a nomination petition for any candidate for that office in that year.

In determining the answer to your inquiry the following provisions of the Constitution of Pennsylvania, as well as the pertinent sections of the Pennsylvania Election Code must be considered. Article VIII, section 3 provides:

> * * * All elections for judges of the courts for the several judicial districts * * * for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a definite day, two-thirds of all the members of each House consenting thereto; provided that such elections shall be held in an odd-numbered year * * *. (Amendment of November 4, 1913.)

Article IV, section 8 of the Constitution provides:

> * * * He (The Governor) shall have power to fill any vacancy that may happen, during the recess of the Senate, * * * in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election for said office shall be held on the second succeeding election day appropriate to such office * * * . (Amendment of November 2, 1909.)

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

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

The apparent conflict between the latter two sections is well explained in Buckley *v.* Holmes, et al., 259 Pa. 176 (1917), where it is held that the specific provisions in the judiciary (Fifth) article for filling vacancies in courts of record, although modified by the amendment of November 4, 1913 requiring elections for judges of the several judicial districts to be held on the municipal election day, has not been changed by the amendment of November 2, 1909 (article IV, section 8); and even if there were an irreconcilable conflict between it and the general provisions of section 8 in article IV, a cardinal rule of construction requires that the specific provisions of article V, section 25 must prevail.

With these basic constitutional provisions in mind let us, then, examine the pertinent requirements of the Pennsylvania Election Code, the machinery set up by the legislature to effectuate the same. It is apparent that this act is a most comprehensive piece of legislation and, as indicated in section 1 thereof, is a codification, revision and consolidation of the laws relating to general, municipal, special and primary elections, the nomination of candidates, primary and election expenses and election contests.

Article VIII, section 801 (b) provides:

> Any party or political body, one of whose candidates at either the general or municipal election preceding the primary polled at least five per centum of the largest entire vote cast for any elected candidate in any county, is hereby declared to be a political party within said county; *and shall nominate all its candidates for office in such county * * * in accordance with the provisions of this act.* (Italics ours.)

The "provisions of this act" pertinent to this discussion are found in article IX thereof.

Section 902 provides:

> * * * All candidates of political parties, as defined in section 801 of this act, for the offices of United States Senator, Representative in Congress and for all other elective public offices within this State, * * * *shall be nominated,* * * * at primaries held *in accordance with the provisions of this act and in no other manner.* * * * (Italics ours.)

Section 905 provides:

> Secretary of the Commonwealth to Notify County Boards of Certain Nominations to Be Made.—On or before the tenth Tuesday preceding each primary, the Secretary of the Commonwealth shall send to the county board of each county a written notice designating all the offices for which candidates are to be nominated therein, or in any district of

which such county forms a part, or in the State at large, at the ensuing primary, and for the nomination to which candidates are required to file nomination petitions in the office of the Secretary of the Commonwealth, including that of President of the United States; and shall also in said notice set forth the number of presidential electors, United States Senators, Representatives in Congress and State officers, including senators, representatives and judges of courts of record, to be elected at the succeeding November election by a vote of the electors of the State at large, or by a vote of the electors of the county, or of any district therein, or of any district of which such county forms a part.

Section 906 provides:

Publication of Notice of Officers to Be Nominated and Elected.—Beginning not earlier than nine weeks, nor later than eight weeks before any regular Spring or Fall primary, the county board of each county shall publish in newspapers, as provided by section 106 of this act, a notice setting forth the number of delegates and alternate delegates to the National convention of each party who are to be elected in the State at large at the ensuing primary, and the number of delegates and alternate delegates who are to be elected at the said primary in said county, or in any district of which said county or part thereof forms a part, and also setting forth the names of all public offices for which nominations are to be made, and the names of all party offices, including that of members of the National committee, if any, and State committee, for which candidates are to be elected at said primary in said county, or in any district of which such county or part thereof forms a part, or in the State at large. Said notice shall contain the date of the primary, and shall be published once each week for two successive weeks.

"The tenth Tuesday preceding" the primary election to be held September 12, 1939, having passed, and the vacancy under discussion not having occurred on or prior to that date, it is obvious that the provisions of section 905, supra, are impossible of compliance. The sole question for determination, therefore, is whether or not the provisions of the above are mandatory. If they are, the questions must be answered in the affirmative.

Although there has been no judicial construction of the pertinent sections of the code hereinbefore referred to, the exact questions previously have been before the courts of this Commonwealth. Section 3 of the Uniform Primaries Act, approved February 17, 1906, P. L. 36, contained the following provisions:

(a) On or before the ninth Saturday preceding the Spring primary, the Secretary of the Commonwealth shall

> send to the county commissioners in each county a written notice, setting forth the number of Congressmen and officers of the Commonwealth, not nominated by State Conventions, to be elected or voted for therein at the next succeeding general election.
>
> (b) Upon receipt of such notices, and beginning within one week thereafter, such county commissioners shall publish * * * the names of all offices for which nominations are to be made or candidates for the party offices to be elected, within the county, at the ensuing primary, at least once each week for three successive weeks, in two newspapers * * *.

It was further stipulated, in section 12 of that act, that vacancies "happening or existing after the date of the primary may be filled in accordance with the party rules, as is now or hereafter may be provided by law."

In Commonwealth *v.* Blankenburg, 218 Pa. 339 (1907), it appeared that the primary election was on June 1, 1907. The ninth Saturday preceding this date was, therefore, March 30, 1907. Prior to the latter date the Secretary of the Commonwealth notified the County Commissioners of Philadelphia of the vacancies in office to be nominated for at the primary, including, inter alia, two judges of the court of common pleas No. 1. On April 16, 1907, after the publication had been started, the Secretary of the Commonwealth notified the commissioners that an additional vacancy had occurred in common pleas No. 1 by the resignation of one of the judges and directed them to change their publication accordingly. In a mandamus proceeding against the commissioners, the Supreme Court affirmed the lower court's refusal of the writ. The Supreme Court, at pages 340, 341, 342 and 343, said:

> The act of 1906 was passed to put an end to this system. Its first requirement is uniformity throughout the state, and in the first section it is enacted that it shall be known as the uniform primaries act. It provides that there shall be two primary elections in each year, one on the fourth Saturday before the February election, to be known as the winter primary, the other on the first Saturday of June (except in the years of presidential elections) to be known as the spring primary. These dates are fixed by the statute, and there is no claim by anyone that there is any discretion in anybody to alter them. * * *
>
> * * * * *
>
> The exact question is whether the provisions of section 3 as to time are mandatory. We do not understand that any claim is made that any of the requirements themselves are not mandatory, but that if circumstances are such that convenience can be served and the substance of the require-

ments obeyed, the direction as to time may be treated as directory only.

This contention is not tenable. As already said the things to be done are a series of prescribed steps for a prescribed purpose. The terminus ad quem whereto they all lead is the spring primary whose date is fixed and immovable. The initiatory step of the series is the notice by the secretary of the commonwealth to the county commissioners, and the next is the publication. For these the statute fixes in positive terms the exact time, "on or before the ninth Saturday preceding the spring primary," for the notice, and the publication to begin "within a week" after receipt of the notice, and to be "at least once each week for three successive weeks." The argument is that the substantial requirement is a reasonable time for the electors and others for the purpose indicated, and if that is given, the intent of the statutes is fulfilled. But reasonable time is matter of opinion on which there may be large differences. * * *

If there were any doubt of this on the general construction of the act the provision of clause three of section two would effectually settle it. "No . . . candidates for the public offices herein specified (shall) be nominated in any other manner than as set forth in this act." * * *

* * * * *

The first notice from the secretary and the publication by the commissioners were in strict accordance with the law under the facts as they then were, and the proceedings were thus regularly commenced under section three. The provisions of that section as to time being mandatory the third vacancy occurred too late for the nomination to be made under that section and it necessarily, therefore, falls under the alternative provisions of section twelve.

In Commonwealth ex rel. Kinsey *v.* County Commissioners, 16 District Reports 341 (1907), arising out of the same situation presented in Commonwealth *v.* Blankenburg, supra, Judge von Moschzisker, then judge of the Court of Common Pleas of Philadelphia County, said:

Provisions in statutes regulating the duties of public officers and specifying the time for their performance have been construed as directory rather than as mandatory on many occasions where the nature of the thing to be done or the phraseology of the statute did not show the evident intent to be otherwise; but where the act to be executed is an integral part of a general system wherein the time prescribed for its performance is essential for the proper carrying out of the whole system, then the provision as to time should be held to be mandatory and not merely directory.

* * * * *

> A strict construction of the act in the sense we have in mind simply means that when nominations are to be made thereunder they must be made in compliance with its essential provisions.

The language of Judge Ferguson, in a concurring opinion is likewise highly significant:

> When a candidate for a state office is to be nominated it is the duty of the Secretary of the Commonwealth to certify to the County Commissioners to that effect at least nine weeks before the first Saturday of June. This latter date is fixed, and there is no power in any officer to alter or change it. * * *
>
> * * * He may send his certificate as long before that date as he elects, and if circumstances should bring about an unexpected vacancy before that date there is no reason why an additional certificate should not be forwarded. But the certificates are of vacancies for which an election must be had in the November following, which are known to the Secretary of the Commonwealth at the time he makes his certificate. If the time for such certification is extended and a doctrine of reasonable construction of the act is applied, then the whole delicate system is disarranged. * * *

These cases were cited with approval in Commonwealth ex rel. Meyers *v.* King, 6 D. & C. 155 (1924); Supper *v.* Stauss, 39 Super. Ct. 388 (1909) and Commonwealth ex rel. *v.* Lenhart, 241 Pa. 129 (1913).

Under the authority of the cases above cited, it is plain that the provisions of the Election Code prescribing the procedure prerequisite to the nomination of party candidates and primary elections are mandatory. The vacancy caused by the death of Judge Cottom on July 6, 1939 not having existed at the time the Secretary of the Commonwealth was *required* to send to the county board of elections a written notice *designating all the offices* for which candidates are to be nominated, the office of judge of a court of record in Fayette County was and could not be included in such notice; and the Secretary of the Commonwealth is clearly prohibited by the code from sending any other notice after the tenth Tuesday preceding the primary election even where, as in this case, the next day a vacancy existed in an office not included in the original list.

In view of the above, therefore, we are of the opinion that you may lawfully rule that,

(1) The Secretary of the Commonwealth may not after the tenth Tuesday preceding any primary designate by written notice the office of judge of a court of record as an office for which candidates are

to be nominated in any election district at the ensuing primary and to be elected at the succeeding November election.

(2) If the office of a judge of a court of record is not vacant on the tenth Tuesday preceding any primary in any odd-numbered year, and is not designated by the county board of elections in a notice filed with the Secretary of the Commonwealth on or before the tenth Tuesday preceding the fall primary in an odd-numbered year, and further if the Secretary of the Commonwealth did not on or before the tenth Tuesday preceding a primary election in an odd-numbered year designate that office as one for which a candidate is to be nominated in the judicial district at the ensuing primary election, the Secretary of the Commonwealth may not lawfully receive and file a nomination petition for any candidate for that office in that year.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED. C. MORGAN,
Deputy Attorney General.

OPINION No. 292

Statutes—Repeal—Later statute dealing with same subject—Licensing pawnbrokers—Act of April 6, 1937—Act of May 7, 1907.

1. Under the Statutory Construction Act of May 28, 1937, P. L. 1019, sec. 91, repeals by implication are not to be favored, so that when two statutes relate to the same subject matter an implied repeal is to be found only where the latter statute provides, in a comprehensive manner, for that which was provided in the prior statute, and the two statutes stand exclusive and irreconcilable.

2. The Pawnbrokers License Act of April 6, 1937, P. L. 200, being intended to regulate the business of pawnbrokers, does not repeal by implication the Revenue Act of May 7, 1907, P. L. 175, imposing a license tax inter alia upon the business of pawnbrokers.

Harrisburg, Pa., July 24, 1939.

Honorable William J. Hamilton, Jr., Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether pawnbrokers are relieved from the payment of the license tax imposed by the Act of May 7, 1907, P. L. 175 (72 PS §2901, et seq.), by the passage of the Act of April 6, 1937, P. L. 200 (63 PS §281-1, et seq.).

Section 1 of the act of 1907, supra, provides, in part:

> That from and after the passage of this act, all brokers whether stock brokers, bill brokers, note brokers, exchange brokers, merchandise brokers, factors or commission merchants, real estate brokers and agents, or pawnbrokers * * * shall pay an annual license tax to this Commonwealth upon his, their, or its gross annual receipts. * * *

Relevant sections of the act of 1937, supra, are as follows:

> Section 1. Short Title.—Be it enacted, &c., That this act shall be known and may be cited, as the Pawnbrokers License Act.
>
> Section 3. License Required.—No person, partnership, association, business corporation, nonprofit corporation, common law trust, joint-stock company or any group of individuals however organized shall, on and after the effective date of this act, engage or continue to engage in business as pawnbroker in this Commonwealth except as authorized by this act and without first obtaining a license from the Secretary of Banking.
>
> Section 6. License Fee—Every application for license under this act shall be accompanied by an annual license fee of one hundred ($100) dollars. * * *
>
> All license fees and fines received by the Secretary of Banking shall be deposited in the State Treasury to the credit of the Banking Department Fund for the use of the Secretary of Banking in administering this act.
>
> * * * * *
>
> Section 33. Repealer.—All acts or parts of acts relating to pawnbrokers which are inconsistent herewith are hereby repealed.

It is patent that the act of 1907, supra, remains applicable to pawnbrokers unless the act of 1937, supra, may be said to be inconsistent therewith and to constitute an implied repeal thereof. If two statutes can stand together, the latter does not abrogate the former; the whole course of legislation is to be so construed that every part and word shall have its effect, if it consistently can, and the will of the legislature be completely executed. Repeals by implication are not favored. When two statutes relate to the same subject matter, an implied repeal can only be found where the subsequent statute provides, in a comprehensive manner, for that which was provided for in the prior statute and the two statutes stand exclusive and irreconcilable. These general principles are confirmed by the Statutory Construction Act. See Act of 1937, P. L. 1019, section 91.

A comparison of the acts in question discloses that they may readily be harmonized. The Act of May 7, 1907, P. L. 175, is en-

titled "An Act to provide revenue by imposing a license tax * * *" The Act of April 6, 1937, P. L. 200 is denominated "An Act licensing and regulating the business of pawnbrokers * * *." There is evident instantly a wide disparity in the purpose of the acts, the first being for revenue, the second for regulation. Without more, it is obvious that there is no inconsistency between the acts with respect to the objectives thereof.

In Com. *v.* American Loan Co., 20 Lack. 321 (1919), a question analogous to that in the present instance was presented. The court concluded that if the appellant therein could be characterized as a pawnbroker, there was no reason why he should not be subject to the tax imposed by the Act of May 7, 1907, P. L. 175, even though he were licensed as a money lender under the Act of June 17, 1915, P. L. 1012. In Com. *v.* Ramun Billiard Company, 3 D. & C. 816 (1923), a case interpreting the Act of May 25, 1907, P. L. 244 (imposing a license tax for revenue on the keepers of billiard rooms) and the Act of June 7, 1911, P. L. 668 (regulating the use of billiard tables), it was said:

> * * * It is claimed on behalf of defendant that the act of 1911 completely controls the method of licensing billiard and pool establishments, provides a uniform system of regulation and taxation for cities of the first class, and, therefore, repeals, as to this city, the act of 1907.
>
> The argument presented in support of defendant's claim is that if both acts are in force, the proprietors of billiard and pool-rooms will be subjected to double taxation; and that "the intent to impose double taxation will not be presumed, the presumption is against the existence of such an intention, and this presumption will prevail until overcome by express words showing an intent to impose double taxation."
>
> This claim of defendant is answered by the argument presented on behalf of plaintiff—that the tax imposed by the act of 1907 is a revenue measure; the fee is exacted solely for revenue purposes, and payment of the tax gave the right to carry on the business without the performance of any further conditions until the fees required to be paid for a license under the act of 1911, were imposed for the purpose of regulation. This legislation is the exercise of the police power, and as such is not controlled by the constitutional requirement that taxes must be uniform, nor is it affected by the ruling in relation to double taxation.
>
> There is no such manifest repugnance or inconsistency between the statutes as to indicate an intention of the legislature to repeal the earlier act. The presumption is against an implied repeal.

> The purpose of the act of 1907 is to collect revenue. The act of 1911 is to protect the community by regulating the business. The acts can stand together and the earlier act is not repealed by the later one.

It has also been held that the Act of May 1, 1929, P. L. 1216, regulating real estate brokers did not impliedly repeal the Act of May 7, 1907, P. L. 175 in so far as the latter act requires the payment of a tax. See Newhouse *v.* Dipner, 118 Sup. 101 (1935).

We have no difficulty in concluding, after an analysis of the pertinent statutes and the above citations, that there is no conflict between the acts. Although both acts pertain to the same general subject of pawnbrokers, each embraces a separate phase thereof.

You are advised, accordingly, that the Act of May 7, 1907, P. L. 175 (72 PS §2901, et seq.), was not impliedly repealed by the Act of April 6, 1937, P. L. 200 (63 PS §281-1, et seq.), and that pawnbrokers must continue to pay the license tax imposed by the former act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRANK A. SINON,
Deputy Attorney General.

OPINION No. 293

Public officers—Necessity for senatorial approval of appointment—Necessity for issuing commissions—Liquor Control Board examiners—Liquor Control Act of June 16, 1937, sec. 409(a)—Constitution, article IV, sec. 8.

Examiners appointed by the Governor under section 409*(a)* of the Pennsylvania Liquor Control Act of June 16, 1937, P. L. 1762, to hold hearings for applications for new licenses and renewals, and to report the cases to the board with their recommendations, are not public officers within the meaning of article IV, sec. 8, of the Constitution, requiring senatorial approval for appointment, but are merely employes: it is not necessary to issue them commissions.

Harrisburg, Pa., July 27, 1939.

Honorable Arthur H. James, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your communication of June 15, 1939, in which you asked to be advised whether or not Senate approval is required, and whether or not commissions should be issued by the Governor, to "examiners learned in the law" who

are appointed under the provisions of section 409 (a) of the Act of June 16, 1937, P. L. 1762, the Pennsylvania Liquor Control Act.

In alternative form the questions involved are:

> 1. Whether "examiners learned in the law," appointed by the Governor under section 409 (a) of this Act of Assembly, for the purpose of hearing testimony for or against applications for new licenses and renewals thereof, are such officers as come within the purview of article IV, section 8 of the Constitution, or whether they are simply employes as distinguished from public officers, and
>
> 2. Whether commissions should be issued to such appointees.

Our answer to these questions stated in alternative form is:

(1) That such "examiners" are not public officers within the purview of the constitutional provisions above mentioned but are simply employes and such appointments do not require senatorial approval, and

(2) That it is not necessary to issue commissions to such appointees.

Section 8 of Article IV of the Constitution of Pennsylvania reads as follows:

> Section 8. Appointing power of Governor; vacancies; confirmation by Senate.
>
> He shall nominate and, by and with the advice and consent of two-thirds of all the members of the Senate, appoint a Secretary of the Commonwealth and an Attorney General during pleasure, a Superintendent of Public Instruction for four years, and *such other officers of the Commonwealth as he is or may be authorized by the Constitution or by law to appoint;* he 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; he shall have power to fill any vacancy that may happen, during the recess of the Senate, in the office of Auditor General, State Treasurer, Secretary of Internal Affairs or Superintendent of Public Instruction, in a judicial office, or in any other elective office which he is or may be authorized to fill; if the vacancy shall happen during the session of the Senate, the Governor shall nominate to the Senate, before their final adjournment, a proper person to fill said vacancy; but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election

> for said office shall be held on the second succeeding election day appropriate to such office. In acting on executive nominations the Senate shall sit with open doors, and, in confirming or rejecting the nominations of the Governor, the vote shall be taken by yeas and nays and shall be entered on the journal. (Amendment of November 2, 1909.) (Italics ours.)

The pertinent provisions of section 409 (a) of the Pennsylvania Liquor Control Act of 1937 contain the following language:

> Section 409. License Year; Renewal of Licenses.—
> (a) The board shall, by regulation, divide the State into convenient license districts and shall hold hearings on applications for licenses and renewals thereof, as it deems necessary, at a convenient place or places in each of said districts, at such time as it shall fix by regulation, for the purpose of hearing testimony for and against applications for new licenses and renewals thereof. *The Board may provide for the holding of such hearings by examiners, learned in the law, to be appointed by the Governor, who shall not be subject to the civil service provisions of this act. Such examiners shall make report to the board in each case with their recommendations.* * * * (Italics ours.)

It will be observed that under the provisions of this act the "examiners" shall make report to the board in each case with their recommendations. There is no sanctity to their recommendations. Their returns are made to the board which may or may not approve their recommendations. Neither term nor salary for these examiners is fixed.

Moreover, the underlying thought in this act seems to be that the examiners are simply employes, else why did the act say that these appointees (examiners) shall not be subject to the civil service provisions of this act?

Section 410 of the act provides for hearing by the board on citations to the licensee to appear before the board or its examiners, but the *board* grants or revokes the license, as the case may be.

The Administrative Code (Act of April 9, 1929, P. L. 177) as amended, provides, in article II, section 207:

> The Governor shall nominate and by and with the consent of two-thirds of all the members of the senate appoint (a) * * * *the members of all independent administrative boards and commissions.* * * * (Italics ours.)

Clearly, an *examiner is not a member of an administrative board, as distinguished from an employe,* for in section 214 of The Administrative Code, as amended, provision is made for the appointment of various *employes,* inter alia, "examiners."

Thus, in Werkman *v.* Westmoreland County, 128 Pa. Super. 297, the court held that a court crier whose salary was fixed by an Act of Assembly was not a public *officer* but a *mere employe or attache of the court,* appointed by the court and subject to removal by the court at will.

A public officer, under article III, section 13, of the Constitution, which prohibits the extension of the term of any public officer or the increase or diminution of his salary or emoluments after his election or appointment, is contrasted with a mere employe in the case of Wiest *v.* Northumberland County, 115 Pa. Super. Ct. 577, where it was held that the solicitor to the county controller in counties of the fifth class was not such a *public officer* with these prohibitions of the Constitution. Judge Trexler said, on page 579, in quoting from an earlier case:

> * * * We quote, "If the officer is chosen by the electorate, or appointed, for a definite and certain tenure in the manner provided by law to an office whose duties are of a grave and important character, involving some of the functions of government, and are to be exercised for the benefit of the public for a fixed compensation paid out of the public treasury, it is safe to say that the incumbent is a public officer within the meaning of the constitutional provisions in question. This we think is the effect of the adjudications on the subject. While this rule requires consideration of various matters in determining whether an office can properly be considered to be within the meaning of the clause of the Constitution under consideration, the character of the functions to be performed is of prime importance. The duties of the counsel for the board of registration commissioners are not defined by statute. It is apparent, therefore, that he is merely the legal adviser of the board with regard to the performance of their duties and shall represent them in legal proceedings in which the board is involved. His duties are important in the sense that the advice and actions of an attorney always entail grave responsibility; but they are performed for the board. He has no direct connection with, or responsibility to the public; he is entirely subordinate to the board; they may follow his advice or disregard it; he cannot control their actions; he cannot perform their duties; his appointment is for no definite term, and he can be recalled at any time; he has no grave and important duties involving a function of government in their performance, or duties which are of such a public character as are held to be an essential characteristic of an office in order to bring it within the meaning of constitutional prohibition. * * *"

But it is argued that because of article IV, section 8 of the Constitution which provides that, "* * * He (the Governor) shall nominate

and by and with the advice and consent of two-thirds of all members of the Senate, appoint * * * *such other officers* of the Commonwealth as he is or may be authorized by the Constitution or by law to appoint * * *" (Italics ours), anyone holding an office by appointment of the Governor must receive senatorial approval; that is, that the term "officer" as used in this article and section is inclusive of all persons who may be appointed under the law by the Governor to a place in the public service.

This is too broad an interpretation of this constitutional provision. The requirement as to senatorial approval should be confined to "officers," or "members" of all independent administrative boards as provided in The Administrative Code, where the term "members" of administrative boards is used.

What under the law, is an *"officer"* or a *"member"* of an independent administrative board?

How is he to be defined? Must a clerk or a stenographer or any employe appointed by the Governor under authority of law, receive senatorial approval by reason of the generality of the phrase used in the Constitution with respect to senatorial approval? However, since, in construing article III, section 13 of the Constitution prohibiting the increase or diminution of salaries of public officers after their election or appointment, the courts have distinguished between public officers and employes in the public service as indicated in the case of Werkman *v.* Westmoreland County, supra; Wiest *v.* Northumberland County, and Gift *v.* Allentown, 37 Leg. Int. 332. The same distinction should be made and the same application made when the same term namely, "public officers" are found in other parts of the Constitution.

Thus, in 12 C. J. 706, section 49, it is said:

> The presumption is that the same meaning attaches to a given word or phrase wherever it occurs in a constitution. The rule is, therefore, that the same meaning will be given to the same words occurring in different parts of the same constitution, unless it appears from the whole that a different meaning was intended in some part alleged to be an exception. * * *

It may be that in the popular conception, anyone who holds a position in public life is a public officer yet in the law, there is a clear line of distinction between what are "public officers" and "employes" in public office.

In this latter class, examiners under the Pennsylvania Liquor Control Act appointed by the Governor, belong; that is, they are simply employes. Hence, their appointment does not require senatorial ap-

proval and you are so advised. You are also advised that it is not necessary to issue commissions to such appointees.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM S. RIAL,
Deputy Attorney General.

OPINION No. 294

Workmen's compensation—Necessity therefor—Relief recipients working on projects approved by local county boards—Duty of sponsors—Act of June 27, 1939—Workmen's Compensation Acts of June 2, 1915, June 4, 1937, and June 21, 1939.

1. Relief recipients employed on projects approved by local county boards under the Act of June 27, 1939 (No. 401), are employes within the meaning of the Workmen's Compensation Act of June 2, 1915, P. L. 736, as reenacted and amended by the Acts of June 4, 1937, P. L. 1552, and June 21, 1939 (No. 210).

2. Relief recipients employed on projects approved by local county boards under the Act of June 27, 1939, are employed by the sponsors of the projects rather than the Department of Public Assistance, and the sponsors must, therefore, furnish the department with certificates showing that they are covered by workmen's compensation insurance.

Harrisburg, Pa., August 8, 1939.

Honorable Howard L. Russell, Secretary, Department of Public Assistance, Harrisburg, Pennsylvania.

Sir: We are in receipt of your communication in which you ask to be advised whether assistance recipients working on a project approved by a local county board of assistance are to be considered as such employes as would fall within the provisions of the Workmen's Compensation Act.

The Workmen's Compensation Act of June 2, 1915, P. L. 736, as reenacted and amended by the Act of June 4, 1937, and further reenacted and amended by Act of June 21, 1939, P. L. 620, under section 104 (a) defines employes as follows:

> All natural persons, who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired,

or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer.

Section 302 of the Workmen's Compensation Act, as reenacted and amended, provides:

> (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be, at the time of the making, * * * an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, * * *

The employment of relief recipients, on projects approved by local county boards, is governed by the Act of June 27, 1939, P. L. 1184, which provides, inter alia, as follows:

> Section 4. It shall be the duty of such governing bodies and of the person in charge of each State district office, institution and other agency, and of each such regularly organized charitable organization and institution to furnish employment for as many such employable persons and for as long a period as the care, maintenance, improvement and policing of the highways, streets, * * * and to designate to the county board of assistance the number of persons that can be used and the character of the work for which they are required. Thereupon, the county board * * * shall notify the required number of such employables to report for work for a specified number of hours each week at a time and place designated in the notice. Such services shall be rendered free of charge to the State, political subdivision or charitable organization except for the cost of transportation if such distance exceeds one mile * * *.

The relation of master and servant clearly exists in the case of assistance recipients working on projects; recipients working on such projects are employes within the meaning of the Workmen's Compensation Act since they do not come within any of the enumerated exemptions. As the Workmen's Compensation Act expressly provides that employers must cover employes with insurance unless they reject the act in accordance with its provisions, recipients on work relief projects coming within the provisions of the Workmen's Compensation Act should be covered.

Having answered your first query in the affirmative, you request to be advised whether or not the sponsor of the project is responsible

for payment of the premium for workmen's compensation insurance, or must this cost be borne by the Department of Public Assistance. There is no provision with respect to the premium in either the Act of June 27, 1939, P. L. 1184, or in the Public Assistance Act (Act of June 24, 1937, P. L. 2051).

To the contrary, the act of 1939 implies no added costs to the Department of Public Assistance as a relief program, and it is obvious if workmen's compensation costs are added, it will decrease appropriations for grants. From your inquiry, the question arises who is the employer in the work relief projects to be carried on under the act. The rule appears to be that the master who directs the servant in the work is the man who is responsible for the workmen's compensation. See the case of Lamb *v.* State Work Relief Compensation Fund, 127 Pa. Super. Ct. 44, 47, where the court said:

> * * * ordinarily, the test of determining by whom one is employed does not depend solely upon the payment of wages, but it may aid in resolving that fact: Sgattone *v.* Mulholland & Gotwals, Inc. et al., 290 Pa. 341, 346, 138 A. 855. Who is the responsible employer in case of injury depends largely on the control or right of control of the employee, not only with regard to the work to be done, but also as to the method and manner of performing it: Venezia *v.* Phila. Electric Co., 317 Pa. 557, 177 A. 25. * * *

See also Hattler, et al. *v.* Wayne County, 117 Pa. Super. Ct. 570 (affirmed in 320 Pa. 280), which is in point. The plaintiff undertook to furnish twenty hours of labor on a county road, and the County of Wayne undertook to employ him. He was paid by the Commonwealth on the basis of twenty-five cents an hour. He was injured in the course of his employment and brought suit for compensation. The Superior Court (affirmed by the Supreme Court) held as follows:

> A person assigned by the emergency relief board of a county, acting under the provisions of the Act of August 19, 1932, P. L. 90, to work on a county road under the direction of the county commissioners, is an employe of the county within the meaning of the Workmen's Compensation Act of 1915.

The court also held:

> * * * The relationship thus created differs only from that existing where the county employs laborers in the usual course of its business in that here the state provided the funds for meeting the cost. In one case the funds come from local taxation and in the other from state-wide taxation. * * *

We find the case of Conn *v.* Lower Tyrone Township, et al., 120 Pa. Super. Ct. 537, is to the same effect. By the terms of a contract of employment, Conn was employed as a laborer on road construction work for the township under direction of its supervisors but was to be paid by the relief board in relief orders at the rate of thirty cents an hour for a nine-hour day. He received an injury to his eye and, as a result thereof, he died. Judgment for claimant was affirmed, the court holding that a work relief employe engaged on road construction work for township was within the compensation act.

In the case of Hubick *v.* Board of Supervisors of Rush Township, et al., 23 D. & C. 697, the court said:

> A work relief employe assisting in widening township roads under the direction of its board of supervisors, and receiving as compensation food orders issued by the Commonwealth, is an employe of the township supervisors within the meaning of the Workmen's Compensation Act and entitled, upon disability occurring in the course of his employment, to compensation based upon the value of the food orders which he was receiving.
>
> An "employe" within the meaning of the Workmen's Compensation Act, is any natural person performing services for another for a valuable consideration, with certain stated exceptions, and it is immaterial whether the consideration was received from the employer or another.

To the same effect, see Selser *v.* Dauphin County Poor District 30 D. & C. 337, where the court said:

> In Pennsylvania relief workers who were injured prior to 1933 are entitled to be paid compensation as provided by the Pennsylvania Workmen's Compensation Act; Hattler et al. *v.* Wayne County, 117 Pa. Superior Ct. 570, affirmed in 320 Pa. 280; Conn *v.* Lower Tyrone Twp. et al., 120 Pa. Superior Ct. 537; Hubick *v.* Board of Supervisors of Rush Twp. et al., 23 D. & C. 697.
>
> This case arose after the amendment of June 3, 1933, P. L. 1515, 77 PS Sections 444-450, to The Workmen's Compensation Act of June 2, 1915, P. L. 736. This amendment was evidently intended to provide special compensation for injured relief workers.

Under former laws relating to work relief projects dating back to 1932, it became well established that such persons on work relief were employes under the provisions of the Workmen's Compensation Law, and that sponsors of projects were the employers, and hence were liable for the payment of workmen's compensation insurance premiums. A special fund was even established in 1933 to pay compensation to persons injured in work relief employment.

In view of the foregoing, we are of opinion:

1. That recipients on work relief projects are such employes as come within the provisions of the Workmen's Compensation Act.

2. That though their wages in the form of assistance are paid recipients by your department, the sponsor of the projects is the employer, and as such, is responsible for payment of premiums for workmen's compensation. Accordingly, each sponsor when asking for an assignment of workers should give to the county board, or your department, a certificate showing that they are covered by workmen's compensation insurance.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 295

Public officers—Coroners—Powers, duties and jurisdiction—Issuance of death certificates for insurance purposes—Act of June 7, 1915.

1. The powers, duties and jurisdiction of coroners today remain as they were at common law except insofar as they may have been modified by constitutional or statutory provisions.

2. The legislature, in enacting the Act of June 7, 1915, P. L. 900, intended to devise a uniform system for the registration and certification of births and deaths in this Commonwealth and to give the Department of Health, through the Bureau of Vital Statistics, the exclusive right to issue such certificates: since the only duty conferred upon coroners was the issuing of certificates to the register of the department in cases of death by violence, etc., as provided in section 8, coroners have no right to issue death certificates for insurance purposes.

Harrisburg, Pa. August 17, 1939.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your letter of recent date advising that numerous coroners throughout the Commonwealth are issuing and requiring a fee for death certificates to be used for insurance purposes; and that this practice deprives the Commonwealth of a considerable sum of money each year which it would otherwise collect for the issuance of such certificates through the Bureau of Vital Statistics. You request an opinion regarding the legality of such action on the part of the several coroners issuing these certificates.

Coroners are specifically designated as county officers in the Constitution of this Commonwealth (article XIV, section 1) and the office has been the subject of considerable legislation, both prior and subsequent to the adoption thereof. Their powers, duties and jurisdiction, however, are of very ancient origin and today remain the same as they were at common law except in so far as they may have been modified by constitutional or statutory provision. In order to answer your inquiry, therefore, it becomes necessary to examine the common law of England and the pertinent acts of parliament of that country (which have become a part of the common law of this Commonwealth) as well as the statutes enacted by the General Assembly in modification thereof.

From a careful examination of the statutes of this Commonwealth it becomes apparent that from the earliest days there has been considerable legislation enacted concerning or affecting the office of coroner and its administration. In none of these statutes, however, are the powers and duties of coroners specifically set forth. The various acts authorizing coroners to appoint deputies generally furnish little assistance since they merely confer upon those persons appointed "the same powers as the coroner." The Act of June 6, 1893, P. L. 330 (authorizing the appointment of deputies in counties of the first class), constitutes an exception in that it provides that "Such deputy or deputies, so appointed, shall have *like* power [i. e. the same as the coroner] to view dead bodies, to hold inquests, to select, summon, and compel the attendance of jurors and witnesses, and to administer oaths." So far as we have been able to ascertain, the provisions above quoted constitute the only statutory reference to the powers of coroners in this Commonwealth.

It is surprising too that there is little judicial opinion concerning the powers and duties of this officer. In In Re Coroners' Inquests, 1 Pa. C. C. R. 14, 15 (1885), the court says:

> The coroner is a very ancient officer, and originally acted only in the nature of a committing magistrate. Much of his authority in England he derived from the common law; and the acts of parliament, which afterwards defined more particularly his authority, became a part of the law of this commonwealth. It is the duty of the coroner to hold inquests, super visum corporis, where he has cause to suspect that the deceased was feloniously destroyed, or where his death was caused by violence, or where he has any ground to suspect that the death of any person was an unnatural one, or an unaccountable one, or a suspicious one. When the cause of death is not doubtful, the coroner ought not to put the county to the expense of holding an inquest.

Perhaps the most comprehensive definition of the powers and duties of coroners is found in 13 C. J. 1244:

> The powers, duties, and jurisdiction of coroners are of very ancient origin, and remain what they were at common law, except in so far as they have been modified by our statutes or institutions. By an ancient statute which is said to be wholly directory and declaratory of the common law, the duties of the coroner are either judicial or ministerial, but principally judicial. His ministerial duties consisted only in acting as the sheriff's substitute when for any reason the sheriff was incapacitated to act. The principal judicial function of the coroner, and the one which virtually characterizes his office in modern times, in both England and America, is that of investigating the cause of sudden, violent, and unnatural deaths. The powers and duties of a coroner with respect to the holding of an inquest include the determination of the question as to whether an inquest is necessary, and, if deemed necessary or proper, then to appoint the time and place for holding the same; and also the summoning and qualifying of the jury; viewing the body, determining the question as to the necessity of a post mortem examination and, if deemed necessary, ordering the same, summoning, qualifying, and examining the witnesses; and the preparation and filing of the return of the inquest. * * *

It, therefore, seems obvious that, although the Constitution recognizes these officers and they have been frequently the subject of legislative enactment and judicial discussion, the framers of the Constitution, as well as the legislature and the courts, intended to preserve, essentially, the nature and functions of the office as the same exsited at common law.

Sharswood's Blackstone's Commentaries (Book I, page 346) contains a discussion of the office which, although very interesting historically, we do not here set forth in full. It appears therefrom, however, that the earliest statutory definition of the powers and duties of coroners is found in the statute 4 Edward I, "de officio coronatoris" and, since this act of parliament has become a part of the common law of this Commonwealth, it is to this day controlling unless modified by legislative or judicial action. At page 347 it is said:

> The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial. This is in great measure ascertained by statute 4 Edw. I. de officio coronatoris; and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be "super visum corporis"; for, if the body be not found, the coroner cannot sit. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six of the neighbouring towns, over whom he is to preside. If any be found guilty, by this inquest, of murder or other homicide, he is to commit them to prison for further

> trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby: but, whether it be homicide or not, he must inquire whether any deodand has accrued to the king, or the lord of the franchise, by this death; and must certify the whole of this inquisition, (under his own seal and the seals of his jurors), together with the evidence thereon, to the court of King's Bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks, and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found or concealed a treasure; "and that may be well perceived (saith the old statute of Edw. I.) where one liveth riotously, haunting taverns, and hath done so of long time": whereupon he might be attached, and held to bail upon this suspicion only.
>
> The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality, (as that he is interested in the suit, or of kindred to either plaintiff or defendant), the process must then be awarded to the coroner instead of the sheriff, for execution of the king's writs.

As hereinbefore indicated, there has been no legislative nor judicial abrogation in this Commonwealth of the powers of coroners as above set forth. On the contrary, the same have to some extent been recognized by the judiciary in at least two instances. In Fayette County Deputy Coroner's Case, 20 Pa. C. C. R. 641, 642 (1898), Judge Mestrezat (later Justice of the Supreme Court) said:

> The powers and duty of the coroner are both judicial and ministerial; what may be called his original jurisdiction is judicial; his ministerial functions being exercised mainly when acting in the place of the sheriff: 7 A. & E. Enc. of L. (2d ed.) 602. * * *

And the Supreme Court of Pennsylvania in County of Lancaster *v.* Mishler, 100 Pa. 624, at page 626 (1882), said:

> In holding an inquest, the coroner acts in a judicial capacity. If he has jurisdiction in the particular case, and makes a sufficient record of the inquest, the regularity of the finding cannot be impeached in a collateral proceeding. We see no such defect in this record, nor in the manner in which it was kept as to prevent its being admitted in evidence.
>
> It is the duty of a coroner to hold an inquest super visum corporis, where he has cause to suspect the deceased was feloniously destroyed: County of Northampton *v.* Innes, 2 Casey 156; or when his death was caused by violence: Commonwealth *v.* Harman, 4 Barr 269. * * *

In view of the above authorities and discussion, does a coroner, then, have the authority to issue and collect a fee for a certificate of death to be used for insurance purposes? Unless authority for such action is to be found in the common law of England or this Commonwealth or has been conferred by an act of the General Assembly, it would appear plainly that he does not. At no place in the above-quoted authorities does it appear that a coroner has the authority, either conferred directly or by implication, to perform a ministerial act of this nature. And certainly this authority has never been conferred by the legislature. On the contrary an examination of the Act of June 7, 1915, P. L. 900 is directly in derogation of such authority. This act established a uniform and centralized system for the registration of births and deaths occurring throughout the Commonwealth and charged the administration of its provisions to the Bureau of Vital Statistics of the Department of Health.

It contains the following pertinent provisions:

> *The Department of Health* shall, upon request and the payment of the fee as hereinafter provided, furnish any applicant a certified copy of the record of any birth, death, or marriage registered under provisions of this act: * * * (as amended by Section 7 of the Act of April 22, 1937, P. L. 399). (Italics ours.)
>
> * * * Provided further, That if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. * * * And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the nature of the disease or the manner of death; and if from external causes or violence, whether (probably) accidental, suicidal, or homicidial, as determined by the inquest, and shall, in either case, furnish such information *as may be required by the State Registrar to classify properly the death.* (Section 8.) (Italics ours.)
>
> That all laws and parts of laws inconsistent with the provisions of this act are hereby repealed, and no system for the registration of births and deaths shall be continued or maintained in any of the several municipalities of this Commonwealth other than the one provided for and established by this act. (Section 24.)

It is obvious that the legislature, in enacting the said statute intended to devise a uniform system for the registration and certification of births and deaths in this Commonwealth and to give the Department of Health, through the Bureau of Vital Statistics, the exclusive right to issue the certificates provided for therein. It will

be noted that the only power conferred upon any coroner is that of issuing a certificate to the registrar in cases of death by violence, etc., as set forth in section 8. Had the legislature intended that the power to issue such certificates was to be vested in any other person or agency, it would have so provided.

We are of the opinion, therefore, that no coroner holding office within this Commonwealth has the authority to issue a death certificate other than to the Department of Health as provided for in section 8 of the Act of June 7, 1915, supra.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED. C. MORGAN,
Deputy Attorney General.

OPINION No. 296

State government—Records of illegitimate births—Right of Department of Health to issue certified copy to district attorney for use in criminal prosecution—Act of June 7, 1915, as last amended by the Act of April 22, 1937, sec. 7.

The Department of Health may, under section 7 of the Act of April 22, 1937, P. L. 399, amending section 21 of the Act of June 7, 1915, P. L. 900, as amended, issue a certified copy of an illegitimate birth record only to the mother of the child, or upon order of a court of competent jurisdiction; it may not issue such certified copies to district attorneys for the purpose of using them in evidence on behalf of the Commonwealth in criminal prosecutions.

Harrisburg, Pa., September 5, 1939.

Doctor John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether your department is authorized to issue certified copies of records of births of illegitimates to the district attorneys of the various counties who have requested said certificates for the purpose of using them as evidence, on behalf of the Commonwealth, in criminal prosecutions.

Your question involves a consideration of the provisions of section 7 of the Act of April 22, 1937, P. L. 399, amending section 21 of the Act of June 7, 1915, P. L. 900, as amended, which provides as follows:

> The Department of Health shall, upon request *and the payment of the fee as hereinafter provided,* furnish any applicant a certified copy of the record of any birth, death, or

> marriage registered under provisions of this act: *Provided, however, That no certified copy of an illegitimate birth record, nor any information relative thereto, except as herein otherwise provided, shall be furnished to any person other than the illegitimate child or the mother of the child, or upon an order of a court of competent jurisdiction.* * * * (Italics ours.)

The act is regulatory and restrictive of the powers of the Department of Health, an administrative department of the State Government. It is, therefore, a restriction on the powers of the Commonwealth with reference to the particular subject matter of the act. Its provisions are mandatory, not merely directory, since the word "shall" is employed in the act both in the part which imposes the duty to issue certified copies of births and in the part prohibiting the issuance of certified copies of illegitimate birth records.

That part of section 7 quoted above and italicized by us, is, both by reason of its express language and by its content, a "proviso" and, as such, in acordance with well established canons of statutory construction, must be strictly construed.

In defining the nature and office of a proviso, the Supreme Court, in Friese's Estate, 317 Pa. 86 (1934), states as follows:

> * * * The office of a proviso is to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation. * * *

In Montgomery, Jr. *v.* Martin, 294 Pa. 25 (1928), the court expounded the rule governing the construction of a proviso in the following language:

> * * * The office of a proviso is to "qualify, restrain, or otherwise modify the general language of an enacting clause." A proviso "is to be strictly [not liberally] construed" (U. S. *v.* Dickinson, 40 U. S. 141, 164; Ryan *v.* Carter, 93 U. S. 78, 83), and "can have no existence separate and apart from the provision which it is designed to limit or qualify." These are not technical but common sense rules, applicable to the interpretation of any written instrument; they govern the construction of constitutional provisions as well as of statutes. See Endlich on the Interpretation of Statutes, sections 184, 186 and 526; see also Booth & Flinn *v.* Miller, 237 Pa. 297, 306, and Perry County T. & T. Co. *v.* Pub. Serv. Com., 265 Pa. 274, 278, on the rule that "general principles governing the construction of statutes apply also to the interpretation of constitutions."

In Orlosky, Appellant, *v.* Haskell, 304 Pa. 57 (1931), the Supreme Court held as follows:

> There are certain canons of construction of statutes expressed as follows: "The legislature must be intended to mean what it has plainly expressed, . . . It matters not, in such a case, what the consequences may be. . . . Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. . . . Its [the court's] duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words": Endlich's Interpretation of Statutes, section 4 (citing cases). * * * "As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter. And, as a general rule, a proviso is deemed to apply only to the immediate preceding clause or provision": 25 R. C. L., page 985. * * *

Quoting directly and more extensively from Endlich on the Interpretation of Statutes, in section 526, page 741, we find the following clear and explicit language covering the interpretation and effect of a proviso, such as that contained in the section of the act of 1937 which we are here considering:

> * * * And, where a provision, general in its language and objects, is followed by a proviso, the rule applicable to such cases occuring in statutes has been applied to constitutions, viz.; that the proviso is to be strictly construed, as taking no case out of the provision that does not fairly fall within the terms of the proviso, the latter being understood as carving out of the provision only specified exception, within the words as well as within the reason of the former. * * *

The rule of statutory construction expounded by the court in the cases quoted above is restated in section 51 of the Act of May 28, 1937, P. L. 1019, known as the "Statutory Construction Act," as follows:

> 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.

From all the above quoted authorities, and in view of the clear, precise and unambiguous language of the act, there is no doubt in our mind that the provisions of section 21 of the Act of June 7, 1915, as amended, are applicable to district attorneys and all other officials of the Commonwealth. If the legislature had intended that such records were to be available to the Commonwealth or any of its officers, such as district attorneys and others, it would have included them in the exception. Since the legislature did not include the

Commonwealth or any of its officers within the exception, we must conclude that it meant the provisions of said act to apply even to the Commonwealth and its officers.

It is our opinion, therefore, that certified copies of illegitimate birth records may and shall only be issued to the illegitimate child or its mother, or upon the order of a court of competent jurisdiction.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

C. JAMES TODARO,
Deputy Attorney General.

OPINION No. 297

State Government—Records of Sanitary Water Board—Public inspection—Act of June 22, 1937, sec. 607—Retrospective interpretation.

All papers, records, and documents of the Sanitary Water Board and applications pending before it, whether filed before or after the effective date of the Act of April 22, 1937, P. L. 1987, are public records included in section 607 of that act; but even though public, they are open only to the inspection of persons having a legitimate interest therein.

Harrisburg, Pa., September 7, 1939.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your letter of recent date advising that you have had a formal request from the district attorney of one of the counties of this Commonwealth for a copy of a survey of Codorus Creek made by the Bureau of Engineering of your department and concerning which survey certain reports were made to and considered by the Sanitary Water Board. You further state that you do not know whether or not such a survey would be included in the category of the papers, records and documents of the Sanitary Water Board as provided in Section 607 of the Act of June 22, 1937, P. L. 1987, which reads as follows:

> All papers, records, and documents of the board, and applications for permits pending before the board, shall be public records open to inspection during business hours, and copies of all such public records and the rules and regulations of the board, certified by the Secretary of Health, shall be received in evidence in all courts and elsewhere.

Specifically, you desire our opinion on the following:

1. Under the terms of the aforesaid section are you obliged to comply with the request of the said district attorney?

2. What constitutes the "papers, records, and documents of the board"?

3. Are the provisions of the above section applicable to all papers, records and documents of the board or only such of them as have been filed or have accumulated subsequent to the date the act was approved?

The act of 1937, supra, is very comprehensive in its scope and provides a system whereby the Sanitary Water Board is charged with the important duty of protecting the waters of this Commonwealth from sewage pollution and industrial waste, and private water supplies from deleterious matter; furthermore, it confers upon the board great powers to regulate stream and water pollution or abate the nuisance resulting therefrom. In fact, an examination of the statutes pertinent to this subject discloses that this board is the paramount authority within the Commonwealth with respect thereto. The Administrative Code of 1929, P. L. 177, section 2109 (a), provides, in part, as follows:

> The Department of Health shall have the power, and its duty shall be:
>
> (a) To act as the enforcement agent for the Sanitary Water Board. The department shall make such inspections, conduct such investigations, and do such other acts as the Sanitary Water Board shall, from time to time, direct, but the department shall, in the exercise of its powers and the performance of its duties hereunder, be subject at all times to the rules and regulations, orders, and directions of the Sanitary Water Board: * * *

Despite the vast authority vested in the Department of Health regarding the waters of this State, it is significant to note that, with regard to this particular phase of the subject, the department is, in some respects, subordinated to the greater power of the board. We have no doubt, therefore, that the magnitude of the authority so conferred by the legislature impelled it, to some extent at least, to require that the board's records and proceedings be open and subject to inspection by the public.

In construing the section under discussion we must follow a fundamental rule of construction and ascertain and give full effect to the intent and purpose of the legislature as expressed in the language used, as well as the result sought to be accomplished. In view of the vast powers granted to this board, and taking into consideration that the language employed is plain and unambiguous and must be given

its ordinary and commonly understood meaning, we have no hesitancy in concluding that the legislature intended that *all* papers, records and documents of the board and applications for permits pending before it should be public records. Since under section 2109 of The Administrative Code, supra, the Department of Health is required to make such inspections and conduct such investigations as the board shall direct, we are of the opinion that any data accumulated or surveys made for, as well as the results of, and reports on, any inspection or investigation made by your department for the board, constitute a part of its records and documents and are, therefore, open to public inspection. In this latter category would fall the survey of Codorus Creek requested by the district attorney. Not included therein, however, would be data and records of the *Department of Health* gathered and used by the Bureau of Engineering in an independent investigation of stream and water pollution and sewerage and industrial waste problems not made at the request of the board or submitted to and considered by it.

We come, then, to a consideration of your final question, viz., whether this section of the act applies to all papers, documents, etc., or only such as have been filed and accumulated since the adoption of the act. In this connection you have advised us that under date of August 16, 1937, you were advised, in a letter of advice from this department, that the section should be construed prospectively and does not apply to records and papers which were filed under former Acts of Assembly and under old rules and regulations of the board. With this conclusion we cannot agree. It is true that retrospective legislation is not favored and that all statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retrospective effect clearly and plainly appears. However, we are of the opinion that this section of the act cannot properly be called retrospective. It confers a *new* right but does not effect or impair a right acquired under a previous law. The section clearly states that *all* papers, records, and documents of the board shall be public records, open to inspection and had the legislature intended that the right so conferred should be limited only to those records which have been filed and accumulated since the adoption of the act, it would have so stated. This conclusion is strengthened by an examination of the act itself. The very next section (608) provides that "all rules and regulations *heretofore adopted* by the board * * * shall continue in force * * *" We cannot attribute a vain thing to the legislature and it would seem only reasonable that since rules and regulations made previous to the adoption of the act should continue in force, the data and records supporting the said rules and regulations should be open to inspection as much as the

data, findings and records supporting rules and regulations made by the board subsequent to the adoption of the act.

Although we conclude that all of the said records, papers and documents are open to public inspection, we are not of the opinion that the right to inspect can be exercised indiscriminately. At common law the right to inspect public documents or to make copies therefrom is limited to those persons who have an interest therein, such as would enable them to maintain and defend an action for which the records and papers sought can furnish evidence or necessary information. The right of the public generally to inspect public records must be based, as in this case, upon statutory authority. We do not believe that the law contemplates an indiscriminate examination of the said records or would permit anyone to conduct a fishing expedition. On the other hand, we believe that the section should be so construed as to permit an inspection and examination only by those who can give a good and sufficient reason therefor.

In view of the above, we are of the opinion:

1. That the survey of Codorus Creek made by the Bureau of Engineering in the Department of Health is a record of the Sanitary Water Board which is open to public inspection. However, it should be noted that "public inspection" does not mean that your department or the board is under any obligation to send a copy of this survey or any other record to anyone who requests the same. The only obligation imposed upon the board is to allow anyone coming to the offices of the board the right to inspect the records as they pertain to any matter in which that person has a legitimate interest.

2. That the order of business and the minutes of the board, reports made to the board by the Department of Health, as its enforcement agent, correspondence to and from the board, orders of the board, records of actions before the board, data accumulated or surveys made for the board by the Department of Health, the results or reports on any inspection or investigation made for the board by the Department of Health and applications for permits and the permits of the board, constitute the aforesaid public records.

3. That the provisions of the said section of the act are not prospective only, but apply to all of the papers, records and documents of the board, whether obtained, filed or accumulated subsequent or antecedent to the adoption of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 298

Corporations—Dissolution of business corporations—Impediments to granting certificate of dissolution—Reservation of Commonwealth's right to collect additional income tax due to adjustment of Federal income and excess profits tax reports—Objection by creditor that debt has been paid or provided for—Business Corporation Law of May 5, 1933—Federal Revenue Act of May 28, 1938, sec. 275.

1. Where a certificate from the Department of Revenue to the Department of State in connection with the dissolution of a Pennsylvania business corporation, certifying that the corporation has fully paid into the State Treasury all taxes due from it to the Commonwealth, reserves the right to collect any additional corporate net income tax which may result from changes made by the Federal Government in income and excess profits tax reports, a certificate of dissolution cannot be issued, but the corporation must apply for a prompt assessment of its income and excess profits tax liability in accordance with the provisions of section 275 of the Federal Revenue Act of May 28, 1938, 52 Stat. at L. 447.

2. While ordinarily the mere statement by a corporation which is about to be dissolved, under seal and signed and verified by two duly authorized officers, that all debts, obligations and liabilities of the corporation have been paid, or that adequate provision has been made therefor, as required by section 1105 of the Business Corporation Law, will be accepted at its face value, if the Department of State is informed by an alleged creditor that no adequate provision has been made for payment of his debt, the certificate must be refused and the corporation required to submit to the department satisfactory evidence to substantiate its statement before a certificate of dissolution can be issued.

Harrisburg, Pa., September 13, 1939.

Honorable S. M. R. O'Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: We have your request for an opinion upon the effect of the provisions of the Business Corporation Law, Act of May 5, 1933, P. L. 364, relative to the duty of the Secretary of the Commonwealth to issue or refuse to issue a certificate of dissolution to a business corporation.

Your inquiry arises out of a request of Jacob Brothers Company, a corporation for the issuance of a certificate of dissolution.

It appears that the above corporation filed with your department an application for the issuance of a certificate of dissolution supported by the following documents:

1. Articles of dissolution dated September 9, 1938, in compliance with the provisions of section 1105 of the Business Corporation Law, Act of May 5, 1933, P. L. 364;
2. Proof of publication as required by that act;
3. Certificate from the Department of Labor and Industry, Division of Unemployment Compensation and Employment Service dated October 28, 1938 certifying that the corporation has fully paid into the Unemployment Compen-

sation Fund all contributions due from it to the Commonwealth of Pennsylvania to September 30, 1938;

4. Certificate dated February 23, 1939, from the Department of Revenue certifying that the corporation has made all reports due to the Department of Revenue, and has fully paid into the State Treasury all taxes due from it to the Commonwealth to September 30, 1938, but stating "The Commonwealth reserves the right to make collection of any additional amount of Corporate Net Income Tax which may arise from changes made by the Federal Government in connection with Income and Excess Profits Tax Reports.

It appears also that the National Farm School, through its attorney, has filed with your department its objection to the issuance of a certificate of dissolution to the above named corporation, on the ground that the said corporation is indebted to the National Farm School in the sum of $25,000 for the payment of which indebtedness no adequate provision has been made by the corporation.

By reason of the above fact situation, you submit three questions which we shall restate and answer in proper order.

I

Does the reservation made in the certificate of the Department of Revenue dated February 23, 1939 constitute a valid impediment to the issuance by the Department of State of a certificate of dissolution to the applicant?

The certificate from the Department of Revenue, dated February 23, 1939, certifies that the corporation has paid into the State Treasury all taxes due the Commonwealth to September 30, 1938. The certificate, however, contains this reservation, "The Commonwealth reserves the right to make collection of any additional amount of Corporate Net Income Tax which may arise from changes made by the Federal Government in connection with Income and Excess Profits Tax Reports."

Section 1105 of the Business Corporation Law of 1933 provides, inter alia, as follows:

> * * * If the Department of State finds that such articles conform to law, it shall endorse its approval thereon, and if all bonus, taxes, fees and charges required by law have been paid, shall file the articles and issue to the corporation, or its representative, a certificate of dissolution, to which shall be attached a copy of the approved articles. * * *

The reservation by the Department of Revenue, in its certificate quoted above, involves possible additional charges for corporate net income tax which may arise from changes made by the Federal Government in connection with income and excess profits tax.

Corporate net income taxes are based and assessed upon a return made to the Department of Revenue by the corporation, wherein it certifies, under oath, that the amount of income therein reported is the same as that contained in the corporation's income and excess profits tax return to the Federal Government. Ordinarily, and for purposes other than for dissolution, the Department of Revenue accepts this figure as a verity without an audit of its own. A corporation is required, within thirty days from the date of any change in its Federal income tax, to file an amended return with the Department of Revenue and pay the amount of additional tax that may be due by reason of said change, or request a resettlement and refund of any overpayment.

Section 275 (b) of the Federal Revenue Act of May 28, 1938 (26 U. S. C. A. 275, c. 289, 52 Stat. 529) provides as follows:

> *Request for Prompt Assessment.—In the case of income* received during the lifetime of a decedent, or by his estate during the period of administration, or *by a corporation, the tax shall be assessed,* and any proceeding in court without assessment for collection of such tax shall be begun, *within eighteen months after written request therefor* (filed after the return is made) by the executor, administrator, or other fiduciary representing the estate of such decedent, or *by the corporation,* but not after the expiration of three years after the return was filed. This subsection shall not apply in the case of a corporation unless—
>
> (1) Such written request notifies the Commissioner that the corporation contemplates dissolution at or before the expiration of such 18 months' period; and
>
> (2) The dissolution is in good faith begun before the expiration of such 18 months' period; and
>
> (3) The dissolution is completed. (Italics ours)

Under the provisions of the section above quoted, a corporation contemplating dissolution may request a prompt assessment of its tax liability to the Federal Government, which must be made within eighteen months from the date of such request, and the amount of corporate net income tax due to the Commonwealth is thereby definitely ascertained.

Section 1111 of the Business Corporation Law of 1933 provides as follows:

> Survival of Remedies After Dissolution. The dissolution of a business corporation, either by the issuance of a certificate of dissolution by the Department of State, or by the decree of a court of common pleas, when the court has not liquidated the assets and property of the corporation, or by expiration of its period of duration, or by the sale of all its franchises, property and assets to another business corpora-

> tion, shall not take away or impair any remedy given against such corporation, its directors or shareholders, for any liability incurred prior to such dissolution, if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name.

Since the ascertainment of the income of the corporation, pursuant to its request for prompt assessment, must be made by the Federal authorities within eighteen months, the two year period fixed by section 1111 above will still have six months to run, thus giving the Commonwealth sufficient time to sue for whatever additional corporate net income taxes may be due by reason of the assessment made by the Federal Government.

Therefore, in view of what we have stated above, in order to preserve and not prejudice the right of the Commonwealth to recover possible additional taxes, which right the Department of Revenue has reserved in its certificate, a corporation applying for dissolution should be required to produce evidence that it has, in accordance with section 275 of the Federal Revenue Act of 1938, applied for a prompt assessment of its income and excess profits tax liability.

II

> Does the objection filed by the National Farm School constitute a valid impediment to the issuance of a certificate of dissolution to the applicant?

Section 1105 of the Business Corporation Law provides that the articles of dissolution, executed by the corporation and submitted to the Department of State, shall set forth, inter alia:

> (4) A statement that all debts, obligations and liabilities of the corporation have been paid and discharged, or that adequate provision has been made therefor.

Ordinarily, the mere statement by the corporation, under seal and signed and verified by two duly authorized officers of the corporation, that all debts, obligations and liabilities of the corporation have been paid and discharged, or that adequate provision has been made therefor, would be accepted at face value. However, where, as in the present case, the Department of State is informed that the debts, obligations and liabilities have not been paid and discharged and that no adequate provision has been made for their payment, the Department of State would not be warranted in issuing a certificate of dissolution, since the allegation as to the payment and discharge of debts, etc., is controverted by the positive assertion of a

creditor of the corporation. Under these circumstances, the certificate should be refused and the corporation required to submit to the Department of State satisfactory evidence to substantiate the allegation in the articles of dissolution as to the payment of debts.

III

Does the Department of State have the power:

a. to withhold a certificate of dissolution offered for approval and filing under the provisions of section 1105 of the Business Corporation Law for the sole purpose of determining whether the corporation has made adequate provision for the discharge of its debts, liabilities and obligations?

b. to determine what is adequate provision for the discharge of debts, liabilities and obligations by a corporation seeking dissolution under the Business Corporation Law.

In view of what we have said in answer to the second question, it follows that your third question must be answered in the affirmative.

In conclusion, it is our opinion that:

1. The certificate issued by the Department of Revenue, containing the reservation as to possible additional corporate net income taxes that may be due by reason of changes made by the Federal Government in the corporation's income and excess profits tax reports, is not a certificate conclusively establishing that the corporation applying for a certificate of dissolution has "paid" the taxes due the Commonwealth within the meaning of section 1105 of the Business Corporation Law of 1933.

2. That while, under section 1111 of the Business Corporation Law of 1933, the Commonwealth can bring suit and recover the amount of additional taxes that may be ascertained to be due within two years, in order that this right may be preserved to the Commonwealth, a corporation desiring to dissolve should be required to produce evidence to the Secretary of the Commonwealth that it has requested the United States Commissioner of Internal Revenue to make a prompt assessment of its Federal income and excess profits taxes, from which it may be definitely determined whether or not there are any additional taxes due to the Commonwealth by reason of an increase in the ascertained income of said corporation. In this manner, the tax liability of the dissolved corporation may be determined definitely within eighteen months, leaving the Commonwealth six additional months within which to institute proceedings for whatever additional tax the Federal assessment may warrant.

3. That the objection filed by the National Farm School, a creditor of the corporation, that the amount of its claim has not been paid or discharged by the corporation and that no adequate pro-

vision has been made for the payment of its claim, constitutes a valid impediment to the issuance of a certificate of dissolution by the Department of State.

4. That the Department of State is empowered, and indeed compelled, to withhold the issuance of the certificate of dissolution and demand that the corporation submit satisfactory evidence that it has made adequate provision for the payment and discharge of its debts, obligations and liabilities.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

C. JAMES TODARO,
Deputy Attorney General.

OPINION No. 299

Third class cities—Powers of board of health—Abatement of nuisances—Third Class City Law of June 23, 1931, secs. 2325 and 2335—Compensation—Notice to owner or occupant—Right to hearing.

1. The board of health of a third class city has the power, under sections 2325 and 2335 of the Third Class City Law of June 23, 1931, P. L. 932, to order the demolition of any building which in its opinion is in such condition as to constitute a public nuisance, and no compensation need be paid for damages resulting from such action.

2. Where the board of health of a third class city has determined that a building constitutes a nuisance, it is required, before taking any action to abate it, to serve a copy of its order upon the owner or occupant of the property who is then entitled to apply to the board for a stay or modification of its order, and if this be done the board is required to allow reasonable and fair opportunity to present such facts as would entitle the owner or occupant to relief.

Harrisburg, Pa., September 18, 1939.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania:

Sir: This department is in receipt of your recent communication requesting our opinion concerning the power of the board of health in cities of the third class in this Commonwealth to order demolition of real property.

The answer to your inquiry is to be found in the provisions of the Act of Assembly approved June 23, 1931, P. L. 932, commonly known as the Third Class City Law.

Sections 2325 and 2335 of the said act (53 PS §12198-2325 and §12198-2335) provide as follows:

> Section 2325. Nuisance; Examination; Abatement.—The board of health as a body or by committee, or the health officer, together with his subordinates, assistants and workmen under and by order of said board, may enter, at any time, upon any premises in the city upon which there is suspected to be any infectious disease or nuisance detrimental to the public health, for the purpose of examining and abating the same. All written orders for the removal of nuisances, issued to the health officer by order of the board of health, attested by the secretary, shall be executed by him and his subordinates and workmen. The costs and expenses of the removal of nuisances shall be recoverable from the owner or owners of the premises from which the nuisance shall be removed, or from any person or persons causing or maintaining the same. The amount of the cost and expense thereof shall be a lien upon the premises which has caused, or from which the nuisance shall be removed, from the time of the commencement of the work, which date shall be fixed by certificate of the health officer filed with the city clerk. Such lien may be filed and proceeded in as provided by law in the case of municipal liens.
>
> * * * * *
>
> Section 2335. Conditions Dangerous to Life or Health to be Declared Nuisances; Order to Abate.—Whenever any building, erection, excavation, premises, business, pursuit, matter or thing, or the sewerage, drainage, or ventilation thereof, in the opinion of the board of health, either in whole or in part, is in a condition or in effect dangerous to life or health, the board may declare the same, to the extent it may specify, to be a public nuisance and dangerous to life and health, and may order the same to be removed, abated, suspended, altered, or otherwise improved or purified, and shall cause said order, before its execution, to be served on the owner, agent, occupant or tenant thereof or some of them, if said parties or any of them are in such city and can be found. If the party so served shall, before its execution is commenced, apply to said board to have said order or its execution stayed or modified, the said board shall temporarily suspend or modify said order and give to such party or parties together, as the case, in the opinion of the board, may require a reasonable and fair opportunity to be heard before said board, and to present proofs and facts against said declaration and the execution of said order, or in favor of its modification. The board shall enter upon its minutes such facts and proofs as it may receive and its proceedings on such hearing, and thereafter may rescind, modify or reaffirm its said declaration and order and require execution of said original or of a new or modified order, to be made in such form and effect as it may finally determine.

It is apparent, therefore, that by virtue of the aforesaid statutory provisions the board of health as a body or by committee, or the health officer of the city under and by order of the said board, may enter, at any time, upon any premises of the said board, may enter, at any time, upon any premises in the city upon which there is suspected to be any nuisance detrimental to the public health, for the purpose of examining and abating the same. Having caused an investigation to be made as aforesaid, the board of health may, when in its opinion the said building, either in whole or in part, is in a condition or in effect dangerous to life or health, declare the same, to such extent as the circumstances and conditions may warrant, to be a public nuisance and direct that the same be removed, abated or altered.

Having thus decided that a nuisance exists, the board is required, before any action is actually taken to abate the same, to serve a copy of its order upon the owner or occupant of the property. The party so served is then entitled to apply to the board for a stay or modification of its order and, if this be done, the board is required to allow the owner or occupant reasonable and fair opportunity to present such facts as would entitle him to relief. An opportunity is thus offered to the owner of the property to vindicate the condition of his building and, if successful, he can prevent a summary destruction thereof.

An examination of the law pertaining to this subject discloses that these provisions of the Third Class City Law are not new but, in substance, are virtually a restatement of similar legislation dating back as far as the year 1818. By the provisions of the Act of Assembly approved January 29, 1818, the Board of Health of the City of Philadelphia was vested with the power "to cause all offensive or putrid substances and all nuisances which may have a tendency, in their opinion, to endanger the health of the citizens, to be removed * * *."

Although we have been able to find no judicial construction of the aforesaid provisions of the third class city law which is directly in point or controlling of the subject here under discussion, the section of the act of 1818 supra, above quoted has, on several occasions, been construed by the appellate courts of this Commonwealth.

In Kennedy *v.* The Board of Health, 2 Pa. 366 (1845), the Board of Health of the City of Philadelphia, issued a writ of scire facias on a municipal claim for removing a nuisance on defendant's property. On appeal to the Supreme Court it was complained that the lower court had erred in refusing to permit the defendant to prove the cause of the nuisance. At page 369 it is said:

> * * * It is not easy to perceive the relevancy of such evidence, unless it was intended to show by it, that there was in reality no nuisance to be removed. But this latter could not be proved, for the act of Assembly on the subject, as recited above, makes the order of the board conclusive, that the nuisance did exist, and expressly enacts that the fact of the nuisance shall not be inquired into. The board decided that the nuisance existed on the lot of the defendant, and the fact being so determined, it made no difference from what cause it arose; it was necessary and proper that it should be removed. The evidence was therefore properly rejected.

Again, in the case of Paris *v.* Philadelphia, 63 Pa. Superior Ct. 41 (1916), the court held that, by virtue of the provisions of the act of 1818, supra, as amended, the Board of Health of the City of Philadelphia is vested with quasi-judicial authority to decide what constitutes nuisances and all presumption favors its action; that the summary action upon notice by the board in the abatement of the nuisance does not contravene the constitutional rights regarding private property but is a necessary exercise of police power; and that the preservation of the public health is uniformly recognized as one of the paramount objects of government and a most important municipal function. The language of the court, at page 54, is particularly significant:

> The general rule has been laid down that a court of equity, upon an application for an injunction to restrain a Board of Health from the summary abatement of what it has adjudged to be a public nuisance, detrimental to the public health will decline to restrain the proposed action of the board, unless it is made to appear clearly that the board has acted in bad faith, or has transcended its jurisdicition, and the rule has been broadly laid down that an injunction will be denied when the jurisdiction conferred on the board is summary in its nature and the procedure proper—since the objects to be attained by its exercise would be defeated in many cases, if the orders of the Board of Health were subject to judicial examination and revision before they could be carried into effect, and that a court of equity even if it has the power will not, except upon good cause shown, interfere in the measure taken by public officials to protect the public health: * * *

See also Dare *v.* City of Harrisburg, et al., 16 D. & C. 22 (1930).

Although, as hereinbefore indicated, there are no reported cases in this Commonwealth construing or concerning the sections of the Third Class City Law above quoted, it should, however, be noted that in Tri-Cities Water Company *v.* Monessen, 313 Pa. 83 (1933), the Supreme Court recognizes the right of a municipality to exercise

the extraordinary powers conferred by the said act where the public health is to be protected. At page 86 the court says:

> * * * [the municipality] could have proceeded under the Act of June 23, 1931, P. L. 932, which provides in article XXIII, §2325, that the expense of removing a nuisance shall be a lien upon the premises causing it, and shall be recoverable from the owner or owners of the property, or from any person or persons causing or maintaining the nuisance. * * *

In view of the foregoing authorities, we are of the opinion, and you are advised, that the board of health in a city of the third class has the power to order the demolition of any house or building if, in the opinion of the board, the said house or building is in such condition as to constitute a public nuisance; and, in the exercise of this power, neither the board nor the municipality is required to compensate for the damage resulting from the taking of the property or the abatement of the nuisance provided, of course, it acts strictly in accordance with the provisions of the Act of June 23, 1931, P. L. 932, supra. The power conferred by the aforesaid act, however, is extraordinary and no board of health should take any action which is arbitrary or capricious or prompted by improper motives and which would result in any injustice to the owner or occupant of the property so taken.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 300

Insurance—Investments of fire and casualty insurance companies—"Capital"—Inclusion of reserves required by law—"Surplus"—Insurance Company Law of May 17, 1921, secs. 517, 518, 602 and 603.

1. The term "capital" as used in sections 417 and 602 of the Insurance Company Law of May 17, 1921, P. L. 682, regulating the investment of capital of fire and casualty insurance companies is not limited in meaning to the "capital stock" of such companies, but includes all assets which such a company must have in order to do business, including all reserves required by law.

2. The term "surplus" as used in sections 518 and 603 of the Insurance Company Law of May 17, 1921, P. L. 682, regulating the investments of the "surplus" of fire and casualty insurance companies, may be defined as those assets of such

companies which are "over-plus", that is, assets not required by such companies in order to do business.

Harrisburg, Pa., September 19, 1939.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: In a letter dated March 29, 1939, you seek advice on the matter of the investment of funds of fire and casualty insurance companies.

There is seemingly no unanimity in the interpretation of the sections of The Insurance Company Law (Act of May 17, 1921, P. L. 682) which deals with the manner in which funds of such companies are to be invested.

The background of the situation is that the legislature has provided safeguards to protect policyholders by restricting investments of the various classes of insurance companies.

Sections 404 and 405 treat of the investment of funds of life insurance companies. Section 404 states the manner in which both the "capital" and "reserves" are to be invested. Section 405 states the manner in which "surplus" may be invested. In general, investments of capital and reserves, under section 404, are restricted, while investments of surplus, under section 405, are less restricted.

This legislation recognizes that a life insurance company is required to have reserves to meet its liabilities. By section 405, recognition is also given to the fact that such companies will have or may have funds additional to that actually required for their purposes.

This legislation also indicates that while it may prescribe the manner in which a life insurance company may invest *all* of its funds, the legislature does not have the same interest or concern with the investments of funds which are not required for the protection of policyholders.

In the case of both fire insurance companies and casualty insurance companies, the corresponding sections do not tie up "reserves" with "capital."

Thus, section 517, which deals with the class of insurance companies known as fire insurance companies, prescribes only for the investment of "capital," while section 518 deals only with the investment of "surplus."

Likewise, section 602, which concerns casualty insurance companies, treats only of the investment of "capital" of such companies, while section 603 deals only with the investment of their "surplus."

The same general plan is carried out with respect to fire and casualty insurance companies, as is the case with life insurance companies in that the "capital" of each must be invested on a more restricted basis than "surplus."

Two positions have been taken by insurance companies as a result of this situation.

The first position is that "capital," in sections 517 and 602, means all the funds not strictly "surplus." This would place both fire and casualty insurance companies on the same practical basis as life insurance companies.

The other position taken by some companies is that in sections 517 and 602 "capital" means only the "capital stock" of the company, that is, the fund with which the company started business.

The question thus raised is this: Which of the above two positions is correct?

As pointed out by Mr. A. C. Boyson, Acting Director, Bureau of Examinations, in his letter to you dated March 29, 1939, if we apply the maxim "Expressio unius est exclusio alterius," we might find legislative intention to exclude "reserves" from the category of "capital" because sections 517 and 602 do not couple "reserves" with "capital." The "reserves" of such companies would not, therefore, be subject to the more restrictive investments to which capital is limited.

The proposition above outlined is apparently the chief argument of those who contend that as so used, the term "capital" means only "capital stock." There are circumstances which operate to defeat such contention.

As pointed out by the letter of March 29, 1939, the items which fire and casualty insurance companies are required to maintain in the nature of reserves are, strictly speaking, not reserves. That is, provision must be made for "unearned premiums" and "unpaid losses," and for similar items by all fire and casualty insurance companies, but these are not the same as reserves of a life insurance company. Such items in the case of fire and casualty insurance companies are "definitive liabilities, not created to provide for contingencies or eventualities, but set up to reflect an obligation known to have been incurred, definitely established or closely approximated * * *"

Resort to this Latin maxim is, therefore, not particularly apropos, and we also feel that too much importance should not be given to the maxim for the reason that the principle of law reflected by it certainly cannot be all-controlling in this situation. In other words, we must examine the entire situation, with particular reference to the object to be attained by the legislation, consequences of the various possible interpretations, and the circumstances which lead to this type of legislation, in order to determine what the term "capital" embraces and what it does not embrace. The word "capital" in the investment sections is not used explicitly and this is the real cause of the problem which confronts us.

In thus examining this situation we note that in subsection (i) of section 517, as amended, the word "reserves" is used. This section provides:

> The Insurance Commissioner may permit any such company [fire, marine, or fire and marine insurance company] to invest sufficient of its reserves in the securities of a foreign government in order to enable it to comply with the laws of such foreign government and transact business therein.

The word "reserves" does not appear in section 602. But if the use of the word "reserves" in section 517 is indicative of anything, it reflects recognition by the legislature that a fire insurance company has funds which are to be treated as "reserves," and which are subject to restricted investment only, except that with permission of the Insurance Commissioner they may be invested in a class of securities not otherwise authorized, namely, foreign government securities.

A controlling fact is that mutual fire and mutual casualty insurance companies are required, by section 802 of the act, to invest in the same manner as stock companies. Yet, mutual companies do not have capital stock as they do not issue shares. If those holding that the word "capital" as used in sections 517 and 602 means only "capital stock," no funds of a mutual fire or mutual casualty insurance company would come within the restrictive investment provision of the law.

As provided in section 51 of the Statutory Construction Act (Act of May 28, 1937, P. L. 1019), when the words of a law are not explicit, the intention of the legislature may be ascertained by considering "the consequences of a particular interpretation." It is quite apparent that the legislature never intended this consequence in the case of mutual fire and casualty companies.

As indicated by the terms, funds styled "unearned premiums" and "unpaid losses" are monies which must or may be payable to other parties by insurance companies. Safeguarding such funds is as justifiable as is the case with "reserves" of life insurance companies. The legislative authority would naturally be invoked as strongly in one case as the other.

Referring again to the Statutory Construction Act, we find that when the words of a law are not explicit, the intention of the legislature may be ascertained by considering "the object to be attained" (Section 51, Act of May 28, 1937, P. L. 1019). The object of investment sections is to safeguard insurance company funds which for any reason must be protected. Funds which must or may be payable to other parties should be so considered.

Additionally, we wish to point out that the best considered decisions add strength to the contention that, as used in the sections above cited, the word "capital" is not limited to "capital stock."

In the case of Persons & Riegel Co. *v.* Lipps, 219 Pa. 99, in interpreting a New Jersey statute, the court, at page 109, says:

> * * * It is evident, from a comparison of the original act with its amendment, that the legislature regarded the difference between the capital and capital stock of a corporation; and there is a well-understood distinction, universally recognized, between "the capital or property" of incorporated companies and "their capital stock." "The term 'capital' applied to corporations is often used interchangeably with 'capital stock,' and both are frequently used to express the same thing,—the property and assets of the corporation—but this is improper. The capital stock of a corporation is the amount subscribed and paid in by the shareholders, or secured to be paid in, and upon which it is to conduct its operations; and the amount of the capital stock remains the same, notwithstanding the gains or losses of the corporation. *The term 'capital,' however, properly means not the capital stock in this sense, but the actual property or estate of the corporation, whether in money or property.* * * *' " (Italics ours)

See also Christenson *v.* Eno, 12 N. E. 648 (New York); Commonwealth *v.* Schwarzchild, 259 Pa. 130; State *v.* Board of Assessors, 18 South. 753 (Louisiana); and People *v.* Feitner, 31 Misc. Rep. 433 (New York).

Likewise, light is thrown upon this situation by decisions which define the word "surplus."

Particularly apropos is certain language appearing in the case of Peoples Fire Ins. Co. *v.* Parker, 35 N. J. Law 575, at page 577, where the court says:

> * * * This word [surplus] is defined as "overplus"; that which remains when use is satisfied; excess beyond what is prescribed, or wanted, in law; the residue of an estate after the debts and legacies are paid.

See also Fry *v.* Provident Sav. Life Assurance Society of New York, 38 S. W. 116 (Tennessee).

Applying the above-quoted language, it would seem that the word "surplus," as used in sections 518 and 603, refers to the amount of money which an insurance company may have, in addition, (1) to that which it was required to have in order to begin business, *plus* (2) what it must have to continue in business.

We are, therefore, of the opinion that:

1. The term "capital" as used in sections 517 and 602 of The Insurance Company Law is not limited in meaning to the "capital stock" of a fire insurance or a casualty insurance company. This term in-

cludes all the assets which a company must have in order to do the business it is authorized to do. Such assets must be invested strictly in accordance with the terms of sections 517 and 602.

2. The term "surplus" as used in sections 518 and 603 of The Insurance Company Law may be defined as those assets of a fire insurance company or a casualty insurance company which are "overplus," that is, assets not required by such company in order to do the business which it is authorized to transact. Such surplus may be invested according to the provisions set forth in sections 518 and 603.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 301

State government—Political activities of State employes—Employment Service employes—Subjection to provisions of Act of Congress of August 2, 1939.

1. State Employment Service employes are State, rather than Federal, employes, even though paid at least in part with Federal funds, and are not therefore subject to the provisions of the Act of Congress of August 2, 1939, commonly known as the "Hatch Law", regulating political activities of Federal employes, except insofar as that law relates to the conduct of all persons in Federal elections.

2. State Employment Service employes, being State employes, are subject to State laws prohibiting political activities by State employes, such as the Act of April 6, 1939, No. 15, commonly known as the Anti-Macing Law.

Harrisburg, Pa., October 4, 1939.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of September 20, 1939 in which you ask to be advised concerning the effect of the Act of Congress, approved August 2, 1939, commonly known as the "Hatch Law," on employes of the Pennsylvania State Employment Service of the Department of Labor and Industry. Specifically, you ask to be advised:

1. Whether the Hatch Law affects Pennsylvania Employment Service employes as such, who are at present holding, in addition to their

employment, elected or appointed positions, such as secretary to a borough council.

2. Whether the State Employment Service employes or other State employes as such are affected by the provisions of this act.

The Hatch Law provides as follows:

Section 1 prohibits *any person* intimidating, threatening or coercing others for the purpose of interfering with the right of such other persons to vote or to vote as they choose, or causing such other persons to vote for or not to vote for Federal offices of President, Vice President, Presidential elector, Senator, Congressman, Delegates or Commissioners from the territories and insular possessions.

Section 2 prohibits *any person employed* in any administrative position by the United States to use his official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the Federal offices enumerated in section 1.

Section 3 prohibits *any person,* directly or indirectly, to promise employment, work, compensation or other benefit provided for or made possible in whole or in part by an Act of Congress (which includes WPA, Public Assistance, Unemployment Compensation Service, etc.) as compensation or reward for political activity or for support or opposition to any candidate or any political party in any election.

Section 4 is the converse of section 3. It prohibits the deprivation of employment, work, compensation or other benefit on account of race, creed, color, political activity, support of or opposition to any candidate or any political party in any election.

Section 5 prohibits *any person* from soliciting or receiving any assessment, subscription, or contribution for any political purpose from any person entitled to or receiving compensation, employment or other benefit from work relief or relief.

Section 6 prohibits *any person* for political purposes to disclose or furnish a list of persons receiving compensation, employment or benefits under WPA and public assistance to a political candidate, committee or campaign manager, and prohibits the latter from receiving such lists for political purposes.

Section 7 prohibits the use of WPA, public assistance, Federal loans and public works projects funds for the purpose of interfering with, restraining or coercing any individual in the exercise of his right to vote at any election, and prohibits the use of any authority conferred by any such act for said purpose.

Section 8 provides a penalty of $1,000 fine or imprisonment of not more than one year, or both, for conviction of violations of the provisions of section 1 to 7 inclusive.

Section 9 makes it unlawful for *any person employed* in the executive branch of the Federal Government or any agency or department thereof to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employe in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. They shall retain the right to vote and express their opinions on all political subjects. The term officer and employe is not to be construed to include:

1. The President and Vice President of the United States.
2. Persons whose compensation is paid from the appropriation for the office of the President.
3. Heads and assistant heads of executive departments.
4. Officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

The penalty for violating this section is immediate removal from the position or office.

Section 9A makes it unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation in whole or in part is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization advocating the overthrow of the constitutional form of government in the United States.

The penalty for violation of this section is immediate removal from the position or office held by the party involved.

It is readily seen that the act is primarily directed against macing. In so far as the law refers to employes, it refers *only* to Federal employes except in section 9A (1) where we find the following provision:

> It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

As stated above, the penalty for violating this prohibition is removal from the position or office held, and no part of the Federal appropriation is to be used to pay compensation.

Though at first glance the provisions of section 9A (1) might seem to apply to employes of the Pennsylvania Employment Service, after a careful scrutiny of the acts creating the Employment Service and the administration thereof, it is readily seen that this service is not an "agency" of the Federal Government.

Under the Act of Assembly, approved December 27, 1933, P. L. 110, the provisions of the Act of Congress of June 6, 1933 (48 Stat. 113) (United States Employment Service Act) were accepted by the Commonwealth of Pennsylvania. By virtue of that act, the Department of Labor and Industry was designated as the State agency to cooperate with the United States Employment Service, and under which act the Commonwealth receives funds for the maintenance and administration of its employment offices. Under Title III and IX of the Social Security Act of August 14, 1935, grants are also made to the State for the administration of Unemployment Compensation and the Employment Service. To be eligible for the Federal grant the employment service offices must be conducted in accordance with the rules, regulations and standards of efficiency prescribed by the Federal act.

The Pennsylvania State Employment Service, though designated to cooperate with the United States Employment Service, is a State agency and its employes are State employes, but because of the grant that is given by the Federal Government, the Employment Service of the Department of Labor and Industry must adhere to the rules, regulations and standards imposed by the Federal Government. Though the employes of the Pennsylvania State Employment Service of the Department of Labor and Industry, designated as the State agency for cooperation with the United States Employment Service, are paid, in part at least, with Federal funds, the above quoted section 9A (1) which prohibits membership in any political party or organization which advocates the overthrow of our constitutional form of government, or any other section of the Hatch Law, does not apply to such employes. There is no restriction in the Hatch Law regarding State Employment Service employes in other positions, elected or appointed. All provisions of the Hatch Law, in so far as they refer to employes, apply solely to Federal employes or to employes of agencies of the Federal Government.

Though the Hatch Law does not apply to the State Employment Service employes, it is interesting to note that Pennsylvania had previously adopted stringent legislation to prevent pernicious political activity generally and in many of its services, including those receiving Federal grants such as old age assistance, aid to dependent children, unemployment compensation and the employment service.

Employes in the Department of Public Assistance under section 2504-A (i) of the Act of June 24, 1937, P. L. 2003 and paragraph (b) of section 13 of the Public Assistance Law of June 24, 1937, P. L. 2051, as amended by Act No. 384, approved June 26, 1939, are forbidden to engage in political activity as follows:

Section 2504-A.

> (i) Political Activity. An employe shall be removed if he shall during his employment—
> (1) Be a member of a political committee or an officer of a political organization;
> (2) Solicit, or receive a contribution for political purposes;
> (3) Injure or benefit an employe or one who applies for or receives assistance, or threaten or promise to do so because of making or withholding a contribution for political purposes because of any past or future vote, or because of taking or refraining from taking any political action;

Section 13, subsection (b).

> (b) Any person in the employ of any county board who, either directly or indirectly influences or endeavors to influence the vote of any person receiving or applying for any form of assistance or pension under the provisions of this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one hundred ($100) dollars, or to undergo imprisonment not exceeding six (6) months, or both, at the discretion of the court.

In addition, the Liquor Control Act of June 16, 1937, P. L. 1762, in section 302 C, prohibits employes of the Liquor Control Board from engaging in political activities during the time of their employment as follows:

> C. The tenure of any person holding a position under the provisions of this act shall be during good behavior; * * * but no person shall be required to contribute to any political fund, nor support any political party or organization, nor shall any such person be removed or otherwise prejudiced for refusing to do so. No such person shall hold any other public office or position under this Commonwealth, or any political subdivision thereof, nor by his own act or permission become a candidate for nomination or election to any public office during the time of his employment by the board.

State employes are further disassociated from political activity by the Act of April 6, 1939, P L. 16, better known as the Anti-Macing Law which prohibits political macing of State employes, including persons receiving public assistance from the Commonwealth or the United States directly or through employment on public works. This law reinstated the provisions prohibiting political macing, repealed by the Act of June 3, 1937, P. L. 1333, with additional provisions to prevent political macing of recipients of public assistance and those obtaining contracts from the Commonwealth or

any political subdivision. The penalties for violation of the provisions of this act are severe, namely, imprisonment for a term not exceeding one year, or a fine of one thousand dollars, or both, in the discretion of the court.

In view of the foregoing, we are of the opinion, and you are therefore advised:

1. The recently enacted Act of Congress, approved August 2, 1939, commonly known as the "Hatch Law," does not affect the Pennsylvania State Employment Service employes who are at present holding, in addition to their employment offices, positions elected or appointed, such as secretary to a borough council.

2. The State Employment Service employes as such are not affected by the provisions of the Hatch Law. Particularly, they are not affected by section 9A (1) which prohibits employes of Federal agencies whose compensation, or any part thereof, is paid from Federal funds, from holding membership in a political party or organization which advocates the overthrow of our constitutional form of government in the United States. However, in Federal elections the Hatch Law affects State employes as it affects "any person" generally. It should be noted that the Pennsylvania State Employment Service is a State agency and as such its employes are subject to our State laws prohibiting political activity.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 302

Alcoholic beverages—Application for new club liquor license—Quota established by Act of June 24, 1939, sec. 2—Construction of act with Liquor Control Act and Beverage License Law—Statutory Construction Act of May 28, 1937, art. IV, sec. 62.

1. The Pennsylvania Liquor Control Board may not grant a new retail license to a club applicant when the number of retail licenses in the community in which the applicant is located, exclusive of hotels as defined in the Act of June 24, 1939, No. 358, and clubs, exceeds the limit permitted by that act, at least in the absence of action increasing the number of licenses issuable, pursuant to section 3 of the act.

2. The Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15, as last amended June 16, 1937, P. L. 1762, the Beverage License Law of May 3,

1933, P. L. 252, as last amended June 16, 1937, P. L. 1827, and the Act of June 24, 1939, No. 358, being in pari materia, are to be construed together, if possible, as one law, in accordance with article IV, sec. 62, of the Statutory Construction Act of May 28, 1937, P. L. 1019.

Harrisburg, Pa., October 10, 1939.

Honorable W. H. Hitchler, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: We have your letter of August 10, 1939 wherein you request to be advised whether the Pennsylvania Liquor Control Board may grant a new retail license to a club applicant when the number of retail licenses in the community in which the applicant is located, exclusive of hotels and clubs, exceeds that allowed by the Act of June 24, 1939, P. L. 806.

The Pennsylvania Liquor Control Act of November 29, 1933, Special Session, P. L. 15, as amended and re-enacted July 18, 1935, P. L. 1246 and June 16, 1937, P. L. 1762, 47 PS §744-1 et seq., was the first legislation regulating and restraining the sale of alcoholic beverages following the repeal of the eighteenth amendment to the Federal Constitution by the twenty-first amendment.

For the control and regulation of 3.2 percent beer, authorized by Congress prior to the repeal of the eighteenth amendment, the Beverage License Law of May 3, 1933, P. L. 252 was passed by the General Assembly. This law was amended December 20, 1933, Special Session, P. L. 75 and July 18, 1935, P. L. 1217, and amended and re-enacted June 16, 1937, P. L. 1827, 47 PS §84 et seq.

Since the Pennsylvania Liquor Control Act and the Beverage License Law relate, in part, to the same things or class of things, they are in pari materia, and are to be construed together, if possible, as one law. Statutory Construction Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 62, 46 PS §562. It will be noted also that both acts were either passed or amended at the same special session of the legislature in 1933, and it is to be presumed that the General Assembly acted with full knowledge of that fact. Statutory Construction Act, Art. IV, Sec. 52, 46 PS §552.

The same reasoning applies to the Act of June 24, 1939, P. L. 806, to wit: that it, too, is in pari materia with the Pennsylvania Liquor Control Act and the Beverage License Law, unless it is irreconcilable with either or both; in which event Act No. 358 will control to the extent that it conflicts with either of the other statutes. Ogilvie's Estate, 291 Pa. 326 (1927); Statutory Construction Act, Art. IV, Sec. 66, 46 PS §566. And this is doubly true since the Act of 1939 contains, in section 4, a repeal of "all acts and parts of acts

inconsistent herewith." Pipa *v.* Kemberling, et al., 326 Pa. 498 (1937).

Both the Pennsylvania Liquor Control Act and the Beverage License Law contain many criteria and restrictions relative to the granting and issuing of licenses for retail dispensers of malt beverages and liquor. Another statute, the Act of July 9, 1881, P. L. 162, 47 PS §181 et seq., is in pari materia with the aforesaid two acts, and must be read with them. Shibe's Case (Hadley's Appeal), 117 Pa. Super. Ct. 7 (1935). This act of 1881, however, confines itself to prohibiting the granting of licenses to sell alcoholic beverages to places of amusement, and we may, therefore, ignore it in our present inquiry.

Neither the Pennsylvania Liquor Control Act nor the Beverage License Law places any absolute prohibition upon the number of retail licenses issuable by the board. The Beverage License Law provides, inter alia, 47 PS §89:

> Section 6. Malt and Berwed Beverages Retail Licenses.—(a) Subject to the restrictions hereinafter provided * * * the board *shall,* in the case of a hotel or eating place, grant and issue, and, in the case of a club, *may,* in its absolute discretion, grant and issue, to the applicant a retail dispenser's license. (Italics ours)

The Pennsylvania Liquor Control Act stipulates, inter alia, Art. IV, Sec. 401, 47 PS §744-401:

> (a) Subject to the provisions of this act, * * * the board shall have authority to issue a liquor license for * * * a hotel, restaurant or club, * * * to sell the same, and also malt or brewed beverages, * * *.

But nowhere, in either act, is any maximum as to the number of licenses issued and granted by the board imposed.

It follows, therefore, that act of 1939 is the sole legislation which places a definite limit upon the number of liquor and malt or brewed beverage licenses for retail dispensers thereof issuable and grantable by the board. The act is:

> An act limiting the number of licenses for the retail sale of liquor, malt or brewed beverages, to be issued by the Pennsylvania Liquor Control Board; defining hotels, * * *.

The act defines hotels and municipalities. In section 2, the most important one in relation to the problem under discussion, it is said, in part:

> No licenses shall hereafter be granted by the Pennsylvania Liquor Control Board for the retail sale of malt or brewed

> beverages, or the retail sale of liquor and malt or brewed beverages, in excess of one of such licenses, of any class, for each one thousand inhabitants or fraction thereof, in any municipality, exclusive of licenses granted to hotels, as defined in this act, and clubs; * * * but where such number exceeds the limitation prescribed by this act, no new license, except for hotels as defined in this act, shall be granted so long as said limitation is exceeded.

Then follows section 3:

> The Pennsylvania Liquor Control Board shall have the power to increase the number of licenses in any municipality which, in the opinion of the board, is located within a resort area.

The question you have addressed to us does not involve the renewal or transfer of existing retail licenses of any class, but is confined to the issuing and granting of *new* licenses to club applicants in a municipality where the number of licenses outstanding, exclusive of hotels as defined in the act, and clubs, already exceeds that allowed by the act.

Nor does your request for advice involve section 3 of the act, whereon, therefore, no opinion is herein expressed.

Although section 2 of the act in setting the maximum number of licenses the board may issue in any municipality, does exclude hotels, as defined in the act, and clubs, from the computation; in the latter part of the same section, in dealing with a situation where the number of licenses issued already exceeds the limit imposed by the act, clubs are not excepted, as are hotels as defined in the act. It follows, therefore, that in such circumstances clubs are included within the prohibition.

In view of the foregoing, it is the opinion of this department, that the Pennsylvania Liquor Control Board has no authority to issue and grant a new license for the retail sale of liquor and malt or brewed beverages to a club applicant in a municipality wherein the number of such licenses outstanding, exclusive of hotels as defined in the Act of June 24, 1939, P. L. 806, and clubs, exceeds that permitted by said act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 303

State Government—Appointment of Unemployment Compensation Division employes—Review of qualifications and methods of selection by Secretary of Labor and Industry—Unemployment Compensation Law of December 5, 1936, sec. 208(j)—Wagner-Peyser Act of June 6, 1933—Social Security Act of August 14, 1935.

The qualifications and methods of selection of appointees to the Unemployment Compensation Division of the Pennsylvania Department of Labor and Industry are provided in section 208(j) of the Unemployment Compensation Law of December 5, 1936, P. L. 2897, in conformity to the Federal standards set by the Social Security Act of August 14, 1935, 48 Stat. at L. 620, to insure payment of the Federal grant; the qualifications and methods of selection of employes of the Pennsylvania Employment Service are placed under the same section by the affiliation agreement between the Department of Labor and Industry and the United States Employment Service, for cooperation under the Wagner-Peyser Act of June 6, 1933, 48 Stat. at L. 113, as amended: such qualifications and methods of selection are mandatory, and it is incumbent on the Secretary of Labor and Industry to take appropriate action to remove any employes not regularly appointed in conformity with the law.

Harrisburg, Pa., October 31, 1939.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether or not you can review qualifications and methods of selection of appointees to the Unemployment Compensation Division because of alleged irregular appointments which were not made in accordance with the Unemployment Compensation Law.

The question involves an analysis of the Unemployment Compensation Act of December 5, 1936 (1937, P. L. 2897), Section 208 (j) as follows:

> (j) The secretary shall make appointments to positions created under this act, and shall fill vacancies as they may occur *from the lists of eligibles certified to him by the board*, except with respect to positions filled by the appointment of persons exempted by subsection (b) of this section. In making appointments therefrom, *the secretary shall select from the three persons ranking highest on the list of eligibles for the grade of employment in the administrative district*, or in the State as a whole, as the case may be, the applicant most suitable for the position in the grade of employment for which a vacancy exists, taking into consideration his experience and personal qualifications with sole reference to merit and fitness for the position to be filled. If, upon inquiry by the secretary, a person on the list of eligibles is found to be not available for employment or cannot be located, his name shall not for the time being be considered among the three names from which a choice is to be made.

> For the second vacancy, the secretary shall make selection from *the highest three persons* remaining on such list of eligibles who have not been within his reach for three separate vacancies. The third and any additional vacancies shall be filled in like manner. (Italics ours)

It also involves consideration of the affiliation agreement between the Department of Labor and Industry and the United States Employment Service for cooperation under the Wagner-Peyser Act of June 6, 1933 (48 Stat. 113), as amended.

You state that certain of the personnel of the Unemployment Compensation Division was not selected in accordance with the provisions of the Unemployment Compensation Act. You further state that the affiliation agreement entered into between the Department of Labor and Industry of the Commonwealth of Pennsylvania and the United States Employment Service for cooperation under the Wagner-Peyser Act (48 Stat. 113) was not followed; that no opportunity was afforded the Executive Director of the State Unemployment Compensation Division, the Associate Director or their designees to interview, to consider qualifications, or to make recommendations as to the persons best suited for the position from the standpoint of experience and personal qualifications, with sole reference to merit and fitness for the position to be filled.

It would appear necessary to distinguish between these two services:

1. Unemployment Compensation.
2. Employment Service.

In the administration of the first, the Pennsylvania Unemployment Compensation Act conforms to the Federal standards set by the Social Security Act, Titles III and IX, to insure the payment of the Federal grant.

As to the second, the affiliation agreement was entered into by the Secretary of Labor and Industry, the Director of the United States Employment Service, the Executive Director of the Division of Unemployment Compensation and Employment Service (Pennsylvania), and the Director of the Pennsylvania State Employment Service, which agrees that the personnel in said service shall be selected and shall hold office in accordance with the merit system established by the State administrative agency.

In Pennsylvania this merit system is prescribed by Paragraph 208 of the Unemployment Compensation Act of 1936, and, therefore, employment in both the Unemployment Compensation Division and the Employment Service actually and in reality are governed by the provisions of this paragraph of the Unemployment Compensation Act. Under section 208, the Secretary of Labor and Industry has un-

qualified power over classifications, qualifications and selections; as to the last named, provision is made in the act that the secretary must appoint from a list of eligibles and from the highest three on the list. These provisions are not mere formalities but are vital portions of the act.

> *No individual shall be appointed or employed by the department for the purpose of administering this act except as provided in this section.* (Italics ours.) (Section 208.)

In McCartney *v.* Johnston, 326 Pa. 442, the court said:

> The fundamental purpose of the Civil Service Acts was to regulate and improve civil service * * * by establishing a system whereby * * * employees would be selected on the basis of their qualications. * * * the statutory provisions regulating appointments call for strict compliance with the terms of the acts.

Pursuant to the Unemployment Compensation Act, regulations for the administration of civil service and personnel in the development of the Unemployment Compensation Division and Employment Service and the Unemployment Compensation Board of Review have been adopted by the Department of Labor and Industry.

If the Secretary of Labor and Industry has any right of review it would be by reason of such noncompliance with the Unemployment Compensation Act as to make appointments illegal. If there was any evidence that appointments had not been made from lists of eligibles certified by the Unemployment Compensation Board of Review, or that appointments had been made from such a certified list but not from the three persons ranking highest on the list of eligibles for the particular grade of employment, or other irregularity or illegality, such as residence requirement (section 208 (1)), then it would be incumbent on the secretary to investigate and review such appointments, and if found to be illegal and hence invalid, to take appropriate action.

It shall be noted that employes in the Unemployment Compensation Division under section 208 (p) are entitled to a hearing before the Board of Review by an appeal made within ten days after notice of dismissal under the act becomes effective.

If appointments were not made in conformity with the Unemployment Compensation Law, the expenditure of public funds is involved, not to mention the jeopardizing of the Federal subsidy. In addition, if the Commonwealth is expending money on the basis of the most highly qualified personnel and is, on the contrary, paying money to appointees not only not meriting and not fitted for the positions they are filling, but illegally appointed, then, in the interest of sound

economy and efficient administration, the secretary has the right and power to take appropriate action.

We are of the opinion, that if appointees have been regularly selected according to the civil service provisions of the Unemployment Compensation Law, and such employes have served their probationary period, then the appointees would come under the permanent classified service. If, however, the provisions of the Unployment Compensation Law have not been adhered to, and appointees have been improperly and illegally selected, in the interest of sound civil service administration, review by you of qualifications and methods of selection, with consequent appropriate action, is essential and necessary.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 304

Costs—Liability of Commonwealth—Statutory authority—Imposition by court—Cases arising under liquor laws—Right to pay costs necessarily payable in advance—Acts of May 19, 1897, sec. 21, April 15, 1907, as amended, and June 5, 1913—Liquor Control Act of November 29, 1933, as last amended June 16, 1937—Beverage License Law of May 3, 1933, as last amended June 16, 1937—Act of July 18, 1935.

1. Since the right to recover costs is purely statutory, and since the sovereign is not embraced within a statute unless specifically named, costs are not recoverable from a State in its own courts, whether it has brought suit as plaintiff or has properly been sued as defendant, whether successful or defeated, unless a statute specifically so provides.

2. The Pennsylvania statutes concerning the recovery of costs generally, being the Acts of May 19, 1897, P. L. 67, sec. 21, of April 15, 1907, P. L. 82, as amended, and of June 5, 1913, P. L. 422, are not applicable to the Commonwealth.

3. Since neither the Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15, as last amended by the Act of June 16, 1937, P. L. 1762, nor the Beverage License Law of May 3, 1933, P. L. 252, as last amended by the Act of June 16, 1937, P. L. 1827, imposes liability for costs in proceedings thereunder, whether those proceedings be appeals from orders of the Liquor Control Board or cases instituted for forfeiture of property or for padlocking of premises used in violation of the liquor law, upon the Commonwealth, it is not liable for the costs of such proceedings, whether successful or unsuccessful, or whether the court attempts to impose costs upon it or not.

4. Section 1(*h*) of the Act of July 18, 1935, P. L. 1316, appropriating moneys in the State Stores Fund for use by the Pennsylvania Liquor Control Board is sufficient to authorize the payment of costs necessarily payable in advance to the prothonotary or clerk of court in any case commenced by the Liquor Control Board, but does not permit the payment of costs as they are commonly taxed against the losing party at the conclusion of a case.

Harrisburg, Pa., November 13, 1939.

Honorable Walter H. Hitchler, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning whether the Pennsylvania Liquor Control Board is liable for court costs arising from litigation involving the board.

At the outset, it must be noted that the right to recover costs depends entirely upon statute. In Estate of Henry K. Cooper, Deceased, 97 Pa. Super. 277, 279 (1929), the rule is set forth as follows:

> * * * Statutes relating to costs are strictly construed. Hoover *v.* Sch'l Dist., 4 Pa. C. C. Rep. 520; In re Braintrim Sch'l Dist., 23 Pa. C. C. Rep. 510; Arnold *v.* McKelvey, 26 Pa. Dist. Rep. 717; Stewart *v.* Baldwin, 1 Penrose & Watts 461; Stillwell *v.* Smith, 17 Pa. Dist. Rep. 502; Lewis *v.* England, 4 Binney 13. *To recover costs requires a statute specifically granting such right.* In re Beassler, 6 Pa. Dist. Rep. 656; Caldwell *v.* Miller, 46 Pa. 233; Heath *v.* Walton, 9 Pa. Dist. Rep. 218; Hoedt *v.* Hoedt, 60 Pa. Superior Ct. 5. (Italics ours.)

To the same effect see Herbein *v.* Philadelphia & R. R. Co., 9 Watts 272 (1840); Blossom Products Co. *v.* National Underwear Co., 29 D. & C. 581 (1937)—affirmed without discussion of costs in 325 Pa. 383.

Thus we find that the rule is well established in Pennsylvania that the right to recover costs is purely statutory.

Furthermore, it is a well established principle of law that statutes enacted by the legislature are not applicable to the Commonwealth unless it is specifically named. See for example Baker *v.* Kirschnek, 317 Pa. 225 (1935), wherein the court decided that the Commonwealth was not a "person" within the meaning of that word as used in an act prohibiting the sale of liquor. In Jones *v.* Tatham, 20 Pa. 398, 411 (1833), the court said:

> * * * The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily applied. * * *

See also the following cases cited by the court below in the case of Baker *v.* Kirschnek, supra; School Directors *v.* Carlisle Bank, 8 Watts 289 (1839); Commonwealth *v.* Real Estate Trust Co., 26 Pa. Super. 149 (1904); County of Erie *v.* City of Erie, 113 Pa. 360 (1886); Pittsburgh *v.* Sterrett Subdistrict School, 204 Pa. 635 (1903).

As a result of these two well established principles, (1) that costs are statutory and (2) that the sovereign is not embraced within a statute unless specifically named, the courts have generally held "* * * apart from statute, that costs are not recoverable from a state, in her own courts, whether she has brought suit as plaintiff or has properly been sued as defendant; or whether she is successful or defeated." (Quoted from 39 C. J. 332, Sec. 503).

This rule was adopted as to the Commonwealth of Pennsylvania in the early case of Commonwealth *v.* Yeakel, 1 Woodward 143 (1863), wherein the court said:

> * * * In a general law passed in order to regulate the rights and duties of citizens, the sovereign is not embraced unless included in the express terms of the statute. * * *
>
> * * * * *
>
> Especially in questions like this, *the Commonwealth is not liable for costs except where so directed by act of Assembly;* and this exemption is founded on the sovereign character of the state, amenable to no jurisdiction and subject to no process. Comth. *v.* Co. Commrs., 8 S. & R. 151. (Italics ours.)

This rule was followed in the able decision of President Judge Hargest of the Court of Common Pleas of Dauphin County in Puloka *v.* Commonwealth, 28 D. & C. 367 (1936).

The appellate courts of other states have almost unanimously adopted this rule in the following cases:

State *v.* Pullman-Standard Car Mfg. Co., 159 So. 541 (Ala. 1938)

People *v.* One Plymouth Sedan, 21 Cal. App. 715, 69 Pac. (2d) 1011 (1937)

State *v.* La Plata River & Cherry Creek Ditch Co., 101 Col. 368, 73 Pac. (2d) 997 (1937)

State *v.* Bartholomew, 111 Conn. 427, 150 Atl. 308 (1930)

City of Idaho Falls *v.* Pfost, 53 Idaho 247, 23 Pac. (2d) 245 (1933)

Galpin *v.* City of Chicago, 249 Ill. 554, 94 N. E. 961 (1911)

(In principle) Ex Parte Fitzpatrick, 171 Ind. 557, 86 N. E. 964 (1909)

James *v.* Walker, 148 Ky. 73, 146 S. W. 21 (1912)

Natalbany Lumber Co. *v.* Louisiana Tax Commission, 175 La. 110, 143 So. 20 (1932)

State *v.* Webster, 8 Me. (8 Greenl.) 105 (1831)

State *v.* Williams, 101 Md. 529, 61 Atl. 297 (1905)

Borgess Hospital *v.* Un. Industrial Trust & Savings Bank of Flint, 265 Mich. 156, 251 N. W. 363 (1934)

In Re Ward's Estate, 133 Minn. 117, 158 N. W. 637 (1916)

Levine *v.* State Board of Dentistry, 14 N. J. Misc. 738, 186 Atl. 814 (1936)

State *v.* Kinne, 41 N. H. 238 (1860)

State ex rel. Commissioners of Land Office *v.* Johnson, 165 Okl. 190, 25 Pac. (2d) 659 (1933)

State *v.* Ganong, 93 Ore. 440, 184 Pac. 233 (1919)

Pope *v.* State, 56 S. W. (2d) 492, (Tex. Civ. App.) (1933)

State *v.* Bradford Sav. Bank & Trust Co., 71 Vt. 234, 44 Atl. 349 (1899)

Washington Recorder Pub. Co. *v.* Ernst, 91 Pac. (2d) 718 (1939)

In Re Sletto's Estate, 224 Wis. 178, 272 N. W. 42 (1937)

The several infrequent decisions arriving at the opposite conclusion are not sufficient in our opinion to change the rule so well established by the cases cited supra and many other decisions of the appellate courts.

Of course, the foregoing cases pertain to the right to assess costs against a sovereign state in its own courts. A different rule has been followed from time to time where the State appears as a litigant in the Federal courts.

Referring now to the Pennsylvania statutes governing costs, we find that the statutory right of plaintiffs to obtain costs goes back to the statute of Gloucester, obviously at a time when the sovereign king could not be sued. Similarly, the statute which enabled defendants to recover costs where plaintiffs were non-suited was expressly rendered inapplicable to those cases in which the sovereign or his representative was the plaintiff.

In Puloka *v.* Commonwealth, 28 D. & C. 367, 373 (1936), President Judge Hargest said:

> * * * *Costs are peculiarly the creature of statutes.* No costs were allowed a litigant at common law. As far back as the year 1278, it took the Statute of Gloucester, 6 Edw. 1, c. 1, to impose costs in certain cases. Then followed the Statute of 3 Hen. VII, c. 10 (1486), awarding costs to plaintiff where defendant issued a writ of error; and the Statute of 23 Hen. VIII, c. 15 (1531), which imposed costs in nonsuits upon plaintiff. Then followed the Statute of 24 Hen. VIII, c. 8 (1532), which provided that the sovereign should not be liable to costs in cases under the Act of 23 Hen. VIII, just referred to. *All of these early English statutes were in force in Pennsylvania:* 3 Binn. 601, 616, and 618. The Act of

> 4 James 1, c. 3 (1606), awarded defendants costs in the same kind of cases where plaintiff was entitled thereto. See Wadlinger on Costs, chapter 1; Black's Appeal, 106 Pa. 344. (Italics ours.)

Clearly, there is no common law statute giving the right to obtain costs against the sovereign.

Present Pennsylvania statutes concerning costs generally are the Act of May 19, 1897, P. L. 67, Section 21 (12 PS §1160), which provides that costs in any appeal cause "shall be paid by the party finally losing the cause"; the Act of April 15, 1907, P. L. 83, as amended (12 PS §1193), providing that in appealed cases the winning party may collect as part of the costs the expense of printing paper books; the Act of June 5, 1913, P. L. 422 (12 PS §1194, 1195), providing for the payment of costs by the losing party in the event that the judgment of the lower court is reversed. These statutes do not name the Commonwealth and are, therefore, not applicable to the Commonwealth: Puloka *v.* Commonwealth, supra. Moreover, the statutes apply only to appellate court cases, and are not pertinent to the present inquiries.

Accordingly, the Commonwealth of Pennsylvania, acting through the Pennsylvania Liquor Control Board, is not liable for costs in any case under the foregoing statutes and decisions, unless the Acts of Assembly dealing with the particular cases involved specifically impose such costs upon the Commonwealth. We shall now examine the statutes concerning each inquiry presented by you.

> 1. Is the board liable for the payment of the record costs in cases where its orders on appeal have been reversed—
> (a) If directed by the court to pay the costs?
> (b) If not directed by the court to pay the costs?

Appeals from the refusal of the Pennsylvania Liquor Control Board to grant a liquor license are governed by section 404 of the Pennsylvania Liquor Control Act, as last amended by the Act of June 16, 1937, P. L. 1762 (47 PS §744-404). That section provides that any person aggrieved by the refusal of the board to issue or renew a liquor license may appeal to the court of quarter sessions of the county in which the establishment is located. The section then provides:

> * * * The court shall hear the application de novo at such time as it shall fix, of which notice shall be given to the board. The court shall either sustain the refusal of the board or order the issuance of the license to the applicant. There shall be no further appeal. Any appeal shall act as a supersedeas, unless, upon sufficient cause shown, the court shall determine otherwise.

A similar provision is contained in section 7 of the Beverage License Law, as amended by the Act of June 16, 1937, P. L. 1827 (47 PS §90), and the above quoted portion from the Pennsylvania Liquor Control Act is contained verbatim in the Beverage License Law.

Section 410 of the Liquor Control Act (47 PS §744-410) deals with the revocation of liquor licenses, and provides as follows concerning appeals:

> * * * In the event the person whose license was suspended or revoked by the board shall feel aggrieved by the action of the board, he shall have the right to appeal to the court of quarter sessions in the same manner as herein provided for appeals from refusals to grant licenses. Such appeal shall act as a supersedeas, unless, upon sufficient cause shown, the court shall determine otherwise. * * *

Section 13 of the Beverage License Law (47 PS §96) contains the same provision for appeal from revocation of licenses, but is silent as to the effect of the appeal as a supersedeas. Incidentally, section 13 of the Beverage License Law prior to the 1937 amendment provided that "the court shall assess or remit the costs in its discretion." It is significant that this provision has been stricken out of the Beverage License Law, as reenacted and amended in 1937.

Both the Liquor Control Act and the Beverage License Law are silent as to the payment of costs in appeals from orders of the board revoking or refusing to grant licenses. From the authorities herein cited, it is clear that the Commonwealth cannot be held responsible for costs in the absence of an express statutory direction. Consequently, in cases where the orders of the board have been reversed on appeal, the board is not liable for the record costs, irrespective of whether the court has directed the board to pay such costs.

> 2. Is the board liable for record costs in cases wherein the board's orders on appeal have been affirmed, if directed by the court to pay the costs?

The answer to your first inquiry likewise is an answer to the second inquiry. If the board cannot be compelled to pay costs when its orders are reversed, a fortiori the board cannot be compelled to pay costs by the court when its orders on appeal have been affirmed.

> 3. Is the board liable for costs in cases instituted by it for the forfeiture of property used in violation of the liquor law—
>
> (a) If the court orders the property forfeited and directs the board to pay the costs?
>
> (b) If the court dismisses the petition of the board and directs it to pay the costs?

Proceedings for the forfeiture of property are authorized in section 611 of the Pennsylvania Liquor Control Act (47 PS §744-611). That section gives the court of quarter sessions power to direct the forfeiture of property upon petition, and to order such property returned to the claimant or turned over to the board. The section is completely silent on the matter of costs.

In view of this silence and the foregoing reasoning, it is clear that the board is not liable for costs in cases instituted by it for the forfeiture of property used in violation of the liquor laws, regardless of whether the Commonwealth wins or loses the case, and regardless of whether or not the court directs the board to pay such costs.

> 4. Is the Commonwealth liable for costs in cases instituted by it for padlocking premises used in violation of the liquor law—
>
> (a) If the court orders the premises padlocked and directs the Commonwealth to pay the costs?
>
> (b) If the court dismisses the proceeding and directs the Commonwealth to pay the costs?

Padlock proceedings are now instituted under section 608 (b) of the Pennsylvania Liquor Control Act (47 PS §744-608 (b)), pertaining to the abatement of nuisances. Such proceedings are to be brought and tried "as an action in equity, * * * in any court having jurisdiction to hear and determine equity cases * * *" The court is given authority to grant temporary or permanent relief, or to order that the place shall not be occupied for one year thereafter. No bond is required of the Commonwealth. Finally, the section permits the court to order the reoccupation of the property upon posting a bond conditioned inter alia upon the payment of "all fines, costs and damages that may be assessed for any violation of this act upon said property."

No authority is granted to the courts of equity to assess costs against the Commonwealth in padlock proceedings, irrespective of the outcome of such proceedings, and the board is not liable for any such costs.

In connection with the foregoing opinion, we have also examined the Act of July 18, 1935, P. L. 1316 (47 PS §744-907) which amends the Act of December 20, 1933, P. L. (Special Session 1933-1934) 89, appropriating moneys in the State Stores Fund for use by the Pennsylvania Liquor Control Board. It appears that the legislature has not made any appropriation for the payment of costs in cases involving the Liquor Control Board, with the possible exception of paragraph (h) of section 1, which appropriates money:

> For all other expenses of every kind and description necessary for the performance by the board of the aforesaid work.

This section is undoubtedly sufficient to authorize the payment of costs necessarily payable in advance to the prothonotary or clerk of court in any case commenced by the board. However, there is no room for any interpretation which would permit the payment of costs as they are commonly taxed against the losing party at the conclusion of a case.

Accordingly, you are advised that the Pennsylvania Liquor Control Board is not liable for the payment of costs in cases arising on appeal or from forfeiture or padlock proceedings, irrespective of whether the Commonwealth is the winning or losing party, and irrespective of whether or not the court directs that the board pay such costs.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION No. 305

Waters—Licensing of motorboats—Act of May 28, 1931—Enforcibility—Conflict with Federal authority—Act of Congress of June 7, 1918.

The Act of May 28, 1931, P. L. 202, as amended, providing for the licensing of all boats operated with an internal combustion motor, and the issuance of licenses to be placed on the bows of the vessels, may be enforced to the extent that a license fee may be exacted from citizens of Pennsylvania on account of their ownership and use of motorboats having their situs within the Commonwealth of Pennsylvania, but may not otherwise be enforced upon the navigable waters of Pennsylvania because of the superior Federal control under the Motor Boat Numbering Act of June 7, 1918, 40 Stat. at L. 602.

Harrisburg, Pa., December 21, 1939.

Honorable C. A. French, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: Referring to your letter of October 23, 1939, we note that during the last few years the board has had considerable trouble on the Allegheny and Monongahela Rivers, in enforcing the Act of May 28, 1931, P. L. 202, as amended, which makes provision for the licensing of all boats operated with an internal combustion motor. You state that motorboat owners operating motorboats on the Ohio River, from the Ohio state line to the City of Pittsburgh and northward

have failed to comply with the act and state that they are complying with the Federal laws and that is all they intend to do. We understand that these motorboats are used for pleasure only and that some of the motorboats are owned by persons residing in states other than Pennsylvania.

We note that the Federal authorities have called your attention to the Motorboat Numbering Act of June 7, 1918, 46 USCA, Section 288. This act provides for the numbering of undocumented vessels operated in whole or in part by machinery, owned in the United States and found on the navigable waters thereof, and provides that such numbers shall be painted or attached to the bow of the vessel and that no numbers not awarded shall be carried on the bow of such vessel. It seems that the Federal authorities object to the fact that the Pennsylvania act provides for the placing of license numbers on the bow of the vessel.

The question is thus raised as to whether the act of 1931 can be enforced. This act, which was amended by the Act of May 31, 1933, the Act of May 7, 1935, and the Act of June 21, 1937, is entitled as follows:

> An Act providing for the licensing and regulation of motor boats, operated or navigated upon any public stream, artificial or natural body of water, or non-tidal waters of any river within the Commonwealth; conferring powers and imposing duties on certain police officers and the Board of Fish Commissioners, including the enforcement of certain existing laws; and prescribing penalties, transferring certain powers and duties from the Board of Fish Commissioners to the Department of Revenue, further providing for the licensing and regulation of motor boats, and boats electrically propelled and providing for liability for damages caused by the negligent operation of a motor boat.

Sections 19 and 20 of 45 Corpus Juris, entitled "Navigable Waters," reads as follows:

> A. In General—1. United States—a. Federal Control. By virtue of the commerce clause of the federal constitution and the clause empowering congress to make all laws necessary to carry into execution the federal judicial power in admiralty and maritime matters, "navigable waters of the United States," which include waters over which by themselves or in connection with other waters commerce may be carried on between states or with foreign countries, and of which admiralty has jurisdiction, are under the control of congress which has power to legislate in regard thereto so far as commerce is concerned. While this power is limited to control of the waters for purposes of navigation, it is a sovereign and supreme power within its appropriate sphere of action, and it is not lost or weakened by reason of previous

inaction or acquiescence by congress in the exercise of authority by a state, but the federal power, when and to the extent exercised, is exclusive of state authority. The federal power to control and improve navigable waters is also superior to the title of the state or of individuals to the land under water, and authority granted by the states confers extraordinary powers. It is for congress to determine when and to what extent its power shall be brought into activity, and it may be exercised through general or special laws. The power of congress extends to the whole expanse of a navigable stream and is not dependent on the depth of the water; also it follows natural changes in the channel or banks and is not limited by former conditions.

b. State Control. Subject to the paramount authority of congress over commerce and the navigable waters of the United States, and to private property rights, a state has full power to legislate concerning the use of navigable waters which are within the territorial limits of the state, without regard to whether or not they connect with waters outside such limits. In other words the power of the state is plenary until the federal government sees fit to exercise its constitutional prerogative. *Ordinarily, however, legislation by the federal government is exclusive of the authority of the state upon the same subject, and always so where there is conflict, but not necessarily so otherwise.* A state is not deprived of power to legislate with reference to navigable waters except by a direct federal statute dealing with the matter in question, and is not deprived of such power by an act of congress making appropriations for the improvement of the waterway or providing that the city situated upon or reached by the waterway is a port of entry, or establishing harbor lines where the state regulations do not conflict with those of the federal government. Provisions of the ordinance of 1787 for the government of the Northwest Territory, and similar provisions in the statutes admitting various states into the Union, that certain navigable rivers should be and remain highways, forever free, without any tax, impost, or duty thereon, have been generally held not to take away the power which the state could otherwise exercise over such waters, since such provisions do not refer to physical obstructions but political regulations. *Furthermore it is recognized that the states have powers of control and regulation over navigable waters which can be exercised as a matter of local or state policy without interfering with the paramount right of navigation and which are or should be exempt from federal interference.* While a state has no power to divert the use of a navigable water to other purposes, to impair the rights of the federal government in its control of its waters in the interest of navigation, or to close any navigable water of the United States, it may close small and unimportant waters, although navigable to some extent, especially where the stream has been declared nonnavigable by congress. In border streams a state has no authority to interfere with the

opposite shores or common rights of navigation. (Italics ours.)

In the case of Wiggins Ferry Co. *v.* City of East St. Louis, 107 U. S. 365, 27 L. ed. 419, the court said, at page 424 of 27 L. ed.:

> The power of congress to require vessels to be enrolled and licensed, is derived from the provision of the Constitution which authorizes it "to regulate commerce with foreign nations and among the several states." We have already seen that this court, in Fanning *v.* Gregoire, ubi supra, has held that this right of congress, "does not interfere with the police powers of a state in granting ferry licenses."
>
> These authorities show that the enrollment and licensing of a vessel under the laws of the United States does not, of itself, *exclude the right of a state to exact a license from her own citizens on account of their ownership and use of such property having its situs within the state.* (Italics ours.)

In the case of Pullman's Palace Car Co. *v.* Commonwealth of Pennsylvania, 141 U. S. 18, 35 L. ed. 613, at page 616 of 35 L. ed. the court said:

> Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicil of their owners in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs, their home port and the domicil of their owners.

In the case of International Transit Co. *v.* City of Sault Ste. Marie, 194 Fed. Rep. 522, the court said, in discussing the Wiggins Ferry Case, supra:

> The basic principle underlying this decision of the Supreme Court seems to be that a municipality has the power to tax property located within its limits or to exact a license fee from the owners thereof living within its limits for the privilege of using and employing such property in a quasi public service, and that the exercise of such power, when applied to persons engaged in and to instruments employed in interstate commerce, is not an invasion of the exclusive power of congress to regulate commerce conferred upon it by the Constitution. Thus construed and limited, the Wiggins Ferry Case falls far short of sustaining defendants' contention that the city of Sault Ste. Marie, by virtue of its

charter powers derived from the state, *has the right to exact a license fee from a citizen of a foreign country for the privilege of operating ferryboats whose situs is in such foreign country,* in the ferriage of passengers and property from a private wharf in the defendant city across an international boundary river to a landing upon the opposite shore. By inference at least, the right to exact such license fee is negatived in the following cases, where the Wiggins Ferry Case is cited and construed: Moran *v.* New Orleans, 112 U. S. 69-74, 5 Sup. Ct. 38, 28 L. ed. 653; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34-50, 6 Sup. Ct. 635, 29 L. ed. 785; Pullman's Car Co. *v.* Pennsylvania, 141 U. S. 18-23, 11 Sup. Ct. 876, 35 L. ed. 613.

In 37 Corpus Juris, sections 12 and 13, under the title "Licenses," it is said:

> Congress has power to impose for the support of the general government, license taxes on businesses and avocations carried on in the several states; *but it has no power to require a license for a wholly intra-state business or occupation. A federal license or license tax, however, on a given business or avocation does not interfere with the state's right to regulate by license or tax, or to prohibit such business or avocation within its borders; and a person who has taken out a license or paid a tax imposed on a certain business by act of congress may also be compelled to pay a state tax or take out a state license for the same business.* But the state cannot require the holder of a federal license to perform duties in conflict with the requirements of the federal statute. (Italics ours.)
>
> Subject to the limitations or restrictions imposed by the Constitution of the United States, or by the State Constitution, and to the limitation that no federal right be interfered with, a state legislature may, either in the exercise of the police power or for the purposes of revenue, require licenses or impose license taxes on occupations or privileges within the limits of the state, when it deems them to be warranted by considerations of public interest and for the general welfare. In some states this form of legislation is expressly authorized by the State Constitution; but as such power is inherent in the legislature, unless prohibited, such constitutional authority is generally not necessary, or if given is regarded as merely declaratory of a right that already exists; and the fact that it authorizes taxation as to certain enumerated occupations does not limit the legislature's power to the particular occupations specified.
>
> Outside business. This power of the state, however, is necessarily limited to subjects within its jurisdiction; it cannot tax persons residing within its borders on account of business which they carry on beyond its jurisdiction.

We are therefore of opinion that the Act of Assembly approved May 28, 1931, P. L. 202, 55 PS §483 may be enforced to the extent that a license fee may be exacted from the citizens of Pennsylvania on account of their ownership and use of motorboats having their situs within the Commonwealth of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 306

Alcoholic beverages—Temporary deposit of liquor license fees—Disposition of interest thereon—General Fund—Spirituous and Vinous Liquor Tax Law of December 5, 1933, sec. 18.

Interest accruing to the Liquor License Fund by reason of the temporary deposit of liquor license fees is to be paid into the General Fund of the State Treasury: such disposition is indicated by section 18 of the Spirituous and Vinous Liquor Tax Law of December 5, 1933, P. L. 38.

Harrisburg, Pa. December 29, 1939.

Honorable W. H. Hitchler, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: In your letter of June 7, 1939, you state that the present balance in the Liquor License Fund includes accumulated interest in the amount of $36,447.60. This has accrued to the fund by reason of the temporary deposit of liquor license fees therein. You request that the Pennsylvania Liquor Control Board be advised as to what disposition shall be made of this accumulated interest.

You also state that, despite the passage of section 701 of what is commonly known as the Pennsylvania Liquor Control Act, the legislature apparently did not contemplate that any interest might accrue by reason of the temporary retention of license fees, and that, therefore, it made no provision for the disposition thereof.

The Liquor Control Act of November 29, 1933, Special Session, P. L. 15, Article IV, Section 407 (c), as reenacted and amended, provides as follows:

> All license fees authorized under this section shall be collected by the board for the use of the municipalities or townships in which such fees were collected,

Section 701 of said act is as follows:

> All license fees collected by the board under the provisions of this act, except fees for public service liquor licenses, sacramental wine and importers licenses, shall be paid into the State Treasury, through the Department of Revenue, into a special fund to be known as the "Liquor License Fund." Fees for public service licenses, sacramental wine, importers licenses, permit fees, and compromise penalties in connection with the suspension of licenses, shall be paid into the State Stores Fund. The moneys in the "Liquor License Fund" shall, on the first days of February and August of each year, be paid by the board to the respective municipalities and townships in which the respective licensed places are situated, in such amounts as represent the aggregate license fees collected from licensees in such municipalities during the preceding period.

Although we are not concerned in this opinion with the disposition of the license fees collected by the Pennsylvania Liquor Control Board, it can readily be seen by this section of the Pennsylvania Liquor Control Act (section 701), which you have cited to us for consideration, that it provides only for the board regularly to collect all the license fees and to pay them into either the Liquor License Fund or into the State Stores Fund. We agree with your statement in respect to section 701, that it makes no provision for the disposition of any accumulated interest.

From a study of the Liquor Control Act, we are of the opinion that the solution to your problem lies in section 18 of the Act of December 5, 1933, Special Session, P. L. 38, the Spirituous and Vinous Liquor Tax Law, a statute in pari materia with the Liquor Control Act. This section provides that:

> All taxes, fines, penalties and interest, received, collected or accruing under the provisions of this act, shall be paid into the General Fund of the State Treasury by and through the department.

It can readily be seen from the quoted section of the Spirituous and Vinous Liquor Tax Law, that the legislature did contemplate that there might be an accumulation of interest accruing under the administration of the Liquor Control Act, and legislation in pari materia with it, and provided therefore for its disposition in that the Pennsylvania Liquor Control Board is to pay all such interest into the General Fund of the State Treasury.

We are of the opinion that the sum of $36,447.60, which represents accumulated interest which has accrued to the Liquor License Fund by reason of the temporary deposits of liquor license fees in said

fund, should be paid by the Pennsylvania Liquor Control Board into the General Fund of the State Treasury.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 307

Corporations—Street railway companies—Formation under Act of May 14, 1889—Liability to bonus charge under Act of May 1, 1868—Exemption of "railroad" companies—Definition—Contemporaneous executive construction.

1. While the term "railroad company" as used in the statutes of this Commonwealth has a distinct, independent and precise meaning in itself, it is broad enough to include a street railway company unless a more restricted meaning is clearly apparent from the title and provisions of a particular act in which the phrase is used.

2. Section 15 of the Act of May 1, 1868, P. L. 108, imposing a bonus charge upon the granting of corporate franchises and upon increase of capital stock, exempting, inter alia, "railroad" companies, includes in that exemption street railway companies incorporated under the Act of May 14, 1889, P. L. 211.

3. Contemporaneous executive construction of an act is entitled to the highest respect and will not be disturbed except for very cogent and persuasive reasons.

Harrisburg, Pa., December 29, 1939.

Honorable S. M. R. O'Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: You inquire whether street railway companies which were incorporated under the Act of May 14, 1889, P. L. 211, while the Bonus Act of May 1, 1868, P. L. 108, was in effect, were required to pay bonus by that act.

You state that the filing in your department of an agreement of consolidation and merger between the Philadelphia Rapid Transit Company, the present operating corporation, and its sixty-four underliers, has revealed that nineteen of the underliers were incorporated as above stated and paid no bonus to the Commonwealth.

The Act of May 1, 1868, P. L. 108, with which we are concerned here, was a general revenue law. This was the first general act imposing bonus upon the grant of corporate franchises and upon in-

creases of capital stock. Section 15 of the act, which relates to bonus, reads as follows:

> That hereafter every company incorporated by or under any general or special law of this commonwealth, *except railroad,* canal, turnpike, bridge or cemetery *companies,* and companies incorporated for literary, charitable or religious purposes, shall pay to the state treasurer, for the use of the commonwealth, a bonus of one-quarter of one per centum upon the amount of capital stock which said company is authorized to have, in two equal instalments, and a like bonus upon any subsequent increase thereof. The first instalment shall be due and payable upon the incorporation of said company, or upon the increase of the capital thereof, and the second instalment one year thereafter; and no company, as aforesaid, shall have or exercise any corporate powers until the first instalment of said bonus is paid; and the governor shall not issue letters patent to any company until he is satisfied that the first instalment of said bonus has been paid to the state treasurer; and no company incorporated by any special act of assembly shall go into operation, or exercise any corporate powers or privileges, nor shall said act be enrolled among the laws of the state until said first instalment of bonus has been paid as aforesaid. (Italics ours.)

Your inquiry resolves itself into the determination of whether or not the street railway companies fell within the scope of the exemption extended to railroad companies.

The courts repeatedly have held that the term "railroad company," as used in the statutes of this Commonwealth, does not have a distinct, independent and precise meaning in itself, but that this term is broad enough to include a "street railway company," unless a more restricted meaning is clearly apparent from the title and provisions of a particular act in which the phrase is used.

The rule is well stated in Philadelphia *v.* Philadelphia Traction Company, 206 Pa. 35 (1903). The question involved in that case was whether the Act of April 21, 1858, P. L. 385, conferred upon the City of Philadelphia the power to tax certain property of street railway companies. The statute expressly provided that "the offices, depots, car houses and other real property of *railroad** corporations situated in said city" were subject to taxation by ordinances for city purposes. The court held that this statute permitted the taxation of the property of street railway companies, and in so doing stated as follows: (page 39)

> * * * The words "railway" and "railroad" have been used

* The court erroneously quoted the statutory language as reading "railway corporations," whereas the statutory language is, in fact, "railroad corporations."

> indiscriminately by the legislature, and have no strict technical meaning in our statutes. * * * The rule established by our decisions is that these words used in the statutes will be considered as synonymous, and either will be held to apply to both kinds of roads, unless there appears from the title of the act, its purpose or its context something to indicate that a particular kind of a road is intended: Hestonville, etc., Railroad Co. *v.* Philadelphia, 89 Pa. 210; Gyger *v.* Phila. City Pass. Ry. Co., 136 Pa. 96; Cheetham *v.* McCormick, 178 Pa. 186; Old Colony Trust Co. *v.* Transit Co., 192 Pa. 596. * * *

An examination of the act of 1868 reveals that neither the title nor the nature and purpose of the act, nor any of its provisions, indicate an intention on the part of the legislature to have used the word "railroad" in a restricted sense. The generality of the word "railroad," as used in the act of 1868, is unquestionable.

The Bonus Act of 1868 was passed at the same session as the Act of April 4, 1868, P. L. 62, which provided generally for the incorporation of railroad companies and expressly provided, in section 12, that it should not be construed to authorize the formation of street passenger railway companies.

While it may be argued that the fact these acts were passed at the same session indicates the intention of the legislature to have used the word "railroad" in the Bonus Act in the same limited sense in which it was used in the Incorporation Act of 1868, we are of the opinion that this is a non sequitur. On the contrary, the legislature, by expressly excluding street railway companies from the scope of an act relating to "railroad companies" clearly indicated that the term "railroad companies" would otherwise have included street railway companies, particularly in view of the court decisions to the effect that the terms "railroad" and "railway" are synonymous, unless there is an indication to the contrary.

Also, an examination of the Incorporation Act of May 14, 1889, P. L. 211, under which the underliers in question were incorporated, clearly indicates that the term "railroad corporation," in its general sense, at that time embraced street railways, in that the terms "railroad" and "railway" are used interchangeably in that act. Thus, in the title and in many of the sections of the act the term "street railway" appears, while in other sections, particularly sections 12 and 13, the terms "railroad" and "railroad corporation" appear.

In Millvale Borough *v.* Evergreen Railway Company, 131 Pa. 1 (1890), the question arose as to the types of certain transportation companies. The court commented upon the interchangeable use of the words "railroad" and "railway" in the statute in question as follows: (page 15)

> * * * In the general law of May 23, 1878, P. L. 111, authorizing the incorporation of street-railway companies, the terms "railway" and "railroad" are used indiscriminately, as representing the same thing. Thus, in the title it is "railway" companies that are mentioned. In the second section it is provided that $2,000 of stock for every mile of "railroad" shall be subscribed. The sixth section provides that the president and directors of any "railroad" company organized under the act shall have power to borrow money. The seventh section directs notice to be given for payment of instalments by publication in one or more newspapers published in the county where such "railroad" shall be located. This form of expression is repeated in the twelfth section, and in the thirteenth the corporation created under the act is called "railroad corporation." In the fifteenth section it is referred to as a "passenger railway company," and in the sixteenth as "street passenger railway," where the structure itself is described. It is perfectly clear, therefore, that in the legislative sense these several modes of expression are used to designate the same thing. * * *

Accordingly, it is clear that at the time of the passage of the Bonus Act of 1868 and the Incorporation Act of 1889, under which the underliers in question were incorporated, the term "railroad," whenever used in its general sense, included a street railway.

The Bonus Act of 1868 provided that letters patent should not be issued to corporations liable to the payment of bonus until the payment of the first installment. Letters patent were issued to the underliers in question without the payment of bonus. This is a clear indication of the contemporaneous executive construction of the act of 1868, as applied to street railway companies, particularly in view of the legal presumption that the Governor and the Secretary of the Commonwealth, at that time, properly performed their official acts and duties in the issuance of letters patent. The courts repeatedly have held that the contemporaneous executive construction of an act is entitled to the highest respect and will not be disturbed except for very cogent and persuasive reasons: Commonwealth *v.* Mann, 168 Pa. 290 (1895); Reeves's Appeal, 33 Pa. Super. 196 (1907); Garr *v.* Fuls, 286 Pa. 137 (1926) and Commonwealth *v.* Quaker City Cab Company, 287 Pa. 161 (1926).

As we have previously indicated, this executive construction was in harmony with the meaning of the act of 1868.

Moreover, the same legislature which enacted the General Incorporation Act for street railway companies also enacted the Act of May 7, 1889, P. L. 115, which provided for the payment of bonus upon an authorized increase of the capital stock of corporations, and which contained the same exemption for "railroad companies" that

appeared in the act of 1868. If the legislature had intended that this exemption should not apply to street railway companies, it certainly would have so provided at that time. Moreover, the legislature permitted this exemption in the act of 1868 and the act of 1889 to continue in effect, without change, until the passage of the General Bonus Act of May 3, 1899, P. L. 189, when the entire exemption was withdrawn. In so doing, the legislature impliedly endorsed the executive construction placed upon the exempting language.

Accordingly, you are advised that the exemption of railroad companies contained in the Act of May 1, 1868, P. L. 108, included street railway companies that were incorporated under the Act of May 14, 1889, P. L. 211, while the Act of May 1, 1868, P. L. 108, was in force.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

E. RUSSELL SHOCKLEY,
Deputy Attorney General.

OPINION No. 308

Weights and measures—Weighing of solid fuel—Act of July 19, 1935—Method of enforcement—Extent of inspector's authority—Right to arrest before obtaining a warrant—Right to compel immediate unloading of truck—Prosecution for possession of faulty weight slip.

1. Under section 5 of the Act of July 19, 1935, P. L. 1356, inspectors of weights and measures appointed by the Commonwealth, counties, boroughs, cities of the first, second and third classes, and the respective assistants of such inspectors, have equal authority to enforce the provisions thereof.

2. An inspector of weights and measures has no authority to make an arrest under the Act of July 19, 1935, P. L. 1356, without first obtaining a warrant before a justice of the peace as provided in section 8 of the act.

3. An inspector of weights and measures cannot, under the Act of July 19, 1935, P. L. 1356, compel the driver of a truck loaded with solid fuel immediately to deliver said fuel or to unload said truck after the truck and the fuel have been weighed together; the driver may be compelled only to return the empty truck to the scales for weighing immediately after unloading it, which should be within a reasonable time after weighing, taking all circumstances into consideration.

4. Under sections 7 and 8 of the Act of July 19, 1935, P. L. 1356, either the driver of a truck containing solid fuel or a weighmaster, or both, may be prosecuted for the possession or issuance of a faulty weight slip.

Harrisburg, Pa., January 5, 1940.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of December 5, 1939 relating to the Act of July 19, 1935, P. L. 1356, 76 PS §342, et seq. This is an act to regulate the sale and delivery of solid fuel. You request answers to certain specific questions which have arisen in the administration of the legislation mentioned. These questions are:

1. Under section 5 of this act, do the following officers have equal authority: State Inspectors, County Inspectors of Weights and Measures, also the Inspectors and Assistant Inspectors of Weights and Measures appointed by boroughs, first, second, and third class cities?

2. Should a truck driver refuse to accompany the inspector, does the inspector have authority to arrest said driver without obtaining a warrant?

3. When gross weight is obtained, the truck driver at times uses some ruse to delay delivery. Can the inspector compel the driver to proceed immediately with delivery or to unload the truck immediately in order to prove correct weight?

4. When a faulty weight slip is found, who should be prosecuted, the truck driver, the weighmaster, or both?

Section 5 of the Act of July 19, 1935 reads as follows:

> Section 5. Any weights and measures official of this State, or of any local government of this State, who finds any quantity of solid fuel ready for or in process of delivery, may direct the person in charge of the solid fuel to convey the same to the nearest available accurate scales designated by said official. Such official shall thereupon determine the weight of the solid fuel, and the vehicle on which it is carried, and shall direct such person in charge to return to such scales forthwith upon unloading the solid fuel, and upon such return the official shall determine the weight of the vehicle without load. No person in charge of a vehicle containing such solid fuel, or from which such solid fuel has been unloaded, shall fail to take the vehicle, upon the direction of the weights and measures official, to scales as aforesaid, or refuse to permit the solid fuel or vehicle to be weighed by such official.

With reference to question No. 1, above, it is clear from the text of section 5 of the act above set forth in full, that any and all of the officials enumerated in question No. 1 have equal authority to perform the duties imposed by this section.

The answer to your question No. 2, as to whether an inspector has authority to arrest a truck driver who refuses to accompany the inspector, without first obtaining a warrant is also clear. While it says, in section 5 of the act, that no person in charge of a vehicle containing solid fuel shall fail to obey the directions of the inspector to take the vehicle to the scales, nowhere in said section nor in the rest of the act is there any authority conferred upon such inspector to arrest the recalcitrant truck driver without first obtaining a warrant. Section 8 of the act provides penalties for any person violating the same, which penalties are applied after summary conviction before a magistrate. The inference from this is that the inspector must first swear out an information before a magistrate against a person offending, such as a driver who refuses to accompany him, and obtain the issuance of a warrant for the offender's apprehension, before the latter may be arrested.

This conclusion is fortified by the rule at common law reviewed in 1 Sadler, Criminal Procedure in Pennsylvania (2d ed. 1937) 91 to 98, that a peace officer may make an arrest without a warrant where an offense has been committed within the officer's sight; when an offense has been committed and the offender is scaping; and where a felony has been committed, or the officer has reasonable ground to believe that one has been recently committed. A peace officer may also arrest without warrant where a misdemeanor has been committed within his view, or where the officer is in fresh pursuit of one who has just committed a misdemeanor, provided the offense amounts to a breach of the peace.

Various statutes confer the power of arrest without warrant upon peace officers in certain specific cases enumerated in such statutes. There is also statutory authority for certain law enforcement agents, such as inspectors of the Departments of Health, Game, Fish, Fire and Forest Wardens, and agents of societies for the prevention of cruelty to animals, to make arrests without warrants under certain circumstances.

Unless, therefore, the act under discussion specifically empowers inspectors to make arrests without warrants, which it does not; or unless an offense under the act constitutes a breach of the peace, which it may or may not; inspectors have no authority to arrest without a warrant.

Your question No. 3 inquires whether an inspector may compel a truck driver immediately to deliver coal after having the same weighed, or in the alternative, immediately to unload the truck, so that as a result the inspector may ascertain the weight of the empty truck.

Section 5 of the act above quoted provides that, after a truck and its contents are weighed, the inspector shall direct the person in charge thereof "to return to such scales forthwith upon unloading the solid fuel," and upon such return the inspector shall determine the weight of the truck. There is nothing in this section or in any other part of the act which compels a truck driver to unload immediately. The only thing he is compelled to do is to return the empty truck to the scales for weighing immediately after unloading it. It is quite possible a driver might have his truck and load weighed at nightfall and not deliver the coal until the next morning. About the only rule to guide inspectors here is that a truck should be unloaded within a reasonable time after weighing, taking all circumstances into consideration.

Question No. 4 of your inquiry asks who should be prosecuted when a faulty weight slip is discovered—the truck driver or the weighmaster, or both. Section 7 of the act provides that it shall be unlawful for any weighmaster to issue a false or incorrect weight certificate, and that it shall be unlawful for any person knowingly to use such certificate. Section 8 of the act provides that any person violating any provision thereof will be amenable to the penalties therein provided. Consequently, either the truck driver or the weighmaster, or both of them, may be prosecuted when a faulty weight slip is discovered. It would seem that the circumstances surrounding the case should indicate the proper procedure in each instance.

As a result of the foregoing, it is the opinion of this department that:

1. Under section 5 of the Act of July 19, 1935, P. L. 1356, inspectors of weights and measures appointed by the Commonwealth, counties, boroughs, cities of the first, second and third classes, and the respective assistants of such inspectors, have equal authority to enforce the provisions thereof.

2. An inspector of weights and measures has no authority under said act to make an arrest without first obtaining a warrant, should the driver of the truck containing solid fuel, as defined in said act, refuse to accompany such inspector on demand.

3. An inspector of weights and measures cannot, under said act, compel the driver of a truck loaded with solid fuel, as defined in said act, immediately to deliver said fuel or to unload said truck, after the truck and the fuel are weighed together.

4. Either the driver of a truck containing solid fuel, as defined in said act, or a weighmaster, as defined in said act, or both, may be prosecuted for possession or for issuance of a faulty weight slip.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 309

Insurance—Reciprocal and inter-insurance exchanges—Issuance of nonassessable policies—Maintenance of required surplus—Act of June 24, 1939, sec. 1004(d)—Calculation of surplus—Insurance Company Law of May 17, 1921, sec. 206—Failure to maintain surplus after issuing policies—Effect on policies—Duty to report impairment—Approval of forms by Insurance Commissioner.

1. To calculate the surplus required of a reciprocal or inter-insurance exchange to authorize it to write nonassessable policies under the Act of June 24, 1939, P. L. 682, sec. 1004*(d)*, it is necessary first to determine the classes or kinds of insurance which it is writing and then to apply the provisions of section 206 of The Insurance Company Law of May 17, 1921, P. L. 682, to determine the amount of capital and surplus which both a stock fire and a stock casualty company would be required to have to write such classes or kind of insurance: if, after elminiating from the financial statement of all reciprocal all reserves and all other liabilities which it required to make provision for, its surplus so determined equals or exceeds the required total amount, the reciprocal may be authorized to write nonassessable policies.

2. When a qualifying reciprocal or inter-insurance exchange is authorized by the Insurance Commissioner to write a nonassessable policy, such policy remains nonassessable for its life, and no liability for assessment can ever attach to the holder of such policy even though the reciprocal, subsequent to its issuance, fails to maintain the required reserve; any other construction would impair the obligation of contracts in violation of article I, sec. 17, of the Pennsylvania Constitution and article I, sec. 10, of the Federal Constitution.

3. It is necessary that reciprocal or inter-insurance exchanges qualifying to issue nonassessable policies under section 1004*(d)* of the Act of June 24, 1939, P. L. 683, submit policy forms which they propose to write to the Insurance Commissioner for approval.

4. The primary duty to determine if a qualifying reciprocal or inter-insurance exchange is maintaining its surplus, which qualifies it to issue nonassessable policies, is upon the officers of the reciprocal, who should immediately notify the Insurance Commissioner if it becomes apparent that the surplus is no longer maintained; but it is also the duty of the Insurance Commissioner to examine annual and examination reports and to investigate any information which appears to him reliable, in order to determine if the reciprocal is in fact maintain-

ing the required surplus, and immediately to withdraw the privilege of writing nonassessable policies and to cancel approval of all nonassessable policies in the event that the surplus is no longer maintained.

5. While section 1004 of the Act of June 24, 1939, P. L. 683, does not specify whether a foreign reciprocal or inter-insurance exchange must, in order to issue nonassessable policies, meet the financial requirements for Pennsylvania stock fire and casualty companies set forth in section 206 of The Insurance Company Law of May 17, 1921, P. L. 682, or of foreign stock fire and casualty insurance companies set forth in sections 516 and 601 of the act, it is apparently the legislative intention that the reciprocal, whether foreign or domestic, must meet the requirements Pennsylvania stock companies are required to meet.

Harrisburg, Pa., January 5, 1940.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: On July 25, 1939, you inquired concerning the Act of June 24, 1939, P. L. 683 (Act No. 318), requesting an opinion as to how your department shall calculate the surplus required of an inter-insurance exchange or reciprocal, in order to permit it under that act to write a nonassessable policy where the exchange in question is writing both fire and casualty coverages. Other questions are suggested by this inquiry.

The Act of June 24, 1939, supra, amends section 1004, subsection (d) of The Insurance Company Law of 1921 (P. L. 682), and reads as follows:

> A copy of the form of power of attorney, or other authority of such attorney, under which such insurance is to be effected or exchanged, and which shall provide that the liability of the subscribers, exchanging contracts of indemnity, shall make provision for contingent liability, equal to not less than one additional annual premium or deposit charged: *Provided, however, That where an exchange has a surplus equal to the minimum capital and surplus required of a stock insurance company transacting the same kind or kinds of business, its power of attorney need not provide for such contingent liability of subscribers, and such exchange, so long as it maintains such surplus, may issue to its subscribers policies or contracts without contingent liability.* (Italics shows amending language to the section.)

As your letter of July 25, 1939, points out, reciprocals or inter-insurance exchanges in Pennsylvania are authorized to write all classes of insurance except life insurance. That is, they may do the classes of business covered by section 202, subsections (b) and (c) of The Insurance Company Law of 1921, being the Act of May 17, 1921, P. L. 682, as amended. Subsection (b) covers lines of business

in which fire insurance companies engage and subsection (c) those in which casualty companies engage.

According to annual reports and examination reports on record in your office, while all reciprocals have, generally speaking, a similar line of business, there is some variance in what coverage they offer. But as indicated, their coverage is in both the fire and casualty field.

Financial requirements for Pennsylvania stock fire and casualty companies are set out in section 206. The requirements for foreign stock fire and casualty insurance companies are set out in sections 516 and 601, respectively.

We feel, in view of the fact that the language of amended section 1004 does not designate whether the reciprocal, if a foreign reciprocal, must meet the requirements of section 206, or of sections 516 and 601, the intention of the legislature is that the reciprocal, whether foreign or domestic, must meet the requirements Pennsylvania companies are required to meet, namely, the requirments under section 206.

To calculate the amount required for each reciprocal, therefore, it will be necessary for you to determine from the examination reports and annual reports the classes of business which such reciprocal is transacting and to total the amounts of capital which both a Pennsylvania fire insurance company and a Pennsylvania casualty insurance company, doing the same lines of business that the particular reciprocal is transacting, would be required to have.

The lines usually written by a reciprocal are set out in section 202, paragraphs B (1) and (2), and C (3), (4) and (11). Applying section 206 to such schedule, it will be seen that a reciprocal may engage in the indicated fire insurance lines if it has a surplus of $300,000 and the usual lines of the casualty insurance if it has a surplus of $300,000, or a total of $600,000. On the basis of added classes of insurance engaged in by a reciprocal, these figures would be increased.

As is quite clear by the terms of section 1004, this must be a surplus, and the surplus of a reciprocal can be determined only by first deducting all reserves and all other liabilities.

It is understood, of course, that the annual statements and examination reports on file in your office for any reciprocal should reflect the assets of that fund, the beneficiaries of which are the subscribers, and that there has never come into such fund the compensation (which is a fixed percentage of each premium or deposit) which the attorney-in-fact for the subscribers, receives.

It is upon the above basis that you have already approved non-assessable policies now being written by Consolidated Underwriters and the State Automobile Insurance Association of Indianapolis, two

reciprocals admitted into this Commonwealth whose surpluses exceed the requirements.

We desire, also, to pass upon several other situations which arise because of this amendment. One question which has been raised is whether or not a nonassessable policy written by a reciprocal or inter-insurance exchange, would become assessable under any circumstances. The suggestion is made that because amended section 1004 provides that the reciprocal *maintain* the required surplus, should the reciprocal fail in this, the policy may become assessable.

This suggestion is, of course, not well founded because the legislature could never have intended that a policy which is nonassessable could or would, under any circumstances, during the life of such policy, change to or become an assessable policy.

To find otherwise would be unreasonable and absurd. Section 52 of the Statutory Construction Act of May 28, 1937, P. L. 1024, provides:

> * * * In ascertaining the intention of the Legislature in the enactment of the law, the courts may be guided by the following presumptions among others:
> (1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;

Additionally, we would be ascribing to the legislature an intention to pass a law which would impair the obligation of contracts if we were to hold that the legislature, by the 1939 amendment, ever intended to authorize a reciprocal to write nonassessable policies which, in the lifetime of such policies, would become assessable.

Section 17 of Article I of the Constitution of Pennsylvania, provides:

> No ex post facto law, *nor any law impairing the obligation of contracts,* or making irrevocable any grant of special privileges or immunities, shall be passed. (Italics ours.)

That is, an insurance policy is a contract between the insurer and the assured and the rights and liabilities thereunder are established for the term thereof. An intention cannot be ascribed to the legislature which would create a situation whereby this constitutional provision would be violated.

Section 10 of Article I of the Constitution of the United States prohibits states from passing any law impairing the obligation of contracts. The first paragraph of such section reads as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of

> Attainder, expost facto Law, *or Law impairing the Obligation of Contracts,* or grant any Title of Nobility. (Italics ours.)

It is our inevitable conclusion, therefore, that a nonassessable policy, once written by a reciprocal duly authorized to write the same, remains during its life a nonassessable policy; and no liability for an assessment can ever attach to the holder of such a policy.

It is, of course, required that you approve all policy forms. Therefore, a reciprocal which does qualify and which is authorized to write nonassessable policies, must, nevertheless, submit to you its nonassessable policy form for approval, before it may write the same.

There is one other situation which we consider of much importance. The amendment of 1939 does not impose upon you, as Insurance Commissioner, any additional duties, but a burden naturally falls upon someone to determine whether or not a qualifying reciprocal is maintaining its surplus.

The officers of a reciprocal will know before anyone if the required surplus is no longer maintained, and it is quite evident that the primary duty in this respect is upon such officers. When it appears that the surplus is no longer maintained, the officers must immediately cease issuance of nonassessable policies, notify you to that effect, and surrender their authority to write such policies.

It should be pointed out, however, that if through annual reports or examinations, or by means of other reliable information, it appears to you that a reciprocal has failed to maintain the required surplus, it would be your duty to withdraw immediately authority to write nonassessable policies, and to cancel all approvals of policies theretofore given.

It is our opinion, therefore, that:

1. To calculate the surplus required of a reciprocal or inter-insurance exchange to write nonassessable policies, it will be necessary first to determine the classes or kinds of insurance which such reciprocal is writing. It will then be necessary to apply the provisions of section 206 of The Insurance Company Law, to determine the amount of capital and surplus which both a stock fire and a stock casualty company would be required to have to write such classes or kinds of insurance. There must be eliminated from the financial statement of such reciprocal all reserves and all other liabilities which such reciprocal is required to make provision for, in order to determine what its surplus may be. If its surplus, so determined, equals or exceeds the required total amount, the reciprocal may be authorized to write nonassessable policies.

2. When a qualifying reciprocal is authorized by you to write a nonassessable policy, such policy remains nonassessable for the life

of such policy, and no liability for assessment can ever attach to the holder of such a policy.

3. It is also necessary that qualifying reciprocals submit to you for approval all policy forms which they propose to write.

4. The primary duty to determine if a qualifying reciprocal is maintaining its surplus is upon the officers of such reciprocal, who should notify you immediately if it becomes apparent that the surplus is no longer maintained. It is your duty to examine annual reports and examination reports and also to investigate any information which appears to you reliable, in order to determine if a reciprocal is maintaining the required surplus.

In the event that the surplus is no longer maintained, the privilege to write nonassessable policies must be withdrawn immediately and approvals of all nonassessable policies cancelled.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 310

Mines and mining—Necessity for mine foremen—Act of July 1, 1937, sec. 4, amending Bituminous Coal Act of 1911—"Employment" of five or more men —Work by co-owners of mine—Statutory Construction Act of May 28, 1937.

1. The word "employed," as used in section 4 of the Act of July 1, 1937, P. L. 2486, amending article IV, sec. 1, of the Bituminous Coal Act of June 9, 1911, P. L. 756, and requiring employment of a mine foreman for every mine "where five or more persons are employed," is to be construed as "engaged," rather than as employed in the relationship of master and servant; such construction is necessitated by article IV, sec. 51, of the Statutory Construction Act of May 28, 1937, P. L. 1019, providing that legislative intent is to be ascertained by considering, inter alia, the mischief to be remedied and the object to be atttained, since the primary purpose of the requirement is to protect those engaged in a hazardous occupation.

2. Section 4 of the Act of July 1, 1937, P. L. 2486, amending article IV, sec. 1, of the Bituminous Coal Act of June 9, 1911, P. L. 756, requires the employment of a mine foreman where five men or more are actually engaged in the mining of coal, even though some or all of the men are co-owners of the mine.

Harrisburg, Pa., January 17, 1940.

Honorable John Ira Thomas, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: Your letter of November 22, 1939 raises a question as to the employment of mine foremen in bituminous coal mines. This may be stated as follows:

Where a number of co-owners or a partnership owns and operates a bituminous coal mine and five men or more are actually engaged in the mining of the coal, either as co-owners or co-owners and employes, does the Bituminous Coal Act of June 9, 1911, P. L. 756, in article 4, section 1, as amended by the Act of June 1, 1915, P. L. 716, section 2, (52 PS §871), and as amended by the Act of July 1, 1937, P. L. 2486, section 4 (52 PS §871), require the employment of a mine foreman?

Section 4 of the act of 1937, supra, provides:

> In order to secure efficient management and proper ventilation of the mines, to promote the health and safety of the persons employed therein, and to protect and preserve the property connected therewith, *the operator or the superintendent shall employ a competent and practical mine foreman for every mine where five or more persons are employed, who shall be under the supervision and control of the operator or the superintendent. The mine foreman shall have full charge of all the inside workings and the persons employed therein, subject, however, to the supervision and control of the operator or the superintendent, in order that all the provisions of this act so far as they relate to his duties shall be complied with, and the regulations prescribed for each class of workmen under his charge carried out in the strictest manner possible.* If the mine is generating explosive gas, in quantities sufficient to be detected by an approved safety lamp, the mine foreman must possess a first grade mine foreman's certificate. If the mine is non-gaseous, the mine foreman must possess either a first grade mine foreman's certificate or a second grade mine foreman's certificate. (Italics ours.)

The Bituminous Coal Act of 1911, supra, as amended, while not so described is nevertheless a comprehensive codification of the law relating to the mining of bituminous coal.

The answer to your question, as stated above, turns upon the interpretation to be given to the words "where five or more persons are employed" in the phrase "the operator or superintendent shall employ a competent and practical mine foreman for every mine *where five or more persons are employed,*" contained in section 4 of the act of 1937, supra. The question in its narrowest compass is, what does the word "employed" mean in the connection in which it is used.

Section 1 of the act of 1937, supra, provides (52 PS §701):

> For the purposes of this act the terms and definitions contained therein shall be as follows:

Mine.—In this act the term "mine" includes the shafts, slopes, drifts, or incline planes connected with excavations penetrating coal stratum or strata, which excavations are ventilated by one general air current, or divisions thereof, and connected by one general system of mine railroads over which coal may be delivered to one or more points outside the mine, when such is operated by one operator.

Excavations and Workings.—The term "excavations and workings" includes all the excavated portions of a mine, those abandoned as well as the places actually being worked; also all underground workings and shafts, tunnels, and other ways and openings, and all such shafts, slopes, tunnels, and other openings in the course of being sunk or driven, together with all roads, appliances, machinery, and material connected with the same below the surface.

* * * * *

Operator.—The term "operator" means any firm, corporation or individual operating any coal-mine, or any part thereof.

Superintendent.—The term "superintendent" means the person who shall have, on behalf of the operator, immediate supervision of one or more mines.

Mine Foreman.—*The term "mine foreman" means the person whom the operator or superintendent shall place in charge of the inside workings of the mine and of the persons employed therein.* (Italics ours.)

It must be constantly borne in mind that the legislation relating to coal mining continually aimed primarily at protection of the miner for it is generally conceded that a coal miner is engaged in a very hazardous occupation.

Historically, legislative protection of miners had its origin in the Act of April 18, 1877, P. L. 56, the title to which recites that it is "An act providing for securing the health and safety of persons employed in the bituminous coal mines of Pennsylvania" and the Act of June 30, 1885, P. L. 205, the title to which recites that it is "An act relating to bituminous coal mines and providing for the lives, health, safety, and welfare of persons employed therein." Provisions were there made for a "mining boss," described in later legislation as a mine foreman. These acts were superseded and supplied by the Act of May 15, 1893, P. L. 52, and this latter act by the act of 1911, supra.

Under the above mentioned acts of 1911 and 1937, and all the former acts for that matter, the duties of a mine foreman were chiefly directed to the protection of the miner against the hazards of his occupation. The later legislation amplified and increased his duties and also provided for the protection of the mine property as that particular mine where he was employed might affect, or be affected

by, adjoining mines in the same stratum but separated by barrier pillars.

In addition to the mine foreman's general duties recited in section 4 of the act of 1937, supra, there are other duties imposed upon him. Thus he is required to see that the working places are properly secured by props or timbers; that no one be permitted to work in an unsafe place; that the proper timbers are delivered to the working places of the miners; that shelter holes shall be cut and maintained in the stratum along haulage roads; that the coal be properly mined before it is blasted; that protection be afforded against explosive gas, which may be generated in the mine; that provision be made for rock dusting; that as the miners advance in their excavation, dangerous pieces of coal, slate and rock be taken down; that prompt attention be given to the removal of all dangers reported to him; that he daily visit, either personally or by his assistant, all working places; that he pass upon the ability of the miner safely to work in a mine for the protection of co-employes; that he instruct inexperienced miners how safely and properly to perform their work; that he employ shot firers in gaseous mines; that he perform important duties where the mine is in proximity to any abandoned mine suspected of generating gas or where there may be accumulation of water; that he report accidents daily and that he see that approved safety lamps are used.

These statements of his duties are illustrative of, but not inclusive of, the obligations resting upon mine foremen looking to safety. Under former legislation, that is, prior to 1911, and the court interpretations thereof, the whole burden of protection of the men employed in mines and the safety of an operation fall upon him. There does not seem to be any change in that respect in the acts of 1911 and 1937, supra, for in section 1 of the act of 1937, supra, it is said, "The term 'mine foreman' means the person whom the operator or superintendent shall place in charge of the inside workings of the mine and of the persons employed therein." So important are his duties that for violation of the obligations imposed upon him by the statutes, he may be held criminally responsible.

The decisions of the Supreme Court of this Commonwealth in actions of trespass against the mine owner, arising out of negligence in the performance of a mine foreman's statutory duties under the earlier legislation, hold that the *mine foreman is the representative of the State and not of the mine owner, even though employed by the operator.*

In Durkin *v.* Kingston Coal Company, 171 Pa. 193, 33 Atl. 237 (1895), the court declared that:

> * * * Under the operation of this statute [an earlier act than in the instant case] the mine foreman represents the commonwealth. * * *

In Golden *v.* Mt. Jessup Coal Company, Limited, 225 Pa. 164, 73 Atl. 1103 (1909), it was held that the foreman was the State's representative and that:

> * * * an employer cannot be held liable for the mistakes or incompetency of the state's representative. * * *

In Wolcutt *v.* Erie Coal & Coke Company, 226 Pa. 204, 75 Atl. 197 (1910), the court declared:

> * * * We have uniformly held that a mine foreman is a fellow servant of the other employes engaged in the mine, and in none of our cases has it been suggested that he is a representative or agent of the owners. * * *

It was declared in that case that the duty of the mine foreman is to see that the interior of the mine is kept in a proper and safe condition, and that in that position he is supreme, and that the superintendent—

> * * * who is the representative of the owner, cannot interfere with him in the discharge of his duties. While his powers are extensive and ample in regulating and controlling the internal operations of the mine so as to protect those employed therein, yet he is in no sense the agent or representative of the owner of the mine. * * *

See also Dempsey *v.* Buck Run Coal Company, 227 Pa. 571, 76 Atl. 745 (1910), and Reeder *v.* Lehigh Valley Coal Company, 231 Pa. 563, 575, 80 Atl. 1121, 1125 (1911). See also Vagaszki *v.* Consolidation Coal Co., (C.O.A. 2d Circuit) 225 Fed. Rep. 913 (1915).

This rule was qualified, however, to this extent, that if any matter injuriously affecting the health or safety of miners is brought to the attention of the owner, it is his duty to correct it and if on the faith of a promise so to do, the miner goes to work and is injured he can recover against the owner. Collins *v.* Northern Anthracite Coal Co., 241 Pa. 55 (1913). There are other exceptional instances but they need not be here considered.

While actions in trespass for negligence in cases of mine accidents have largely disappeared since the passage of the Workmen's Compensation Act, the construction adopted by the Supreme Court that the mine foreman is the State's representative in mining operations still seem to be the law.

The Century Dictionary variously defines the verb *employ:* "To give occupation to; make use of the time, attention, or labor of; keep busy or at work; use as an agent." "To make use of as an instrument

or means; apply to any purpose: as, to employ medicines in curing diseases." Also: "To occupy; use; apply or devote to an object; pass in occupation: as, to employ an hour, a day, or a week; to employ one's life." It is distinguished from "hire": "A man hired to labor is employed, but a man may be employed in a work who is not hired." As a noun this same authority defines it as "Occupation; employment."

"To be 'employed' in anything, means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it. * * *" The United States *v.* Morris, 39 U. S. 464, 470; 10 L. Ed. 543 (1840). Ritchie *v.* People, 155 Ill. 98; 40 N. E. 454, 455 (1895). To employ was held to mean " 'to have in service, to cause to be engaged in doing something.' " Buffalo Steel Co. *v.* Aetna Life Ins. Co., 136 N. Y. Supp. 977, 982 (1912).

In an action on a policy of insurance, covering liability for injuries caused by drivers or by one hired as a substitute driver, issued to a partnership where a partner became the substitute driver of a truck when the driver became ill and an accident occurred, the insurer contended that the word "employ" meant "hired substitute." The District Court of Appeals of California (rehearing denied by the Supreme Court) in Antichi *v.* New York Indemnity Co., 14 Pac. (2d) 598, 126 Cal. App. 284 (1932), denied such contention, in affirming a judgment against the insurance company. The court said: (page 600)

> In the instant case Antichi was not employed by the partnership of which he was a member to drive the said truck, but merely took over its operation owing to the illness of Harden.
>
> The word "employ" is used in divers significations. Although it usually imports the relation of master and servant or of employer and employee, this is not the universal rule, and the idea of compensation is not necessarily involved in the term. In the present tense it is applied to persons engaged in doing something. In the past tense it is applied to persons engaged in the performance of work or duties, either busy or occupied at work. 20 Cor. Jur. 1228, 1229. To engage is one of the meanings of "employ." Black's Law Dictionary, 430.
>
> The word "employed" may mean either busy or occupied at work or may mean intrusted with the management of affairs. * * *

20 C. J. 1238, defines the word "employ":

> In General. The word is used in divers significations. Although it usually imports the relation of master and serv-

> ant, or employer and employee, this is not the universal rule * * *
>
> When used passively, it sometimes has a reflexive meaning signifying only to be engaged in; to occupy the time, attention and labor of, citing Weaver *v.* Ann Arbor R. Co., 139 Mich. 590, 596, 102 N.W. 1037 (1905).

In view of the manifold definitions of the word "employ" as above indicated, the difficulty in this case arises out of the application of the word to the concrete case: how is the word "employed" to be understood in the legislative phrase under consideration.

A wise jurist once said that "words, like people, are to be known by the company they keep." Thus it is said in 59 C. J. section 577:

> * * * The words [of a statute] are to be interpreted with due regard to the subject matter of the statute and its purpose, and it may be necessary, in order to give effect to the legislative intent, to extend or restrict the ordinary and usual meaning of words; but the words of a statute are not to be given a forced, strained, or subtle meaning. The meaning of doubtful words must be determined by the sense in which they were used by the legislature without regard to their primary meaning. The same words may not always have the same effect, and their usual meaning may be disregarded when it is evident that they were incorrectly used or used in another sense. So also uncertain or ambiguous words will be construed so as, if possible, to produce a reasonable result in harmony with the purpose of the act.

When the act of 1937, supra, says that a mine foreman shall be employed for "every mine *where five or more persons are employed,*" does the word "employed" mean that these five or more persons are "employed" in the master and servant relation or does the word "employed" mean "engaged" in doing something or "engaged" in the performance of work or duties, in the sense of busy or occupied at work, engaged in mining coal, regardless of the master and servant relation.

If section 4 of the act of 1937, supra, requires that "In order to secure efficient management and proper ventilation of the mines, to promote the health and safety of the persons employed therein, and to protect and preserve the property connected therewith, the operator or the superintendent shall employ a competent and practical mine foreman for every mine where five or more persons are employed," the question fairly arises, who is the directing head in the day-to-day operations, if a large number of men, in excess of five, are actually engaged in an extensive mine operation, albeit co-owners or members of a partnership where danger is always imminent?

The Statutory Construction Act of May 28, 1937, P. L. 1019, provides, in article IV, section 51 (46 PS §551), as follows:

> Construction of laws; legislative intent controls.—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.

Measured by these standards, if we interpret the word "employed," as used in the Act of Assembly in question, to signify the master and servant relationship, then we adopt a meaning which sets at naught the obvious and expressed purposes and the legislative intent of the various related acts, beginning in 1877.

Such an interpretation should not be accepted unless it is imperatively demanded by the statute. Here, however, we have an alternative definition of the word "employed" as meaning "those engaged" in the mining of the coal, regardless of the relationship which they bear either as owners or employes and which harmonizes with the spirit and purposes of the legislation. Therefore, the latter interpretation should be adopted.

We are of opinion, that where a number of co-owners or a partnership owns and operates a bituminous coal mine and "five or more persons are employed" therein, that means "five or more persons actually engaged" therein, whether co-owners or co-owners and employes, and in such cases the Bituminous Coal Act of June 9, 1911, P. L. 756, as amended by the Act of June 1, 1915, P. L. 716, and as amended by the Act of July 1, 1937, P. L. 2486 (52 PS §871), requires the employment of a competent and practical mine foreman.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,

Attorney General.

WILLIAM S. RIAL,

Deputy Attorney General.

OPINION No. 311

Physicians and surgeons—Suspension of license—Conviction of violation of Federal narcotic laws—Suspension of sentence—Imposition of fine—Act of June 3, 1911.

1. The arrest and conviction of a physician in the Federal courts for violation of the Federal laws governing the dispensing of narcotics, and the subsequent imposition of a sentence of one year and one day, which was suspended, and defendant placed upon probation for a period of three years, together with the imposition of a fine of $500 to be paid within one year, does not constitute such a "conviction" as to justify the suspension or revocation of defendant's license by the Pennsylvania Superintendent of Public Instruction under the provisions of the Act of June 3, 1911, P. L. 639, as last amended by the Act of July 19, 1935, P. L. 1329.

2. A conviction is not complete until judgment is given upon a plea of guilty or upon a verdict; in a criminal case the sentence is the judgment, and if sentence is suspended there is no judgment.

Harrisburg, Pa., January 17, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have submitted to this department on behalf of the State Board of Medical Education and Licensure a request to be advised whether the arrest and conviction of a physician in the Federal courts for a violation of the Federal laws governing the dispensing of narcotics, and the subsequent imposition of a sentence of one year and one day, which was suspended and the defendant placed upon probation for a period of three years, together with the imposition of a fine of $500 to be paid within one year, constitutes such a conviction under the Act of June 3, 1911, P. L. 639, as amended May 24, 1917, P. L. 271; April 26, 1921, P. L. 158; June 14, 1923, P. L. 758; July 12, 1935, P. L. 703 and July 19, 1935, P. L. 1329, 63 PS §410, as to warrant your department in either suspending or revoking a practitioner's license under the provisions of said act.

From your letter of transmittal and the record of the hearing held before your board in the specific case of Doctor Pasquale Ferrari, it appears that he was convicted in the United States District Court for the Western District of Pennsylvania, on various counts involving the unlawful sale and unlawful dispensing of narcotics.

The defendant received a sentence of a year and one day in the Federal prison, which sentence was immediately suspended and the

defendant placed on probation for three years. A fine of $500 was also imposed and the defendant given a year within which to pay said fine. The question, therefore, is: Does this judgment of the court constitute a conviction?

The Medical Practice Act provides, inter alia, as follows:

> * * * The Bureau of Medical Education and Licensure may, for a definite or indefinite time, refuse, revoke, or suspend the right to practice medicine and surgery in this State for any or all of the following reasons, to wit: The conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits or stimulants, narcotics, or any other substance, or any condition **which** impairs intellect and judgment to such an extent as to incapacitate for the performance of professional duties. * * * (Act of July 12, 1935, P. L. 703, §12)

As we stated in Informal Opinion No. 1028, the appellate courts of our State have held that the word "conviction" has both a popular and a technical meaning. A verdict of guilty or a plea of guilty is commonly considered a conviction but, in its strict legal meaning, a conviction is not complete until judgment is given on a plea or verdict of guilty.

In criminal cases, the sentence is a judgment. Until sentence there is no judgment and if sentence is suspended, there is no judgment. Commonwealth *v.* Torr, 111 Pa. Super. Ct. 178, 180 (1933).

An order of court suspending sentence on condition of payment of costs is not, legally speaking, a sentence. Commonwealth *v.* Dunleavy, 16 Pa. Super. Ct. 380 (1901); Commonwealth *v.* Caralli, 90 Pa. Super. Ct. 416 (1927).

However, the present case presents a slightly different situation than an out-and-out suspension of sentence. The Federal court imposed the payment of a fine and directed that it be paid within one year. Since the case of Doctor Pasquale Ferrari arose out of a violation of the Federal law and was passed upon by the Federal court having jurisdiction, the question of whether the sentence imposed upon said physician constitutes a conviction, must be determined by the decisions of the Federal courts relating thereto.

In the case of Scalia *v.* United States, 62 Fed. Rep. (2d) 220 (1932), it was held that an order of the court suspending a sentence of imprisonment, releasing the defendant on probation, imposing a fine without directing that the same be immediately paid into court by providing payment be made within a certain specified period of time, constitutes a suspension of the judgment. The court said as follows:

> We think the judgment of June 20, 1929, was suspended entirely by what was done; and, although the order of sus-

> pension referred only to that part of the judgment imposing the imprisonment for a year and a day, the execution of the remaining part, the fine, was not then ordered paid forthwith into court but was to be paid to the probation officer. This was in itself a suspension of the judgment as to the fine and was authorized by the Probation Act. The provisions of section 1 of the Probation Act (18 USCA §724) in terms authorize the court to require a defendant, at the time he is placed on probation, to pay a fine which has been imposed on him to the probation officer (in one or several sums) during his probation, and section 4 (18 USCA §727) provides that the probation officer "shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof" to the court. The order directing the payment of the fine to the probation officer during the probation period was therefore also a suspension of the original sentence so far as it related to the fine.

In the same case the court, quoting from United States *v.* Murray, 275 U. S. 347, states as follows:

> * * * "The Probation Act gives power to grant probation to a convict after his conviction or after a plea of guilty, by suspending the imposition or suspending execution of the sentence." * * *

There are no subsequent decisions in the Federal courts on this specific point and the Scalia case, quoted above, is referred to with approval although not necessarily involving the question before the court in the case of United States *v.* Moore, 101 Fed. Rep. (2nd) 56.

It is clear, therefore, that under the facts of this case and the interpretation of the law by the Federal courts, the order of the Federal court for the Western District of Pennsylvania, was not a judgment and, therefore, not a conviction such as to justify the suspension or revocation of a license to practice medicine.

Of particular interest along this line of cases is the case of State Medical Board *v.* Rodgers, 79 SW (2nd), 83-85, wherein the court held:

> Where physician had pleaded guilty to crime involving moral turpitude and had been sentenced, but at time hearing was held by State Medical Board to determine whether his license to practice medicine should be revoked, sentence had been suspended until later date, board held without authority to revoke physician's license since there had been no *"final judgment"* or *"conviction"* within meaning of statute empowering board to revoke license where a physician had been convicted of crime involving moral turpitude. (Italics ours.)

It is our opinion, therefore, that where, as in the case of Doctor Pasquale Ferrari, a Federal court has made an order suspending the sentence and deferring the payment of a fine, this does not constitute a conviction such as would warrant the suspension or revocation of a license to practice medicine under the Medical Practice Act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 312

State government—Washington Crossing Park Commission—Liability for accident occurring within park—Fall of branch of tree on automobile—Negligence of employe—Acts of June 25, 1917, and April 9, 1929.

The Washington Crossing Park Commission, created by the Act of June 25, 1917, P. L. 1209, and continued by the Act of April 9, 1929, P. L. 177, is an agency or instrumentality of the Commonwealth of Pennsylvania and there is, therefore, no liability for damages sustained as the result of the falling of a branch of a tree, along a public highway in the Washington Crossing Park, upon an automobile, even though it were shown that the branch had not been removed because of the negligence of an employe of the commission.

Harrisburg, Pa., January 23, 1940.

Honorable G. Albert Stewart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to the position you should take with regard to a claim for damages sustained as the result of a branch of a tree along the river road at the end of Washington Crossing Park falling upon an automobile. We note that the tree was not known to be in a dangerous condition and that, while there were some dead branches on the tree, those over the highway were green.

The Act of April 9, 1929, P. L. 177 (71 PS, §62), as amended, reads 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 Forests and Waters,

* * * * *

Washington Crossing Park Commission

Section 1812 of the Act of April 9, 1929, P. L. 177 (71 PS, §472), provides that:

> Subject to any inconsistent provisions in this act contained, the Washington Crossing Park Commission shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said commission.

Section 1806 of the Act of April 9, 1929, P. L. 177, as amended (71 PS, §466) reads as follows:

> The Department of Forests and Waters shall have the power, and its duty shall be:
>
> (a) To supervise, maintain, improve, regulate, police and preserve, all parks belonging to the Commonwealth, except the * * * Washington Crossing Park * * *.

The Washington Crossing Park was established and the Washington Park Commission was created by the Act of June 25, 1917, P. L. 1209 (32 PS, §§1081 and 1086 inclusive).

Thus, it is quite apparent, from a reading of this act, that the Washington Crossing Park is an agency or instrumentality of the Commonwealth of Pennsylvania, created for the purpose of establishing, improving and maintaining the site of Washington's crossing of the Delaware River.

Assuming that there was some negligence on the part of the employes of the Washington Crossing Park Commission (although no such evidence appears in the various communications sent to us), the question immediately arises as to whether or not the Commonwealth is liable for the torts of its officers and employes, in the absence of a statute providing that it shall be. This question was before the Supreme Court of Pennsylvania on several occasions and in the case of Collins *v.* Commonwealth, 262 Pa. 572, the court said, at page 575:

> It is clear that the Commonwealth, being sovereign, cannot be sued without her consent, which may be given by the Constitution or by statute. If the Constitution is silent on the subject, the legislative authority, being uncontrolled, is supreme; but if the Constitution speaks, then the legislative consent can become effective only if the legislature has complied with the requirements imposed upon it in passing the consenting statute; for not otherwise is it authorized to consent.

> Art. I, Sec. 11, of our Constitution provides, inter alia, that "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct." That provision is general in its terms; but not more general than Art. III, Sec. 7, which embraces all legislative action on the subjects specified in it, and is intended to prevent favoritism in legislation, whether as regards individuals or localities. Hence, so far as affected by the provisions thereof, the State has not consented to waive her sovereign right to immunity from suit, except as a result of general acts of assembly.

In the case of Watson *v.* Barnhart, 33 D. & C. 290, the court said, at page 293:

> The State is a political, corporate body and can only act through its agents. The Pennsylvania Department of Highways is a part of the State Government and is the agency created by the Commonwealth for looking after the roads which belong to the Commonwealth of Pennsylvania. It is not a subordinate public agency but is the State itself, and no action can be brought against it without the consent of the State. It differs from those agencies of the State which the legislature has incorporated and authorized to sue and be sued, as in the case of Counties and boroughs, but the act creating the Department of Highways confers no such authority. * * *

Your attention is called to the opinion of former Attorney General Thomas J. Baldridge (Official Opinions of the Attorney General, 1922-1928, page 138) in which it was held that the boards of trustees of welfare institutions could not be held personally liable for the negligence of the employes of such boards unless they personally contributed to the employe's negligence.

We are, therefore, of the opinion, that though no evidence has been produced showing negligence on the part of any employes of the Commonwealth, even if such negligence were shown, the fundamental principle of law that the Commonwealth cannot be sued for the torts of its employes is applicable. Consequently, the claim must be ignored.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 313

State government—Right of municipality to impose duties on Commonwealth—Philadelphia City Income Tax—Ordinance of December 13, 1939—Duty of Commonwealth to deduct tax from payments to Philadelphia employes—Commonwealth tax appraisers in offices of City Treasurer and Register of Wills.

1. A municipal corporation cannot impose upon the Commonwealth or any of its political subdivisions, administrative departments, boards, or commissions, any duties or obligations whatever, without its consent thereto.

2. The Commonwealth is under no legal duty or obligation to deduct, or approve the deduction, of any moneys due from its employes, who are residents of Philadelphia, to the City of Philadelphia, for or on account of the income tax levied upon such employes by the Philadelphia City Ordinance of December 13, 1939, or to submit any data with respect to such employes' salaries; and this is equally true as to expenditures by the Treasurer of the City of Philadelphia, and by the Register of Wills of Philadelphia County for salaries of Commonwealth employes, appointed by the Commonwealth or whose number and compensation are fixed by the Commonwealth, connected with their respective offices.

Harrisburg, Pa., January 29, 1940.

Honorable Warren R. Roberts, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your letter of January 19, 1940, relating to the income tax ordinance of the City of Philadelphia, approved December 13, 1939. This ordinance imposes an annual tax of one and one-half per centum on incomes earned after January 1, 1940, by residents of Philadelphia; on incomes of nonresidents of the city earned after said date for work done or services performed in the city; on the net profits earned after January 1, 1939, on businesses, professions and other activities conducted by residents; and on the net profits earned after January 1, 1939, on businesses, professions and other activities conducted in Philadelphia by nonresidents.

Section 4 of the ordinance requires employers within Philadelphia to deduct from salaries, wages, et cetera, paid to employees, at the time of payment, the tax imposed by the ordinance, and to pay said deducted tax to the city. The return made by the employer shall also contain the names and earnings of all his employees. The residence of the employer, under this section, appears to be immaterial; the test of his amenability to the ordinance seems to be whether or not he, within Philadelphia, employs anyone.

It is our understanding that the Department of the Auditor General employs at the Capitol residents of Philadelphia who are presumptively subject to this tax. It is also our impression that you appoint inheritance tax appraisers in the office of the register of wills of Philadelphia County (coterminous with the City of Philadelphia);

mercantile tax appraisers in the office of the city treasurer of Philadelphia; that these appraisers' salaries are set by you; but that said salaries are paid by the register and treasurer respectively out of inheritance taxes and mercantile taxes collected by and paid into said offices.

You inform us that the receiver of taxes of Philadelphia, who, under the tax ordinance, is charged with enforcing the same, has written you stating that "it will * * * be necessary * * * to have the tax taken out at the source" in the cases of (1) employees of the Department of the Auditor General who reside in Philadelphia, and (2) such employees who work in Philadelphia but do not live there.

You specifically ask to be advised what are your powers and duties, under the subject ordinance:

1. In auditing pay roll requisitions and drawing warrants thereon for the issuance of pay checks of employees of administrative departments, boards and commissions of the Commonwealth, who reside in Philadelphia; and

2. In approving expenditures of the city treasurer of Philadelphia and register of wills of Philadelphia County for salaries of employees appointed by you, or whose number and compensation are approved by you, and who assist in the assessment and collection of Commonwealth taxes by the treasurer and register.

The status of a municipality, such as the City of Philadelphia, is clearly expressed in Shirk *v.* Lancaster City, 313 Pa. 158, at page 162 (1933):

> Municipal corporations are creatures of the State, created, governed and abolished at its will. They are subordinate governmental agencies established for local convenience and in pursuance of public policy. The authority of the legislature over all their civil, political, or governmental powers is, in the nature of things, supreme, save as limited by the federal Constitution or that of the Commonwealth. * * * "They have no vested rights in their offices, their charters, their corporate powers, or even their corporate existence. This is the universal rule of constitutional law, and in no state has it been more clearly expressed and more uniformly applied than in Pennsylvania."

It is thus quite clear that a municipal corporation cannot impose upon the sovereign, the Commonwealth, any duties or obligations unless the Commonwealth consents thereto. The creature of the state cannot dictate to its creator. The City of Philadelphia cannot compel the Commonwealth, or any of its political subdivisions, administrative departments, boards or commissions, to submit any data to the city relating to names and salaries of their employees; or to deduct from such employees' pay and tax levied by Philadelphia.

It is equally clear that you need not approve any deductions by the treasurer of Philadelphia or by the register of wills of Philadelphia County, for payments made by said officials out of salaries of employees appointed by you, or whose number and compensation are approved by you, for or on account of the subject tax. Such employees are State employees, whether they are paid directly by the Department of the Auditor General out of funds appropriated to it for such purpose, or whether they are paid out of moneys collected for the Commonwealth.

It is, therefore, our opinion, that:

1. In auditing pay roll requisitions and drawing warrants thereon for the issuance of pay checks of employees of administrative departments, boards and commissions of the Commonwealth, which employees reside in Philadelphia, you are under no legal duty or obligation to deduct, or to approve the deduction of, any moneys due from such employees to the City of Philadelphia for or on account of the income tax levied upon such employees by the Ordinance of the Council of the City of Philadelphia, approved December 13, 1939.

2. In approving expenditures by the treasurer of the City of Philadelphia, and by the register of wills of Philadelphia County, for salaries of Commonwealth employees appointed by you, or whose number and compensation are fixed by you, you are under no legal duty or obligation to approve any deductions from said salaries by the treasurer or register, for payment, or on account of payment, of the tax levied upon such employees under the aforesaid ordinance.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 314

State Government—State employes in National Guard—Right to leave of absence—Pennsylvania National Guard Act of May 17, 1921, sec. 68—Members of reserve component of United States Army, Navy, or Marine Corps—Leave of absence for active service or field training—Act of July 12, 1935—Effect on pay.

1. A State officer or employe who is a member of the Pennsylvania National Guard is entitled, under section 68 of the Pennsylvania National Guard Act of May 17, 1921, P. L. 869, to a leave of absence from his duties without loss of pay,

time, or efficiency rating, on all days during which he shall be engaged in the active service of the Commonwealth or in field training ordered or authorized under the act applicable to such service.

2. A State officer or employe who is a member of a reserve component of the United States Army, Navy, or Marine Corps, and as such a member is engaged in the active service of the United States or in field training ordered or authorized by the Federal forces, is entitled, under the Act of July 12, 1935, P. L. 677, to a leave of absence for each day of such service up to 15 days in any one year, without loss of pay, time, or efficiency rating, regardless of the length of employment of the State employe during that year.

3. If a State officer or employe who is a member of a reserve component of the United States Army, Navy, or Marine Corps, renders his military services while on his regular vacation, he is entitled to his pay both as a State officer or employe and as a reserve officer, but if his pay received from services rendered as a reserve officer from the Federal Government, at any time other than during his regular vacation period, equals or exceeds his regular pay as a State employe, then he is not entitled, under part V(B) of the Rules and Regulations Relating to Extra Compensation, Leaves of Absence, and Office Hours, promulgated under the provisions of section 215, 222, 709(c) and 709(*d*) of the Administrative Code of April 9, 1929, P. L. 177, to his State pay, but merely to 15 days leave of absence in any one year.

Harrisburg, Pa., January 30, 1940.

Honorable W. H. Hitchler, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of October 9, 1939, requesting advice on the interpretation of the Act of July 12, 1935, P. L. 677 (49 PS §32), which is as follows:

> Section 1. Be it enacted, &c., That all officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any reserve component of the United States Army, Navy, or Marine Corps, *shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year* during which they shall, as members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces. (Italics ours.)

You state that you specifically desire to be advised in respect to the following questions in the interpretation of this act:

> 1. Is the allowance of fifteen days during any calendar year to be made without respect to the length of time of employment during that year?

In connection therewith, you submit the following example:

> If an employe is ordered to active duty as a Reserve Officer in the Army, Navy or Marine Corps on September 1 and remains on such duty after December 31 of the same year, is he to be paid for the fifteen days, or are the fifteen days to be reduced proportionately to the length of time he actually performed his duties as an employe of this Board?
>
> 2. If, under the aforementioned conditions, the employe is entitled to pay for fifteen days, and if the military duty extends into or beyond the next calendar year, is he to be paid for fifteen days in each succeeding calendar year until the termination of his military service?

Due to the fact that the military service of the Pennsylvania National Guard and that of the reserve component of the United States Army, Navy or Marine Corps are often confused as being one and the same service, we believe that an inquiry into the act of the legislature controlling both services will be helpful in the solution of the problem before us.

Section 68 of the Act of May 17, 1921, P. L. 869 (51 PS §95), provides as follows:

> All officers and employes of the Commonwealth of Pennsylvania, members of the Pennsylvania National Guard, shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall, as members of the Pennsylvania National Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized under the provisions of this act.

This act was not repealed by the Act of April 9, 1929, P. L. 177, commonly known as The Administrative Code of 1929. (See Informal Opinion No. 981.)

A study of these two acts readily reveals that they do not contain similar or overlapping provisions. In fact the two services, the National Guard and the "Reserve Component of the United States Army, Navy, or Marine Corps" are different. A study of the National Guard Act of May 17, 1921, P. L. 869, reveals that there is *no limit to the number of days of leave of absence which a member of the National Guard may be allowed from the State service,* provided his National Guard service is (1) in the active service of the Commonwealth, or (2) in field training ordered or authorized under the provisions of this act.

It should be kept in mind, however, that paragraph 5 of Memorandum No. 11, issued by The Adjutant General under date of May 11, 1938 and effective at the present time, provides that civil employes in the employ of the Commonwealth are entitled to either their military or civil pay, depending on which they choose to elect;

providing, however, that they are entitled to only one pay unless the military service is rendered during their authorized vacation period, in which case the employe or employes would be entitled to both civil and military pay during such period.

The Act of July 12, 1935, P. L. 677, provides that all State officers and employes of this Commonwealth who are members of a reserve component of the United States Army, Navy, or Marine Corps are entitled to their leaves of absence from their respective duties as employes of the Commonwealth without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year if they are engaged as members of such reserve components in (1) active service of the United States, or (2) field training ordered or authorized by the Federal forces.

We may shed some light on your problem by referring to the "Classification and Compensation System of Personnel Service" established by the Executive Board of the Commonwealth of Pennsylvania, effective as of September 1, 1933. Under part V, entitled "Rules and Regulations Relating to Extra Compensation, Leaves of Absences, and Office Hours," under the provisions of Sections 215, 222, 709(c) and 709(d) of The Administrative Code of 1929, as set forth on page 129 under the heading "Special Absence From Duties," it is provided:

> B. Members of the Reserve Corps of the United States Army may be granted absence from duties with pay by the Executive Board during the length of time which the employe shall have been in training camp, except where the pay allotments by the Federal Government equal or exceed the pay which the State employe received for his State service, in which case the employe shall be granted absence from duties without pay.

Evidently the legislature intended, under the Act of July 12, 1935, P. L. 677, to include the Navy and Marine Reserve Components as well as the Army Reserve Corps, and limited the leaves of absence of the various reserve members to fifteen days in any one year without loss of pay, time or efficiency rating.

An interpretation of the act under consideration and section B of the Rules and Regulations, under the heading "Special Absence From Duty" leads to the conclusion that before the passage of the Act of 1935, P. L. 677, there was no limitation on the leaves of absence and that a member of the Army Reserve Corps would be entitled to leave of absence without loss of pay, excepting where the pay allotted by the Federal Government equalled or exceeded the pay which the employe received for his State service, in which case

the employe was entitled to be granted absence from State duties without pay.

However, the Act of July 12, 1935, P. L. 677, includes members of the Reserve Corps of the Army, Navy and Marine Corps and provides for leaves of absence from the respective duties without loss of pay, time or efficiency rating on all days not exceeding fifteen days in any one year if they are engaged as such members of a reserve corps in the active service of the United States or in field training ordered by the Federal Government.

In considering the problem at hand, we must not lose sight of the fact that our State has from long custom treated members of our military service with special consideration. Evidence of this can be found in the cases where the service men were given special consideration such as in matters of funeral expenses, rating under our civil service positions, etc.

We believe, therefore, that in these troubled times when our State and Nation are deeply concerned with the preparation of a proper and sufficient defense for the common welfare of their citizens, a liberal construction should be given to the act under consideration.

In Informal Opinion No. 1043, the rule is laid down in accordance with the law under section 222 of the Act of April 9, 1929, P. L. 177, and the ruling of the Executive Board (effective since August 1, 1933) in section (d) on page 125 of the "Classification and Compensation System of Personnel Service of Pennsylvania," that in the case of vacation with pay, a State employe is entitled to one and one-quarter days for each month of employment in all cases where an employe is employed less than a full year. In the case of a full year's employment, the vacation period allowable with pay is fifteen days.

It is of particular significance that no such limitation appears to apply to the leaves of absence to which a member of the Reserve Corps of the United States Army, Navy, or Marine Corps is entitled. It is common knowledge that reserve officers are required to undergo periodic training, or to report for active duty in time of national emergency, and evidently the legislature had this in mind when it enacted the law that a member of a reserve component of the Army, Navy, or Marine Corps would be entitled in any one year to fifteen days' leave of absence without loss of pay, time or efficiency rating.

In view of the fact that the fifteen day period is generally spent by a member of a reserve corps in field training in better preparing himself for the discharge of his duties as a member of the reserve component of the Army, Navy, or Marine Corps, or in active service of the United States, all of which helps to provide for the common defense so necessary to the continued welfare of the people of this

Commonwealth and of this Nation, we feel that a State officer or employe who is a member of the Army, Navy, or Marine Reserve Corps, should be entitled to a full fifteen days' leave of absence in a year without loss of pay, time or efficiency rating in case he is ordered to active service as a member of such reserve corps or ordered or authorized into field training by the Federal forces, regardless of the length of his employment with the State during the year when his services as a member of the Reserve Corps are rendered.

It is to be noted, however, that while members of the reserve component of the Army, Navy, or Marine Corps are "entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year," this is true only for those days during which they shall "as members of such reserve component, *be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces.*" (Italics ours). We interpret this to mean that a State officer or employe, if he is engaged as a member of a reserve component of the Army, Navy, or Marine Corps, is entitled up to fifteen days in any one year "without loss of pay, time, or efficiency rating." Naturally a State officer or employe is entitled to his fifteen days' leave of absence under the provisions of the act before us and under consideration only if he is engaged in the active service of the United States or in field training ordered or authorized by the Federal forces. Should he be engaged in such service for a period less than fifteen days, then he is entitled only for those days he is so engaged not in excess of fifteen in number in any one year.

By the same reasoning, it follows that if a State officer or employe as a member of a reserve component of the Army, Navy, or Marine Corps is not engaged in the active service of the United States or in field training ordered or authorized by the Federal forces in any one year, although he is such a member he is not entitled to any leave of absence from his duties.

From our previous discussion, it follows that the answer to your second example cited to us for consideration must be guided by the same line of reasoning that we have applied heretofore. We are constrained to hold that, even if a State officer or employe is ordered into active service and does not render any service as a State officer or employe during a year or portion thereof, he is still entitled to a leave of absence without loss of pay, time, or efficiency rating on all days not exceeding fifteen in one year.

We are of the opinion, that:

1. A State officer or employe who is a member of the Pennsylvania National Guard is entitled to a leave of absence from his duties

without loss of pay, time, or efficiency rating on *all days* during which he shall be engaged in the active service of the Commonwealth or in field training ordered or authorized under the act applicable to such service.

2. A State officer or employe who is a member of a reserve component of the Army, Navy, or Marine Corps, and as such a member is engaged in the active service of the United States or in field training ordered or authorized by the Federal forces, he is entitled to a leave of absence for each day of such service up to fifteen days in any one year, without loss of pay, time, or efficiency rating regardless of the length of employment of the State employe during that year.

3. If a State officer or employe who is a member of such a reserve component renders his military service while on his regular vacation, he is entitled to both his pay as a State officer or employe and as a reserve officer, but if his pay received for services rendered as a reserve officer from the Federal Government at any time other than during his regular vacation period, equals or exceeds his regular pay as a State employe, then he is not entitled to his State pay but merely to his fifteen day leave of absence in any one year.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 315

State Government—Preferential treatment of war veterans—Preference of appointment—Preference of employment—Applicability to civil service employes —Acts of May 19, 1887, April 12, 1939, and Act of June 27, 1939.

1. The Act of May 19, 1887, P. L. 132, as amended April 12, 1939, P. L. 27, gives preference both of appointment and of employment in State positions, exclusive of those under the civil service system, to honorably discharged soldiers, sailors, marines, and nurses, who rendered service in any war in which the United States has been engaged.

2. The Act of June 27, 1939, P. L. 1198, being a comprehensive treatment of the rights of honorably discharged soldiers, sailors, marines, and nurses, who rendered service in any war in which the United States has been engaged, and being, by the express terms of section 5 thereof, the exclusive law on the subject, repeals the provisions of the earlier Act of May 19, 1887, as amended by the Act

of April 12, 1939, relating to the same subject, though the provisions of the earlier act, as amended, governed between September 1, 1939, and January 1, 1940.

3. The Act of June 27, 1939, P. L. 1198, gives preference of appointment to all State positions, including those under the civil service system, to honorably discharged soldiers, sailors, marines, and nurses who rendered service in any war in which the United States has been engaged, but gives no preference of employment, and such persons are not, therefore, entitled to any preference in respect of dismissals or furloughs.

Harrisburg, Pa., January 31, 1940.

Honorable P. Stephen Stahlnecker, Chairman, Unemployment Compensation Board of Review, Department of Labor and Industry, Harrisburg, Pennsylvania.

Sir: We have your communication of December 13, 1939 in which you ask to be advised concerning preferential treatment of honorably discharged soldiers, sailors, marines and nurses under the Acts of April 12, 1939, P. L. 27 (51 PS §481) and June 27, 1939, P. L. 1198 (51 PS §491.1, et seq.), with particular reference to the provisions of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. 2897, as amended (43 PS §751, et seq.).

Statutory preferential treatment of United States war veterans in public employ in the Commonwealth has a rather long history, dating back to the Act of May 19, 1887, P. L. 132 (51 PS §481).

The Act of May 19, 1887, supra, gave preference of appointment and employment to honorably discharged soldiers, sailors and marines who fought in the Union cause; the Act of April 12, 1939, supra, added nurses to the aforesaid groups, and enlarged the scope of said act to include any war in which the United States was engaged, as follows:

> Section 1. Be it enacted, &c., That, in every public department and upon all public works of the State of Pennsylvania, *honorably discharged soldiers, sailors, marines and nurses,* who were engaged in the military or naval service of the United States *during any war in which the United States engaged, shall be preferred for appointment and employment;* age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the other requisite qualifications. (Italics ours)

Sections 3 and 4 of the Act of June 27, 1939, P. L. 1198 provide, in part, as follows:

> Section 3. Whenever any soldier shall successively pass a civil service examination for a public position under the Commonwealth, or any political subdivision thereof, and shall thus establish that he possesses the qualifications re-

quired by law for appointment to such public position, such soldier's examination shall be marked or graded an additional ten per centum above that credited for the examination, and the total mark or grade thus obtained shall represent the final mark or grade of such soldier and shall determine his standing on any eligible list certified or furnished to the appointing power.

Section 4. * * *

Whenever any soldier possesses the requisite qualifications and his name appears on any eligible list certified or furnished, as the result of any civil service examination, the appointing power, *in making an appointment to a public position, shall give preference to such soldier notwithstanding that his name does not stand highest on the eligible list.*

In making an appointment to public office where a civil service examination is required, the appointing power may give preference to any soldier who has passed the required examination for such position and possesses the requisite qualifications, although his name does not appear on the list of eligibles certified or furnished to the appointing power. (Italics ours.)

The Unemployment Compensation Law, supra, sets up a system of civil service, and in section 208 (f) provides for additional rating for military service as follows:

* * * Provided, however, That in the final rating of all applicants persons who were engaged in the military or naval service of the United States during any war in which the United States was engaged, and who have an honorable discharge from such service, shall receive, in addition to all other ratings, an additional five per centum, and any such person who shall have been disabled by wounds or in any other manner while engaged in such service (so long as he is able to perform the work of the employment for which he is examined), and who shall submit satisfactory evidence to the board that such disability was received while engaged in such service, shall be rated an additional five per centum over and above the five per centum hereinbefore set forth, and in either case, the total per centum mark or grade thus obtained shall determine the order of standing of such persons on any list of eligibiles.

The Unemployment Compensation Law, in section 208, subsection (e), provides that the secretary shall prescribe by rules and regulations the qualifications to be possessed by persons desiring employment in the various grades of employment in the administration of this act. Under the Act of June 27, 1939, supra, it is necessary that applicants shall possess requisite qualifications before they can be preferred in appointment, though they can be preferred even if

they have not attained a higher rating among the list of eligibiles who have taken the civil service examination and may even be appointed though their names do not appear on the list of eligibles.

Since the Act of April 12, 1939, P. L. 27, becoming effective September 1, 1939, and the Act of June 12, 1939, P. L. 1198, becoming effective January 1, 1940, were both enacted during the same session of the legislature, the question arises as to which act governs. It should be noted that Section 5 of the Act of June 27, 1939, P. L. 1198 expressly declares:

> This act shall be construed as being the *exclusive law* applying to the Commonwealth and its political subdivisions in giving preference to soldiers in *appointment* to public position. (Italics ours.)

Since the Act of June 27, 1939, supra, is comprehensive, includes the substance of the Act of April 12, 1939, supra, and expressly states that it is "the exclusive law," even though the two acts are in pari materia, since the later act is obviously intended as a substitute for the earlier act, the earlier Act of May 19, 1887, as amended by the Act of April 12, 1939, supra, was repealed by the later Act of June 27, 1939. It should be noted, however, that the earlier Act of April 12, 1939 would govern between September 1, 1939 and January 1, 1940, but that the later Act of June 27, 1939 would govern after January 1, 1940.

The earlier Act of April 12, 1939, P. L. 27, which is controlling between September 1, 1939 and January 1, 1940 has no application to our civil service systems. The Unemployment Compensation Law sets up a complete civil service system in section 208. The Act of May 19, 1887, as amended, applies to appointments in the State service generally, and does not apply to the State departments which are subject to civil service.

The civil service acts are complete in themselves. The Act of May 19, 1887, supra, as above stated, only applies to appointments made in departments not subject to civil service. A particular statute which relates to a portion of the subject covered generally by a general law is usually considered an exception to the general law: See the case of Thomas *v.* Hinkle, 126 Pa. 478 (1889) where the court said:

> Hence if there are two acts, of which one is special and particular, and clearly includes the matter in controversy, *whilst the other is general,* and would, if standing alone, include it also, and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between *it and the special provision,* it must be taken that the latter is decided as an exception to the general provision. **(Italics ours.)**

The later Act of June 27, 1939 does *expressly* apply to the civil service system as well as to the remaining State service, but gives a veteran preference only in the matter of appointments.

There is nothing contained in the Act of June 27, 1939, supra, which in any way affects the provisions of the Unemployment Compensation Law so far as respects the power of the Secretary of Labor and Industry in dismissing employes for cause, even though they were honorably discharged soldiers, sailors, marines and nurses as provided by the Act of June 27, 1939, supra.

Section 208, subsection (o) of the Unemployment Compensation Law provides that the Secretary of Labor and Industry may suspend or dismiss an employe of the department engaged in the administration of this act for delinquency or misconduct in his or her duties under this act. This paragraph applies to any and all employes irrespective of any preference.

The subsection also provides that the secretary may, by reason of lack of funds or curtailment of work, furlough any employes of the department engaged in the administration of the Unemployment Compensation Act.

Though under the earlier Act of May 19, 1887, as amended April 12, 1939, supra, preference was given "of appointment or employment to honorably discharged soldiers, sailors, marines and nurses," the later Act of June 27, 1939, supra, though it extends veteran preference to civil service employes as well as those employed in other public positions, limits such preference to *appointment* only. Since these veteran preference statutes should be strictly construed (See American Jurisprudence—Civil Service—volume 10, page 929) preference can only be given to veterans in the matter of appointment, as stated in the act, and cannot be extended to furlough which is a form of dismissal rather than appointment.

In view of the foregoing, we are of opinion, that though the Act of May 19, 1887, P. L. 132, as amended April 12, 1939, P. L. 27, exclusive of the civil service systems, gives preference for both *appointment* and *employment* to honorably discharged soldiers, sailors, marines and nurses who rendered service in any war in which the United States has been engaged, the Act of June 27, 1939, P. L. 1198 gives preference only for appointments, but extends such preference to the civil service systems as well as the rest of the State service. Since this preference is limited to appointments and such statutes are strictly construed, they do not include furloughs. If furloughs are made, veterans are not retained in preference to other employes; in other words, honorably discharged veterans, having requisite ratings and qualifications, are now pre-

ferred for appointment but are not preferred in case furloughs are made, furloughs being a form of dismissal and not appointment.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 316

Taxation—Federal tax on income of State employes—Right to require State to report salaries paid—Right to inspect records—Revenue Act of May 10, 1934, sec. 147—Public Salary Tax Act of April 12, 1939.

1. A sovereign State is not a "person" within the meaning of section 147 of the Revenue Act of May 10, 1934, 48 Stat. at L. 680, requiring all persons making payment to others of $1,000 or more in any taxable year to render to the Federal Bureau of Internal Revenue a return setting forth the amount and name and address of the recipient of such payment.

2. The Federal Government cannot require a sovereign State to submit to it reports of salaries paid to State employes, for the purpose of checking upon returns of income taxable under the Public Salary Tax Act of April 12, 1939, 53 Stat. at L. 574, since such a requirement would place a burden upon the State, but the State's records should be open to the Federal Government to the extent necessary for the latter to obtain the desired information.

Harrisburg, Pa. February 2, 1940.

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

Sir: You have requested this department to advise you what obligation, if any, rests upon the Commonwealth, or any of the departments, boards or commissions thereof, with respect to: (1) the Public Salary Tax Act of 1939, approved April 12, 1939, in so far as it amends the Federal income tax laws, relating to the definition of "gross income," 26 USCA Sec. 22 (a); and (2) in view of the Public Salary Tax Act of 1939, supra, with respect to Section 147 of the Act of May 10, 1934, 48 Stat. 726, 26 USCA Sec. 147, which relates to information to be supplied by employers, to the Federal Government, of salaries paid by them.

The Public Salary Tax Act of 1939 enlarged the term "gross income," as used in the Federal income tax laws, 26 USCA Sec. 22, to include salaries, wages and compensation received for personal

service as an officer or employe of a state, or any political subdivision thereof, or any agency or instrumentality thereof.

Section 147 of the Act of May 10, 1934, supra, provides, in part, that:

> * * * All persons * * * making payment to another person * * * of $1,000 or more in any taxable year * * * shall render a true and accurate return * * * setting forth the amount * * * and the name and address of the recipient of such payment.

The word "persons," as used supra, does not appear, by any relevant statutory definition, to include a sovereign state of the United States; nor would it, otherwise. Therefore, there would seem to be no statutory duty imposed upon the Commonwealth of Pennsylvania, as an employer, to file any return under section 147, supra.

By letter of January 18, 1940, the Commissioner of Internal Revenue addressed Governor Arthur H. James to the effect that the Commonwealth, *in compliance with Section 147 of the Internal Revenue Code,* supra, must file such returns on Form 1099, accompanied by a return on Form 1096. We are at a loss to know where, in said section 147, the Commissioner finds any authority for his request.

To the same import as that of the Commissioner, are letters from the Collector of Internal Revenue of the First Collection District of Pennsylvania, addressed to the Governor, and to you, as Budget Secretary.

It follows, therefore, that the authority of the collector, or the commissioner, to make the request referred to, must derive from regulations established by the United States Treasury Department. The latest available of these are Regulations 94; and therein is contained no such authority. No later regulations have been called or submitted to our attention.

The traditional immunity to tax of the salaries of employes of the several states, by the United States, had its remote origin in the law of intergovernmental relations, begun in McCulloch *v.* Maryland, 4 Wheat. 316; 4 L. ed. 579 (1819), wherein it was held that a state cannot impose taxes upon instrumentalities constitutionally created by the Federal Government, unless Congress consents thereto. It was in this case that Mr. Chief Justice Marshall uttered the famous dictum, "* * * the power to tax involves the power to destroy." The absolutism of this fatalistic admonition was later qualified by Mr. Justice Holmes, who said, in Panhandle Oil Co. *v.* Mississippi, 277 U. S. 218, 223; 72 L. ed. 857, 859; 48 S. Ct. 451; 56

A. R. R. 583 (1928) (dissent): "The power to tax is not the power to destroy while this court sits."

The more immediate origin of this freedom from taxation by the Federal Government of compensation paid employes by a state, and conversely, the taxation by a state of Federal salaries, was in Collector *v.* Day (Buffington *v.* Day), 11 Wall. 113; 20 L. ed. 122 (1871), wherein it was held that the United States could not impose a tax upon the salary of a state judge; although in Dobbins *v.* Commissioners of Erie County, 16 Pet. 435; 10 L. ed. 1022 (1842), it was decided that a state could not tax the salary or emoluments of an officer of the United States.

In short, neither government, State or Federal, could tax the salaries of employes of the other.

This doctrine of our constitutional law was reexamined and abandoned in Graves, et al. *v.* New York, ex rel. O'Keefe, 306 U. S. 466; 83 L. ed. 927, decided March 27, 1939. As a result, in so far as the United States was concerned, the Public Salary Tax Act of 1939, supra, was enacted by Congress.

The power to tax is a prime attribute of sovereignty. The United States possesses this power in so far as the Constitution delegates the power to the Government. The several states possess the power inherently. But, except within the Constitution, neither a state can tax the Government nor can the latter tax the former; and the same rule applies to instrumentalities of either: McCulloch *v.* Maryland, supra. And, now, either may tax the salaries of employes of the other: Graves *v.* O'Keefe, supra.

But to require the Commonwealth to submit reports and returns to the Federal Government, such as those requested by the commissioner and collector, as hereinbefore mentioned, would be placing a burden upon the Commonwealth by the Government.

In a memorandum by you to the Governor, dated January 9, 1940, you say "* * * that the State would have to file one of these reports [Form 1099] for practically every State employe, of whom there are more than 30,000." It is self-evident that to do this work would entail special outlay of funds by the Commonwealth, to pay those of its employes who would be engaged in doing it. In our opinion, the Commonwealth cannot be compelled to do this. It is of interest to note that the Attorney General of the State of Michigan has ruled likewise in an opinion addressed to the Auditor General of that state on November 20, 1939. Also, in an opinion by this department of December 14, 1914, Op. Atty. Gen. 1913-1914, page 409; 43 C. C. 295 (1914), it was ruled:

> The federal government cannot by law impose any specific duties upon state officials with reference to the collection of the tax provided by the act of congress.

This decision was upon the question of whether licenses issued by the Commonwealth's Insurance Department need have affixed thereto Federal revenue stamps.

However, we believe the Commonwealth's records should be opened to the Federal Government to the extent necessary for the latter to obtain the information it requests. Such action on the part of the Commonwealth would, presumably, cause it no extra expense.

Of course, as a matter of comity and cooperation between State and Federal governments, it may be advisable and proper policy for the Commonwealth to do as requested. Upon this we express no opinion, as it is neither our duty nor our proper function. In states wherein income taxes obtain, the answer would appear obvious; reciprocal exchange of information between such states and the Federal Government would seem the sensible and natural course of procedure, for all governments would benefit. In states such as ours, which have no income tax—but which may have in the future—the question is one of policy to be decided by the executive or legislative branches of the Commonwealth, or by both.

It is the opinion of this department, that you are under no legal obligation to prepare and file Forms 1099 and 1096, as requested by the Commissioner of Internal Revenue and the Collector of Internal Revenue of the First Collection District of Pennsylvania (or by the collector of any other district), with respect to compensation paid by the Commonwealth, or any of its departments, boards or commissions, to employes thereof.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 317

Game—Acceptance of fines without hearing—Juveniles—The Game Law of June 3, 1937, sec. 1203—Juvenile Court Law of 1933—Juvenile Court Law of Allegheny County of 1933—Legislative intent.

The Juvenile Court Law of June 2, 1933, P. L. 1433, as amended by the Act of June 15, 1939, P. L. 394, and the Juvenile Court Law of Allegheny County of June 3, 1933, P. L. 1449, as amended by the Act of June 15, 1939, P. L. 397, were intended to prevent the association of minors, accused of crime, with criminals, and their incarceration in jails, and do not, therefore, in any way prevent representatives of the Game Commission from accepting penalties from juvenile per-

sons under the provisions of section 1203 of The Game Law of June 3, 1937, P. L. 1225, upon acknowledgment of guilt without a hearing.

Harrisburg, Pa., February 7, 1940.

Honorable Seth Gordon, Executive Director, Game Commission, Harrisburg, Pennsylvania.

Sir: We have your letter of December 8 referring to Acts No. 226, P. L. 394, and No. 227, P. L. 397, approved June 15, 1939, defining the age of a juvenile person to be less than 18 years, and asking to be advised whether or not representatives of the Game Commission may legally accept penalties from juvenile persons under the provisions of Section 1203 of the Act of June 3, 1937, P. L. 1225.

The Act of June 15, 1939, P. L. 394, amends the Act of June 2, 1933, P. L. 1433, known as "The Juvenile Court Law," and defines the word "child" as meaning a minor under the age of 18 years, rather than 16 years. This act of 1933 contains the following paragraphs in its preamble:

> Whereas, The welfare of the Commonwealth demands that children should be guarded from association and contact with crime and criminals, and the ordinary process of the criminal law does not provide for such care, guidance and control as are essential to children in the formative period of life; and
>
> Whereas, Experience has shown that children, lacking proper parental care or guardianship, are led into courses of life which may render them liable to the penalties of the criminal law, and that the real interests of such children require that they be not incarcerated in jails and penitentiaries, as members of the criminal class, but be subjected to wise care, guidance and control so that evil tendencies may be checked and better instincts be strengthened; and
>
> Whereas, To these ends, it is important that the powers of the courts, with respect to the care, guidance and control over delinquent, neglected and dependent children should be clearly distinguished from those exercised in the ordinary administration of the criminal law; * * *

Section 4 of the same act, as amended by the Act of June 15, 1939, P. L. 394 (11 PS §246), provides as follows:

> Section 4. Initiation of Proceedings.—The powers of the court may be exercised—
>
> 1. Upon the petition of any citizen, resident of the county, setting forth that (a) a child, giving his or her name, age, and residence, is neglected, dependent or delinquent, and is in need of care, guidance and control, (b) the names and residence of the parents, if any, or of his or her legal

guardian if there be one, (c) the name and residence of the person or persons having control of the child, and (d) the name and residence of the nearest relative if no parent or guardian can be found.

2. Upon commitment, by a magistrate, alderman, or justice of the peace, of a child arrested for any indictable offense, other than murder, or for the violation of any other laws of this Commonwealth or the ordinance of any city, borough or township.

3. There shall be no preliminary hearings in any cases affecting dependent, delinquent or neglected children under the age of eighteen years.

The Act of June 3, 1937, P. L. 1225 (34 PS §§1311, 1203), known as "The Game Law," provides in part as follows:

Section 1203. Acknowledgment of Guilt.—Any person charged with violating any provisions of this act may sign an acknowledgment of the offense committed, either before or after the beginning of suit, and pay to any duly appointed and commissioned game protector, or deputy game protector, the fine provided by this act, together with costs accruing to that date, and surrender to the Commonwealth any bird or animal, or part thereof, or any article, implement, device or equipment the use of which is expressly forbidden by this act, unlawfully taken or possessed. Such person shall receive a printed receipt therefor, which shall bear the imprint of the seal of the commission and the signature of its executive director, which shall be evidence of full satisfaction of the offense committed.

Inasmuch as it was the intention of the Act of 1933, P. L. 1433 to prevent juveniles accused of criminal law violations from associating with criminals, the acceptance of the fines provided by the Game Law upon acknowledgment of guilt, without a hearing of any kind and without going before a magistrate, alderman or justice of the peace, would be a desirable accomplishment of the Juvenile Court Law.

Act No. 227, approved June 15, 1939, P. L. 397, amends the Act of June 3, 1933, P. L. 1449, (11 PS §269), known as the "Juvenile Court Law of Allegheny County," and defines the word "child" to mean a person less than 18 years of age, rather than 16 years. Section 2 of this act, as amended, reads as follows:

Section 202. Jurisdiction—The court hereby created shall have jurisdiction—

(a) In all proceedings affecting delinquent, neglected and dependent children.

(b) Of all cases wherein an adult is charged with contributing to, or encouraging, or tending to cause, by any act of omission or commission, the delinquency, neglect or dependency of any child, or charged with any act of omission or commission with respect to any child, which act of omission or commission is a violation of any law of this Commonwealth or ordinance of any city, borough or township.

(c) In all proceedings relating to the appointment of guardians of the wards of the juvenile court.

(d) In all procedings for the support of a ward of the juvenile court.

(e) In all summary proceedings and suits for a penalty wherein the defendant is a child under sixteen years of age.

(f) To inquire, under oath or affirmation, of all crimes, misdemeanors and offenses whatsoever against the laws of this Commonwealth, which shall be triable in the county, wherein the person charged is a child under eighteen years of age.

(g) To take, in the name of the Commonwealth, all manner of recognizances and obligations heretofore taken and allowed to be taken by any justice of the peace or the courts of quarter sessions in all cases where the person charged with crime, misdemeanor or offense is under the age of eighteen years, and the court shall certify such as shall be taken in relation to any crime not triable in said court to the next court of quarter sessions or of oyer and terminer having power to take cognizance thereof.

(h) To continue or discharge the recognizances and obligations taken as aforesaid, or certified into said court by any justice of the peace of said county, and to inquire of, hear and determine all complaints which shall be found thereon.

The said court shall also have and exercise such other jurisdiction and powers, not herein enumerated, as may have been heretofore or may be hereafter given to the courts of quarter sessions of the peace, sitting as a juvenile court, or of any judge of said court, sitting as a juvenile court judge, within the several counties of this Commonwealth, or the County Court of Allegheny County, sitting as a juvenile court, in proceedings affecting the treatment and control of dependent, neglected, incorrigible and delinquent children under the age of eighteen years, and all laws relating to such jurisdiction and powers of the courts of quarter sessions, sitting as juvenile courts, or the County Court of Allegheny County, sitting as a juvenile court, are hereby made applicable to said juvenile court.

While this act contains no preamble, it follows the above mentioned act of June 2, 1933, and because of the similarity of its provisions with that act, we are led to believe that it was intended to

accomplish the same ends as the act of 1933, and we therefore feel that it was the intention of both acts, together with their amendments, to prevent the association of minors, accused of crime, with criminals, and their incarceration in jails. It is also of importance to note that both acts set forth very definitely when the powers of the court may be exercised or when the court shall have jurisdiction, but neither act covers the situation under discussion.

As the acceptance of a plea of guilty would, in no sense, subject a juvenile to the association and surroundings intended to be avoided, we are of the opinion that, upon acknowledgment of guilt by any juvenile and the tender of the fine imposed by the Game Law to any commissioner, game protector, or his deputy, such fine and costs may be legally accepted before the institution of any action.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 318

Taxation—Liability of sovereign—Department of Public Assistance—Taxes incidental to institution of legal proceedings—Tax on recording assignment of mortgages—Tax on probate—Act of April 6, 1830, secs. 3 and 4—Register of Wills Act of June 7, 1917, sec. 24.

1. The Department of Public Assistance, being a branch of the sovereign State, is not subject to the tax imposed by section 3 of the Act of April 6, 1830, P. L. 272, upon the entry of an amicable action, the institution of suit in assumpsit, or the issuance of an attachment execution, or to the tax imposed by section 4 of the act upon the recording of an assignment of mortgage to it.

2. The Department of Public Assistance is not subject to the tax of $1 provided by section 24 of the Register of Wills Act of June 7, 1917, P. L. 415, as amended by the Act of April 6, 1921, P. L. 94, upon the probate of any will and the grant of letters testamentary thereon, in cases in which it secures the appointment of one of its claim settlement agents as the administrator of a decedent's estate against which it has a claim, but it is not good practice to appoint such agents as administrators.

Harrisburg, Pa., February 15, 1940.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of De-

cember 11, 1939, requesting our advice as to imposition of certain taxes in view of the rule laid down in Formal Opinion No. 287 to the effect that the sovereign cannot be taxed unless it is definitely and expressly included in the taxing statute.

You state that the Department of Public Assistance is being billed for the State tax of fifty cents by the prothonotary when it enters an amicable action, brings suit in assumpsit, or issues attachment execution, and by the recorder of deeds when it records the assignment of mortgage to it by an assistance beneficiary.

These taxes are imposed by virtue of the Act of April 6, 1830, P. L. 273, section 3 (72 PS §3172) concerning prothonotaries, as follows:

> The prothonotaries of the courts of common pleas and of the district courts, and the prothonotary of the supreme court having original jurisdiction and the court of nisi prius of this commonwealth shall demand and receive on every original writ issued out of said courts (except the writ of habeas corpus), and on the entry of every amicable action, the sum of fifty cents; and on every writ of certiorari issued to remove the proceedings of a justice or justices of the peace, or aldermen, the sum of fifty cents; on every entry of judgment by confession or otherwise, where suit has not been previously commenced, the sum of fifty cents; and on every transcript of a judgment of a justice of the peace or alderman, the sum of twenty-five cents.

Section 4 of the Act of April 6, 1830, P. L. 273 (72 PS §3173) concerning recorders of deeds, provides as follows:

> The several recorders of deeds shall demand and receive for every deed, and for every mortgage or other instrument in writing offered, to be recorded, fifty cents.

The rule contained in our Formal Opinion No. 287 is applicable to the above situations of entering amicable action, bringing suit in assumpsit; or issuing attachment execution, and recording assignment of mortgages to the Department of Public Assistance by an assistance beneficiary. The legal principle therein cited that the sovereign cannot be taxed unless it is definitely so stated and included in the statute imposing the tax, governs. There is nothing in the act of April 6, 1830, supra, which expressly or impliedly imposes the State tax of fifty cents on the sovereign.

You further inquire whether the Department of Public Assistance should continue to pay registers of wills the one dollar tax provided by the Act of June 7, 1917, P. L. 415, section 24, as amended by the Act of April 6, 1921, P. L. 93, section 1 (20 PS §2023) whenever it secures the appointment of one of its claim settlement agents as the administrator of a decedent's estate against which it has a claim.

The Act of June 7, 1917, P. L. 415, section 1, as amended, provides as follows:

> On the probate of any will and the granting of letters testamentary thereon, also on the granting of any letters of administration, every register shall demand and receive, for the use of the Commonwealth, in each case, the sum of one dollar.

You refer to instances where your department secures the appointment of one of its claim settlement agents as administrator of a decedent's estate against which it has a claim. We have already advised you that it is not good practice to appoint claim settlement agents as administrators, since they are employes of the Commonwealth of Pennsylvania. If a claim settlement agent of the Department of Public Assistance of the Commonwealth of Pennsylvania, contrary to our advice, should act as administrator, since he is not acting individually but for the Commonwealth, the register of wills cannot collect the tax of one dollar in accordance with the broad legal principle that the sovereign cannot be taxed unless the sovereign is definitely and expressly included in the taxing statute.

However, since you have already been advised that the department must refrain from having its employes act as fiduciaries, the question of tax is eliminated since the private individual designated for appointment will advance the tax and be reimburse from the assets of the estate.

In view of the foregoing, we are of the opinion, that the tax of fifty cents, imposed by the Act of April 6, 1830, P. L. 273, section 3, should not be collected by the prothonotary when your department enters an amicable action, brings suit in assumpsit, issues attachment execution, or records an assignment of mortgage or other document. The tax of one dollar, payable to the register of wills under the Act of June 7, 1917, P. L. 415, section 24, as amended, cannot be collected from the Commonwealth in accordance with the broad legal principle that the sovereign cannot be taxed unless expressly included in the taxing statute. However, as formerly advised, a claim settlement agent, or other employe of the Commonwealth, should not act as administrator or other fiduciary, but a private individual should be designated. When a private individual is thus designated to act as administrator, the tax of one dollar will be collected by the register of wills, and paid as one of the administration costs against the estate. This tax and other administration costs, including accountants' commissions, are first paid out of the assets

in the estate in the hands of the administrator before creditors are paid or distribution of funds made.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 319

Securities—Registration of dealers—Amendment—Changes of address of dealers or salesmen—Business or residence—Noting changes without amendment—Fees—Pennsylvania Securities Act of June 24, 1939.

It is within the province of the Pennsylvania Securities Commission to determine what circumstances, other than changes in personnel as to which amended registration certificates are required by section 7 of the Pennsylvania Securities Act of June 24, 1939, P. L. 748, require amended registration certificates, and the commission is empowered by the act to make and enforce rules and regulations upon the subject.

2. The Pennsylvania Securities Commission may and probably should require an amended registration certificate in case the office address of a registered dealer is changed, but it need not and probably should not require such amendment in case of change of residence of a registered dealer or in case of change of address, either business or residence, of a salesman, though it might properly require notice of any such changes.

3. Where application is made to the Pennsylvania Securities Commission for an amended registration certificate under circumstances where such an amendment is not required, the commission may properly accommodate the applicant, charging the fee of $20 required by section 27 of the Pennsylvania Securities Act of June 24, 1939, P. L. 748, for that service.

4. The Pennsylvania Securities Commission has no authority to make a charge for noting changes of address upon its records.

Harrisburg, Pa., February 15, 1940.

Honorable Walter C. Miller, Chairman, Pennsylvania Securities Commission, Harrisburg, Pennsylvania.

Sir: By memorandum of January 2, 1940 you inquired as to the interpretation which this department places upon certain sections of "The Pennsylvania Securities Act" of June 24, 1939, P. L. 748. You are particularly interested in determining if your commission must require amendments of registration certificates for the sole reason that a dealer (included in which term is each partner, if a partner-

ship, and each officer, director, manager, etc., if a corporation) has changed his home or business address, or in the case of a salesman, if such salesman has changed his address.

You further inquire concerning the right of your commission to require, by rule and regulation, that dealers and salesmen who have so changed such an address shall notify your commission thereof.

You also ask us to consider the matter of fees which must be charged in case amended registration certificates are required under such circumstances.

The Pennsylvania Securities Act, enacted in 1939, is a new act. It is true, of course, that your commission had been operating previously under the Act of April 30, 1927, P. L. 273, a similar act, but the act of 1927 and all its amendments are repealed by section 29 of the 1939 act.

An examination of the 1939 act indicates that, with great particularity, the address of the dealer, and the names, residences and business addresses of all persons interested in the business as principals, officers, directors, or managing agents, are to be shown on the registry certificate (section 6). Section 8 contains similar provisions as to the residence of a salesman. But the act is silent on the matter of requiring amended registration certificates in cases of change of address of a dealer or salesman.

Section 7 refers to change in personnel as "necessitating" an amended registration certificate. Section 7 reads as follows:

> The certificates of registered dealers shall be in such form as the commission may determine. Changes in the certificates necessitated by changes in the personnel of a partnership, or in the principals, officers, directors, or managing agents of any dealer, may be made at any time, upon written application setting forth the fact necessitating the change. Upon the issue of the amended certificates, the original certificate and the certified copies thereof outstanding shall be promptly surrendered to the commission.

It will perhaps be of value at this point to say that the design of The Pennsylvania Securities Act of 1939 is to secure regulation of sales of securities in this Commonwealth by providing for a strict regulation of dealers. Evidence of this is the fact that throughout the act the emphasis is placed upon dealers. Salesmen are, in fact, registered only upon the application of a dealer, and upon termination of employment of a salesman for a registered dealer, that particular registration of a salesman is cancelled by the dealer notifying the commission at once that the salesman has left its employ and by the salesman surrendering at once his registration certificate to the commission (section 8).

The title of the act is additional evidence that the emphasis is upon the registration of dealers.

Section 7, therefore, very consistently sets forth that a change of personnel of any dealer necessitates a change of certificate. It is upon the basis of this section that we have heretofore advised you that death or resignation of a firm member, or the adding of firm members or designated personnel of a corporate dealer, require amended registration certificates.

But the act in no way limits the right of the commission to require amended certificates for other reasons. That is, the act being silent on the necessity of an amended registration certificate, other than where there is a change in personnel, and the act giving you broad powers to promulgate rules and regulations, it would seem that you are to determine what, if any, other situations call for amended registration certificates.

In this regard, we feel that the only situation which would logically require an amended registration certificate would be a change of a dealer's business address, that is the business address at which the registered firm conducts its business. Conceivably a dealer may move an office from one city to another, and certainly such dealer should be required to amend. But we see no compelling importance in the case of change in the residence or business address of a salesman, a firm member, or of one of the designated personnel of a corporate dealer, which would require or necessitate an amended certificate.

We point out also that the legislature could hardly have intended that a salesman should be required to procure an amended registration certificate because of a change in address, because by section 27 of the act the fee for amended registration certificate is $20.00 and the original registration certificate is only $10.00. Needless to say the legislature could scarcely have intended such a result.

On the other hand, it is essential that you have an up-to-the-minute record of the addresses of all designated dealer personnel and salesmen. Section 15 provides for notice of the time and place of hearing to be sent to a dealer who is alleged to have violated provisions of the act; section 26 provides for injunction proceedings against dealers; and section 5 requires a dealer to consent to service of process upon him by service upon your commission as his agent. It is impossible for us to conceive how your commission can function properly without changes of address being promptly noted upon your records.

It will be entirely proper, therefore, for you to provide by rule or regulation that upon any change of residence or business address of

indicated parties, such parties shall notify your commission of such change immediately.

Your authority for making any rule or regulation suggested herein or which may suggest itself to you, is that part of section 26 which provides as follows:

> The administration of the provisions of this act shall be vested in the commission. The commission shall have authority from time to time to make, amend, and rescind such rules and regulations, including rules of practice hereunder before it, and to prescribe such forms, as may be necessary or convenient to carry out the provisions of this act. * * *

Of course, it might be that a salesman or a dealer might desire an amended registration certificate, even though the commission's rules and regulations would not require the same. An important salesman might prefer to have such amended certificate to show his new address, and a dealer might likewise wish a new certificate. In the event of such application, the applicant should be accommodated, but the fee provided in section 27 of the act, namely, $20.00, should be charged.

There is apparently no provision for any charge to be made for the noting of changes of addresses in cases where, pursuant to such rule or regulation, your commission would be notified of the change of such address. Provision is made for the commission, by general rule or regulation, to charge fees for certain items set forth in the last paragraph of section 27 of the act, but the changing of an address is not included among such items.

The nature of such items does not readily permit of an interpretation of the act to the effect that a fee should be charged for notation of a change of address. The pertinent language of section 27 is as follows:

> For copies of any papers filed in the office of the commission, or for the certification thereof, for transcripts of testimony taken at hearings before the commission, for the preparation of records of proceedings before the commmission, and for issuing subpoenas and summons the commission shall charge such fees as it shall, by general rule or regulation, prescribe: Provided, however, That the provisions of this section shall not prohibit the commission from issuing free of charge copies of records to other states or to the United States or any of their agencies.

It is our opinion, therefore, that :

1. It is within the province of your commission to determine what circumstances, other than changes in personnel, require amended registration certificates; and you are specifically authorized and em-

powered by the act which establishes your commission, to make and enforce such rules and regulations.

2. Such rules and regulations can include a requirement that in case the office address of a registered dealer is changed an amended registration certificate be required.

3. Such rules and regulations need not require an amended registration certificate in case of change of address, either business or residence, other than as noted in paragraph 2 above, but notice thereof can be required by rule and regulation.

4. In case application is made to you for an amended registration certificate under circumstances where the same would not be required, it would be proper for you to accommodate the applicant for such amended certificate, but in such case the fee of $20.00 required by section 27 should be charged.

5. You cannot make any charge for the notation of changes of address upon your records.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.
HERMAN A. BECKER,
Deputy Attorney General.

OPINION No. 320

Veterans—Preference in public appointments—Extent of preference—Liquor Control Board appointments—Acts of April 12 and June 27, 1939.

1. Eligibility lists, established by civil service examinations held prior to January 1, 1940, are, insofar as the making appointments to public positions therefrom is concerned, subject to the Act of June 27, 1939, P. L. 1198; but the 10 percent credit provided in said act is not to be added to the standing on an eligible list of a soldier, as defined in the act, who passed his examination prior to January 1, 1940.

2. Whenever a soldier, as defined in the Act of June 27, 1939, P. L. 1198, has successfully passed a civil service examination for a public position under the Commonwealth, or under any administrative department, board, commission, or officer of the Commonwealth, or under any political subdivision of the Commonwealth, he shall receive an added credit to his civil service rating of 10 percent, which, added to his passing grade, shall determine his standing on any eligible list, but he is not entitled to any other statutory credit.

3. Soldiers, as defined in the Act of June 27, 1939, P. L. 1198, who have passed a civil service examination without the aid of the percentage credit in said act, are to be preferred in appointment over other eligibles, regardless of such soldiers' standings on the eligible list and regardless of whether they have been credited with the statutory percentage after examination or not, so long as they are morally and physically fit to be employed; and they may be preferred by the appointing power even though their names do not appear on the eligible list.

4. Whenever a soldier, as defined in the Act of June 27, 1939, P. L. 1198, possesses the requisite qualifications and is eligible to appointment to a public position, where no civil service examination is required, the appointing power must appoint such soldier to such position, provided he is morally and physically fitted for the position.

5. The Pennsylvania Liquor Control Board is not and never was, subject to the Act of April 12, 1939, P. L. 27.

6. All administrative departments, boards, commissions, officers, and political subdivisions of the Commonwealth should regard the Act of June 27, 1939, P. L. 1198, as the exclusive law relating to and governing preferential treatment of soldiers, as defined in said act, to public positions.

Harrisburg, Pa., February 15, 1940.

Honorable W. H. Hitchler, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: By your letter of January 8, 1940, this department has been requested to advise you concerning certain aspects and effects of the Acts of June 27, 1939, P. L. 1198, (51 PS §491.1 et seq.), and April 12, 1939, P. L. 27, (51 PS §481). Both of these statutes relate to preferential appointment and employment by the Commonwealth and its political subdivisions of honorably discharged persons who were engaged in the military or naval service of the United States during any war wherein that nation participated.

Specifically, you desire advice upon the following questions:

1. Are eligibility lists, established by civil service examinations held prior to January 1, 1940, subject to the Act of June 27, 1939, P. L. 1198, supra?

2. Are soldiers, as defined in said act, entitled in civil service examinations to any credit other than the ten percentum stipulated in the act?

3. Are soldiers, as defined in said act, to be preferred over other persons, in appointment to public positions, despite the fact that such soldiers' standings on an eligibility list established by civil service examinations, are, with the ten percentum added, lower than the standings of other persons on such lists?

4. Is the Pennsylvania Liquor Control Board subject to the Act of April 12, 1939, P. L. 27, supra; and, if so, to what extent?

At the risk of unduly extending this opinion, we deem it advisable to review the subject of statutory preferential treatment of United States war veterans in public employment in the Commonwealth.

Prior to the World War of 1914-1918, the Act of May 19, 1887, P. L. 132, (51 PS §481), enacted that honorably discharged Union veterans of the Civil War should be preferred for appointment and employment in all public departments and works of the Commonwealth, provided such veterans possessed the other requisite qualifications. The Act of April 12, 1939, P. L. 27, (51 PS §481) (1939 Cum. Ann. Pock. Pt.), supra, one of the two statutes whereof you inquire, amended the title and body of the act of 1887, and actually completely supplemented and supplied it. The effect of the Act of April 12, 1939 is to extend the benefits of the act of 1887 to United States veterans of all wars wherein the Nation engaged.

The Civil Service Act of March 5, 1906, P. L. 83, repealed by the Act of June 25, 1919, P. L. 581, exempted honorably discharged United States veterans of wars of the country, and their families, from its provisions. This exemption was declared unconstitutional in Wood *v.* Philadelphia, 46 Pa. Super. Ct. 573 (1911), on the ground that the act, with the exempting proviso, was class legislation, but that without the objectionable proviso, it was valid.

Section 3 of the Act of June 12, 1919, P. L. 444, (53 PS §303), allowed preference to be given in the appointment of county, city and borough employes, to honorably discharged veterans who had served the United States in wartime, provided such veterans passed the required civil service examinations, and notwithstanding the fact that such veterans might not stand among the four highest on an eligibility list or come within the age limitations fixed by law or by the rules and regulations of any board or commission administering civil service requirements. This act of 1919 was repealed, in so far as it related to third class cities, by The Third Class City Law, the Act of June 23, 1931, P. L. 932, (53 PS §12198-101 et seq.).

The Act of July 16, 1917, P. L. 1002, decreed that preference be given to honorably discharged veterans who had served the United States in time of war, in the appointment of persons to the engineering and electrical departments, and to the position of building inspector, in third class cities, provided such veterans fulfilled the other requisites of the act. This legislation was repealed by The Third Class City Law, supra.

Sections 1 and 2 of the Act of May 11, 1923, P. L. 203, (51 PS §§485, 486), provided that honorably discharged veterans who had been engaged in the military or naval service of the United States during any of its wars should be given credit for such service by

being marked fifteen per centum perfect in any civil service examination before the quality or contents of such examination were considered. This act was repealed, in so far as applicable to third class cities, by The Third Class City Law, supra.

Article XIX, Section 14, of the Act of June 25, 1919, P. L. 581, (53 PS §3334), provided that in civil service examinations for employment in first class cities, honorably discharged soldiers, sailors and marines who had served as such under the United States or in the National Guard of the Commonwealth, should be given full credit for their experience in such service.

Second class cities are adverted to by Section 1 of the Act of May 23, 1907, P. L. 206, as amended by Section 1 of the Act of May 8, 1919, P. L. 118, (53 PS §9361). This legislation provides that honorably discharged veterans who served the United States during the Civil War, or the United States, or its Allies during the former's participation in the World War of 1914-1918, should be given preference in civil service appointments, provided such veterans possess equal qualifications and eligibility with persons over whom they are preferred.

Third class cities are governed by The Third Class City Law, supra, which provides in section 4405 of article XLIV thereof, (53 PS §12098-4405), that when any person who was engaged in the military or naval service of the United States during any war of the Nation, and who has an honorable discharge from such service, shall take a civil service examination for appointment or promotion, his examination shall be marked fifteen per centum perfect before the quality or contents thereof shall be considered; and the total of his actual grade, plus the added per centum, shall determine his final grade and standing on the eligibility list.

Section 4406 of The Third Class City Law, (53 PS §12198-4406), outlines the compilation of an eligibility list of those who have passed the civil service examinations. Section 4407, (53 PS §12198-4407), provides that amongst those possessing eligibility for appointment, preference shall be given to honorably discharged sailors and soldiers who served the United States in war; and that preference may be given to honorably discharged soldiers, sailors and marines, who served the United States in war, if such soldiers, sailors and marines have passed the required examinations, notwithstanding the fact that their names are not among the four standing highest on the eligible list. Further, such appointments of soldiers, sailors and marines may be made without regard to age limitations provided by law or by rules and regulations of any board or commission having charge of civil service in counties, boroughs or cities.

Section 19 of the Act of June 5, 1937, P. L. 1705, (35 PS §1519), the State Board of Housing Law, provides that honorably discharged persons who were engaged in the military or naval service of the United States in any war wherein the Nation took part, should be rated, in examinations for positions, five per centum over and above the rating fixed for the quality and character of the examinations, and such persons, as have been wounded or disabled as a result of such service should be given an additional five per centum in rating, provided they are otherwise qualified to do the work for which they are examined.

The Unemployment Compensation Law, the Act of December 5, 1936, Second Ex. Sess. (1937), P. L. 2897, as amended by the Act of May 18, 1937, P. L. 658, (43 PS §768), provides that persons taking civil service examinations for employment under the Unemployment Compensation Law shall, if honorably discharged from the military or naval service of the United States, after having been in any war in which the Nation participated, be given an additional rating of five per centum in such examinations. If such veterans were disabled by wounds or otherwise, they shall be given a further and additional five per centum in their final rating, provided their said disability does not prevent them from performing the work for which they were examined.

The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended by Section 3 of the Act of June 24, 1937, P. L. 2003, (71 PS §667), relating to the Public Assistance Law, provides that persons taking civil service examinations who are honorably discharged veterans of the military or naval service of the United States, and who served during any war wherein the Nation was engaged, shall receive an additional five per centum for such service; and if such veterans were wounded or disabled in such service, they shall receive a further and additional five per centum in their civil service ratings.

The provisions of The Third Class City Law, supra, (53 PS §§12198-4405 to 12198-4407), came under the scrutiny of the Supreme Court in the case of Commonwealth ex rel. Graham (to use of Markham et al.) *v.* Schmid, 333 Pa. 568 (1938), wherein the constitutionality of the preferences accorded war veterans in said statutory provisions was questioned. The court elaborately reviewed legislation preferring war veterans in public employment, and remarked that it had not theretofore passed upon the validity of such laws.

Setting out to analyze the types of preferential statutes, the Supreme Court, in the Graham case, supra, found that they fell into three classifications.

(1) Those giving preference to veterans where no examination is required, but preserving to the appointing power its discretion, and

those preferring veterans so long as the veterans possess qualifications which are reasonable, or equal to those of other candidates: these have been held valid.

(2) Those ostensibly mandatory and not expressly requiring that veterans be reasonably qualified for the position, or be equal to other candidates in their merits: these have been upheld by implying in the statutes a requisite that the preferred veterans be reasonably qualified.

(3) Those dealing with civil service requirements. This last category falls into several subdivisions:

(a) Statutes giving veterans an absolute or discretionary preference regardless of their standing on an eligible list; (b) statutes wholly exempting veterans from examinations; (c) statutes giving veterans additional credits on examinations, or, in the alternative, lowering their passing requirements; and (d) those giving veterans extra credits after they have passed the regular examinations and have become eligible.

Where the legislation prefers veterans who have already passed the regular examination, it has been held constitutional; as has also that placing veterans who have passed examinations, at the top of eligible lists. Statutes preferring veterans who have passed examinations, whether the preference is mandatory or discretionary, have been declared valid constitutionally.

The conclusion of the Supreme Court in the Graham case, supra, is thus stated, beginning at page 577 of 333 Pa.:

> Our conclusion from these decisions is that, so long as the statute requires passage of the examination, a veteran may constitutionally be preferred over non-veterans whether the statute be mandatory or directory. In either case the minimum qualification for appointment is success in an examination. Its passage satisfies the requirement that appointments of public employees be made only of persons reasonably fitted for the position.
>
> There can be no objection to the provision of section 4407 [of The Third Class City Law, 53 PS §12198-4407] which *permits* a preference of any veteran on the eligible list. The provision that those in the first four of the eligible list *shall be preferred,* * * * must, however, be construed to be mandatory, with the exception that the appointing power need not select such veteran if it is found on a fair basis that he is morally or physically unfit to be employed. * * *
>
> But statutes completely exempting veterans from taking the customary examinations for civil service positions have been ordinarily held unconstitutional since they do not require that the appointees be fit for the position. [Such a situation was that dealt with in Wood *v.* Philadelphia, supra, 46 Pa. Super. Ct. 573.]

> There is an exception to this rule against exemption from examination where the statute is not mandatory but merely discretionary in permitting such appointment, and where the nature of the position is such that it does not require an examination to establish qualification; * * *
>
> A provision granting veterans a lower passing grade than other candidates, or, what is an equivalent provision, a credit to veterans of a specific number of points aiding them in passing an examination, is in parity with exemption from examination; these provisions will be held unconstitutional * * *
>
> In several jurisdictions the statutes have provided for a credit of a specific number of points to veterans *who pass the examination,* which credit aids their order or standing in the eligible lists. * * * Their propriety rests on their reasonableness * * *
>
> It therefore clearly appears that the decisions of other states condemn the provision of section 4405 [of The Third Class City Law, 53 PS §12198-4405] giving fifteen per cent credit in advance to veterans as unconstitutional. * * * We do not hold that no credit can be given to veterans *who have passed examinations* in addition to the preference when on the eligible list, but the present grading is given to those who do not pass the examination.
>
> * * * We do not pass on the age and other provisions of the Act. [The Third Class City Law.] The preference feature is otherwise sustained as constitutional, while the fifteen per cent provision is held illegal.

The portion of Section 4407 of The Third Class City Law, (53 PS §12198-4407), that preferential appointments of soldiers, sailors and marines who have been honorably discharged after service during war in the Army or Navy of the United States may be made without regard to age limitations provided by law or by rules and regulations of civil service boards or commissions of cities, boroughs and counties, expressly not passed upon in the Graham case, supra, was specifically declared unconstitutional in the recent case of Carney et al. *v.* Lowe et al., 336 Pa. 289, decided by the Supreme Court on November 27, 1939.

It is not the proper function of this department to pass upon the constitutionality of legislation. Op. Atty. Gen. 1905-1906, page 398 (1906), 32 C. C. 520; Op. Atty. Gen. 1909-1910, page 264 (1909), 13 Dauphin 49, 36 C. C. 689; Op. Atty. Gen. 1913-1914, page 47 (1913), 41 C. C. 216; and see Commonwealth ex rel. *v.* Lewis, 282 Pa. 306 (1925). Nor does this opinion purport to pass upon the constitutional validity of the Acts of June 27, 1939, P. L. 1198 and April 12, 1939, P. L. 27, supra, whereof you inquire; although it is

of interest and significance that both acts are mentioned by the Supreme Court in Carney et al. *v.* Lowe et al., supra, in footnotes 2 and 3. It has been prolonged, however, in an effort fully to advise you and all administrative departments, boards, commissions, officers and political subdivisions of the Commonwealth of the general, and in your case, specific, effects of the subject legislation. The historical background and the judicial travels, of legislation in pari materia, lend aid in a proper understanding of the subject. And now, as all writers of opinions ultimately must, we come back to your inquiries.

For reasons of logical approach, we shall answer your four questions in reverse order. Your question No. 4 inquires whether the Pennsylvania Liquor Control Board is subject to the Act of April 12, 1939, P. L. 27, and if so, in what respect. First of all, it must be noted that said act and that of June 27, 1939, P. L. 1198, whereof you also inquire, were both enacted during the same session of the legislature.

> Whenever the provisions of two or more laws passed during the same session of the legislature are irreconcilable, the law latest in date of final enactment, irrespective of its effective date, shall prevail from the time it becomes effective. * * * Statutory Construction Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 65, 46 PS, §565.

The two statutes have different effective dates. The Act of April 12, 1939 became effective from and after September 1, 1939. Statutory Construction Act, article I, section 4, (46 PS §504). The Act of June 27, 1939, by its own terms (section 7), became effective January 1, 1940. The two acts are not irreconcilable, and as a result, could stand together, for they are in pari materia. However, the Act of June 27, 1939 expressly declares, in section 5, (51 PS §491.5):

> This act shall be construed as being the exclusive law applying to the Commonwealth and its political subdivisions in giving preference to soldiers [as defined in said act] in appointment to public position.

Since the Act of June 27, 1939, is comprehensive, and includes the substance of the Act of April 12, 1939; since the former act by its own terms purports to be "the exclusive law"; and even though the two acts are in pari materia, see Statutory Construction Act, section 62 of article IV, (46 PS §562) and Palmer's Appeal, 307 Pa. 426 at 430, 431 (1932); nevertheless:

> Whenever a law purports to be a revision of all laws upon a particular subject, or sets up a general or exclusive system covering the entire subject matter of a former law

> and is intended as a substitute for such former law, such law shall be construed to repeal all former laws upon the same subject. Statutory Construction Act, Article VII, Section 91, 46 PS §591.

And since it is quite clear, also, that no violence would be done the legislative will, see Statutory Construction Act, article IV, section 52, (46 PS §552), by holding that the Act of April 12, 1939 was repealed, as of January 1, 1940, by the Act of June 27, 1939; it is our opinion that it was so repealed. Consequently, the Act of April 12, 1939, P. L. 27 is no longer effective.

But, in the interval between September 1, 1939, the date the Act of April 12, 1939 became effective, and January 1, 1940, the date the Act of June 27, 1939 became effective, the former act was law, and fully in force. This act follows:

> Whereas, There are no laws in the State of Pennsylvania giving preference of appointment or employment to honorably discharged soldiers, sailors, marines and nurses, who fought for the United States in the wars in which the United States has engaged.
>
> And Whereas, The sacrifices, trials and sufferings, they have endured, entitle them to special recognition; therefore,
>
> Section 1. Be it enacted, &c., That, in every public department and upon all public works of the State of Pennsylvania, honorably discharged soldiers, sailors, marines and nurses, who were engaged in the military or naval service of the United States during any war in which the United States engaged, shall be preferred for appointment and employment; age, loss of limb, or other physical impairment, which does not in fact incapacitate, shall not be deemed to disqualify them, provided they possess the other requisite qualifications.

To borrow from our Formal Opinion No. 315, dated January 31, 1940:

> The earlier Act of April 12, 1939, P. L. 27, which is controlling between September 1, 1939 and January 1, 1940 has no application to our civil service systems. * * * The Act of May 19, 1887, as amended [by the Act of April 12, 1939], applies to appointments in the State service generally, and does not apply to the State departments which are subject to civil service.

And, since the Pennsylvania Liquor Control Act, as reenacted and amended, (47 PS §744-1 et seq.), governs the Pennsylvania Liquor Control Board; and since said act sets up a complete civil service system for the selection of the Board's employes in section 302 of article III, as amended, 47 PS §744-302); the Act of April 12, 1939

did not apply to the Board between September 1, 1939 and January 1, 1940; and, since said act was repealed as of January 1, 1940, as hereinbefore pointed out, said act never applied to the Board.

Your question No. 3 inquires whether soldiers, as defined in the Act of June 27, 1939, P. L. 1198, are to be given preference over non-soldiers in appointment to public positions, notwithstanding the fact that the standing of such soldiers on an eligible list established by civil service examinations is, with the ten per centum added by the act, lower than the standing on said list of non-soldiers. The answer to this question is to be found in the act.

Section 4 of the act reads, in part:

> Whenever any soldier possesses the requisite qualifications and his name appears on any eligibile list certified or furnished, as the result of any civil service examination, the appointing power, in making an appointment to a public position, *shall* give preference to such soldier *notwithstanding that his name does not stand highest on the eligible list.* (Italics supplied.)

Therefore, so long as a soldier has passed the examination without the aid of the statutory ten per centum; and so long as he is, on a fair basis, morally and physically fit to be employed; he must be appointed to the position sought, even though he does not stand highest, or among the highest, on the eligible list, and regardless of whether the statutory ten per centum has been added to his passing grade or not.

The answer to your question No. 2: Are soldiers, as defined in the Act of June 27, 1939, entitled to credit in civil service examinations other than the said statutory ten per centum? is: No. The reason for this is that the said act itself provides in section 2 thereof:

> Whenever any soldier shall take any civil service examination for a public position * * * he shall be given credit, *in the manner hereinafter provided.* * * * (Italics supplied.)

Your question No. 1 inquires whether eligibility lists, established by civil service examinations held prior to January 1, 1940, are subject to the Act of June 27, 1939. In our opinion such lists are subject to the act. Regardless of whether the lists were established before January 1, 1940, or subsequent thereto, *when an appointment therefrom is made after January 1, 1940, such appointment must be made in accordance with the act.*

We are, therefore, of the opinion, and you are accordingly advised, that:

1. Eligibility lists, established by civil service examinations held prior to January 1, 1940, are, in so far as the making appointments

to public positions therefrom is concerned, subject to the Act of June 27, 1939, P. L. 1198; but the ten per centum credit provided in said act is not to be added to the standing on an eligible list of a soldier, as defined in the act, who passed his examination prior to January 1, 1940.

2. Soldiers, as defined in the Act of June 27, 1939, P. L. 1198, are not entitled to any statutory credit after passing a civil service examination, other than the ten per centum credit stipulated in said act.

3. Soldiers, as defined in the Act of June 27, 1939, P. L. 1198, who have passed a civil service examination without the aid of the percentage credit in said act, are to be preferred in appointment over other eligibles, regardless of such soldiers' standings on the eligible list, so long as such soldiers are morally and physically fit to be employed. This advice applies whether such soldiers have been credited with the statutory percentage after examination, or not.

4. The Pennsylvania Liquor Control Board is not, and never was, subject to the Act of April 12, 1939, P. L. 27.

It is also our opinion, and you are accordingly advised that:

5. Whenever a soldier, as defined in the Act of June 27, 1939, P. L. 1198, has successfully passed a civil service examination for a public position under the Commonwealth, or under any administrative department, board, commission or officer of the Commonwealth, or under any political subdivision of the Commonwealth, he shall receive an added credit to his civil service rating of ten per centum, which, added to his passing grade, shall determine his standing on any eligible list.

6. Whenever a soldier, as defined in the Act of June 27, 1939, P. L. 1198, possesses the requisite qualifications and is eligible to appointment to such public position, where no civil service examination is required, the appointing power must appoint such soldier to such position, provided he is morally and physically fitted for the position.

7. A soldier, as defined in the Act of June 27, 1939, P. L. 1198, who has passed a civil service examination, and who possesses the requisite qualifications, may be preferred by the appointing power, even though his name does not appear on the eligible list.

8. All administrative departments, boards, commissions, officers and political subdivisions of the Commonwealth, shall regard the Act of June 27, 1939, P. L. 1198, as the exclusive law relating to

and governing preferential treatment of soldiers, as defined in said act, to public positions.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 321

Public utilities—Assessment for expenses of Public Utility Commission—Failure of some utilities to file reports of intrastate revenue—Right of commission to calculate revenue and make provisional assessments—Public Utility Law of May 28, 1937, sec. 1201, as amended September 28, 1938.

1. Where certain utilities, subject to assessment for the expenses of the Pennsylvania Public Utility Commission under the provisions of section 1201(b) of the Public Utility Law of May 28, 1937, P. L. 1053, as amended by the Act of September 28, 1938, P. L. 44, fail to file the necessary reports of their gross revenues upon request, the commission may properly calculate their gross revenues for the purpose of computing assessments.

2. Since many small motor carriers have failed to file reports of their gross intrastate revenues, the Pennsylvania Public Utility Commission may calculate the gross intrastate revenue of motor carriers, making the calculation as high as reasonably possible, and make a provisional assessment under section 1201(b) of the Public Utility Law against other utilities upon that basis; when subsequently it is able to ascertain the true revenue of motor carriers, an assessment should be made against them and adjustment should be made in the case of the other utilities.

Harrisburg, Pa. February 19, 1940.

Honorable D. J. Driscoll, Chairman, Public Utility Commission, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your letter of January 26, 1940 in which you request our opinion upon the following:

> 1. May the Pennsylvania Public Utility Commission calculate gross intrastate revenues, under section 1201 (b) of the Public Utility Law, by estimating the gross instrastate revenues of utilities failing to file reports of revenue when requested to do so?
>
> 2. May the Pennsylvania Public Utility Commission, under section 1201 (b) of the Public Utility Law make a provisional assessment against all utilities other than motor carriers and subsequently make a final assessment against all utilities, including motor carriers?

Section 1201 of the Act of Assembly approved May 28, 1937, P. L. 1053 (66 PS §1461), known as the Public Utility Law provides, in part, as follows:

> Section 1201. Assessment of Regulatory Expenses Upon Public Utilities.—(a) Whenever the commission, in the performance of its duties under this act, shall conduct an investigation of the affairs of any public utility, involving an examination of the records or facilities thereof, such public utility shall pay to the commission a sum equal to the salaries paid to commission employes while engaged in such examination, together with such traveling and subsistence expenses of said employes as may be directly attributable to such examination: Provided, however, That the amount so paid by any public utility during any one calendar year shall not exceed one per centum of the gross intrastate operating revenues thereof during its next preceding fiscal year.
>
> (b) Periodically, the commission shall determine the aggregate of its expenditures, less (1) amounts assessable under paragraph (a) hereof; (2) expenditures for equipment, furniture, and machinery; (3) the estimated cost of regulating municipal corporations furnishing public service; and (4) the estimated cost of regulating contract carriers by motor vehicle. The remaining balance shall be so allocated to the groups of public utilities furnishing the various types of service that each group shall have allocated to it—(1) an amount equal to the expenditures of the commission directly attributable to the regulation of that group; and (2) an amount equal to such proportion of the expenditures of the commission not directly attributable to any group, as the gross intrastate operating revenues of the group bear to the total gross intrastate operating revenues of all public utilities: Provided, however, That there shall be deducted from the allocations to each group an amount equal to the fees paid to the commission by the public utilities in such group under the provisions of sections twelve hundred two and twelve hundred three of this act. Every public utility shall then pay to the commission an amount equal to such proportion of the allocation to its group as the gross intrastate operating revenues of the public utility bear to the total gross intrastate operating revenues of the group.

By virtue of the aforesaid provisions a system is established whereby it is at least theoretically possible to recover for the Commonwealth nearly all of the expense incident to the administration of the Public Utility Law from all public utilities in the Commonwealth. For example, you inform us that in the year 1939 the cost of administration was $1,150,971.00. Of this amount the sum of $473,475.00 has already been collected in the form of fees, etc.; $35,000.00 thereof is represented by unrecoverable items such as cost

of equipment, regulation of municipal corporations furnishing public service and the costs of regulation of contract carriers. The balance of $508,475.00 must, therefore, be collected from the various public utility groups which it is the function of the commission to regulate. A part of this amount is directly attributable to a particular group of public utilities (such as, for example, salaries of electrical engineers chargeable to electric companies) and can be billed directly to the company or group involved. The balance, representing indirect charges, must be allocated to the various public utility groups in the relation that the gross intrastate operating revenue of each group bears to the aggregate comparable revenue for all groups (section 1201 (b), supra).

In order to make this calculation it is obviously necessary to know the intrastate revenue of all public utilities in the Commonwealth and, you inform us, an attempt has been made to collect this information by requiring each public utility to submit a form containing its gross intrastate revenue for the years ending December 31, 1938 and December 31, 1939. Most of the utilities responded satisfactorily except the motor carrier group; and of these approximately only one-half have filed returns. This is largely due to the fact that most of the delinquents are small operators, ofttimes owning but a single truck, who are not familiar with record keeping. The cost of trying them for delinquency and canceling their certificates of public convenience would in most cases exceed the amount of the assessment ultimately collectible and, in all probability, it will be a considerable time before the commission succeeds in ascertaining the desired information. Rather than longer deprive the general fund of the Commonwealth of the contribution from the other groups which have already submitted the required information, the commission desires to be informed whether it may legally calculate the gross intrastate revenue of all the groups by ascribing to the motor carriers a hypothetical figure representing their total intrastate revenue. To arrive at this figure the commission would estimate the revenue of motor carriers by a study covering the annual reports of motor carriers filed with the commission in 1936 and 1937, an adjustment for the increased number of small carriers, and a sampling of the reports filed in response to the request for 1938 and 1939 revenues. The estimated revenue of the motor carrier group would purposely be calculated at the highest possible figure and there would be deducted temporarily from the indirect charges an amount equal to the proportion of this estimated revenue figure compared with the total revenue of all utilities. The balance of indirect charges would then be prorated among other groups of utilities on the revenue basis and bills mailed to the individual companies in each

group other than motor carriers. This, it is estimated, would allow the major portion of the assessment to be collected forthwith. For the present no assessment would be made against the motor carrier group. When all motor carriers have finally responded with the desired information, or when sufficient information has been gathered to permit the computation of revenues of nonreporting individual carriers by averaging revenues per truck of carriers who have filed reports, the indirect charges will be recalculated and the exact assessment determined for all companies. The motor carriers will then receive their bills for the general assessment for the first time, and all other public utilities will receive bills for such additional amounts as are necessary to make up the proper proportion of the indirect charges which they should bear. In order to insure that the other groups are not overbilled in the first instance, it is proposed to estimate the motor carrier revenue at the highest figure. This will cause the original charges to be assessed against other public utilities to be lower than the actual amount due.

In enacting the statute here under discussion the legislature conferred upon the commission the power to assess upon all public utilities the cost to the Commonwealth of their regulation. It has long been settled that a state may, in the exercise of its police power, provide for the supervision and regulation of public utilities; may delegate this power to a commission; and may exact the cost of such supervision and regulation from the utilities concerned and allocate the exaction among the members of the affected class or classes (Charlotte, Columbia and Augusta Railroad Company *v.* Gibbs, 142 U. S. 386, 35 L. ed. 1051 (1892). The only requisites would seem to be that the assessment be reasonable and that the cost upon which it is computed be incurred solely in the exercise of that power which has been delegated, viz, the supervision and regulation of the utilities affected. If the amount assessed is clearly excessive and is based, in part, upon the cost of the regulation or supervision of any matter or thing not connected with public utilities, no part of the assessment may be collected (D. E. Foote and Company *v.* Stanley, 232 U. S. 494, 58 L. ed. 698 (1914); Great Northern Railroad Company *v.* Washington, 300 U. S. 154, 81 L. ed. 573 (1937). So long, therefore, as the assessment made by the commission is based upon the actual, reasonable cost of the regulation and supervision of the public utilities within the Commonwealth we do not hesitate to hold that the provision permitting it does not contravene either the constitution of this Commonwealth or of the United States.

The answer to your inquiry, therefore, must be determined by reference to the pertinent provisions of the Public Utility Law. Therein it is provided that "the remaining balance (expenditures)

shall be so allocated to the group of public utilities furnishing the various types of service that each group shall have allocated to it—(1) an amount equal to the expenditures of the commission directly attributable to the regulation of that group; and (2) an amount equal to such porportion of the expenditures of the commission not directly attributable to any group, as the gross intrastate operating revenues of the group bear to the total gross intrastate operating revenues of all public utilities; * * *. Each public utility shall then pay to the commission an amount equal to such proportion of the allocation to its group as the gross intrastate operating revenues of the public utility bear to the total gross intrastate operating revenues of the group."

There is thereby clearly set forth the formula for the computation of the amount of the assessment each public utility will ultimately be required to pay. There is, however, no provision regulating the manner in which the gross intrastate operating revenue of any specific public utility or group is to be computed in the absence of specific information as to the amount of such revenue furnished by that public utility or group. Since the formula is useless without one of its constituent parts, it is only fair to assume that the legislature intended that the commission should, in the exercise of its sound discretion and judgment, supply the same, when necessary, by whatever means it deems practicable.

The system you now seek to employ seems to us to be eminently reasonable. The legislature has provided for the regulation and supervision of public utilities. It has required that the bulk of the resulting financial burden be lifted from the shoulders of the citizens and placed where it rightfully belongs—on the public utilities. Although an appropriation is made each fiscal biennium in anticipation of the payment of the current expenses of the commission, it is obviously the legislative intent that there should be a steady return, throughout the biennium, to the general fund as a result of the collection of fees and assessments. It would defeat the legislative intent, therefore, to permit one group of utilities to interfere, or even prevent, the continuous and steady return of the money to which the Commonwealth is entitled.

And it is not that a hardship will be worked upon any of the public utility groups under the proposed plan. As we understand it, the commission proposes to determine its expenditures retrospectively. It is thereby possible to determine, to the penny, the extent to which the Commonwealth is entitled to be reimbursed. The figures can be justified and are open to inspection by an interested carrier. (Section 1201 (f).) It will be a comparatively simple matter to determine their reasonableness and accuracy. Furthermore,

the public utilities originally billed—that is, all but the motor carrier group—will be required, at this time, to pay *less* than the actual amount which they owe the Commonwealth (and we know of no reason why the commission cannot send a supplemental bill after the exact amount due is determined.) On the other hand, the motor carriers, even those who have filed a report, are required to pay nothing until such time in the future as the actual amount of the motor carrier revenues are determined. As we see it, each public utility group is benefited rather than harmed.

We are of the opinion, therefore, and you are advised:

1. That the Public Utility Commission may calculate gross intrastate revenues, under section 1201 (b) of the Public Utility Law, by estimating the gross intrastate revenues of utilities failing to file reports of revenue when requested so to do.

2. That the Public Utility Commission, under section 1201 (b) of the Public Utility Law, may make a provisional assessment against all utilities other than motor carriers and subsequently make a final assessment against all utilities, including motor carriers.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 322

Firearms—License to carry—Use of more than one weapon—Uniform Firearms Act of June 11, 1931—The Penal Code of June 24, 1939.

The Uniform Firearms Act of June 11, 1931, P. L. 497, as amended by the Act of June 20, 1935, P. L. 350, reenacted in The Penal Code of June 24, 1939, P. L. 872, should be construed to mean that a license issued thereunder permits a licensee to carry any firearm, as defined in said act, the purpose being to license the carrier of the firearm, rather than the firearm itself.

Harrisburg, Pa., February 27, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg, Pennsylvania.

Sir: By your communication to this department you have requested advice concerning the interpretation of the Uniform Firearms Act, the Act of June 11, 1931, P. L. 497, as amended June 20, 1935, P. L. 350, with respect to whether a licensee under this legis-

lation may carry only the firearm described in the license, or whether he may carry any firearm.

In a letter of January 26, 1938, addressed to the Director of the Bureau of Elections, Deputy Attorney General Todaro ruled that a licensee might carry only one firearm under one license, and that such firearm must be the one designated in the license.

The Court of Quarter Sessions of Delaware County on March 4, 1938 held that a license granted under the subject legislation permits the licensee to carry a firearm without any designation on the license of the particular firearm to be carried; in short, that as long as one holds a license he may carry thereunder any firearm. Henry *v.* Pechin, Sheriff, 27 Del. 421, 31 D. & C. 484 (1938).

We are informed by you that the Secretary of the Commonwealth under date of April 20, 1938, sent a form letter to the sheriffs and certain police officials throughout the Commonwealth, which letter was as follows:

> The Attorney General's Office has advised the Secretary of the Commonwealth that all firearm permits issued under the provisions of the Act of 1931, P. L. 497, must contain the make, the manufacturer's number, and also the caliber of the firearm. The Attorney General also advises the Secretary of the Commonwealth that a firearm permit can be only issued for a specified firearm; that a permit purporting to authorize an individual to carry any firearm is illegal.
>
> You are therefore advised that the Secretary of the Commonwealth will not accept for filing any firearm permits which do not contain the make, the manufacturer's number, and a description of the firearm as provided for on the approved form.

You inform us that you are frequently called upon to answer the question you have propounded to us and in view of the divergent rulings above-mentioned, you wish to be advised which you are to follow.

The Uniform Firearms Act, supra, was repealed by article XII, section 1201, of the Act of June 24, 1939, P. L. 872, known as The Penal Code. However, The Penal Code, as section 628 thereof, reenacted the Uniform Firearms Act in substantially the same form as before. In view of this fact, you are still confronted with the same problem which arose under the act of 1931, supra.

After carefully reviewing the above cited opinion of the Delaware County court, and reconsidering the hereinbefore mentioned letter of January 26, 1938 emanating from this department, we are of the opinion that the more cogent reasoning is that contained in the court's decision; and, therefore, that we should follow that decision.

To the extent, therefore, that the conclusions reached herein conflict with the opinions expressed in the letter of Deputy Attorney General Todaro of January 26, 1938, to the Director of the Bureau of Elections, those opinions ought to be, and are, hereby overruled.

We are of the opinion, therefore, and you are accordingly advised, that the Uniform Firearms Act, as contained in The Penal Code, section 628, should be construed to mean that a license issued thereunder permits a licensee to carry any firearm, as defined in said act; and that the purpose of said act is to license the carrier of the firearm, not the firearm itself.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 323

Crimes—Attempt to commit arson—The Penal Code of June 24, 1939, sec. 908—Construction—"Any of the buildings or property attached thereto"—Reference to previous sections.

1. The phrase "any of the buildings or property attached thereto" as used in section 908 of The Penal Code of June 24, 1939, P. L. 872, defining the crime of attempt to commit arson as attempting to set fire to, or burn, or to aid, counsel, or procure the burning of "any of the buildings or property attached thereto", is to be construed as referring to the types of building enumerated in sections 905 to 907, inclusive, of the code.

2. Since The Penal Code of June 24, 1939, P. L. 872, is, as appears from its title, intended to consolidate, amend, and revise the penal laws of the Commonwealth, and since it is to a large extent derived from earlier acts, sections so derived should, under the Statutory Construction Act of May 28, 1937, P. L. 1019, be construed to continue, so far as consistent, previous statutes which it substantially reenacts.

Harrisburg, Pa., February 27, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg, Pennsylvania.

Sir: You request to be advised concerning what interpretation is to be placed upon section 908 of The Penal Code, the Act of June 24, 1939, P. L. 872, (18 PS §4908). This section is as follows:

> Section 908. Attempt To Commit Arson.—Whoever wilfully and maliciously, attempts to set fire to, or attempts to burn, or to aid, counsel or procure the burning of any of

> the buildings or property attached thereto, or in furtherance thereof, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to imprisonment for not more than two (2) years, or to pay a fine not to exceed one thousand dollars ($1,000), or both.
>
> The placing or distributing of any flammable, explosive or combustible material or substance, or any device, in any building or property in an arrangement or preparation, with intent to eventually, wilfully and maliciously, set fire to, burn the same, or to procure the setting fire to or burning of the same, constitutes an attempt to burn such building or property.

Your communication inquires: What "buildings or property attached thereto," mentioned in the first paragraph of section 908, quoted in toto, supra, are meant?

The Penal Code, supra, is, as the title thereof recites:

> AN ACT
>
> To consolidate, amend and revise the penal laws of the Commonwealth.

Section 908 of The Penal Code, whereof you inquire, was derived from section 5 of the Act of April 25, 1929, P. L. 767, an act defining the crime of arson and of attempted arson, et cetera, as amended by the Act of June 12, 1931, P. L. 541. The said Acts of April 25, 1929 and June 12, 1931, were repealed by article XII, section 1201, of The Penal Code, (18 PS §5201). The provisions of The Penal Code relating to arson and analogous crimes are sections 905 to 909, inclusive, of article IX, (18 PS §§4905 to 4909), inclusive. The Act of April 25, 1929, P. L. 767, supra, was in turn derived from the criminal code of March 31, 1860, P. L. 382.

The Act of March 31, 1860, supra, provided, in section 137, that the burning, *or attempt to set fire to,* any of enumerated buildings, should be arson. Section 138 of said act provided that anyone burning, *or attempting to set fire to,* any of certain designated buildings and property, was guilty of a misdemeanor.

The Act of April 25, 1929, P. L. 767, supra, defines arson in section 1; prescribes as a felony the burning of certain designated buildings and structures in section 2; penalizes as a felony the burning of certain personalty in section 3; and in section 4 deals with burning certain property with intent to defraud the insurer thereof. Section 5 of the act provides:

> Section 5. Any person who, wilfully and maliciously, attempts to set fire to, or attempts to burn, or to aid, counsel or procure the burning of, any of the buildings or property mentioned in the foregoing sections, or who commits any

act preliminary thereto, or in furtherance thereof, shall be guilty of a misdemeanor, and, upon conviction thereof, be sentenced to imprisonment for not less than one nor more than two years, or fined not to exceed one thousand dollars.

The placing or distributing of any flammable explosive, or combustible material or substance, or any device, in any building or property mentioned in the foregoing sections, in an arrangement or preparation, with intent to eventually, wilfully and maliciously, set fire to or burn same, or to procure the setting fire to or burning of the same, shall, for the purposes of this act, constitute an attempt to burn such building or property.

It will be noted that in section 5 of the act of 1929, quoted in full immediately above, the buildings and property are not enumerated specifically, but are referred to and incorporated by reference, by using the words: *"mentioned in the foregoing sections."* (Italics supplied.)

The Penal Code, supra, in sections 905 to 908, inclusive, substantially re-enacts the Act of April 25, 1929, supra. Section 908 of The Penal Code must be read, not alone, but together and along with the other sections thereof relating to arson and kindred crimes, to wit: Sections 905 to 907, inclusive, and section 909.

The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, (46 PS §501, et seq.), provides, inter alia:

> * * * Every law shall be construed, if possible, to give effect to all its provisions. Article IV, Section 51.
>
> * * * * *
>
> 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; * * *. Ibid.
>
> * * * * *
>
> In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions among others:
>
> (1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;
>
> (2) That the Legislature intends the entire statute to be effective and certain; * * * Art. IV, Section 52.
>
> * * * * *
>
> Words and phrases which may be necessary to the proper interpretation of a law and which do not conflict with its obvious purpose and intent, nor in any way affect its scope

and operation, may be added in the construction thereof. Article IV, Section 53.

* * * * *

The title and preamble of a law may be considered in the construction thereof. * * * The headings prefixed to * * * sections * * * of a law shall not be considered to control * * *. Article IV, Section 54.

In view of the facts that: (1) The Penal Code is for the purpose of consolidating, amending and revising the penal laws of the Commonwealth; (2) sections 905 to 908, inclusive, of The Penal Code, were derived from the Act of April 25, 1929, P. L. 767, as amended by the Act of June 12, 1931, P. L. 541; (3) section 5 of the Act of April 25, 1929, P. L. 767 defined an attempt to set fire to, or burn, any of the buildings or property "mentioned in the foregoing sections"; (4) The Penal Code substantially re-enacts the Act of April 25, 1929, P. L. 767, and was intended so to do; and (5) in view of the provisions of the Statutory Construction Act, cited and quoted, supra, it is our opinion, and you are accordingly advised, that the first paragraph of section 908 of The Penal Code, the Act of June 24, 1939, P. L. 872, should be construed to read as follows:

Section 908. Attempt To Commit Arson.—Whoever wilfully and maliciously, attempts to set fire to, or attempts to burn, or to aid, counsel or procure the burning of any of the buildings or property attached thereto, or in furtherance thereof, [Mentioned in the foregoing sections 905, 906 and 907] is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to imprisonment for not more than two (2) years, or to pay a fine not to exceed one thousand dollars ($1,000), or both. (Words within brackets supplied.)

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 324

Schools—State teachers colleges—Athletic contest—Injury to spectator—Right to recover damages—Right of college to carry liability insurance.

1. A State teachers college is, under the provisions of the Act of April 25, 1929, P. L. 712, amending the School Code of May 18, 1911, P. L. 309, an agency of the government of the Commonwealth of Pennsylvania.

2. A spectator cannot recover from a State teachers college or from the Commonwealth for injuries received at an athletic meet between two or more State teachers colleges, or between a State teachers college and another educational institution, from a baseball or shot-put, regardless of whether the injury occurred either on or off State property; and since there is no liability on the part of State teacher colleges for such injuries they may not, in the absence of statutory authority, protect themselves by liability insurance therefor.

Harrisburg, Pa., February 28, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have informed us that the presidents of the State teachers colleges desire to be advised on the following questions:

> 1. Where a spectator at an athletic meeting between two or more State teachers colleges is injured as a result of being hit by a baseball or shot-put and the injury occurs on or off State property, can the injured spectator recover for damages?
>
> 2. If the spectator may recover for expenses incurred through injury; is it permissible for the State teachers colleges to cover themselves with some form of liability insurance?

From the propounded questions, the chief concern of the presidents of the State teachers colleges appears to be as to what liability, if any, a State teachers college may incur by reason of an injury being received by a spectator under the circumstances set forth in your questions.

Under existing law, a State teachers college is an agency of the government of the Commonwealth of Pennsylvania. This is provided for in the following acts: Section 1 of the Act of April 25, 1929, P. L. 712, which is an amendment of the Act of May 18, 1911, P. L. 309. Article XX, section 2001 of the Act of April 25, 1929, P. L. 712, provides:

> There shall be thirteen State Teachers College Districts in this Commonwealth, as now provided, and one State Teachers College in each district.

Section 2002 provides:

> The Colleges shall be a part of the public school system of the Commonwealth * * *. (May 18, 1911, P. L. 301, Art. XX, sec. 2002; April 25, 1929, P. L. 712, sec. 1.)

A study of these acts indicates that the Act of April 25, 1929, P. L. 712, section 1, is an amendatory act of article XX of the act of

1911, in that it substitutes the words "State Teachers Colleges," or "Teachers Colleges" for the words "State Normal School."

The Act of April 19, 1929, P. L. 177, Article II, Section 201, provides:

> The executive and administrative work of this Commonwealth shall be performed by the Executive Department, consisting of the
>
> Governor,
>
> * * * * *
>
> *Superintendent of Public Instruction;*
>
> * * * * *
>
> By the following administrative departments:
>
> * * * * *
>
> Department of Public Instruction,
>
> * * * * *
>
> (Italics ours.)

Section 202 of this same act provides:

> 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 Public Instruction, [Herein follow the names of all the State Teachers Colleges or Normal Schools]. (Italics ours.)

It is, therefore, obvious that a State teachers College or State normal school is a part of the Commonwealth's administrative department and that as such is a State instrumentality or a governmental agency.

In view of this fact, we are, therefore, faced with the question as to what is the responsibility of this State instrumentality or agency if a spectator were to be injured under either of the factual situations, or similar ones, as are set forth in your letter.

In the case of Collins *v.* Commonwealth, 262 Pa. 572, at page 575, it was held:

> * * * that the Commonwealth, being sovereign, cannot be sued without her consent, which may be given by the Constitution or by statute. * * *

Predicating on the principle announced in this case, the Department of Justice has further repeatedly ruled that neither the Commonwealth nor any of its institutions, such as a State teachers college, is liable for the negligence of any employe of a State institution.

(See Official Opinions of the Attorney General, 1927-1928, page 138.)

Therefore, it can readily be seen that an action for an injury such as has been described in your questions could not be brought against a State teachers college, even if it were assumed that there was some negligence by someone connected with a State teachers college, unless the State would consent to be a defendant to such an action, inasmuch as an action against a State teachers college would be, in effect, one against the Commonwealth of Pennsylvania.

Another principle of law which should be considered by us in this discussion is that which is generally known as the doctrine of "assumption of risk," which is applicable in this case.

The appellate courts of our Commonwealth have ruled that a spectator at a sporting contest assumes all the ordinary dangers incident to the game in witnessing the contest. (See cases of Leon H. Benjamin, Appellant, *v.* Nernberg, 102 Pa. Superior Ct. 471, an action of trespass to recover damages for personal injuries sustained while playing golf on a public link; and Douglass, Appellant, *v.* Converse, 248 Pa. 232, where a spectator was injured at a polo game when a horse became unmanageable and breaking from the field of play ran into the spectators, of whom the plaintiff was one.)

From the principle laid down in these cases, which is applicable to our case, we can see that a spectator at a baseball game or a track meet assumes, as a matter of law, the chance of ordinary dangers incident to the game in witnessing the contest, such as being hit by a baseball or shot-put.

In connection with your first question, it is also to be noted that you raised the point of "the injury" occurring "on or off State property." The particular emphasis of whether the injury was inflicted either on or off State property is raised undoubtedly by reason of sports events being staged by the various State teachers colleges on athletic fields that are located either on State-owned land or on real property which is not owned by the State. We believe, in view of our previous discussion of the liability to the Commonwealth for the acts of its officers, agents or servants, that there is no liability on the part of any of the State teachers colleges regardless of where the injury occurred.

It is, therefore, apparent from the reasoning advanced by us in this case, that there could be no liability for an injury received at a baseball game or track meet, for the reason that a State cannot be sued for any tort of its servant, agent or officer unless the legislature passes appropriate legislation permitting such an action against the State.

In relation to your second inquiry, we desire to point out that, inasmuch as there is no liability on the part of a State teachers college or of the Commonwealth for an injury received under the circumstances as described by you, it is self-evident that it would not be lawful for a State teachers college to spend the money of the Commonwealth for the purpose of liability insurance to provide coverage for these injuries unless there is statutory authority to that effect. From our research, we have been unable to find any such legislative authority.

We are of the opinion, therefore, that:

1. A spectator cannot recover from a State teachers college or from the Commonwealth if he is injured at an athletic meet between two or more State teachers colleges, or between a State teachers college and another educational institution other than a State teachers college, as a result of being hit by a baseball or shot-put, regardless of whether the injury occurred either on or off State property, and

2. Inasmuch as there is no liability on the part of State teachers colleges for such injuries, it is not permissible for State teachers colleges to provide themselves with any form of liability insurance in the absence of any statutory authority.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 325

Motor vehicles—Prosecution for driving while intoxicated—Physical examination of defendant—Constitutionality—Constitution, art. I, sec. 9—Admissibility of result of examination in evidence.

Compulsory examination by a physician of a person accused of operating a motor vehicle while under the influence of intoxicating liquor, in violation of section 620 of The Vehicle Code of May 1, 1929, P. L. 905, is not a violation of article I, sec. 9, of the Constitution, providing that an accused cannot be compelled to give evidence against himself, since the word "evidence" does not comprehend physical examination; but not decided whether evidence obtained by compulsory examination is admissible in the courts.

Harrisburg, Pa., February 29, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg Pennsylvania.

Sir: You have requested this department to advise you whether a person accused of operating a motor vehicle while under the influence of intoxicating liquor, may constitutionally be compelled to submit to examination by a physician. Your inquiry states that the proposition has been advanced that to require such examination without the permission of such accused person, after he has been informed of the charge against him, violates the accused's rights under Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania.

Nowhere in The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, (75 PS §1 et seq.), is there any provision requiring a person accused of operating a motor vehicle while intoxicated to undergo an examination such as that described above. The Vehicle Code does, of course, in article VI, section 620, as amended, (75 PS §231 (f)), make it unlawful for anyone to operate a motor vehicle while under the influence of intoxicating liquor; but the only reference to an examination such as you mention is in Section 1207 of Article XII of the Code, as amended, (75 PS §737 (a)). This reference is, in part, as follows:

> * * * all fines and penalties collected, and all bail forfeited for violations of * * * section * * * (620), [cited supra] shall be paid to the treasury of the county wherein the violation occurred, to be used by such county *for the payment of physicians' fees for the examination of persons accused of violating the provisions of the said section.* * * * (Italics supplied.)

As a result, we are not confronted with the necessity of ruling upon the constitutionality of any portion of The Vehicle Code, or of any other Act of Assembly. And, in any event, it is not the proper function of the Department of Justice to pass upon the constitutionality of legislation. Op. Atty. Gen. 1905-1906, page 398, 32 C. C. 520 (1906); Op. Atty. Gen. 1909-1910, page 264, 13 Dauphin 49, 36 C. C. 689 (1909); Op. Atty. Gen. 1913-1914, page 47, 41 C. C. 216 (1913); and see Commonwealth ex rel. *v.* Lewis, 282 Pa. 306 (1925).

The question resolves itself, therefore, into one of whether the Pennsylvania Motor Police may constitutionally require a person, accused as aforesaid, to submit involuntarily to the examination hereinbefore described.

Research has revealed only one case in Pennsylvania dealing with the subject of inquiry, and that occurred in the criminal courts of Montgomery County: Commonwealth *v.* Cox, 10 D. & C. 678 (1927). In this case, the defendant had been arrested for driving an automobile while under the influence of liquor, in violation of Section 23 of the Act of June 30, 1919, P. L. 678. After his arrest, he was

examined by a physician, who testified at the trial that in his opinion, the defendant was under the forbidden influence. The doctor admitted that without the examination he could not have so testified; and that he had not warned the accused that whatever he (the accused) might say or do under examination could be used against him later. The contention was made by the defendant that the admission of the physician's testimony at the trial compelled the defendant to give evidence against himself in violation of Article I, Section 9, of the Constitution of the Commonwealth, which provides, in part:

> In all criminal prosecutions the accused * * * cannot be compelled to give evidence against himself * * *.

It should be noted here that the Fifth Amendment to the Federal Constitution, that no person "* * * shall be compelled in any criminal case to be a witness against himself * * *" is not involved in our decision because that amendment applies only to the National Government. Twining et al. *v.* New Jersey, 211 U. S. 78, 53 L. ed. 97 (1908).

The court found, in the Cox case, from the evidence as a whole, that the defendant had submitted to the examination *voluntarily*. However, by way of obiter dicta, the court went on to say that whatever the defendant disclosed against himself during the physician's examination was not evidence within the meaning of the Pennsylvania Constitution; that the word "evidence" in article I, section 9, supra, means "testimony"; and that the word "testimony" means speaking or discourse, or voluntary signs, by the accused. The court said, further, at page 686 of 10 D. & C.:

> The prohibition of compelling the accused in a criminal prosecution to give evidence against himself is a prohibition against the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when such body is material. * * *

Consequently, said the court, an examination by a physician of a person accused of operating a motor vehicle while under the influence of intoxicating liquor, whether consented to or not, does not violate Article I, Section 9, of the Constitution of Pennsylvania. As indicated above, this is not a decision, for the point was not at issue in the Cox case: it is pure dicta; but the opinion may be taken as an expression of the average judicial viewpoint.

In an able opinion by Schaeffer, P. J., the Berks County Court held in Commonwealth *v.* Rocci, 9 D. & C. 389 (1926), that fingerprints of a defendant in a criminal case, obtained under compulsion, were admissible as evidence without violating article I, section 9, supra. See also, Ladd and Gibson: The Medico-Legal Aspects of the

Blood Test to Determine Intoxication, 24 Iowa Law Review 191 (1939).

No useful purpose would be served by reviewing the numerous cases and authorities cited and quoted in the decisions hereinbefore cited. Suffice it to say that they support the conclusions reached herein. At the same time, cognizance is taken of the fact that on January 3, 1940, the Attorney General of Illinois ruled that a person accused of causing the death of another cannot lawfully be compelled to submit to a blood test for the purpose of ascertaining whether he was intoxicated at the time he is supposed to have caused such death.

Both on reason and authority, it would be a strained construction of Article I, Section 9, of the Pennsylvania Constitution, to hold that a compulsory medical examination of a person accused of driving a motor vehicle while under the influence of intoxicating liquor, is forbidden by it; and, in our opinion, such examination is not so prohibited. The rights, constitutional or otherwise, of the thousands of motorists lawfully using our highways, to be secure in their persons and property, and the enjoyment thereof, from the menace of the drunken driver, certainly transcend the right, constitutional or otherwise, of the drunken driver, not to be compelled to testify against himself.

It should be noted, of course, that this opinion does not comprehend, nor rule upon, the question of whether evidence obtained by compulsory examination, as herein discussed, is admissible in the courts.

It is the opinion of this department, that compulsory examination by a physician of a person accused of operating a motor vehicle while under the influence of intoxicating liquor, is not a violation of such person's rights under Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 326

State Government—Members of General Assembly—Exemption from arrest—Constitution, art. II, sec. 15—Applicability to criminal proceedings.

1. Members of the General Assembly have no privilege from arrest on sight

or from service of summons for violations of The Vehicle Code of May 1, 1929, P. L. 905, as amended, at any time.

2. Article II, sec. 15, of the Constitution, providing that members of the General Assembly shall, in certain cases, be privileged from arrest during attendance at the sessions of their respective houses and in going to and returning from the same, does not apply to criminal proceedings.

Harrisburg, Pa., March 5, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg, Pennsylvania.

Sir: By your communication of August 12, 1938, you ask us to advise you of the answers to three questions relating to Article II, Section 15, of the Constitution of the Commonwealth of Pennsylvania. These questions are:

> 1. Are members of the General Assembly exempt from arrest on sight and exempt from service of summons for violation of The Vehicle Code during that period between the opening of the General Assembly and final adjournment, with a reasonable period of time for each member to reach his home?
>
> 2. Should a violation of The Vehicle Code be noted during such period, should prosecution be properly entered and warrant or summons be held in abeyance pending final adjournment or should there be no prosecution during the period indicated?
>
> 3. No immunity from arrest is afforded by the Constitution in cases of felony, treason, breach or surety of the peace. Should any of the violations of The Vehicle Code be construed as a breach or surety of the peace?

Article II, Section 15, of the Constitution of the Commonwealth is, in part, as follows:

> The members of the general assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same; * * *

The privilege from arrest accorded members of the Congress by the Federal Constitution, Article I, Section 6, Clause 1, is almost identical in wording. In part it reads:

> * * * They [members of Congress] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; * * *

Shortly after the adoption (1873) and effective date (1874) of the Constitution of the Commonwealth, the foregoing section 15 of article II thereof came under the scrutiny of the Delaware County Court in Commonwealth ex rel. O. F. Bullard *v.* The Keeper of the Jail, 1 Del. 215, 4 W. N. C. 540 (1877). That court held that the privilege extended to members of the General Assembly could be claimed only in cases of civil restraint, where no crime is charged; and that "breach or surety of the peace" included all indictable crimes.

The subject privilege is but the written expression of an ancient parliamentary immunity which existed in England. The privilege, as there enjoyed, applied only to prosecutions of a civil nature, and excluded all crimes. And, as used in the Constitution of the United States, supra, the words "treason, felony and breach of the peace," except from the privilege *all criminal offenses.* Williamson *v.* United States, 207 U. S. 425, 28 S. Ct. 163, 52 L. ed. 278 (1908).

In a report to the House of Representatives of the General Assembly on January 29, 1878, the Committee on Judiciary General reported, inter alia:

* * * * *

> We are therefore of opinion that the words "breach or surety of the peace" in the fifteenth section of the second article of our Constitution are used in the same sense, and must receive the same construction as that given to a similar clause in the Federal Constitution, and to the same words as they are used in limiting the personal privileges of members of the English Parliament, and that against any indictable offence privilege cannot be pleaded. * * * The fact that the offences charged are criminal in their nature is an end of the matter with us, * * * House of Representatives, Case of F. O. Bullard, 1 Del. 218, 221, 222.

We are not unmindful that the Court of Common Pleas of Erie County decided on April 2, 1883, that a State Senator was privileged, under the subject provision of the Constitution of the Commonwealth, from service upon him of a writ of assumpsit, while home on a leave of absence from the Senate, then sitting. But that was all that case could decide, for that was the only issue therein. The process involved was civil, not criminal. Gray *v.* Sill, 13 W. N. C. 59 (1883).

In 1889, the Dauphin County Court decided that a State Representative was privileged from service of civil process within twenty-four hours after the House adjourned, the summons there being one in assumpsit. Ross *v.* Brown, 7 C. C. 142 (1889); Gyer's Lessee *v.* Irwin (Sup. Ct. Pa.), 4 Dallas 107, 1 L. ed. 762 (1790) (by implication).

In an ably argued and carefully considered case before the Common Pleas of Philadelphia County in 1788, that court held that a member of the convention assembled at Philadelphia to consider the adoption or rejection of the proposed Federal Constitution, was privileged from service of a summons in a civil suit. Bolton *v.* Martin, 1 Dallas 296, 1 L. ed. 144 (1788). The court, in the Bolton case, went on to say by way of dicta that a member of our Assembly was not subject to arrest while the Assembly sat.

To recapitulate: Gray *v.* Sill, supra, involved only service of a writ in a civil suit; to the same effect was Ross *v.* Brown, supra. The case of Gyer's Lessee *v.* Irwin, supra, decided by the Pennsylvania Supreme Court, actually held that the defendant had waived any privilege he might have had; and in any event, the case (to paraphrase Shippen, President, in Bolton *v.* Martin, supra, at page 148 of 1 L. ed.), decided at so early a period, when the rights and privileges of the General Assembly were so little ascertained and defined, cannot have the same weight as more modern authorities. The Bolton case, supra, related to the Pennsylvania convention held to consider the proposed Federal Constitution, and did not involve either the Constitution of the Commonwealth or of the United States; and it too, as to age, falls into the class of Gyer's Lessee *v.* Irwin.

In our opinion, also, the early cases were decided at a time when arrest, as for debt, was a common incident of civil process. It no longer is. Consequently, the reasons then necessitating the protection of members of legislative bodies such as Parliament, the constitutional convention at Philadelphia, and the Assembly of Pennsylvania, from arrest, no longer obtain. And, no one, then or now, should be exempt from criminal process.

That our view is the more modern and practical one, and that it has the support of public policy as expounded by the courts, is borne out by the Bullard case, supra, and by the Supreme Court of the United States in the Williamson case, supra. Also, and of acute importance, is the report of a committee of the House of Representatives of the Commonwealth, to the House itself, *which committee was investigating the Bullard incident,* that the proper interpretation of the constitutional privilege of House members was that pronounced by the Federal courts. No one is more jealous of a privilege or of an immunity than the one who enjoys it.

We are of the opinion, therefore, and you are accordingly advised, that members of the General Assembly have no privilege from

arrest on sight, or from service of summons, for violations of The Vehicle Code, at any time.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 327

Architects—State Board of Examiners of Architects—Limitation of expenditures—Amount allocated by Department of Public Instruction—Sums received by Commonwealth in fees for examinations, registrations, and renewals—Act of June 27, 1939, sec. 3—Preparation of plans or specifications for occasional or incidental erection without compensation—Act of June 27, 1939, sec. 13.

1. The State Board of Examiners of Architects, in the administration of its duties, is restricted to the expenditure of that amount of money allocated to it by the Department of Public Instruction for the biennium, which amount may not, under the provisions of the Act of June 27, 1939, P. L. 1188, sec. 3, exceed the sum received by the Commonwealth in fees for examinations, registrations, and renewals, and cannot incur expenses which exceed this allocation even though they do not exceed the sum so received by the Commonwealth.

2. Any resident of this Commonwealth may prepare plans or specifications for the occasional or incidental erection or construction of any of the four types of buildings or constructions specified in section 13 of the Act of June 27, 1939, P. L. 1188, provided that he receives no compensation as the author thereof.

Harrisburg, Pa., March 5, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction
Harrisburg, Pennsylvania.

Sir: In your memorandum of September 13, 1939, you asked for an interpretation of certain sections hereinafter stated of Act No. 402, approved June 27, 1939, P. L. 1188.

Your first question is "whether the Board [The State Board of Examiners of Architects] is restricted to the amount of moneys allocated by the Department of Public Instruction for the biennium, or whether the board can, under the provisions of the act, incur such expenses as shall be necessary, not exceeding the sums received by the Commonwealth by fees for examinations, registrations and renewals."

The original and basic Act of July 12, 1919. P. L. 933 (71 PS §1181 et seq.), as amended, governs the licensing and practice of architects.

The second paragraph of section 3 of Act No. 402, approved June 27, 1939, is a part of the latest amending act of the original act herein referred to and reads as follows:

> The said board shall be charged with the duty of enforcing the provisions of this act, *and may incur such expenses as shall be necessary, not exceeding, however, the sums received by the Commonwealth by fees provided for herein for examinations, registrations and renewals,* all of which shall be paid, upon the warrant of the Auditor General approved by the State Treasurer, out of the funds in the State Treasury duly appropriated for such purposes. * * * (Italics ours.)

It can readily be seen that this section of the act is controlling on this question asked by you.

Article XIII, Section 1301 of The Administrative Code of April 9, 1929, P. L. 177 (71 PS §351), provides:

> * * * the Department of Public Instruction shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said department, * * * *the former Bureau of Professional Education thereof,* and the Superintendent of Public Instruction. (Italics ours.)

Article II, Section 201 of the Act of April 9, 1929, P. L. 177, as amended May 10, 1939, P. L. 101, Section 1 (71 PS §61), reads as follows:

> The executive and administrative work of this Commonwealth shall be performed by the Executive Department, consisting of the:
>
> Governor,
>
> * * * * *, and
>
> Superintendent of Public Instruction; * * *
>
> * * * * *
>
> by the following administrative departments:
>
> * * * * *
>
> Department of Public Instruction,
>
> * * * * *

The provisions of the Act of June 1, 1931, P. L. 350, Section 1, as amended June 6, 1939, P. L. 250, Section 1 (71 PS §62), read as follows:

> The following boards, * * * are hereby placed and made departmental administrative boards, * * * as the case may be, in the respective administrative departments * * * as follows:
>
> * * * * *
>
> In the Department of Public Instruction,

* * * * *

State Board of Examiners of Architects,

* * * * *

Section 1 of the Act of June 21, 1937, P. L. 1865 (71 PS §360), contains the following language:

> *The professional examining boards within the Department of Public Instruction* shall, respectively, exercise the rights and powers, and perform the duties, by law vested in and imposed upon them: *Provided, however, That all certificates and official documents of such examining boards shall be issued by the Department of Public Instruction,* but may be signed by the members of the appropriate board, or any of them, as determined by such board.
>
> * * * * *
>
> The State Board of Examiners of Architects shall continue to exercise the powers, and perform the duties, by law vested in and imposed upon the said board; (Italics ours)

Under Sections 1 and 2 of the Act of April 1, 1925, P. L. 111 (71 PS §1061), it is provided:

> The Department of Public Instruction be and hereby is authorized and directed annually, * * * to fix the fees to be charged by the several professional examining boards within said department during the ensuing fiscal year.

Section 2 of the same act (71 PS §1062), states:

> * * * *The Department shall estimate the proper costs of administering and enforcing such act or acts of Assembly during* the ensuing fiscal year, * * * (Italics ours)

In connection with these various statutes we have hereinbefore cited, we also desire to bring to your attention Section 2 of the Act of April 1, 1925, P. L. 112, Section 2 (71 PS §1064), which reads as follows:

> From and after the effective date of this act all such professional examining boards within the Department of Public Instruction shall pay into the general fund of the State Treasury all fees, fines, and other income received by them under the provisions of the several acts of Assembly authorizing the collection of such fees and fines and other income.* * *

Section 3 of this same act (71 PS §1065), provides for the abolition of any special funds that the various professional examining boards possessed, so that thereafter the only funds at the disposal of the various professional examining boards would be those that were appropriated to them by the legislature or allocated to them by the

Superintendent of the Department of Public Instruction of which they were made a part. These acts clearly demonstrate that the intention of the legislature was to abolish the special funds, which at one time were especially allocated or set aside to the various individual professional examining boards among which was included the State Board of Examiners of Architects.

The General Appropriation Act of 1939, No. 69-A, approved June 27, 1939 Appropriation Acts, page 60, made, inter alia, an appropriation to the Department of Public Instruction as follows:

> *For the payment of salaries, wages, or other compensation* of a deputy, *members, and other employes; for the payment of general expenses, supplies, printing, and equipment necessary for the proper conduct of the work of the Department of Public Instruction with respect to professional education and licensure and the professional examining boards* and advisory committees *within the department, the sum of five hundred thousand dollars ($500,000);* Provided, That no part of this appropriation shall be expended for any purpose other than the work of the department with respect to the certification of teachers, professional education and licensure, and the professional examining boards and advisory committees within the department. (Italics ours.)

The following paragraph of the same act provides for a special appropriation to the State Board of Pharmacy, a professional examining board of similar nature and under the same classification as the State Board of Examiners of Architects. It is to be noticed, however, that a study of the 1939 Appropriation Acts reveals no similar or special appropriation to the State Board of Examiners of Architects nor to any other professional examining board. The conclusion, therefore, is inescapable that any appropriation that the legislature made or contemplated for the State Board of Examiners of Architects, was of necessity included in the $500,000 appropriation to the Department of Public Instruction referred to in the section of the act just cited.

In interpreting paragraph 2 of section 3 of Act No. 402, approved June 27, 1939, we are, therefore, forced to the conclusion that any appropriation to the State Board of Examiners of Architects must be a sum allocated out of said appropriation of $500,000 by the Superintendent of Public Instruction as head of that department. The Superintendent is limited in making the allocation or appropriation to the board in that he *cannot exceed in amount* the total of the fees received by the Commonwealth through the board for examinations registrations and renewals of certificates.

The biennium budget ending May 31, 1941, which was adopted and is now in force, reveals that the sum of $7,940 was allocated by the Superintendent of Public Instruction to the State Board of Examiners

of Architects. Of this appropriation, the amount of $4,002 was allocated for the year ending May 31, 1940, with the remainder for the following year. Therefore, in no case is the Board of Examiners of Architects entitled legally to expend more than the sum total of these amounts allocated to it for this biennium, unless the Superintendent of Public Instruction should make re-allocations during the biennium. Although the Superintendent of Public Instruction is authorized by law to re-allocate to the board a greater sum, it must not exceed the total of the fees which are collected by the board under the provisions of Act No. 402 of the 1939 legislative session.

In this connection sight should not be lost of the fact that The Fiscal Code, Act of April 9, 1929, P. L. 343, Article III, Section 302 (72 PS §302), provides that moneys received by the State Board of Examiners of Architects is to be paid into the State Treasury. It is to be noted that no provision was made by this act for payment into any special fund for the board of these fees received. However, The Administrative Code of April 9, 1929, P. L. 177, as amended, article VI, section 604 (71 PS §224), makes provision for the Department of Public Instruction, and for the board, to prepare and submit an estimation to the Governor of the amount of money required to carry on the activity of the board. After approval of that estimation by the Governor, any further appropriation or re-allocation to the board during the biennium must first be approved by the Governor, even though consented to by the Superintendent of Public Instruction.

Your second question is specifically directed to paragraph five of section 13 of Act No. 402 of 1939, P. L. 1188 which reads as follows:

> Nothing in this act shall be construed to prevent any resident of this Commonwealth from making a set of plans or specifications for the *occasional or incidental erection or construction of* (1) any building or enlargement or alteration thereof intended for occupancy by himself or any person, association or corporation employing him, costing less than $10,000, where the space enclosed does not exceed 30,000 cubic feet calculated by the standards or methods recommended by the American Institute of Architects; (2) any building or enlargement or alteration thereof which is to be used for farm purposes; (3) any single family residence of any size or cost which is to be used by such resident as his home; (4) any remodeling or alteration, regardless of cost, to existing buildings, not involving structural changes and which do not include additions costing $10,000 or more or containing an enclosed space of greater than 30,000 cubic feet calculated as aforesaid: Provided, That the author of such plans and specifications shall not receive any compensation as the author thereof. (Italics ours.)

The queries raised by you are:

First, whether the proviso "that the author of such plans and specifications shall not receive any compensation as the author thereof" applies to all four specified types; and

Secondly, what is meant by the "occasional" or "incidental" erection or construction.

"Incidental" is defined by The Century Dictionary, as follows:

> Occurring, inseparably or fortuitously, in conjunction with something else, usually of greater importance; of minor importance; occasional; casual: as incidental expenses.

"Occasional," an adverb, is defined by The Century Dictionary to mean:

> Of occasion; incidental; hence, occurring from time to time, but without regularity or system; made, happening, or recurring as opportunity requires or admits: as an occasional smile; * * *

We, therefore, construe this section of the act to mean that a resident of this Commonwealth may occasionally, even if "occurring from time to time, but without regularity or system; * * * or recurring as opportunity requires or admits," make a set of plans or specifications under any of the four specific types, providing that the author of these plans does not receive any compensation. All four enumerated types under this section of the act must be included under this limitation, inasmuch as no provision is made for exceptions or exclusions.

We are of the opinion, therefore, and you are advised, that:

1. The State Board of Examiners of Architects, in the administration of its duties, is restricted to the expenditure of that amount of money allocated to it by the Department of Public Instruction for the biennium; and that it cannot incur expenses which exceed this allocation, even though such expenses did not exceed the sum received by the Commonwealth in fees for examinations, registrations and renewals; and

2. Any resident of this Commonwealth may prepare a set of plans or specifications for the occasional or incidental erection or construction of any of the four specified types of building or construction as are set forth in section 13 of Act No. 402 of 1939, provided that the author of such plans and specifications shall not receive any compensation as the author thereof.

Very truly yours,
DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 328

Architects—Registration—Qualifications—Person engaged in practice prior to July 12, 1919—Person serving 15 years under registered architect—Services rendered outside Pennsylvania—Necessity for photographs, application, and fees—Applicants having six full years' experience—Right to prepare plans—Necessity for signing and sealing—"Private plans"—Preparation of plans by carpenters, contractors, and builders—Propriety of partnership of architect and engineer—Act of July 12, 1917, as amended.

1. Any person who shall have been engaged in the practice of architecture under the title of "architect" prior to July 12, 1919, may continue so to do without a certificate or registration, providing an affidavit setting forth these facts was filed with the State Board of Examiners of Architects prior to June 1, 1940, pursuant to section 7*(e)* of the Act of June 27, 1939, P. L. 1188, but such person may not be styled or known as a registered architect unless application for qualification and registration as such be made with the board prior to January 1, 1942, as further provided in the section.

2. Anyone who has been in the continuous employ of a duly licensed, qualified, or registered architect or architects, performing general drafting and architectural service for 15 years, may qualify under section 7 *(d)* of the Act of July 12, 1919, P. L. 933, added by the Act of June 27, 1939, P. L. 1188, even though all of the 15 years' service was not rendered in this Commonwealth: the State Board of Examiners of Architects in giving the oral examination, which must be satisfactorily passed by the applicant under the provisions of the section, may determine whether or not the service has been such as to satisfy the standards in existence in this Commonwealth.

3. Every registered architect must, under section 15 of the Act of June 27, 1939, P. L. 1188, sign and impress his seal on all plans and specifications prepared by him.

4. A partnership comprising a registered architect and a registered engineer may properly use the title "architectural offices" on its office door and letterheads, provided that the architect is designated as such thereon.

5. The use of the title "private plans" is not prohibited by the Act of June 27, 1939, P. L. 1188, if the plans are prepared by a duly qualified and registered architect who has signed them and impressed his seal thereon, or if they are prepared by an individual who is exempted by the provisions of sections 13 or 17 of the act.

6. Carpenters, contractors, and builders are prohibited from preparing plans or specifications for their clients by the Act of June 27, 1939, P. L. 1188, except in those instances covered by the last paragraph of section 13 of the Act of July 12, 1919, P. L. 933, as amended by the act of 1939, relating to occasional or incidental erection or construction of certain specified types of buildings where the author of the plans receives no compensation as such.

7. The State Board of Examiners of Architects may, under section 7*(b)* of the Act of July 12, 1919, P. L. 933, added by the Act of June 27, 1939, P. L. 1188, require all applicants for registration as qualified architects to pay the board a fee of $25, and furnish it with two photographs of the applicant and a properly

filled out application containing questions serving to establish the moral character, education, qualifications, practical experience, and identification of the applicant.

8. Section 7(a) of the Act of June 27, 1939, P. L. 1188, requiring six full years' experience in duly-qualified and registered architects' offices, is mandatory where an applicant seeks to qualify as a registered architect under that section at any time subsequent to June 27, 1939.

Harrisburg, Pa., March 5, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: In your memorandum of October 25, 1939, you requested our opinion on a number of questions which have been raised by the State Board of Examiners of Architects in connection with the administration of the Act of June 27, 1939, P. L. 1188. We shall answer your questions as we state them:

I

> May persons who began the practice of architecture in this Commonwealth after July 12, 1919, file an affidavit under Section 7, sub-paragraph (e); or does the amended act contemplate persons only who were engaged in practice between July 12, 1918 and July 12, 1919 and prior thereto?

Your question is based on the provisions of Section 7 (e) of the Act of July 12, 1919, P. L. 933 (63 PS §21, et seq.), as amended by the Act of June 27, 1939, P. L. 1188, which reads as follows:

> The board shall, upon application made at any time prior to January 1, 1942, issue a certificate of qualification and registration to all persons entitled to engage in the practice of architecture *by reason of filing, before January first, one thousand nine hundred and forty, with the board, the affidavit provided for in section six hereof.* (Italics ours.)

To answer your question properly, it is necessary to read, in conjunction with section 7 (e), supra, section 6 of the act of 1919 as also amended by Act No. 402, which section reads as follows:

> * * * Any person who shall have been engaged in the practice of architecture under the title of "architect" prior to the approval of this act may continue so to do without a certificate or registration, provided that an affidavit setting forth these facts be filed with the board of examiners; but such person shall not be styled or known as a registered architect *unless the board shall have issued to him or her a certificate of qualification and registration as herein pro-*

vided. (Italics, which is ours, represents new matter added by amendatory Act of June 27, 1939, P. L. 1188.)

Under the provisions of Section 6 of the original Act of July 12, 1919, P. L. 933, a person engaged in the practice of architecture under the title of "architect," for a period of one year prior to the approval of that act (that is prior to July 12, 1919), was authorized to continue in the practice of architecture without a certificate or registration, provided an affidavit setting forth these facts was filed with the board of examiners within five years from the date of its approval, or, prior to July 12, 1924. Such persons, however, were not to be styled or known as "registered architects."

The provisions of section 6 were amended by Act No. 402 of the 1939 legislature by the deletion of the words "for a period of one year" and "within five years from the date of approval of this act," unless the board shall have issued to him or her a certificate of qualification and registration as herein provided. In addition, the amendatory Act No. 402, by section 7 (e), which sub-section is entirely new, places, what may seem at first blush, a mandatory duty upon the board to issue a certificate of qualification and registration to any person entitled to engage in the practice of architecture upon the filing with the board an affidavit setting forth these facts prior to January 1, 1940.

The Act of May 28, 1937, P. L. 1019, article V, section 73 (46 PS §501, et seq.), provides for the construction of amendatory laws, and reads as follows:

> Whenever a section or part of a law is amended, the amendment shall be construed as merging into the original law, become a part thereof, and replace the part amended and the remainder of the original law and the amendment shall be read together and viewed as one law passed at one time: but the portions of the law which were not altered by the amendment shall be construed as effective from the time of their original enactment, and the new provisions shall be construed as effective only from the date when the amendment became effective.

It will, therefore, be seen that the apparent mandatory effect of section 7 (e) is modified by the provisions of section 6, as amended by Act No. 402.

We are, therefore, of the opinion that "any person who shall have been engaged in the practice of architecture under the title of 'architect' prior to the approval of the act of 1919, may continue to do so without a certificate or registration, provided that an affidavit setting forth these facts was filed with the board of examiners prior to January 1, 1940; but such person shall not be styled or

known as a registered architect *unless the board shall have issued to him or her a certificate of qualification and registration as herein provided.*" (Italics, which is ours, represents new matter inserted in the original act by the amendatory Act of June 27, 1939, P. L. 1188.) It should be kept in mind, however, that (1) the affidavit setting forth the facts must have been filed before January 1, 1940, and application for registration made before January 1, 1942, and (2) that the person filing the affidavit "shall have been engaged in the practice of architecture under the title of 'architect' prior to July 12, 1919."

II

> Inasmuch as the classification covering draftsmen in the original act referred only to resident architectural draftsmen of this Commonwealth, does paragraph (d) of Section 7 require that persons shall be residents of this Commonwealth with fifteen years' continuous employment in the office or offices of qualified architects in this Commonwealth, to qualify for registration under this section?

Paragraph (d) of section 7, which was added to the original Act of 1919 by the amendatory Act of June 27, 1939, P. L. 1188, reads as follows:

> The board may grant a certificate of qualificaion and registration to any one who has been in the continuous employ of a duly licensed, qualified or registered architect or architects, performing general drafting and architectural service for fifteen years, providing he or she submits evidence of having completed the course in a high school approved by the board of examiners, or its equivalent, and satisfactorily passing an oral examination to be determined by the board.

An examination of section 7 as a whole reveals that various classifications are provided under which a certificate of qualification and registration may be granted by the board. Paragraph (d) of section 7 governs the granting of certificates of qualification to all those who qualify under its provisions.

It is clear that "any one who has been in the continuous employ of a duly licensed, qualified or registered architect or architects, performing general drafting and architectural service for fifteen years," may be granted a certificate of qualification by the board "providing he or she submits evidence of having completed the course in a high school approved by the board of examiners, or its equivalent, and satisfactorily" passes an oral examination "to be determined by the board." Your inquiry, however, is directed as to whether those persons who may qualify under section 7 (d) must be residents of this Commonwealth with fifteen years' continuous employment in

the office or offices of qualified architects in this Commonwealth. This section of the act is silent as to where the fifteen continuous years' experience must be served. We may argue by analogy that had the legislature intended that this experience be obtained in the office of a duly licensed, qualified or registered architect or architects in this Commonwealth, it would have undoubtedly so stated. We are of the opinion that the legislature contemplated that the fifteen years' service could be rendered either in the office of a duly licensed, qualified or registered architect or architects located in this Commonwealth, or in some other state or foreign country where the standards governing the practice of architecture are the equivalent of those in this Commonwealth or acceptable to the board.

This interpretation is strengthened by a study of the provisions of section 7 (c) of the act before us for consideration, in that architects who have been lawfully practicing architecture for a period of more than ten years outside the State shall be required to take only "a practical examination, which shall be of the nature to be determined by the board of examiners." This indicates a reciprocity as it were between this Commonwealth and other states and foreign countries.

In passing, we desire to point out that the State Board of Examiners of Architects, in giving the oral examination which must be passed satisfactorily by the applicant, has control of determining whether or not the fifteen years' service as a draftsman has been of such a nature or has been rendered in a State which has standards which are the equivalent of those in existence in this Commonwealth.

Inasmuch as the original act referred to residential architectural draftsmen of this Commonwealth, the elimination of this "residential" requirement by the legislature in the latest amendment of this act further indicates that our interpretation is both logical and proper in this respect.

III

> Shall all plans and specifications be signed by and stamped with the seal of a registered architect?

This question is evidently directed at the provisions of the first paragraph of section 15 of the Act of June 27, 1939, P. L. 1188, which provides that:

> All plans and specifications prepared for such structures which by the terms of this act shall be prepared by a registered architect, shall be signed by a duly qualified and registered architect and stamped with his seal.

We desire to call to your attention, in this connection, that section 13 of this act, inter alia, states that:

> *In order to safeguard life, health and property,* no person shall practice architecture in this Commonwealth * * * unless such person shall have secured from the board a certificate of qualification and registration * * * and shall thereafter comply with the provisions of the laws of the Commonwealth of Pennsylvania governing the registration and licensing of architects. (Italics ours.)

It is obvious that the intention of the legislature was to place a mandatory duty on registered architects to sign and imprint their seals on plans and specifications so that it would be easier to safeguard life, health and property, by enabling the board or any other proper authority to place the responsibility for any defects on the party really at fault.

IV

> If one member of a firm is a registered architect and the other a registered engineer is it permissible for the firm to use the title "Architectural Offices"?

You inform us that the term "Architectural Offices" is used on the doors and letterheads of certain offices where one member is a registered architect and the other is a registered engineer, and that on the letterheads, after the name of each individual, there appears the title "architect" or "engineer" according to their respective qualifications. You direct our attention to section 15 which was added to the original act of 1919 by the amendatory Act of June 27, 1939, P. L. 1188. The particular part of the section which is applicable to our problem reads as follows:

> All plans and specifications prepared for such structures which by the terms of this act shall be prepared by a registered architect, shall be signed by a duly qualified and registered architect and stamped with his seal.
>
> No person shall designate or imply that he or she is the author of a set of plans or specifications except if he or she was or is in responsible charge of their preparation, whether made by them personally or under his or her immediate supervision.

A study of this particular section of the act leads us to the conclusion that the title "Architectural Offices," on an office door or letterhead, is permissible as long as an architect is a member of the firm, and such architect is a duly registered architect in accordance with the provisions of this act.

V

> Is it permissible to use the title "Private Plans"?

The title "Private Plans" is not prohibited by the act if the plans are prepared by a duly qualified and registered architect, signed by him and impressed with his seal, or if prepared by an individual who is exempted from the provisions of sections 13 and 17 of the act of 1919 as amended by the act of 1939.

VI

Under the provisions of Section 13, may contractors, builders or carpenters prepare plans and specifications for their clients? If so, what title shall appear on the drawings and specifications?

The amendment of section 13 of the Act of July 12, 1919, as amended by Act No. 402 of 1939, eliminated those provisions of the law which permitted the designing and supervising of the construction of buildings, provided the drawings were signed by the authors with their true appellation as engineer, contractor, builder or carpenter as the case may be, but without the use in any form of the title "architect." We construe the elimination by the legislature of 1939 of that part of the law which permitted an engineer, contractor, builder or carpenter to prepare plans for the construction of buildings as long as they signed them with their true appellation, to mean, according to the provisions of the act of July 12, 1919, as amended, that they may no longer prepare such plans either directly or indirectly unless they are qualified and registered architects, or unless they come within the purview of the provisions of this act as provided for in section 13. Reference in this respect should be made to Formal Opinion No. 327, wherein we ruled that "any resident of this Commonwealth may prepare a set of plans or specifications for the occasional or incidental erection or construction of any of the four specified types of building or construction as are set forth in section 13 of the Act of June 27, 1939, P. L. 1195, Act No. 402, provided that the author of such plans shall not receive any compensation as the author thereof." It follows, therefore, that no occasion arises where contractors, builders or carpenters would place any title on plans or specifications.

VII

May the board require all applicants for registration regardless of classification to comply with the provisions of the act and the rules of the board so as to fill out a proper form of application, provide a fee of $25 and two photographs?

You also inform us in this respect that the board is particularly interested in knowing if an applicant can be compelled to fill out an

application containing questions tending to establish the moral character, educational qualifications, practical experience and identification of the applicant.

Under section 7 (b), which was added to the act of 1919 by the amendatory Act of June 27, 1939, P. L. 1188, it is provided that:

> Every person applying for examination or certificate of qualification and registration under this act shall pay a fee of twenty-five dollars to the Commonwealth.

Sections 2, 6 and 7 of the act of 1919, as amended, clearly give the board the right to request all applicants to furnish it with two photographs, as well as to permit the board to require the filling out of application blanks containing questions tending to establish the moral character, educational qualifications, practical experience and identification if the applicant desires to be registered as a qualified architect.

VIII

> In defining Class "EA" on the attached copy of "Classifications," is the interpretation of the board correct?

Class "EA" is defined by the State Board of Examiners of Architects under "Classifications," as follows:

> Class "EA" Registration without full examination shall be granted, based upon the applicant's evidence of proper qualifications and his having been engaged in the practice of architecture in this Commonwealth on or before July 12, 1919, providing an affidavit in accordance with section 6 of the act is filed prior to January 1, 1940, and application for registration is filed with the Board prior to January 1, 1942.

For answer to this question, we refer you to our advice on the first question answered in this opinion, which demonstrates that the board is correct in its interpretation.

IX

You inform us that the board has certain discretionary power in accepting scholastic training, and then ask:

> Does the Board have the right to accept applicants for written examinations who may not have had the full six years in architects' offices but have the equivalent along architectural lines?

You further state that since 1929 the depression has made it difficult for young architects to obtain experience with a duly licensed, qualified or registered architect or architects. Your question evi-

dently is brought about by the addition to section 7 (a) of Act No. 402, particularly the following paragraph thereof:

> He shall also present evidence that he or she has had at least six years' satisfactory experience in the office or offices of a duly licensed, qualified or registered architect or architects.

It is to be noted that this particular section of the act has no application to any applicant who qualifies under subsections (a) and (b) of section 7.

We are confronted with the question whether or not the new section above cited is a mandatory requirement. We are inclined so to hold. Those who come under this classification do not qualify within the purview of the other classifications, which are made up of those applicants who had a prescribed course of study in an architectural college or school and three years' experience in the office or offices of a duly licensed, qualified or registered architect or architects; or who qualify for registration and certification by virtue of their coming from another state or country where the qualifications required of an architect are equal to those in this State.

In recent years, there has been a well defined and decided movement in all professional and semi-professional occupations to raise the standards of preparation and training so that the individual may be better qualified to render the service which the public is entitled to expect. We may properly infer that this was the intention of the legislature when it stated in clear and unmistakable language, in section 13 of the act of 1919 as amended by the Act of June 27, 1939, P. L. 1188, that:

> *In order to safeguard life, health and property, no person shall practice architecture in this Commonwealth* * * * unless such person shall have secured from the board a certificate of qualification and registration * * *. (Italics ours.)

This is another example of what may seem to be a hardship visited upon an individual or a particular group of individuals, which in reality, however, inures to the benefit and welfare of the public.

While section 56 of the Statutory Construction Act of 1937, P. L. 1019, provides that "no law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature," yet we believe any applicant who applies for examination under the provisions of section 7 (a) after the effective date of the act, i. e., June 27, 1939, must "present evidence that he or she had at least six years' satisfactory experience in the office or offices of a duly licensed, qualified or registered architect or architects."

We are of the opinion, that:

1. Any person who shall have been engaged in the practice of architecture under the title of "architect" prior to July 12, 1919, may continue so to do without a certificate or registration, provided an affidavit setting forth these facts was filed with the State Board of Examiners of Architects prior to January 1, 1940; but any such person may not be styled or known as a registered architect unless application for qualification and registration as such be made with the board prior to January 1, 1942.

2. Anyone who has been in the continuous employ of a duly licensed, qualified or registered architect or architects, performing general drafting and architectural service for fifteen years, may qualify under section 7 (d) of the act of 1919, which was added thereto by the amendatory Act of June 27, 1939, P. L. 1188, even though all of the fifteen years' service was not rendered in the employ of a duly licensed, qualified or registered architect or architects in this Commonwealth.

3. Every registered architect must sign and impress his seal on all plans and specifications prepared by him.

4. Where there is a partnership comprising a registered architect and a registered engineer, it is permissible to use the title "Architectural Offices" on the office door or letterheads, since the architect is registered and this designation appears after his name.

5. The use of the title "Private Plans" is not prohibited, if the plans are prepared by a duly qualified and registered architect who has signed them and impressed his seal on the plans, or if the plans are prepared by an individual who is exempted by the provisions of sections 13 and 17 of the act.

6. Carpenters, contractors and builders are no longer permitted to prepare plans or specifications for their clients except in those instances covered by the last paragraph of section 13 of the Act of 1919, P. L. 933, as amended by the Act of June 27, 1939, P. L. 1188.

7. The State Board of Examiners of Architects may require all applicants for registration as qualified architects to pay the board a fee of $25.00, furnish it with two photographs of the applicant, and a properly filled out application containing questions serving to establish the moral character, educational qualifications, practical experience and identification of the applicant.

8. The board has properly defined Class "EA," which provides that:

> Registration without full examination shall be granted, based upon the applicant's evidence of proper qualifications and his having been engaged in the practice of architecture in this Commonwealth on or before July 12, 1919, providing an affidavit in accordance with section 6 of the act is filed

prior to January 1, 1940, and application for registration is filed with the Board prior to January 1, 1942.

9. The provisions of the law requiring six full years' experience in duly qualified and registered architects' offices is mandatory where an applicant seeks to qualify under section 7 (a), which was added to the act of 1919 by the amendatory Act of June 27, 1939, P. L. 1188. This is so in all cases where the applicant seeks to qualify under these particular provisions of the law at any time subsequent to June 27, 1939.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 329

Poor—Eligibility for public assistance—Public Assistance Law of June 24, 1927, as amended June 26, 1939—Effect of amendment upon existing applications—Persons leaving Commonwealth to obtain employment—Eligibility to assistance on return—Persons having quasi-settlement in State—Emergency cases.

1. All applications for assistance, whether new applications or reapplications of whatsoever kind or character, if filed after the effective date of the Act of June 26, 1939, P. L. 1091, amending the Public Assistance Law of June 24, 1937, P. L. 2051, must comply with the requirements of the amendatory act.

2. Since the legislature has in section 7*(i)* of the Public Assistance Law expressed an intention to encourage employables to accept full- or part-time employment, an applicant having settlement in the Commonwealth, who has left it in an honest effort to obtain employment, and who thereafter returns or is returned to this State, is eligible for assistance though lacking two years' residence immediately preceding the date of application as required by section 9*(d)*.

3. Applicants who have resided within the Commonwealth continuously for two years prior to filing application for assistance, but who do not have settlement in the Commonwealth, and also those who have neither settlement nor two years' residence prior to filing an application, may be granted assistance under section 9*(e)* of the Public Assistance Law since they have quasi-settlement in the State, but such assistance can continue only until the recipients are returned to their place of settlement, and if they cannot be returned the grant must be discontinued unless the recipient meets the requirements of eligibility prescribed in section 9 *(d)*.

4. Assistance should be granted in emergency cases, under section 4*(a)* of the Public Assistance Law, only to persons who appear to be eligible for assist-

ance, but, even where the facts indicate ineligibility, a grant may be made in an emergency situation until other aid can be solicited, providing that if, upon proper investigation, the applicant is found to be ineligible, the grant must be immediately discontinued.

Harrisburg, Pa., March 6, 1940.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of October 11, 1939 in which you request our advice on the extent to which certain sections of the Public Assistance Act, the Act of June 24, 1937, P. L. 2051 (62 PS §2501, etc.), as amended by the Act of June 26, 1939, P. L. 1091, and the Institution District Act, the Act of June 24, 1937, P. L. 2017 (62 PS §2201, etc.), modifies the conditions of eligibility for assistance as stated in section 9 (d) of the amended act.

You suggest that under section 9 (d) as interpreted by our Informal Opinion No. 1011, the following classes of citizens, applying for general assistance subsequent to July 26, 1939, are ineligible for general assistance:

> (1) Persons in Pennsylvania at the time of application who have settlement in Pennsylvania, but have not resided in Pennsylvania continuously for two years preceding the date of their application. These persons are not transferable to other states since they have settlement in Pennsylvania.
>
> (2) Persons in Pennsylvania at the time of application who have resided here continuously for two years prior to application but do not have settlement in Pennsylvania. Some of these persons, but not many, are returnable to other states where they have settlement.
>
> (3) Persons in Pennsylvania at the time of their application who have neither settlement nor two years' residence prior to application. Some, but not all, of these persons could be sent back to other states where they have settlement.
>
> (4) Persons not in Pennsylvania, but who have settlement in Pennsylvania. This Department was informed, however, that it must approve the return of such persons if requested to do so by other states.

Our Informal Opinion No. 1011 presented an interpretation of this amended section 9 (d) of the Public Assistance Law, and in answer to your specific question:

> 3. If the amended section 9 (d) of the Public Assistance Law means that no person with legal settlement in Pennsylvania is eligible to receive public assistance unless he has

> resided in Pennsylvania for two years immediately prior to application, does this provision affect only persons who apply for assistance after the effective date of the amending act, or does it also mean that persons now receiving assistance are ineligible if, as of the effective date of the amending act, they had not resided in Pennsylvania for the two years immediately preceding?

we replied as follows:

> 3. As above stated, the provisions of Act No. 384, approved June 26, 1939, amending the Public Assistance Law of June 24, 1937, P. L. 2051, only affects persons who file applications for assistance on and after the effective date of the amending act.

At the outset, we may state that the Act of June 26, 1939, P. L. 1091 affects all applications for assistance filed on and after the effective date of the amendatory act, be they new applications or reapplications of whatsoever kind or character. Since recipients on work relief projects, operated under the Act of June 27, 1939, P. L. 1184, remain on the assistance rolls, they present no problem. A question does, however, arise with reference to employable recipients of assistance who are given full or part-time employment. Section 7 (1) of the Public Assistance Law, as amended, provides as follows:

> Section 7. Powers and Duties of County Boards of Assistance.—Each county board of assistance shall have the power, and its duty shall be:
>
> * * * * *
>
> (1) To encourage employable recipients of assistance to accept full or part-time employment, by providing that such recipients will again be granted assistance upon the termination of such employment, if in need thereof; and any rule or regulation of the Department of Public Assistance or of the State Board of Public Assistance or of the county board of assistance heretofore or hereafter adopted, contrary hereto, is hereby avoided.

The express legislative intent here enunciated shows a desire to encourage bona fide employables to endeavor to obtain full or part-time employment within or outside the Commonwealth by assuring such bona fide employables that upon the failure or termination of such employment they will not be penalized by being deprived of their right to obtain assistance. The obvious intent of the legislature is not to penalize those employables who go out of the State to obtain full or part-time employment, and, therefore, if an applicant has settlement in Pennsylvania and had the residence requirement before leaving the State, and can show that the absence

was due to a bona fide effort to obtain full or part-time employment, then such applicant should not be penalized for endeavoring to obtain such employment, and would come under the provisions of section 7 (1) of the Public Assistance Law and be eligible under the Public Assistance Law if otherwise qualified.

Relative to your main query as to the extent, if any, section 9 (d) is modified by sections 2, 4 (a) and 9 (e) of the Public Assistance Law, it is essential to submit section 9 (d), as amended, which provides as follows:

> Eligibility for Assistance.—Except as hereinafter specifically otherwise provided in the case of pensions for the blind, all persons of the following classes shall be eligibile to receive assistance, in accordance with rules, regulations and standards established by the Department of Public Assistance with the approval of the State Board of Assistance, as to eligibility for assistance, and as to its nature and extent:
>
> * * * * *
>
> (d) Other persons who are citizens of the United States and who have a settlement in Pennsylvania and have resided therein for at least two years immediately preceding the date of application for assistance, and all aliens who have within two years previous to the first day of January, one thousand nine hundred and forty, filed their declaration of intention to become a citizen, and who have a legal settlement in Pennsylvania and have resided therein for a period of not less than two years 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, and who do not require institutional care because of physical or mental infirmity.

This section made certain changes in eligibility requirements; among others it increased the residence requirement from one to two years, and added the settlement requirement. The Public Assistance Law does not define the term "settlement," but the Act of May 14, 1925, P. L. 762, section 10 (e) defines "settlement" as follows:

> (e) A "settlement" of a person shall be his right under the provisions of this act to relief in any particular poor district.

In further defining this term, the court, per Clark, J., Huston Township *v.* Benezetta, 135 Pa. 393, 399 (1890) said:

> A settlement under the poor laws is a residence of such permanent and continuous character as, under certain circumstances, will entitle a person to support or assistance as a pauper. * * *

This 1925 act was repealed by the County Institution District Law (Act of June 24, 1937, P. L. 2017). Though the County Institution District Law does not define "settlement," it considers settlement and removal in article V of the act.

The poor laws of the Commonwealth of Pennsylvania were taken from the Elizabethan Law of 1601 (43 Eliz., c. II) and our Act of March 9, 1771 (I Sm. 338, 8 Statutes at Large 75). These continued in effect until the Act of June 13, 1836, P. L. 541, and amendatory acts, until repealed by the Public Assistance Law of June 24, 1937, supra. Under these earlier acts settlement was made the basis of eligibility for poor relief: See Busser *v.* Snyder, 282 Pa. 440.

Though the legislature, by these statutes, made settlement a basis for eligibility for poor relief and assistance, this did not give any vested right to such relief or assistance.

The responsibility of the county or the State to furnish relief or assistance to indigent persons is purely statutory, and there appears to be no reason why the legislature may not prescribe the conditions or circumstances under which the county or State obligation shall come into existence.

The conditions of eligibility, namely two years' residence and settlement, imposed by the amended Public Assistance Law, should be adhered to unless modified by other sections of the Public Assistance Law or the County Institution District Law.

As stated above, you inquire as to the extent, if any, to which sections 2, 4 (a) and 9 (e) of the Public Assistance Law, as amended, modify these requirements for eligibility for public assistance.

Section 2 of the Public Assistance Law, as amended, merely sets forth a definition for "assistance," whereas section 9 sets forth requirements for eligibility to obtain such assistance grants.

Section 2 provides as follows:

> Definitions.—As used in this act, unless otherwise indicated,
>
> "Assistance" means assistance in money, goods, shelter, medical care, or services, 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. The word, assistance, shall be construed to include pensions for those blind persons who are entitled to pensions, as provided in this act, and to include also burial for those indigent persons who were receiving assistance at the time of their death.
>
> "General Assistance" means assistance provided from or with State funds, *only to persons entitled under this act to*

assistance, other than dependent children, aged persons, and blind persons. (Italics ours.)

This section by its provision that general assistance is to apply only to persons entitled under this act to assistance makes section 9, prescribing conditions of eligibility, controlling.

Section 4 (a) provides as follows:

> General Powers and Duties of Department of Public Assistance.—The Department of Public Assistance shall have the power, and its duty shall be:
>
> (a) To allocate to the several assistance programs funds with which to provide assistance and funds for administrative expenses, and as may be needed, from time to time, *to keep reasonable emergency funds in the hands of local boards,* which shall be used by the executive director for the furnishing of assistance and pensions respectively *in emergency cases,* upon application to him, or under the direction of any member of the local board; (Italics ours.)

The emergency fund set up by this section to meet immediate needs is expressly to be administered under the discretion of the executive director of the county board of assistance. Though the emergency fund is thus placed under the discretion of the executive director to meet assistance needs which are immediate, it does not establish a type of assistance which can be granted to persons otherwise ineligibile under the Public Assistance Law. Assistance should be granted in emergency cases only to persons who appear to be eligibile for assistance under the Public Assistance Law. It would, however, appear permissible under the emergency provision to make a grant in an emergency situation until other aid could be solicited, even in cases where the facts disclosed indicated ineligibility under the act. This would merely be sound public policy and allow the immediate need to be met, but no continuation of such grants could be allowed if, upon proper investigation, applicants were found to be ineligibile.

Section 9 (e) of the Public Assistance Law provides as follows:

> Section 9. Eligibility for Assistance.—Except as hereinafter specifically otherwise provided in the case of pensions for the blind, all persons of the following classes shall be eligibile to receive assistance, in accordance with rules, regulations and standards established by the Department of Public Assistance, with the approval of the State Board of Assistance, as to eligibility for assistance, and as to its nature and extent:
>
> * * * * *
>
> (e) Any person within any group, defined in this section, who has a *quasi-settlement* in this Commonwealth *until* he is removed to his place of legal settlement. (Italics ours.)

There is no definition of "quasi-settlement" in the Public Assistance Law, nor is there any definition of the term "quasi-settlement" as such in the law dictionaries. However, Bouvier defines the terms "settlement" and "quasi" separately as follows:

> SETTLEMENT. A residence under such circumstances as to entitle a person to support or assistance in case of becoming a pauper.
>
> It is obtained in various ways, to wit: by birth; by the legal settlement of the father, in the case of minor children; by marriage; by continued residence; by the payment of requisite taxes; by the lawful exercise of a public office; by hiring and service for a specified time; by serving an apprenticeship; and perhaps some others, which depend upon the local statutes of the different states. See 1. Bla. Com. 363; Guardians of the Poor of Philadelphia *v.* Overseers, 6 S. & R. (Pa.) 565.
>
> QUASI (Lat. as if, almost). A term used to mark a resemblance, and which supposes a difference between two objects. Dig. 11, 7. 1. 8. 1. See People *v.* Bradley, 60 Ill. 402. It is exclusively a term of classification. Prefixed to a term of Roman law, it implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other; Maine, Anc. Law 332.

It is clear from the above section and definitions that any person, whose stay in the Commonwealth resembles that of settlement, is eligible for assistance but *only until he can be removed to his place of legal settlement.*

Although the County Institution District Act (Act of June 24, 1937, P. L. 2017), section 501 (j) placed responsibility on the Commonwealth for persons not dependents who had no known settlement in this Commonwealth and could not be removed to another state, it should be noted that the legislature, by its amendment, the Act of June 26, 1939, supra, section 9 (d) placed certain additional requirements for eligibility on recipients of assistance.

In view of the foregoing, we are of the opinion that:

(1). The Act of June 26, 1939, P. L. 1091, amending the Public Assistance Law of June 24, 1937, P. L. 2051, affects all applications for assistance filed on and after the effective date of the act, be they new applications or reapplications of whatsoever kind or character.

(2) All such applications must comply with the eligibility requirements as prescribed under section 9 (d) of the Act of June 26, 1939, supra, except as such requirements are modified by sections 7 (1), 9 (e) and 4 (a) of the Public Assistance Law as follows:

(a) Under section 7 (1), since the legislative intention is expressly to encourage employables to accept full or part-time employment, if an applicant has settlement in the Commonwealth, but has left the State in an honest effort to obtain such full or part-time employment and returns or is returned to this State, his place of settlement, then such applicant should not be penalized and under this section 7 (1) would be eligibile, though lacking two years' residence immediately preceding the date of application.

(b) Under section 9 (e), applicants who have resided here continuously for two years prior to filing an application, but who do not have settlement in Pennsylvania, and also those who have neither settlement nor two years' residence prior to filing an application, can be granted assistance under section 9 (e) since they have quasi-settlement in the State, but such assistance granted under section 9 (e) is only to be granted *until* such recipients are returned to their place of settlement. If after investigation they cannot be returned, grant must be discontinued unless recipient meets the requirements of eligibility prescribed in section 9 (d).

(c) Under section 4 (a) assistance should be granted in emergency cases only to persons who appear to be eligibile for assistance under the Public Assistance Law. However, it would appear permissible under the emergency provisions to make a grant in an emergency situation until other aid could be solicited, even in cases where the facts disclosed indicated ineligibility under the Public Assistance Law. This would merely be sound public policy and allow an immediate need to be met, but no continuation of such grants could be allowed if, upon proper investigation, applicants were found to be ineligible. If any change is desired, the remedy is with the legislature.

The particular problems of eligibility that present themselves are matters of administration and ought to be decided by your department as they arise on the basis of the Public Assistance Law, as interpreted above and in our Informal Opinion No. 1011.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 330

Criminal procedure—Prisoners under death sentence—Custody—Warden of Western State Penitentiary—Death house at Rockview—Time for transfer of prisoner—Act of June 19, 1913.

1. A convict who has been found guilty of murder in the first degree and sentenced to death, must, under the Act of June 19, 1913, P. L. 528, be delivered by the officer having him in custody to the warden of the Western State Penitentiary upon due notification by the warden, as provided in section 4 of the act, and must thereafter be kept in solitary confinement in said penitentiary until the penalty of death has been inflicted or until lawfully discharged from such custody.

2. In view of the very limited accommodations at the death house at Rockview, and its inconvenience to friends and relatives of one confined therein, the warden of the Western State Penitentiary should not assume custody of a convict condemned to death until shortly before the time set for execution, in the absence of exceptional circumstances, as where it seems advisable for safety or where local accommodations are not satisfactory.

Harrisburg, Pa., March 7, 1940.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: We have your request for a formal ruling as to the place in which a convict, who has been found guilty of murder in the first degree and sentenced to death by electrocution, shall be kept in custody after the sentence has been imposed, and until penalty of death has been inflicted.

You state that in years past in some cases the prisoner has been held in the county jail until such time as the sheriff has been directed to read the formal death warrant to the prisoner, after which he has been removed to Rockview. You further inquire whether this practice is a "requirement" or merely a "custom."

You also state that as a safety measure it would appear advisable in some cases to remove the prisoner to the penitentiary until such time as a definite date of execution has been named.

Such a situation is governed by the Act of June 19, 1913, P. L. 528 (19 PS §1122 et seq.), which provides in part as follows:

> Section 2. Whenever any person shall have been convicted and sentenced to death, the clerk of the court where such conviction shall have taken place shall transmit to the Governor of the Commonwealth a full and complete transcript of the record of such trial and conviction, within thirty days after sentence, or, in the event of an appeal, within twenty days after the final disposal of the cause upon such appeal.

> Section 3. After the receipt of the said record the Governor of the Commonwealth shall issue his warrant, directed to the warden of the Western Penitentiary, commanding said warden to cause such convict to be executed in said penitentiary, within the week to be named in said warrant, and in the manner prescribed by law.
>
> Section 4. Upon the receipt of such warrant the said warden shall, by a written notice under his hand and seal, duly notify the officer having the custody of such convict to deliver such convict to the custody of such warden, and it shall be the duty of such officer to forthwith cause such delivery to be made. Thereupon, and until the penalty of death shall be inflicted, or until lawfully discharged from such custody, said convict shall be kept in solitary confinement in said penitentiary. During such confinement no person except the officers of such penitentiary, the counsel of such convict, and a spiritual adviser selected by such convict, or the members of the immediate family of such convict, shall be allowed access to such convict without an order of said court or a judge thereof.

The language of this act contained in the sections above quoted bearing upon the point raised in your communication is so plain as to render the answer to your question altogether free from doubt.

It appears that this act was construed in former opinions of this department. In our opinion, dated March 4, 1915, Op. Atty. Gen. 1915-1916, page 511, 45 Pa. C. C. 14, it was stated, in part: (page 15)

> * * * that the prisoner referred to is not in the custody of the sheriff of Philadelphia County, but is in the custody of the keeper of the Philadelphia County Prison, whose duty it is to deliver him to you, as the warden of the Western Penitentiary, upon receipt of the notice referred to in Section 4 of the Act of 1913.

This act was also interpreted in our opinion, dated August 2, 1922, Op. Atty. Gen. 1921-1922, page 444, 2 Pa. D. & C. 354, in which it was stated, in part: (page 355)

> * * * convicts delivered to the custody of the Warden of the Western Penitentiary under the provisions of the aforesaid act can not lawfully be returned to the custody from which received by the warden upon a respite granted by the Governor, the custody imposed by the Act upon the warden and the manner and place of confinement not being affected thereby.

The death house at Rockview has not been used for long custody nor for the custody of a large number of prisoners, as there is a maximum cell capacity for only six convicts, and no accommodations whatever for women. It not infrequently happens that there

are more than this number of convicts throughout the Commonwealth upon whom the death sentence has been imposed. In order to take custody of all such convicts, it would be necessary to enlarge the quarters at Rockview, and to maintain a continuous death watch, which would involve a special appropriation therefor.

It is doubtful whether it was intended that a convict should be confined to the death chamber for any other purpose than to be put to death. Frequently, a convict who goes to the death chamber at Rockview is without funds; usually his family is also without funds. During the time that he is in custody there he would virtually, by reason of the costs of transportation, etc., be deprived of seeing his family, his counsel, and his spiritual adviser, who are the only persons allowed access to the convict, according to the terms of the act. This would result in a hardship to the convict, due to the fact that it often happens that after the death sentence has been imposed, there is a considerable lapse of time due to causes such as appeals and respites.

Were a large number of convicts confined in the death house for long periods, it would constitute most inhumane treatment constantly to subject them to the ordeals of witnessing the preparations for, and the actual going of fellow convicts to, their deaths a few feet away.

It will be observed from the language of section 4 of the act that upon the receipt of the death warrant, the warden shall *duly* notify the officer having custody of the convict to deliver him to the warden, etc.

There is nothing in the act which requires a convict to be delivered to the penitentiary immediately. Nor is it advisable to do so, especially in view of the conclusions reached in the opinion cited in Op. Atty. Gen. 1921-1922, page 444, that convicts delivered to the warden under the act cannot lawfully be returned to the custody from which received by the warden on a respite granted by the Governor.

The word *duly* is defined in The Century Dictionary and Cyclopedia as follows:

> In a due manner; when or as due; agreeably to obligation or propriety; exactly; fitly; properly.

> "Duly" in legal parlance means according to law; in accordance with what is right, required, or suitable, fittingly, becomingly, regularly. Chattanooga Boiler & Tank Co. *v.* City of Collinsville, Tex. Civ. App., 111 S. W. 2d. 1170, 1171.

> WORDS AND PHRASES, Fifth Series, page 536.

> The word "duly" means in due or proper time, in ac-

cordance with what is right, required, or suitable, and meaning "according to law." Dixie Grain *v.* Quinn, 61 So. 886, 889; 181 Ala. 208.

WORDS AND PHRASES, Third Series, page 79.

In view of the foregoing, it appears that the present practice of receiving convicts at the penitentiary after all reasonable likelihood of further respite or commutation has passed, and immediately prior to the time set for the infliction of the death penalty, is a reasonable and proper interpretation of the act.

This interpretation would not prevent the removal of a convict to the penitentiary by agreement between the proper authorities, under special circumstances, as a safety measure, or where in a particular county, facilities are not adequate to take care of such convict.

We are of the opinion, therefore, that, after the receipt of the death warrant, the warden of the Western State Penitentiary should duly, or in proper time, notify the officer having custody of a convict, who has been sentenced to death by electrocution, to deliver such convict to the warden; and until the penalty of death shall be inflicted or until lawfully discharged from such custody, said convict should be kept in solitary confinement in said penitentiary, in accordance with the provisions of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 331

The Solicitation Act—Authority of the Department of Welfare to prosecute under section 10 of the act—Jurisdiction of local authorities—Act of May 13, 1925, P. L. 644.

Criminal prosecutions under section 10 of the act, as amended, may be brought by warrant of arrest, after complaint on oath or information made by a member of the Department of Welfare or any other person qualified to take an oath. The enforcement of the act should be accomplished by the ordinary modes of procedure for the enforcement of penal statutes. While any person may institute criminal proceedings, it is the duty of the Department of Welfare to do so whenever violations of the act come to its attention.

Harrisburg, Pa., March 12, 1940.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether or not the Department of Welfare has authority to bring prosecutions under section 10 of the Act of May 13, 1925, P. L. 644, (commonly referred to as "The Solicitation Act"), as amended by the Act of June 20, 1935, P. L. 358, section 1, (10 PS §141, et seq.), or whether this matter comes within the jurisdiction of local authorities.

You state that although certificates of registration under said act have been refused several organizations throughout the Commonwealth, they continue soliciting funds. You further request, if the enforcement of this act is the responsibility of the Department of Welfare, that you be furnished with advice concerning the procedure to be followed.

The act referred to is, in part, entitled, "An act relating to and regulating the solicitation of moneys and property for charitable, religious, benevolent, humane and patriotic purposes."

Section 1 of the act referred to, as amended, provides as follows:

> That thirty days after the approval of this act it shall be unlawful for any person, copartnership, association, or corporation, except in accordance with the provisions of this act, to appeal to the public for donations or subscriptions in money or in other property, or to sell or offer for sale to the public any thing or object whatever to raise money, or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment, or exhibition, or by any similar means for any charitable, benevolent, or patriotic purpose, or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere, or of relieving suffering of animals, or of inculcating patriotism, unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, or association holding a valid certificate of registration from the Department of Welfare, issued as herein provided.

Section 2 of the act provides for the issuance, refusal, and revocation by the Department of Welfare of certificates of registration.

Section 10 of the act provides as follows:

> Any person who or any copartnership association or corporation which violates any of the provisions of this act or any of the rules and regulations made under the authority of this act, or fails to file any statement required to be filed within the period fixed by the law, shall be guilty of a misdemeanor, punishable, in case of a corporation, copartnership, or association by a fine of not less than one hundred dollars or more than one thousand dollars; in the case of an individual, either by such fine or by imprisonment for not more than one year, or both.

It would appear that proceedings under the above section 10 of the act are similar to other cases where a crime has been committed, the usual nature of which is by warrant of arrest, after complaint on oath or information, and a binding over for trial after hearing. See 1 Sadler, Criminal Procedure in Pennsylvania (2d ed. 1937) section 71. To quote, id. at section 73, we find:

> An agent of the Department of Health may make information for violation of the Act of April 20, 1921, regulating the practice of medicine. Citing the case of Commonwealth *v.* Wells, 11 Leh. 1.

Quoting further from the above section:

> As a general rule, any person capable of taking an oath in a court of justice is competent to become a prosecutor.

To the same effect are Commonwealth *v.* Barr, 25 Pa. Super. Ct. 609 (1904) and Commonwealth *v.* Hamilton, 74 Pa. Super. Ct. 419 (1920).

There is nothing in the language of the act which expressly limits prosecutions for violations of the act to the Department of Welfare, nor is said department specially charged with the enforcement of the provisions of the statute. But, even if it were, a mandate to the department to enforce the provisions of the act would not constitute an exclusive authority to it to institute criminal prosecutions therefor. See Commonwealth *v.* Hamilton, supra.

While the Department of Welfare has the power under the act to issue certificates of registration and to make rules and regulations necessary for the purpose of carrying out the provisions of the act, this does not disable another from appearing as prosecutor. See Commonwealth *v.* Hamilton, supra; Commonwealth *v.* Byrd, 24 Pa. Dist. 1031 (1915).

The case of Commonwealth *v.* Hamilton, supra, arose on the appeal of the Commonwealth from the action of the court of quarter sessions quashing an indictment against the defendant charging him with unlawfully, wilfully and knowingly engaging in the practice of medicine and surgery without first having received a certificate of licensure from the Bureau of Medical Education and Licensure. In this case, referring to the medical licensure act, it was said, inter alia, at page 423 of 74 Pa. Super. Ct.:

> * * * No more as we view the statute is the authority to enforce the law limited to the bureau of medical education with respect to the subject now under consideration. That board has its place of business at the State capitol. It is presumably not familiar with the conduct of citizens of the State generally. It would be an unwieldy and probably in-

> efficient method which required it to be informed of transgressions of the statute with reference to the illegal practice of medicine throughout the Commonwealth as a necessary condition precedent to the enforcement of the law. It is more consonant with the legislation of the State to hold that while the law requires the board to be active in procuring the enforcement of all its provisions, it is neither to be expected nor required to be exclusively responsible for criminal prosecutions thereon.

By the Act of March 24, 1909, P. L. 63, an obligation was imposed upon the dairy and food commissioner with reference to the enforcement of that statute which contained a provision making it a misdemeanor to sell adulterated ice cream; but it was held in the case of Commonwealth *v.* Crowl, 52 Pa. Super. Ct. 539 (1913), as follows (page 546):

> It is not an objection to the prosecution that it was not commenced by the dairy and food commissioner. That functionary was specially charged with the enforcement of the provisions of the statute, but that did not disable any citizen of the commonwealth from appearing as a prosecutor. The offense is a misdemeanor, and a prosecution for a violation of the act might be instituted by any person inclined so to do.

We are unable to hold that the prosecution of a violation of the act can be instituted only by the Department of Welfare, or that such a case can be maintained only on an indictment signed by a person selected by that department. See Commonwealth *v.* Hamilton, supra.

The enforcement of the act under consideration should be left to the ordinary modes of procedure for the enforcement of penal statutes: See Commonwealth *v.* Byrd, 24 Pa. Dist. 1031, supra; Commonwealth *v.* Spencer, 28 Pa. Super. Ct. 301; Commonwealth *v.* Barr, 25 Pa. Super. Ct. 609.

Since the Department of Welfare is the licensing agency under the act, it has a *duty* to enforce the act by having its agents institute criminal proceedings. Of course, other persons *may* do so, but it is the *duty* of the Department of Welfare to do so whenever violations come to its attention.

We are of the opinion, therefore, that criminal prosecutions under Section 10 of the Act of May 13, 1925, P. L. 644, as amended, may be brought by warrant of arrest, after complaint on oath or information made by a member of the Department of Welfare or any other person qualified to take an oath; and that the enforcement of the act should be accomplished by the ordinary modes of procedure for the enforcement of penal statutes. While any person *may* institute

criminal proceedings, it is the *duty* of the Department of Welfare to do so whenever violations of the act come to its attention.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 332

Public assistance—Appointment of claim settlement agents as administrators—Support Law—Certain section of Opinion No. 318 to be ignored.

As it has been the policy of the department to appoint claim settlement agents as administrators and the department feels that it is impossible to secure repayments of assistance paid by the Commonwealth from estates where no administration has been raised through any other method, the department is authorized to ignore the section of Opinion 318 which prohibits appointment of claim settlement agents as administrators and to proceed with such matters as heretofore.

Harrisburg, Pa., March 12, 1940.

Honorable Howard L. Russell, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: We have your letter of March 4, 1940 relative to Formal Opinion No. 318, in so far as it applies to the appointment of claim settlement agents as administrators. You inform us that practically all the estates against which the Department of Public Assistance holds claims consist solely of real estate, and that an administration is raised for the one purpose of instituting suit to preserve the lien of the Commonwealth and that no compensation or commission will, therefore, be derived by the administrator.

For these reasons you state that it is almost impossible to secure private individuals to act as such administrators and that, therefore, your department cannot carry out the provisions of the Support Law relative to repayments of assistance in so far as claims against estates of deceased persons are concerned.

As it has been the policy of your department to appoint claim settlement agents as administrators and the department feels that it is impossible to secure repayments of assistance paid by the Commonwealth from estates where no administration has been raised through any other method, you are hereby authorized to ignore the

section of Formal Opinion No. 318 which prohibits appointment of claim settlement agents as administrators and to proceed with such matters as heretofore.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 333

Criminal procedure—Offenses by minors under eighteen—Violation of The Vehicle Code—Procedure before magistrates—Juvenile Court Law of June 2, 1933—Juvenile Court Law of Allegheny County of June 3, 1933.

All criminal cases instituted against minors under 18 years of age in this Commonwealth, including cases involving violation of The Vehicle Code, must be referred by the magistrate, alderman, or justice of the peace before whom the criminal action is instituted to the juvenile court for disposition without holding a preliminary hearing, in accordance with The Juvenile Court Law of June 2, 1933, P. L. 1433, and The Juvenile Court Law of Allegheny County of June 3, 1933, P. L. 1449; where the arrest is for a summary offense and bail is not obtainable, and there is no detention home available, it seems that the proper procedure is to release the minor on his own recognizance or in the custody of his parents until such time as proper return can be made to the juvenile court and arrangements completed to bring the minor before such court for disposition.

Harrisburg, Pa., March 13, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg, Pennsylvania.

Sir: In your letter of October 9, 1939, it was called to our attention that The Juvenile Court Law, the Act of June 2, 1933, P. L. 1433 (11 PS §243, et seq.), was amended by Act No. 226, approved June 15, 1939, P. L. 394, in that it extended the maximum age of minors who are subject to the provisions of this act from sixteen to eighteen years.

You also state that The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, (75 PS §1, et seq.), permits the issuance of licenses to operate motor vehicles to juveniles over sixteen years of age, and that numerous violations of The Vehicle Code are committed by persons less than eighteen years old.

You request an opinion as to whether those persons under eighteen years of age, who are charged with summary offenses against The Vehicle Code, or any other statute, may be sentenced by a magis-

trate, alderman, or justice of the peace, or whether such cases must be returned by the magistrate to the juvenile court.

Under the laws of this Commonwealth, we find that there are two basic acts with which we are concerned. The one act is that of June 2, 1933, P. L. 1433 (11 PS §243), known as "The Juvenile Court Law," as amended by the Act of June 15, 1939, P. L. 394. In respect to your problem, we are particularly concerned with part of section 4, which reads:

> Initiation of Proceedings.—The powers of the court may be exercised—
>
> 1. Upon the petition of any citizen, resident of the county, setting forth that (a) a child, giving his or her name, age, and residence, is neglected, dependent or delinquent, and is in need of care, guidance and control, (b) the names and residence of the parents, if any, or of his or her legal guardian if there be one, (c) the name and residence of the person or persons having control of the child, and (d) the name and residence of the nearest relative if no parent or guardian can be found.
>
> 2. Upon commitment, by a magistrate, alderman or justice of the peace, of a child arrested for any indictable offense, other than murder, *or for the violation of any other laws of this Commonwealth or the ordinance of any city, borough or township.*
>
> 3. There shall be no preliminary hearings *in any cases* affecting dependent, delinquent or neglected children under the age of *eighteen years.* (Italics ours.)

The following section of the same act is also enlightening on our problem:

> Section 6. Preliminary Orders; Temporary Custody of Children.—Upon the filing of any petition as above set forth, *or the commitment of a child* by any magistrate, alderman or justice of the peace, the judge holding the juvenile court shall, if after preliminary inquiry he deems the same necessary, make all necessary orders for compelling the production of such child, and the attendance of parents or other person or persons having the custody or control of the child, or with whom the child may be.
>
> Pending the final disposition *of any case,* the child shall be subject to the order of the court, and may be permitted by the court to remain in the control of his or her parents or the person having him or her in charge, or in charge of a probation officer, or the child may be placed by the court in the custody of any association or society having for one of its objects the care of dependent, delinquent or neglected children, or may be ordered by the court to be kept and maintained in some place provided by the county for such

> purposes: Provided, That if such child is sixteen years of age or over and less than eighteen years of age, he or she may be confined in any place of detention maintained and provided for the custody of adults awaiting trial. (Italics ours.)

The amending act chiefly provides for increasing the age from sixteen years to eighteen years, not only in this particular section of the act, but for all purposes set forth therein as, "The word 'child' as used in this act, is a minor under the age of eighteen years." (Section 1 (2) of the Act of June 15, 1939, P. L. 394).

Section 2 of the Act of June 2, 1933, P. L. 1433, reads:

> * * * the several courts, as defined in this act, shall have and possess *full and exclusive jurisdiction* in (a) *all proceedings* affecting delinquent, neglected and dependent children; * * * (Italics ours.)

The preamble of the Act of June 2, 1933, P. L. 1433, provides:

> Whereas, The welfare of the Commonwealth demands that children should be guarded from association and contact with crime and criminals, and the ordinary process of the criminal law does not provide for such care, guidance and control as are essential to children in the formative period of life; and
>
> Whereas, Experience has shown that children, lacking proper parental care or guardianship, are led into courses of life which may render them liable to the penalties of the criminal law, and that the real interests of such children require that they be not incarcerated in jails and penitentiaries, as members of the criminal class, but be subjected to wise care, guidance and control so that evil tendencies may be checked and better instincts be strengthened; and
>
> Whereas, To these ends, it is important that the powers of the courts, with respect to the care, guidance and control over delinquent, neglected and dependent children should be clearly distinguished from those exercised in the ordinary administration of the criminal law; therefor.

Section 1, subsection 4 of this same act, under the heading of "Definitions," reads as follows:

> The words "delinquent child" include:
>
> (a) *A child who has violated any law of the Commonwealth or ordinance of any city, borough or township;* (Italics ours).

The provisions just cited clearly include any violations of The Vehicle Code, as well as any other statute, by minors under the age of eighteen years.

The preamble of The Juvenile Court Law, which we have herein set forth, refers specifically to the "care, guidance and control as are essential to children in the formative period of life." There is no doubt that the intention and chief concern of the legislature was to provide special consideration for any violators of the law under eighteen years of age, and to prevent any minors under eighteen years of age accused of crime from being incarcerated in and comingling with older and seasoned criminals either before or after trial. The disadvantage of youthful offenders associating with older and seasoned criminals is too obvious to need any comment.

The other act of the legislature with which we are concerned is that known as the "Juvenile Court Law of Allegheny County," which is the Act of June 3, 1933, P. L. 1449 (11 PS §269-1 et seq.), as amended by the Act of June 15, 1939, P. L. 397. We are particularly concerned with section 202, and subsection (e) thereof, of this act, which provides that:

> The [Juvenile] court hereby created shall have jurisdiction—
>
> * * * * *
>
> *In all summary proceedings* and suits for a penalty wherein the defendant is a child under sixteen years of age. (Italics ours.)

The provisions of this latter law are, we believe, intended by the legislature to bring the treatment of the Allegheny County juvenile violators in line with that procedure set up throughout the remainder of the Commonwealth.

Judge Stadtfeld, in the case of Commonwealth *v.* Jordan and Dillon, 136 Pa. Super. Ct. 242, interprets the Act of June 21, 1933, P. L. 1433 (The Juvenile Court Law), by stating at page 248:

* * * The language of the act is free of ambiguity. * * *

and continuing on pages 250 and 251 as follows:

> The beneficent purpose of the legislation involved in this case, is well described by Mr. Justice Brown, in the opinion of the Supreme Court in Com. *v.* Fisher, 213 Pa. 48, 62 A. 198. He says, p. 53: "To save a child from becoming a criminal, or from continuing in a career of crime, to end in maturer years in public punishment and disgrace, the legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so, *by bringing it into one of the courts of the state without any process at all, for the purpose of subjecting it to the state's guardianship and protection.* * * * When the child gets there and the court, with the power to save it, *deter-*

> *mines on its salvation,* and not its punishment, it is immaterial how it got there. The act simply provides how children who ought to be saved may reach the court to be saved. If experience should show that there ought to be other ways for it to get there, the legislature can, and undoubtedly will, adopt them, and they will never be regarded as undue processes for depriving a child of its liberty or property as a penalty for crime committed * * *
>
> "Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. * * *"
>
> Considering the beneficent purpose of the legislation, no court should be astute in finding reason to relieve those who violate its provisions. (Italics ours.)

The argument may be advanced that "preliminary hearings," as referred to in the acts under consideration, do not include hearings for summary violations of The Vehicle Code, inasmuch as summary hearings are final hearings. To accept such an interpretation would be to emasculate the real purpose of the acts, inasmuch as they would not be able to accomplish what the legislature enacted them for, because the various provisions of these juvenile court acts indicate that the juvenile courts are to have exclusive jurisdiction of minors under eighteen years of age in case of any violation of the laws of the Commonwealth or ordinance of any city, borough or township.

It should be clearly understood that minors under the age of eighteen years, because of the provisions of these two acts, are not privileged to violate The Vehicle Code, or any other laws, of this Commonwealth, or of any of its political subdivisions. The law must be obeyed by everyone regardless of age. However, in the case of violators under the age of eighteen years, the legislature has seen fit to say in effect that, while there may be a criminal action instituted against a juvenile under eighteen years of age, yet it must be kept in mind that further disposition of the case must then conform to the provisions of the statutes which we have hereinbefore cited.

Both juvenile court acts distinctly state that no preliminary hearings are to be held in the case of a criminal violation by any minor under eighteen years of age. Both acts clearly require that the magistrate, alderman or justice of the peace shall return all such cases to the juvenile court in the county where the offense occurred. In cases of any violations in Allegheny County, in addition, it further appears that where the age of the offender is under eighteen years "all such cases shall be certified * * * to the Juvenile Court * * *"

Therefore, it is evident that all criminal cases instituted against any minor under eighteen years of age in this Commonwealth must be referred by the magistrate, alderman or justice of the peace before whom the criminal action is instituted, to the juvenile court of that county for disposition without holding a preliminary hearing.

In passing, we would like to call your attention to those cases where juveniles are arrested for summary offenses and bail is not obtainable, and there is no detention home available for the purpose of detaining a defendant until he can be brought before the juvenile court. In such cases it seems that the proper procedure would be for the magistrate, alderman or justice of the peace to release the defendant on his own recognizance or in the custody of his parents until such time as proper return can be made to the juvenile court and arrangements completed to bring the juvenile before such court for disposition.

We are of the opinion that there is no way by which a magistrate, alderman or justice of the peace is legally justified in circumventing the provisions of the juvenile court acts by holding any minor under eighteen years of age for a hearing, either for any summary violation of The Vehicle Code or of any other law of this Commonwealth, or ordinance of any city, borough or township; and much less for the purpose of passing sentence on such minor for any such violation.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 333a

QUO WARRANTO PROCEEDINGS

DEPARTMENT OF JESTICE,
Harrisburg, Pa., March 14, 1940

In re Petitions of J. W. Gitt for Writs of Quo Warranto against Walter F. Owen and Ralph W. Keech, Alderman and Constable respectively, of the First Ward, City of York, Pennsylvania.

These cases originated by petitions filed with the Attorney General by J. W. Gitt, praying that the Attorney General file his suggestion

in the Court of Common Pleas of York County for writs of quo warranto directed to Walter F. Owen, alderman, and Ralph W. Keech, constable, of the first ward of the City of York, requiring these officials to show by what authority they exercise the rights and duties of their respective offices.

Following due notice thereof, a hearing was held before the undersigned representative of the Attorney General, whereat petitioner and respondents appeared by counsel, and numerous witnesses were heard and considerable evidence received. Respondents filed no answer on the merits, but did present a motion, based on matters of law, to dismiss the petitions. The practice of this department provides for an answer in such cases, but not for a motion to dismiss the petitions filed therein. However, the motion to dismiss has been treated as a demurrer, and has been carefully considered. All parties submitted briefs in support of their pleadings.

The petitions are virtually identical, although they involve different respondents. Inasmuch as the averments of illegality in both are substantially the same, and the motion to dismiss applies to both petitions, both cases will herein be dealt with and disposed of.

An alderman is a county officer. Commonwealth ex rel. *v.* Brunner, 6 Pa. C. C. 323 (1888). By the same reasoning and authority, a constable is, a fortiori, also such an officer.

The Act of June 14, 1836, P. L. 621, 12 PS §2021 et seq., is the general legislation relating to writs of quo warranto. Section 2 of this act, 12 PS §2022, provides, inter alia, that whenever any person shall unlawfully hold any county office or shall do any act whereby forfeiture of such office shall by law be created, a writ of quo warranto may issue upon the suggestion of the Attorney General, or his deputy in the county involved. The suggestion for the issuance of the writ in such cases may also, of course, be made by the district attorney of the county wherein the question arises. Gilroy et al. *v.* Commonwealth ex rel. District Attorney, 105 Pa. 484 (1884).

It is not believed that the Attorney General should, in the absence of unusual circumstances, arrogate to himself the jurisdiction which is shared by the district attorney, to suggest the awarding of writs of quo warranto in cases involving purely local offices. The district attorney is more likely to be informed of local conditions than is the Attorney General.

We do not mean to say, or to imply, however, that the Attorney General may not act in cases like the instant ones, if, in his discretion, he deems it advisable so to do; for he may. Nothing has been presented in the cases before us which would, in our opinion, remove them from the operation of the policy above enunciated. True it is that it has been urged upon us that one of the respondents

is a nephew of a county detective of York County. This, standing alone, is of no especial significance. To assume or suppose that the district attorney of York County, if applied to by petitioner, would refuse to suggest the issuance of writs of quo warranto in the premises because one of the detectives on his staff is uncle to one of the respondents, would not only be wholly unwarranted, but would be a totally unjustified reflection upon the integrity of the district attorney. In fact, petitioner expressly disclaims any such imputation.

For the Attorney General to refuse, in his discretion, to grant the prayers of petitioner, will not deprive petitioner of his remedy by quo warranto, if any he has, for he may make the same applications to the district attorney. No injustice would, therefore, be done petitioner by such refusal. Nor would such refusal, for the reasons herein advanced, be arbitrary on the part of the Attorney General.

Furthermore, in Commonwealth ex rel. Graham *v.* Cameron, 259 Pa. 209 (1917), the question was specifically raised whether a district attorney may file a suggestion for a writ of quo warranto against a justice of the peace. The court therein said, at page 213 of 259 Pa.:

> * * * we have reached the conclusion that the district attorney is the proper person to file a suggestion for a writ of quo warranto against a justice of the peace.

A justice of the peace is a county officer. Commonwealth ex rel. Graham *v.* Cameron, supra. And so also are an alderman and a constable, as has hereinbefore been demonstrated.

Whether petitioner has presented prima facie cases for our consideration need not be here decided, nor is this opinion to be construed as touching upon or deciding the merits of the instant cases.

For the reasons given herein, the prayers of the petitions are refused.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 334

Milk Control—Milk marketing area—Legality of establishing an equalization pool.

(1) The Milk Control Commission of the Commonwealth of Pennsylvania has

authority, under the Milk Control Law of April 28, 1937, P. L. 417, to establish a milk price equalization pool within a particular milk marketing area after holding a hearing, of which reasonable notice thereof has been given to interested parties, at which it is shown that an equalization pool is an appropriate means of carrying out the purpose of the Milk Control Law.

(2) Consent of producers or dealers is not necessary for the establishment of a milk price equalization pool, but such consent may be made a condition precedent to the establishment of an equalization pool by the Milk Control Commission.

(3) If an equalization pool is established, milk dealers whose own classified prices blend higher than the announced blended price for the milk marketing area, should be ordered to pay the announced blended price to their producers and the balance to an administrator appointed by the Milk Control Commission to administer the equalization pool for the benefit of producers entitled to the benefits of the pool.

(4) If an equalization pool is established, milk dealers whose own classified prices blend lower than the announced blended price for the milk marketing area should be ordered to pay the classified prices to their producers and report to the Milk Control Commission the additional amounts to which their producers are entitled to receive to have the announced blended price for their milk, or information from which these amounts may be readily ascertained.

(5) Funds paid to the administrator of an equalization pool must be paid by the Milk Control Commission into the State Treasury and by the Treasury to the producers shown to be entitled to the funds.

(6) Producer-distributors may be excluded from the operation of an equalization pool unless special circumstances are brought out at a hearing concerning the establishment of a pool that make it necessary to include them in the operation of the pool in order to carry out the purpose of the Milk Control Law.

(7) Producer-dealers are subject to pooling orders in the same manner as milk dealers who do not produce any of the milk they handle, and may be required to include the milk that they produce with other milk subject to a pooling order.

(8) The expense of administering an equalization pool must be paid from moneys of the Commonwealth of Pennsylvania in the Milk Control Fund in the State Treasury.

Harrisburg, Pa., March 21, 1940.

Honorable John M. McKee, Chairman, Milk Control Commission, Harrisburg, Pennsylvania

Sir: We are in receipt of your recent letter asking our opinion of the legality of establishing an equalization pool in one of the Pennsylvania milk marketing areas. Your request reads as follows:

> The Milk Control Commission of Pennsylvania hereby requests your opinion as to whether the Commission has authority under the Milk Control Law of April 28, 1937, P. L. 417, to establish an equalization pool by which a uni-

form price will be paid to milk producers for milk, regardless of the use to which the milk is put.

Some time ago a hearing was held in the Erie Milk Marketing Area for the purpose of determining a means by which prices can be so fixed in that area that the milk producers will be able to receive a fair return for their milk. The testimony produced at the hearing showed that a great deal more milk is produced, or is otherwise available, in this area, than the public in that area can consume in the form of fluid milk and fluid cream. The milk that is not consumed as fluid milk or fluid cream is manufactured into by-products of milk—ice cream, butter, evaporated milk, etc. Since the by-products of milk can be shipped for thousands of miles without substantial deterioration or loss of quality, it becomes necessary for the price of milk used in manufacturing by-products of milk to be sold in Pennsylvania, to be approximately the same price that prevails generally throughout the United States. Unfortunately the price that is generally realized throughout the United States is lower than the cost of producing milk generally in this area in Pennsylvania. Consequently, in order to assure the public a constant supply of pure and wholesome milk, it becomes necessary for the Milk Control Commission to fix the minimum prices to producers for milk consumed in fluid form at considerably higher than the cost of production. This returns to the farmer a blended price for all his milk that is based upon the use that the dealer makes of his milk. The dealer who manufactures most of the milk he receives into by-products of milk returns to his producers a comparatively low price, while the dealer whose business is nearly all in the fluid market returns to his producers a comparatively high price. As a result a few fortunate farmers receive a higher price than necessary for their milk, while many others receive too low a price.

A result of this inequality is that certain milk dealers make a practice of bargaining with farmers receiving a low return for their milk to sell them milk at a price slightly higher than they are receiving but considerably lower than the prices fixed for milk sold in fluid form. These dealers then market the milk in fluid form. This practice has continued until, according to reports, much milk is being paid for at less than fluid milk prices, and the blended price approaches the price of milk used in manufacturing.

It has been suggested and requested by a majority of the milk producers and dealers in the Erie Milk Marketing Area that an equalization pool be established to return to the producers a uniform price. A milk equalization pool is operated in the following manner: The milk dealers are required, as they now are required, to keep records of the amount of milk received by them and the manner in which it is used. The amount of milk utilized in each of the eight

classes for which a price is fixed by the Milk Control Commission is determined for the total of all dealers. The price that should be returned to the producers for the total quantity of milk in each class is computed from the price orders of the Commission. The total price of all the milk is then computed by adding the total price of each of the eight classes, subject to certain deductions. This total price is divided by the total hundredweight of milk in all eight classes. The result is the blended price or uniform price that each dealer must return to his producers.

The milk dealer then pays to his producers an amount computed by multiplying the hundredweight of milk received by the blended price. If this amount paid to the producer is less than the prices he would return to the producers by computing the prices of milk utilized in each class, the dealer pays the difference to the administrator of the equalization pool. If the amount paid by the milk dealer to the producers at the blended price is more than he would have to pay on a utilization basis, then the milk dealer presents a statement to the administrator showing the amount that he has overpaid his producers on a utilization basis. The administrator then pays this dealer the amount of his overpayment from the funds received from dealers who have made payments into the fund in the manner before stated. The advantage of this method of paying producers is that it removes the temptation for producers whose milk is used mostly for manufacturing to combine with price cutting dealers in accepting less than minimum prices fixed for fluid milk.

There is an urgent request for the establishment of an equalization pool in the Erie Milk Marketing Area. We are not sure, however, whether we have authority to establish such a pool, and are therefore requesting your opinion as to the legality of such a pool or what procedure would be necessary to make it legal, and if it is, what financial arrangement could be followed in operating the equalization fund; whether or not a vote of the producers and dealers in the area should be taken to determine their willingness to cooperate in such a plan, under what conditions, if any, could a check-off of possibly two cents per hundredweight be made to help finance the cost of administration, what type of producer-distributor or producer-dealer, if any, would be exempt from the equalization pool.

This is a question of very serious moment in the field of milk regulation. One of the larger producers' groups has expressed a serious doubt as to the authority of the Commission to carry out such a procedure, and they feel that if an attempt is made and fails it may have a great effect in jeopardizing the standing of the equalization plan. However, in expressing themselves on this question, they stated that they are in favor of the equalization plan where there is certain legal authority to carry it out properly.

The method that you have described of returning to milk producers a uniform price for their milk is supplemental to price fixing. It has been introduced in other states and by the United States as a part of their systems of milk control.

I.

Constitutionality of Equalization Pools.

That the authority vested in the Milk Control Commission of Pennsylvania to fix minimum and maximum prices for milk is in consonance with the Constitution of the United States and the Constitution of Pennsylvania has been settled: Rohrer *v.* Milk Control Board, 322 Pa. 257, 186 Atl. 336 (1936); Colteryahn Sanitary Dairy *v.* Milk Control Commission, 332 Pa. 15, 20, 1 Atl. (2d) 775 (1938); Nebbia *v.* New York, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

The dairy industry and price-fixing commissions have long recognized a system by which milk producers are paid for milk according to the manner in which it is used: Milk Control Law of April 28, 1937, P. L. 417, (31 PS §700j-101, et seq.), Preamble; Colteryahn Sanitary Dairy *v.* Milk Control Commission, 332 Pa. 15, 28, 1 Atl. (2d) 775 (1938); Nebbia *v.* New York, 291 U. S. 502, 517-518, 54 S. Ct. 505, 78 L. Ed. 940 (1934); United States *v.* Rock Royal Co-Operative, Inc., 307 U. S. 533, 550, 571, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); H. P. Hood & Sons *v.* United States, 307 U. S. 588, 593, 59 S. Ct. 1019, 83 L. Ed. 1478 (1939); Green Valley Creamery, Inc. *v.* United States, 108 F. (2d) 342 (C. C. A. 1st, Dec. 15, 1939).

Where milk dealers within a milk marketing area do not utilize the milk handled by them in the same proportions, their producers receive different average or "blended" prices for their milk. The milk dealer who is engaged chiefly in manufacturing milk products will pay much less to his producers than the dealer whose principal business is distributing fluid milk. The equalization pool is designed to return to all milk producers helping to supply the fluid market within an area the same price per unit of milk. Where the utilization method of fixing prices is used, pooling becomes a supplement to price fixing.

In United States *v.* Rock Royal Cooperative, Inc., 307 U. S. 533, 571 to 573, 59 S. Ct. 993, 1012 to 1013, 83 L. Ed. 1446, 1469-1470 (1939), it was held that the provision in the Federal Agricultural Marketing Agreement Act of 1937 (7 U. S. C. A. §608c) authorizing the Secretary of Agriculture to establish milk price equalization pools and the order of the Secretary thereunder was valid. In delivering the opinion of the Supreme Court Mr. Justice Reed said (307 U. S. at 571-573):

> The defendants' objection to the equalization pool, here considered, * * * is to the alleged deprivation of liberty and property accomplished by the pooling requirement in taking away from the defendants their right to acquire milk from their patrons at the minimum class price, according to its use, and forcing the handlers to pay their surplus, over the uniform price, to the equalization pool instead of to their patrons. * * * It is urged that to carry this principle of contribution to its logical conclusion would mean that the wages of the employed should be shared with the unemployed; the highly paid, with the underpaid and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone.
>
> No such exaggerated equalization of wealth and opportunity is proposed. The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulations, designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. In Mulford *v.* Smith (307 U. S. 38), we made it clear that volume of commodity movement might be controlled or discouraged. As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, we are of the opinion it might permit the movement on terms of pool settlement here provided.
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> Common funds for equalizing risks are not unknown and have not been considered violative of due process. The pooling principle was upheld in workmen's compensation, bank deposit insurance, and distribution of benefits in the Transportation Act.

State laws establishing milk price equalization pools have been sustained in the following cases: Milk Control Board *v.* Crescent Creamery, Inc., 214 Indiana 240, 14 N. E. (2d) 588, 15 N. E. (2d) 80 (1938), appeal dismissed in 305 U. S. 559, 59 S. Ct. 87, 83 L. Ed. 352, rehearing denied in 305 U. S. 671, 59 S. Ct. 143, 83 L. Ed. 435; Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273 (1939); and Noyes *v.* Erie & Wyoming Farmers Co-Operative Corp., 281 N. Y. 187, 22 N. E. (2d) 334 (1939).

In United States *v.* Rock Royal Co-Operative Inc., 307 U. S. 533, at 569-571 (1939), holding Federal milk price equalization pooling valid, it is said:

> The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce. * * * The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal com-

merce rests with the Congress in the commerce between the states.

Since the Constitution of Pennsylvania does not prohibit fixing prices for milk (Rohrer *v.* Milk Control Board, 322 Pa. 257, 186 Atl. 336 (1936); Colteryahn Sanitary Dairy *v.* Milk Control Commission, 332 Pa. 15, 20, 1 Atl. (2d) 775 (1938), and since equalization pools are auxiliary to price fixing, the State Constitution cannot be said to prohibit the establishment of milk price equalization pools.

II.

Authority in the Milk Control Law to Establish Equalization Pools.

Milk control in Pennsylvania is provided for in the Milk Control Law of April 28, 1937, P. L. 417, (31 PS §700j-101, et seq.). This statute does not provide for the establishment of equalization pools by name. The question, therefore, is whether the powers vested in the Milk Control Commission by this act are broad enough to include the power to establish equalization pools.

The preamble to the Milk Control Law discloses the purposes of the act. It states that "public health is menaced when milk dealers do not or cannot pay a price to producers commensurate with the cost of sanitary production, or when consumers are required to pay excessive prices for this necessity of life"; that "public control of the milk industry in recent years is stabilizing the conditions therein"; and that "it is necessary to preserve and promote the strength and vigor of the inhabitants of this Commonwealth, to protect the public health and welfare, and to prevent fraud and imposition upon consumers and producers by continuing to treat the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth of Pennsylvania as a business affecting the public health and affected with a public interest."

Section 301 of the Milk Control Law, (31 PS §700j-301), provides that the Milk Control Commission is thereby "vested with power to supervise, investigate and 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, and including the establishment of reasonable trade practices. * * *"

Section 801 of the Milk Control Law, (31 PS §700j-801), reads:

> The commission * * * shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect

> the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein.

The same section provides that before a price-fixing order is written the Commission shall hold a hearing at which all interested parties may be heard.

Section 803, (31 PS §700j-803), states:

> 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.

Section 804, (31 PS §700j-804), provides:

> Each such order may classify such milk by forms, classes, grade or uses, as the commission may deem advisable, and may specify the minimum prices therefor. Other reasonable methods of classification may be prescribed by the commission.

The following provision is contained in section 806, (31 PS §700j-806):

> *The commission may likewise fix, by official order, the terms upon which milk dealers shall pay producers and others for milk, may prescribe the method of computing payment therefor,* and may prescribe a form of written statement to be sent to producers with each payment. (Italics ours.)

These provisions show that there is authority in the Milk Control Commission to establish milk price equalization pools where the Commission has before it testimony showing the reasonableness of establishing pools.

It is our opinion that the Milk Control Commission has authority, after holding a hearing at which it is shown that a pool is an appropriate means of carrying out the purposes of the Milk Control Law in a particular area, to establish a milk price equalization pool.

The remainder of this opinion concerns the extent to and manner in which the Milk Control Commission may apply the principles of the equalization pool.

III.

Consent of Producers and Dealers to Pooling Order.

The Federal Agriculture Marketing Agreement Act of 1937, as amended (7 U. S. C. A. 608c) provides that an equalization pool

shall not be established without the consent of producers, and sometimes dealers (referred to therein as "handlers"). In substance, the Secretary of Agriculture is authorized, after holding a hearing on the subject, to establish a pool where handlers of at least half the volume of milk produced or marketed within an area have signed a marketing agreement and the proposed pooling order is approved by at least two-thirds of the milk producers or producers of two-thirds of the volume of milk produced for market within an area. If no marketing agreement is made by the dealers, but the Secretary of Agriculture determines, after a hearing, that failure to sign an agreement tends to prevent carrying out the policy of the act, and a pooling order is the only practical means of having it carried out, the Secretary may issue an order, if it is approved by producers as in the case where there is a marketing agreement.

The Act of May 19, 1937, Laws of New York, 1937, Chapter 383, page 966, amending the Agriculture and Markets Law of 1922, as amended, provides (section 258m, subdivision 6):

> If approved by seventy-five per centum of the producers affected, any order or marketing agreement fixing the price to producers under either subdivision one or subdivision five of this section for market or markets, may provide for an equalization of prices to all producers of the production area of the market affected so that each producer or cooperative association shall receive the same base price for all milk delivered subject to reasonable differentials for quality and location and for services. * * *

The Oregon statute (Oregon Laws, Special Session of 1933, Chapter 72 p. 196, as amended), and the Indiana statute (Act of Indiana of March 12, 1935, Chapter 231, p. 1365, as amended by Act of March 11, 1937, Chapter 215, p. 1071) do not require consent of producers or dealers as a prerequisite to the establishment of a pool.

In Milk Control Board *v.* Crescent Creamery, Inc., 214 Indiana 240, 14 N. E. (2d) 588 (1938), and Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273 (1939), statutes providing for the establishment of equalization pools were held valid without any provision in the statutes for consent by producers or dealers. In United States *v.* Rock Royal Co-Operative Inc., 307 U. S. 533 (1939), it was held that the provision in the Agricultural Marketing Agreement Act of 1937, as amended, for a pooling order was constitutional, and that the method of requiring consent of producers and handlers to the order did not invalidate the provision of the statute for pooling. As to this the Supreme Court said (307 U. S. 559):

> * * * If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. * * *

It is therefore apparent that if a pool is an appropriate method of carrying out the purposes of a milk control law, consent to the arrangement is superfluous so far as the validity of the order is concerned. If the Milk Control Commission desires to have consent of a definite portion of producers and dealers before establishing a pool, the requirement of such consent as a prerequisite to establishing a pool will be a valid exercise of the powers of the Commission.

It will be observed that there are four classes of people affected by an equalization pool: (1) milk producers who, while paid for their milk at minimum prices established by the Milk Control Commission, receive an average price for their milk *higher* than the blended price received by all producers throughout the milk marketing or producing area; (2) milk dealers who handle the milk of these producers; (3) milk producers who, even though paid for their milk at minimum prices established by the Milk Control Commission, receive an average price for their milk *lower* than the blended price received by all producers throughout the area; and (4) milk dealers who handle the milk of these producers. The validity of an equalization pool under the Milk Control Law as to each of these four classes of people will be considered separately.

IV.

Equalization Pools and Milk Producers Who Receive a Price For Their Milk Higher Than the Blended Price For the Area.

Milk Control legislation was a result of the widespread depression that followed the financial panic of 1929. During the early 1930's farm prices had declined to such an extent that farmers were threatened with financial ruin or the necessity of abandoning their farms. Realizing the danger to public health that would follow desertion of dairy farms, the General Assembly of Pennsylvania passed the Act of January 2, 1934, P. L. 174, the first milk control law of this State. This was amended by the Act of April 30, 1935, P. L. 96, and superseded by the Act of April 28, 1937, P. L. 417, (31 PS §700j-101, et seq.), the present Milk Control Law. Under these acts a method was provided for fixing minimum prices to be paid producers for milk, in order to assure to the public a constant supply of pure and wholesome milk. Because of the established method of paying for milk according to the use made of it by the milk dealer, provision was made for classifying minimum prices to be paid producers according to the use made of the milk. Because of variations in production and consumption of milk at various periods of the year, it is necessary to have greater production of milk than the requirements for fluid milk and cream at any

given time. The milk producer whose milk is used partly for fluid purposes and partly for manufacturing is, therefore, necessary to assure to the public an adequate supply of pure and wholesome milk. As has been pointed out in Colteryahn Sanitary Dairy *v.* Milk Control Commission, 332 Pa. 15, 28 (1938), the problem in fixing a fair return to producers in areas of normal production is to fix minimum prices that will return a blended price to producers to meet the cost of producing the milk. If the operations of all dealers within the area are similar, the producers will receive such a blended return. If, however, dealers differ widely in the manner in which they use the milk they receive, one group of producers will receive more than this fair blended return, to the detriment of the other producers, who will receive less than this return. The pooling device eliminates this unequal distribution of the minimum return. The producers whose return is cut down by the pooling device cannot complain, for they still receive the minimum return that the orders of the commission are designed to return them. See Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273, 283 (1939). Of course, the Milk Control Law does not prevent producers from bargaining for more than the minimum return. Your letter refers to price-cutting by this type of producer. The equalization pool will tend to eliminate their price-cutting by eliminating a return so high that it induces price-cutting, to the detriment of other producers.

V.

Equalization Pools and Milk Dealers Handling Milk of Producers Who Receive a Price for Their Milk Higher Than the Blended Price for the Area.

The milk dealers who deal mostly in fluid milk become obligated to producers for more than the blended return. If an equalization pool is established, they will pay the blended price to their producers, and the excess that formerly would have gone to their producers will be paid into the equalization pool for the benefit of producers whose return would otherwise be less than the blended price. Since these dealers will pay no more for milk under the pooling plan than they now do, they cannot complain that their payments are made partly to their producers and partly to the pool. United States *v.* Rock Royal Co-Operative, Inc., 307 U. S. 533, 571, 59 S. Ct. 993, 1012, 83 L. Ed. 1446, 1469 (1939); H. P. Hood & Sons, Inc. *v.* United States, 307 U. S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478 (1939); Milk Control Board *v.* Crescent Creamery, Inc., 214 Indiana 240, 14 N. E. (2d) 588, 590 (1938); Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273 (1939); Noyes *v.* Erie & Wyoming Farmers Co-Operative Corp., 281 N. Y. 187, 22 N. E. (2d) 334

(1939); Green Valley Creamery, Inc. *v.* United States, 108 Fed. (2d) 342 (C. C. A. 1st, Dec. 15, 1939).

VI.

Equalization Pools and Milk Producers Who Receive a Price for Their Milk Lower Than the Blended Price for the Area.

The purpose of fixing prices of milk is to "insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein." Section 801 of the Milk Control Law (31 PS §700j-801). The milk referred to is primarily fluid milk and cream. Since milk products are not nearly as perishable as milk, can be shipped great distances and are not as vital to public health as fluid milk, milk producers and dealers whose milk is utilized solely in manufacturing are not necessary to supply the public with milk and need not be included in an equalization pool.

Milk producers whose milk is used partly for fluid purposes and partly for manufacturing are the producers intended to be helped by the equalization pool. Part of their milk is necessary to supply fluid requirements, and they are entitled to the protection of the Milk Control Law to maintain production. Without the equalization pool these producers receive less than the blended price for their milk, and therefore less than a fair return. Since the equalization pool aids these producers, they can have no objection to it.

VII.

Equalization Pools and Milk Dealers Handling Milk of Producers Who Receive a Price for Their Milk Lower Than the Blended Price for the Area.

The usual form of equalization pool requires all dealers to pay their producers for milk at the same blended rate. For the dealer whose own classified prices exceed the blended price for the area this means paying part of the amount he owes directly to producers, and the balance to the administrator of the pool. For the dealer whose producers would otherwise receive less for their milk than the blended price for the area, this means paying his producers more than before, and recovering the balance from the pool. The operation of an equalization pool is described in Milk Control Board *v.* Crescent Creamery, Inc., 214 Indiana 240, 14 N. E. (2d) 588, 589-590 (1938), in which the latter type of dealer is described as "dealer A," as follows:

> * * * The order complained of provides for a tentative or "announced" blended price; that at the end of the period

the total amount of milk of each class sold in the entire area be ascertained; and the total price which each distributor should have paid to the producer, upon the basis of the purposes for which his milk was resold, be determined; that, if he has paid more to the producer for his total purchases than the average price which he should have paid, upon the basis of the disposition of the product, he shall be reimbursed out of the pool, and, if he has paid less to the producer, he shall pay the difference into the pool. Thus, if dealer A purchased 100,000 pounds of milk from producers, 40,000 pounds of which were disposed of as class A milk, for which the fixed price to the producer is $2 per hundred, and 60,000 pounds of which was surplus or class IV milk, the fixed price of which is $1.10 per hundred, the total which he should have paid to producers is $1,460. Under the announced "blended price," he paid $1.64 per hundred pounds for all of the milk purchased, or $1,640. Thus, he has overpaid the producers $180, and is entitled to be reimbursed by the producers. Dealer B purchased 100,000 pounds at $1.64 per hundred, or $1,640. Of this he disposed of 80,000 pounds of class 1, for which the producers were entitled to $2 per hundred, and 20,000 pounds of surplus or class IV, for which the producers were entitled to $1.10 per hundred. For the total the producers were entitled to $1,820, but dealer B has paid to the producers only $1,640. There is a balance due the producers of $180, which they are entitled to be paid. Thus, if distributor B paid $180 to all of the producers in the area, and they turned over that $180 to distributor A, the price would be effectively adjusted, and each distributor would have paid the price required by the board for each class of milk purchased by him. But distribution to all of the producers may be impracticable, if not impossible. Therefore the pool authorized by the law is set up and managed by the representatives of the Milk Control Board as a clearing house, and through the pool, the balance due producers from distributor B is paid directly to distributor A, to whom the producers are indebted, and the same result is achieved.

It is our opinion that an equalization pool conducted in the manner described above, at least in the absence of specific authority to do so, is unconstitutional as to this type of milk dealer. It compels this dealer to advance sums of money to his producers that he would ordinarily not advance, and which he ultimately will receive back from the equalization pool. Upon him falls the risk of loss from failure of the equalization pool to collect in full. It is conceivable that dealers of this type would either be driven out of business by being forced to advance sums of money which they are not obligated to spend, or else would fail to pay producers above classified prices until paid from the pool. Under the type of equalization pool described above, these dealers are forced to make involuntary loans

to their producers. It seems to us that this tends to deprive them of property without due process of law, for they are forced to undertake a risk of loss that the orders of the Commission themselves admit they are not obligated to assume if the risk turns out to be bad. Furthermore, it impairs the obligations of their contracts, for they may be obligated only to pay minimum classified prices and yet be forced to pay more than this by reason of inability to collect from the utilization pool.

In the cases involving equalization pools (Milk Control Board *v.* Crescent Creamery, Inc., 214 Indiana 240, 14 N. E. (2d) 588 (1938); United States *v.* Rock Royal Co-Operative, Inc., 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273 (1939); Noyes *v.* Erie & Wyoming Farmers Co-Operative Corporation, 281 N. Y. 187, 22 N. E. (2d) 334 (1939); and Green Valley Creamery, Inc. *v.* United States, 108 Fed. (2d) 342 (1939)), the milk dealers complaining of the pooling arrangement were those who were obligated to pay into the equalization pool and not those seeking reimbursement from the equalization pool.

It would not prejudice these dealers, however, to have a pooling arrangement by which these dealers paid to their producers the amounts due under classified prices, and reported to the equalization pool administrator the names and addresses of their producers and the amounts to which each is entitled, to bring his return up to the blended price. Since these producers will receive all that they are entitled to under classified prices, and will be entitled to receive an additional amount from the equalization pool, they will be benefited rather than prejudiced by such a pooling arrangement. These producers will also have the advantage of not being subjected to the additional risk of loss that would occur if the administrator of the pool made payments directly to their dealers, and depended upon the dealers to make payment over to them.

Under Article XI of the Milk Control Law it is necessary that the funds collected by the administrator of the pool be paid by the Milk Control Commission into the State Treasury, and by the Treasury to the producers shown to be entitled to the funds.

There are two types of milk dealers that require special consideration in determining the validity of an equalization pool; milk producers who handle only milk that they themselves produce; and milk dealers who, in addition to handling milk they produce also handle milk of other milk producers.

VIII.

Milk Producers Who Handle Only Milk That They Produce.

A milk producer who handles only milk he has himself produced

is a milk dealer within the meaning of the Milk Control Law; Section 103 of the Milk Control Law of April 28, 1937, P. L. 417; Milk Control Board *v.* Stafford, 29 D. & C. 506 (1937). He is often referred to as a "producer-distributor"; Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273, 276 (1939). The producer-distributor ordinarily sells most of his milk as fluid milk or cream. As a milk dealer he is able to protect himself in the market in a way that other producers cannot. When he sells milk or cream he is protected by minimum resale prices fixed by the Commission. When he sells milk products, he is free to bargain for whatever price will result in a fair return to him. Usually the producer-distributor will not be materially affected by an equalization pool, and it would therefore be proper to exclude him from the operation of a pool. If, however, it appeared at the hearing held prior to establishing a pool that producer-distributors were receiving high returns and were guilty of price-cutting, it would be proper to include producer-distributors in the scope of a pool. Likewise, if it appeared that producer-distributors in a particular area supplied small but necessary quantities of milk to the fluid market and used most of their milk for manufacturing milk products, as a result of which they were unable to compete with other milk dealers manufacturing milk products, it would be proper to include producer-distributors within the scope of an equalization pool. In Savage *v.* Martin, 28 Oregon Advance Sheets 917, 91 Pac. (2d) 273, 276, 282-283 (1939), a provision of the Oregon Milk Control Law requiring producer-distributors to contribute to the equalization fund was held not to be a taking of property without due process of law.

IX.

Milk Dealers Who, in Addition to Handling Milk They Produce, Also Handle Milk of Other Milk Producers.

The milk dealer who produces part of the milk he handles is sometimes referred to as a "producer-dealer" (as distinguished from a producer-distributor). He has become a dealer in the milk of other producers. Since he must be considered a dealer as to the milk of other producers, he is subject to the operation of an equalization pool. In order to deal equitably with other producers, all milk handled by producer-dealers, including that which they produce, may be made subject to pooling orders.

X.

Assessing the Cost of Administering an Equalization Pool.

It has been provided in the Milk Control Law of Indiana (Section

5, Subdivision (11), of the Act of March 12, 1935, Chapter 281, as amended), and the Federal Agricultural Marketing Agreement Act (7 U. S. C. A., Section 608c, Subdivision (5) (E)), for example, that reasonable deductions may be made from the amounts paid by dealers to producers for milk in the equalization pool. These deductions or "check-offs" are used to defray the cost of the administration of the equalization pool. The services for which these deductions are used are checking the quality, butterfat content, and quantity of milk delivered by producers to dealers.

There is no provision in the Milk Control Law of Pennsylvania authorizing the Milk Control Commission to make such deductions, although the Commission has authority under sections 310 and 606 to check quality, butterfat content and quantity of milk delivered by producers to dealers. The expenses of administering the Milk Control Law must be paid from moneys of the Commonwealth in the Milk Control Fund in the State Treasury, as provided in sections 1101 to 1104.

Deductions or check-offs to administer equalization pools are similar to costs imposed upon public utilities for supervision and regulation of state commissions or boards. In the exercise of its police power, a state may provide for the supervision and regulation of public utilities, may delegate these duties to a board or commission, and may exact the reasonable cost of such supervision and regulation from the utilities concerned, allocating the exaction among those affected, without violating the guarantees of due process and equal protection assured by the Fourteenth Amendment to the Constitution of the United States. Great Northern Railway Co. *v.* Washington, 300 U. S. 154, 159-160, 57 S. Ct. 397, 81 L. Ed. 573 (1937); Charlotte, Columbia and Augusta Railroad Co. *v.* Gibbes, 142 U. S. 386, 12 S. Ct. 255 (1892); New York *v.* Squire, 145 U. S. 175, 191, 12 S. Ct. 880 (1892). Where a state has not provided in its public utility law that costs of supervision and regulation shall be imposed upon the utilities affected, however, the state must bear such costs itself. Cumberland Telephone & Telegraph Co. *v.* Railroad and Public Utilities Commission of Tennessee, 287 Fed. 406, 414-416 (1921); Re: J. F. Ramier and Frank S. Elgin, Receivers of Memphis Gas & Electric Co., P. U. R., 1921c, 121, 132; Bronx Gas & Electric Co. *v.* Maltbie, 268 N. Y. 278, 284, 197 N. E. 281, 282-283 (1935). Compare the Public Service Company Law of July 26, 1913, P. L. 137, and its amendments, (now repealed) containing no provision for assessing regulatory expenses upon public utilities, with Section 1201 of the Public Utility Law of May 28, 1937, P. L. 1053, as amended, (66 PS §1461), assessing regulatory expenses upon the

utilities affected. See Re: Pennsylvania Edison Company, 18 Pa. PUC 535, 25 P. U. R. (N. S.) 385 (1938).

It is our opinion, that:

(1) The Milk Control Commission of the Commonwealth of Pennsylvania has authority, under the Milk Control Law of April 28, 1937, P. L. 417, to establish a milk price equalization pool within a particular milk marketing area after holding a hearing, of which reasonable notice thereof has been given to interested parties, at which it is shown that an equalization pool is an appropriate means of carrying out the purposes of the Milk Control Law.

(2) Consent of producers or dealers is not necessary for the establishment of a milk price equalization pool, but such consent may be made a condition precedent to the establishment of an equalization pool by the Milk Control Commission.

(3) If an equalization pool is established, milk dealers whose own classified prices blend higher than the announced blended price for the milk marketing area, should be ordered to pay the announced blended price to their producers and the balance to an administrator appointed by the Milk Control Commission to administer the equalization pool for the benefit of producers entitled to the benefits of the pool.

(4) If an equalization pool is established, milk dealers whose own classified prices blend lower than the announced blended price for the milk marketing area should be ordered to pay the classified prices to their producers, and report to the Milk Control Commismission the additional amounts to which their producers are entitled to receive to have the announced blended price for their milk, or information from which these amounts may be readily ascertained.

(5) Funds paid to the administrator of an equalization pool must be paid by the Milk Control Commission into the State Treasury and by the Treasury to the producers shown to be entitled to the funds.

(6) Producer-distributors may be excluded from the operation of an equalization pool unless special circumstances are brought out at a hearing concerning the establishment of a pool that make it necessary to include them in the operation of the pool in order to carry out the purpose of the Milk Control Law.

(7) Producer-dealers are subject to pooling orders in the same manner as milk dealers who do not produce any of the milk they handle, and may be required to include the milk that they produce with other milk subject to a pooling order.

(8) The expense of administering an equalization pool must be paid from moneys of the Commonwealth of Pennsylvania in the Milk Control Fund in the State Treasury.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
FRANK E. COHO,
Deputy Attorney General.

OPINION No. 335

Schools—Dental hygienists—Extent of supervision necessary—The Dental Law of April 30, 1937, sec. 2.

The Dental Law of April 30, 1937, P. L. 554, sec. 2, does not require that each dental hygienist employed in a school district of the Commonwealth be under the immediate supervision of some licensed or registered dentist practicing within the district, but merely that he be under the general supervision of a licensed and registered dentist who need not be a practicing dentist in the same or a near-by school district, and who may be the Chief of the Dental Division of the Department of Health.

Harrisburg, Pa., March 28, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: In your letter of January 10, 1940 you request us to furnish you with an answer to the following question:

> Do the provisions of the Act of April 30, 1937, P. L. 554, (63 PS §121), require that each dental hygienist employed in the school districts of this Commonwealth shall be under the immediate supervision of some licensed or registered dentist practicing within the district, or are the provisions of this Act met through the supervision provided by the Chief of the Dental Division in the Department of Health?

This inquiry arises by reason of the need of an interpretation of section 2 of the act of 1937, supra, which is an amendment to the Dental Law.

You have also informed us that for some time prior to the passage of this particular amendment, supervision of the various dental hygienists employed by different school districts in this Commonwealth has been, and still is, exercised by the Chief of the Dental Division of the Health Department in Harrisburg, who is a licensed and regis-

tered dentist. You have also furnished us with the information that there are many school districts in this Commonwealth where there are no practicing dentists.

The provisions of the law referred to are a part of Section 2 of the Act of April 30, 1937, P. L. 554, (63 PS §121), which reads as follows:

> A "Dental Hygienist" is one who is legally licensed as such by the said dental council and examining board to remove tarter deposits, accretions, and stains from the exposed surfaces of the teeth and directly beneath the free margin of the gums, in the office of a dentist or *any public* or private *institutions such as schools*, hospitals, orphan asylums, and sanitoriums or State health cars, *under the general supervision of a licensed and registered dentist, and not otherwise*, and who does not perform any other operation or work on the teeth, jaws, gums or mouth whatever. (Italics ours.)

It has been urged by the Department of Public Instruction that unless the Chief of the Dental Division in the Health Department, located in Harrisburg, is permitted to provide that "general supervision" required by the provisions of the act, it means the breaking down of the dental hygienic program now in effect throughout our Commonwealth, inasmuch as many school districts have no practicing licensed and registered dentists, either because there is no dentist in the school district, or because the school district cannot afford to pay for the services of one.

The words "general supervision" at the most as used by the legislature in this statute are but a relative term. Neither the meaning of these words, nor any other provisions of the act, *limit or require* that the "licensed and registered dentist" *be practicing in the same, or a near, school district where the dental hygienist is employed.* While it may be argued that "general supervision" by a registered and licensed dentist of the same, or a near, school district would be more preferable than the "general supervision" exercised by the Chief of the Dental Division in the Department of Health, yet it is clear that the legislature did not see fit to adopt this point of view. We may not, therefore, read more into the law than was intended by the legislature.

> It is a fundamental rule of statutory construction that courts in seeking for the legislative intent must find it in the statute itself; that unless good grounds can be found in the statute for restraining or enlarging the meaning of its words, the court cannot subtract therefrom or add thereto. Where the words of a statute are plain and clearly define its scope and limit, construction cannot extend it. (Grayson *v.* Aiman, Inc., 252 Pa. 461.)

It appears, therefore, that the answer to your question is that a dental hygienist may practice under the "general supervision" of a licensed and registered dentist regardless of whether the dentist is practicing in the same school district or is located in some other nearby school district within this Commonwealth.

It is our opinion, that a dental hygienist may perform the operation and work permitted by the law for a school district as long as these services are performed under the "general supervision" of a licensed and registered dentist, who need not be a practicing dentist in the same, or a nearby school district. This "general supervision" may be exercised by the Chief of the Dental Division in the Department of Health, as long as he is a licensed and registered dentist in this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 336

State Government—Department of Property and Supplies—Board of Commissioners of Public Grounds and Buildings—Functions in making certain purchases.

(1) Under the provisions of Sections 507 (c) and 2403 (g) of The Administrative Code of 1929, the Department of Property and Supplies may adopt a plan whereby the department would authorize the various administrative departments, boards and commissions to make direct purchases in the field, involving an expenditure of not more than fifty dollars, without the prior approval of the Board of Commissioners of Public Grounds and Buildings, and, in the case of such purchases involving an expenditure of less than ten dollars, without obtaining competitive bids.

(2) Under the provisions of Section 2409 of The Administrative Code of 1929, relating to purchases involving an expenditure of less than fifty dollars, a plan may be adopted by the Department of Property and Supplies whereby all such purchases for various State agencies will be made by the department without the prior approval of the Board of Commissioners of Public Grounds and Buildings, provided the department files with the board a record of such purchases.

(3) Where the Department of Property and Supplies is requested, under the provisions of Section 2409 of The Administrative Code of 1929, to make purchases costing fifty dollars or more, which are not within the scope of the effective supplies contracts, the department is not required to secure the prior approval or disapproval of the Board of Commissioners of Public Grounds and

Buildings of proposed purchases, where two or more proposals are invited but only one bid is secured. On the other hand, the approval or disapproval of the board is required where only one proposal is invited, for whatever reason.

(4) The Department of Property and Supplies is not required to submit requests for purchases from the Prison Labor Division of the Department of Welfare to the Board of Commissioners of Public Grounds and Buildings for its approval or disapproval.

Harrisburg, Pa., April 3, 1940.

Honorable Roger W. Rowland, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: You have asked for advice regarding a number of questions relative to the respective functions of the Department of Property and Supplies and the Board of Commissioners of Public Grounds and Buildings in making certain purchases. We shall answer your questions as we state them.

I.

> Under the provisions of Sections 507 (c) and 2403 (g) of The Administrative Code of 1929, may the Department of Property and Supplies adopt a plan whereby the department would authorize the various administrative departments, boards and commissions to make direct purchases in the field, not exceeding fifty dollars, without the prior approval of the Board of Commissioners of Public Grounds and Buildings, and, in the case of purchases of less than ten dollars, without obtaining competitive bids?

Paragraph (c) of section 507 of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177), as last amended by the Act of June 21, 1937, P. L. 1865, (71 PS §187), provides an exception to the general rule that the Department of Property and Supplies must make all purchases for State agencies, either directly or as purchasing agent, and reads as follows:

> (c) Any department, board, or commission, which shall have been authorized in writing by the Department of Property and Supplies to make purchases in the field, not exceeding a specified amount, but records of all such purchases shall be transmitted periodically to the Department of Property and Supplies in such form as it may require. in so far as practicable, purchases under this paragraph shall be made from contractors having effective supplies contracts with the Department of Property and Supplies, and shall be in accordance with applicable specifications in such contracts, otherwise such purchases shall be made from the lowest of at least two bidders.

Paragraph (g) of section 2403 of The Administrative Code of 1929, cited above, as last amended by the Act of June 21, 1937,

P. L. 1865, (71 PS §633), expressly authorizes the Department of Property and Supplies to authorize departments, boards and commissions to make direct purchases in the field, as indicated above. That section is substantially, if not identically worded, the same as paragraph (c) of section 507, quoted above.

You state that your department proposes to notify, in writing, all the departments, boards and commissions that they may make purchases in the field in amounts not exceeding fifty dollars by issuing local purchase orders; that all such purchases involving an expenditure of not less than ten dollars nor more than fifty dollars must be made from the contractors having effective supplies contracts with the Department of Property and Supplies, unless it is impractical to do so, in which event such purchases must be made from the lowest of at least two bidders; and that all purchases involving an expenditure of less than ten dollars must be made from the contractors having effective supplies contracts, unless it is impractical to do so, in which event such purchases may be made without securing competitive bids. You further state that the State agencies making such purchases will be required to send to your department a copy of each local purchase order.

Generally speaking, there is no question but that your proposed plan conforms to the procedure outlined in paragraph (c) of section 507 and paragraph (g) of section 2403 of The Administrative Code of 1929, mentioned above.

You specifically inquire whether purchases of this character must be submitted to the Board of Commissioners of Public Grounds and Buildings either for approval or for record.

An examination of sections 507 and 2403 in their entirety reveals that the approval of the Board of Commissioners of Public Grounds and Buildings is expressly required in the following circumstances:

(a) Where the Department of Property and Supplies acts as purchasing agent for departments, boards and commissions (not having charge of State institutions), any departure from effective supplies contracts must first be authorized by the board—sections 507 (a) and 2403 (e).

(b) Where the Department of Property and Supplies, in its capacity as purchasing agent, makes any purchases for use in a State institution, any departure from the effective supplies contracts or standard specifications of the department must first be approved by the board—sections 507 (b) and 2403 (e).

(c) Where any department, board or commission, having charge of a State institution, purchases articles directly, after competitive bidding, for a price less than the Department of Property and Supplies can furnish them f. o. b. the institution, any departure from

the specifications contained in the effective supplies contracts or the standard specifications adopted by the Department of Property and Supplies must first be approved by the board—sections 507 (b) and 2403 (e).

However, neither paragraph (c) of section 507 nor paragraph (g) of section 2403 expressly requires the approval of the Board of Commissioners of Public Grounds and Buildings of purchases made under the provisions of those paragraphs. Since the legislature expressly provided for the approval of the board in other paragraphs of these sections, its failure to require the approval of the board with respect to purchases made under paragraph (c) of section 507 and paragraph (g) of section 2403 is, in itself, a clear indication that the approval of the board was not intended with respect to such purchases. Moreover, in reading sections 507 and 2403 in their entirety, it is clear that the purpose of the legislature in making provisions for the making of small purchases directly in the field was to facilitate the field operations of the State government and not to hamper the procurement of such items by requiring the prior approval of the Board of Commissioners of Public Grounds and Buildings, located in Harrisburg. The requirement of such prior approval would defeat the very purpose of the statutory provisions under consideration. Also, there is no requirement that records of such purchases be filed of record with the board after they are made.

You further inquire whether it is permissible not to require competitive bids for purchases in the field involving an expenditure of less than ten dollars.

As previously indicated, your plan contemplates that all purchases in the field involving an expenditure of less than ten dollars may be made without securing competitive bids in any case where it is impractical to make such purchases from the contractors holding effective supplies contracts with your department. Purchases involving an expenditure of not less than ten nor more than fifty dollars, under such circumstances, must be made after competitive bidding.

Paragraph (c) of section 507, which we have quoted above, in so far as it is applicable to this particular question, reads as follows:

> * * * In so far as practicable, purchases under this paragraph shall be made from contractors having effective supplies contracts with the Department of Property and Supplies, and shall be in accordance with applicable specifications in such contracts, otherwise such purchases shall be made from the lowest of at least two bidders.

In our Informal Opinion No. 869, dated November 8, 1937, this department advised the then Budget Secretary that the words "in so

far as practicable" relate to the entire sentence in which they appear; that is to say, purchases under paragraph (c) of section 507 are to be made from contractors having effective supplies contracts or from the lowest of at least two bidders, if either of these requirements is practicable, otherwise, purchases may be made in the open market without first obtaining bids. You now propose to determine the practicality of obtaining bids by arbitrarily classifying purchases according to the amount involved. In other words, a purchase involving an expenditure of less than ten dollars would not require competitive bids, the inference being that it would not be practicable to obtain bids for such small purchases.

We are of the opinion that it is proper for the Department of Property and Supplies, in authorizing departments, boards and commissions to make direct purchases in the field, to include as part of its authorization such a provision with respect to purchases involving an expenditure of less than ten dollars. In the absence of any information to the contrary, we presume that experience has proven to your department that it is not practicable to obtain bids on items costing less than ten dollars. This is nothing more than a lawful exercise of discretion placed in your department by the legislature.

II.

> Under the provisions of Section 2409 of The Administrative Code of 1929, relating to purchases of less than fifty dollars, may a plan be adopted by the Department of Property and Supplies whereby all such purchases for various State agencies will be made by the department without the prior approval of the Board of Commissioners of Public Grounds and Buildings, the department merely filing with the board a record of such purchases?

We are concerned here with the penultimate paragraph of section 2409 of The Administrative Code of 1929 (Act of April 9, 1929, P. L. 177), as last amended by the Act of June 21, 1937, P. L. 1865, (71 PS §639), which reads as follows:

> In the event that requisitions are made upon the department for any article of furniture, furnishing, stationery, supplies, fuel, or any other matter or thing, the want of which was not anticipated at the time of the making of the schedules, the department may, in its discretion, invite proposals from at least two responsible bidders, unless the article can be procured from only one source, and, when one proposal shall be invited, such proposal or proposals, together with such requisition or requisitions, shall be submitted to the Board of Commissioners of Public Grounds and Buildings for approval or disapproval: Provided, however, That the department may, in its discretion, purchase

> in the open market, without inviting any proposals, any such article costing less than fifty dollars, but all such purchases shall be reported to the Board of Commissioners of Public Grounds and Buildings at its next meeting.

You state that the proposed plan is based upon the above proviso. Under the plan, as we understand it, departments, boards and commissions desiring to make purchases costing less than fifty dollars, which are not to be made in the field and which are not within the scope of the effective supplies contracts, will be required to request the Department of Property and Supplies to make such purchases for them. Upon receiving any such request, the Department of Property and Supplies would issue to the requesting agency a local purchase order calling for the purchase of the desired article, a copy of which would be retained by the Department of Property Public Grounds and Buildings. The agency receiving the local purchase order would then actually make the purchase by use of the and Supplies and would be filed with the Board of Commissioners of order. The prior approval of the Board of Commissioners of Public Grounds and Buildings would not be required before a local purchase order is issued. We understand that this plan will supersede a practice which has grown up whereby some departments, boards or commissions actually make purchases and then send to the Department of Property and Supplies a confirmation purchase requisition, on the basis of which a purchase order is issued by that department after the purchase is approved by the Board of Commissioners of Public Grounds and Buildings. Under that practice, the purchasing agency receives the purchases promptly, but the payments of such purchases are delayed for a considerable period of time, in view of the necessity of obtaining the approval of the Board of Commissioners of Public Grounds and Buildings. Under the proposed plan, the purchasing agency not only would receive the purchases promptly, but payments of such purchases would be expedited considerably at an additional saving to the Commonwealth in the form of discounts for prompt payments.

Generally speaking, we are of the opinion that the proposed plan is in accordance with the portion of section 2409 of The Administrative Code of 1929 quoted above. In the first place, the proviso specifically refers to purchases to be made for all departments, boards and commissions. In the second place, the proviso does not require the prior approval of the Board of Commissioners of Public Grounds and Buildings, but merely requires that such purchases be reported to the board at its next meeting. The proposed plan of furnishing to the board a copy of local purchase orders issued by the Department of Property and Supplies is clearly a compliance with the statutory requirement.

III.

> Where the Department of Property and Supplies is requested, in accordance with Section 2409 of The Administrative Code of 1929, to make purchases of fifty dollars or more, which are not within the scope of the effective supplies contracts, must the department secure the approval or disapproval of the Board of Commissioners of Public Grounds and Buildings of proposed purchases where two or more proposals are invited, but only one bid is secured, or where only one proposal is invited because the purchase can be secured from only one source?

Your inquiry arises under the penultimate paragraph of section 2409 of The Administrative Code of 1929, which we quote at length under Question II, and which, for the purpose of convenience, we again quote, in part, as follows:

> In the event that requisitions are made upon the department for any article of furniture, furnishing, stationery, supplies, fuel, or any other matter or thing, the want of which was not anticipated at the time of the making of the schedules, the department may, in its discretion, invite proposals from at least two responsible bidders, unless the article can be procured from only one source, and, when one proposal shall be invited, such proposal or proposals, together with such requisition or requisitions, shall be submitted to the Board of Commissioners of Public Grounds and Buildings for approval or disapproval * * *.

A careful reading of this statutory provision, with respect to purchases involving an expenditure of fifty dollars or more, reveals that the approval of the Board of Commissioners of Public Grounds and Buildings must be sought only when one proposal is invited. Thus, if the Department of Property and Supplies, in its discretion, invites proposals from two or more responsible bidders but receives only one bid, the purchase need not be reviewed by the board. On the other hand, if the Department of Property and Supplies should invite only one proposal, irrespective of whether or not such purchase may be obtained from only one source, the purchase must be submitted to the board for review. The obvious intention of the legislature was to require a review of purchases by the board where competition was not available or was not sought.

IV.

> Is the Department of Property and Supplies required to submit requests for purchases from the Prison Labor Division of the Department of Welfare to the Board of Commissioners of Public Grounds and Buildings for its approval or disapproval, inasmuch as only one proposal is invited in respect to such purchases?

The prison industries maintained in State penal and correctional institutions are authorized by section 2312 of The Administrative Code of 1929, which, among other things, authorizes the Department of Welfare to establish and maintain such industries and to contract to sell, or sell, the manufactured articles to the Commonwealth, or any other state, or the political subdivisions thereof, or to the Federal Government or any agency thereof, or to any institution receiving any State or Federal aid. In other words, the products of prison industries may not be sold competitively in the open market.

In an informal opinion under date of October 1, 1929, addressed to Honorable Benson E. Taylor, then Secretary of Property and Supplies, this department advised that products manufactured under the supervision of the Department of Welfare in State penal and correctional institutions are the property of the Commonwealth; that section 2409 of The Administrative Code did not require the Department of Property and Supplies to invite competitive proposals against the purchase of articles manufactured in prison industries; that the word "sell," as used in section 2312 of The Administrative Code, cannot be construed in the usual sense of the word, for the Commonwealth cannot be both seller and buyer; hence, the only significance of the word "sell" is to authorize the transfer of funds to the Manufacturing Fund, from appropriations made to other agencies of the State Government, for the purchase of articles of the kinds produced in the prison industries. To this extent we agree and reaffirm this prior informal opinion.

However, that opinion goes on to say that, while it is not necessary to invite competitive bids preliminary to the purchase of articles which can be bought from the Prison Labor Division of the Department of Welfare, nevertheless, if the Department of Welfare desires to furnish "printing, binding, paper, fuel, stationery * * * and repairs and furnishings for the halls and rooms used for the meetings of the General Assembly and its committees," the department is required, by article III, section 12, of the Constitution to bid with respect to these articles, "however inconsistent it may seem to have it do so, and however fictitious the contract may seem to be, if the Department of Welfare be the successful bidder."

We are of the opinion that article III, section 12, does not require the Department of Property and Supplies to request competitive bids with respect to purchases it desires to make from the Prison Labor Division of the Department of Welfare. Clearly, the constitutional provision has reference only to printing, binding, paper, fuel, and the like, which are purchased from sources other than the Commonwealth itself. As previously indicated, the sale or use of prod-

ucts manufactured or produced by the prison industries is limited to governmental agencies or institutions financed in part by governmental funds. Actual competition with the open market is neither contemplated nor permissible. To the extent that the informal opinion previously referred to is inconsistent with this view, it is hereby modified.

In view of the foregoing, we are of the opinion that the prior approval or disapproval of the Board of Commissioners of Public Grounds and Buildings is not necessary with respect to purchases made by the Department of property and Supplies from the Prison Labor Division of the Department of Welfare.

Summarizing, you are advised that:

(1) Under the provisions of sections 507 (c) and 2403 (g) of The Administrative Code of 1929, the Department of Property and Supplies may adopt a plan whereby the department would authorize the various administrative departments, boards and commissions to make direct purchases in the field, involving an expenditure of not more than fifty dollars, without the prior approval of the Board of Commissioners of Public Grounds and Buildings, and, in the case of such purchases involving an expenditure of less than ten dollars, without obtaining competitive bids.

(2) Under the provisions of section 2409 of The Administrative Code of 1929, relating to purchases involving an expenditure of less than fifty dollars, a plan may be adopted by the Department of Property and Supplies whereby all such purchases for various State agencies will be made by the department without the prior approval of the Board of Commissioners of Public Grounds and Buildings, provided the department files with the board a record of such purchases.

(3) Where the Department of Property and Supplies is requested, under the provisions of section 2409 of The Administrative Code of 1929, to make purchases costing fifty dollars or more, which are not within the scope of the effective supplies contracts, the department is not required to secure the prior approval or disapproval of the Board of Commissioners of Public Grounds and Buildings of proposed purchases, where two or more proposals are invited but only one bid is secured. On the other hand, the approval or disapproval of the board is required where only one proposal is invited, for whatever reason.

(4) The Department of Property and Supplies is not required to submit requests for purchases from the Prison Labor Division of

the Department of Welfare to the Board of Commissioners of Public Grounds and Buildings for its approval or disapproval.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

E. RUSSELL SHOCKLEY,
Deputy Attorney General.

OPINION No. 337

Legislature—Senators—Resignations—Elections to fill vacancy—Compensation of elected senator with respect to the year 1939—Constitution, Article II, section 8; Acts of June 24, 1919, P. L. 579; Act of May 28, 1937, P. L. 999.

Senator Henney, representing the Forty-fifth Senatorial District, resigned December 23, 1938, and James G. Fulton was elected November 7, 1939 to fill the unexpired portion of Senator Henney's term and was sworn into office on December 12, 1939.

Senator Fulton is not entitled to any salary as State senator for the regular legislative session of 1939. If a special session should be called before the next regular session of 1941, Senator Fulton would be entitled to receive therefor the compensation provided by law with respect to special sessions of the legislature.

See Official Opinions of the Attorney General, 1913-1914, p. 355.

Also Official Opinions of Attorney General, 1905-1906, p. 115.

Harrisburg, Pa., April 5, 1940.

Honorable George F. Holmes, Secretary, Senate of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You state that Senator Henney, representing the Forty-fifth Senatorial District, resigned December 23, 1938, and that James G. Fulton was elected, on November 7, 1939, to fill the unexpired portion of Senator Henney's term and was sworn into office on December 12, 1939.

You ask to be advised what compensation, if any, Senator Fulton is entitled to receive with respect to the year 1939 for his services as senator.

The compensation of members of the General Assembly is controlled by constitutional and statutory provisions.

Article II, section 8, of the Constitution provides as follows:

> The members of the General Assembly shall receive such

> salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committtee or otherwise. No member of either House shall during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term.

The compensation of members of the General Assembly is fixed by Section 1 of the Act of June 24, 1919, P. L. 579, as last amended by the Act of May 28, 1937, P. L. 999, (46 PS §4), which reads as follows:

> The salary of the members of the General Assembly shall be three thousand dollars ($3,000) for each biennial session, and mileage to and from their homes at the rate of five cents per mile circular for each week a member was in actual attendance at the session, to be computed by the ordinary mail route between their homes and the capital of the State. The salary of the members of the General Assembly shall be five hundred dollars ($500), and mileage as aforesaid, for each special or extraordinary session lasting less than one calendar month, and seven hundred and fifty dollars ($750), and mileage as aforesaid, for each special or extraordinary session lasting one calendar month or more, and no other compensation shall be allowed whatever, except one hundred and fifty dollars ($150) in postage for each regular biennial session and fifty dollars ($50) for each special or extraordinary session.

The General Appropriation Act of 1937 (Appropriation Acts of 1937, page 74) makes the following appropriation for the payment of the salaries of senators (page 98):

> For the payment of the salaries of fifty Senators and extra compensation allowed by law to the President pro tempore of the Senate, session of one thousand nine hundred and thirty-nine the sum of one hundred thirty-eight thousand five hundred dollars ($138,500).

The General Appropriation Act of 1937 provides that the salaries of the senators shall be paid as follows (page 97):

> * * * the salaries, stationery, and mileage of the Members of the Senate and House of Representatives, and all the salaries and mileage of the session officers and employes of the legislative session of one thousand nine hundred and thirty-nine, shall only be paid after statement of the amounts due the several Senators, Members, officers and employes shall have been certified to the Auditor General by the President pro tempore of the Senate and the Speaker of the House of Representatives, respectively, and that the Senators and Members, also the officers receiving fixed

> salaries for said session shall each be paid one-fifth of his total salary each month for the first four months of the session, if the Legislature shall be in session that long, and the balance on the day fixed for the final adjournment of the Legislature or during the two days previous thereto * * *.

It will be noted that the constitutional provision and the various legislative enactments mentioned above all provide for, or relate to, the payment of the salaries of senators for a regular or special session. In other words, the compensation of senators is for their services rendered during their attendance at a regular or special session of the General Assembly.

In a formal opinion rendered by former Attorney General John C. Bell to Honorable Thomas H. Garvin, then Chief Clerk of the House of Representatives, under date of April 19, 1913 (Official Opinions of the Attorney General—1913-1914, page 355), this department ruled that the estate of a member of the General Assembly who died during the session was entitled only to the proportionate part of his salary for which he served during the session; and that his successor, who was elected during the session, was entitled to receive only the compensation fixed by law for such services as were rendered by him on and after the date he qualified as a senator. The basis of that opinion was that the relation between a public officer and the government does not rest upon the theory of contract, but arises from the rendition of services. Thus, it is stated at page 357:

> On the question of the legal rights of the members to receive the compensation provided by law, it is clear that the salary or compensation spoken of in the Constitution and the act of assembly above mentioned, is to be paid to the officers in question for actual services rendered by them.

The opinion also refers to a prior opinion of this department rendered by former Attorney General Carson, dated December 28, 1906, and reported in 33 Pa. C. C. 177, which exhaustively reviewed the nature of the office of a member of the General Assembly and the right of such member to receive the compensation provided by law. In the course of his opinion, former Attorney General Carson said (page 180):

> It is also clear that the compensation spoken of in the Constitution and in the act of assembly is for services rendered, and it would follow that, if a member of either house died before the rendition of such services, or resigned, or became incapacitated, or for any cause was removed, he could not claim, nor could his estate claim, payment for services not rendered,

Applying the above principles to the facts of the present case, it is at once apparent that Senator Fulton has rendered no services with respect to the regular legislative session of 1939, in that he was elected and qualified as a Senator long after that session terminated. Accordingly, it would be impossible for any compensation to be paid to Senator Fulton out of the appropriation made by The General Appropriation Act of 1937, for the simple reason that the procedure outlined in that act with respect to the payment of the salaries of senators could not be followed. As previously indicated, a senator is required to be paid "one-fifth of his total salary each month for the first four months of the session, if the legislature shall be in session that long, and the balance on the day fixed for the final adjournment of the legislature or during the two days previous thereto." This method of payment required by The General Appropriation Act of 1937 is a clear indication that the salary of a senator is to be paid only for the actual rendition of services during a session of the General Assembly, and that such payments are to be spread over the period of time, as previously indicated, during which the General Assembly actually is in session.

Accordingly, you are advised that Senator Fulton is not entitled to any salary as State senator for the regular legislative session of 1939. Of course, if a special session should be called before the next regular session of 1941, Senator Fulton would be entitled to receive therefor the compensation provided by law with respect to special sessions of the legislature.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

E. RUSSELL SHOCKLEY,
Deputy Attorney General.

OPINION No. 338

Weights and measures—Weightmasters' licenses—Restriction to single location—Act of July 19, 1935, sec. 6, as amended June 24, 1939.

It is not lawful to place more than one location on weighmasters' licenses required under section 6 of the Act of July 19, 1935, P. L. 1356, as amended by the Act of June 24, 1939, P. L. 865.

Harrisburg, Pa., April 12, 1940.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion "whether it is or is not lawful to place two or more locations on weighmasters' licenses." We assume you refer to the license required under section 6 of the Act of July 19, 1935, P. L. 1356, (76 PS §347). This section of the act was amended by Act of June 24, 1939, P. L. 865.

A consideration of the entire act leads us to the conclusion that not more than one location may be specified on a weighmaster's license issued by your department under the provisions of the above mentioned act. This act in its amended form requires, inter alia, that no person shall make or issue a weight certificate of solid fuel unless licensed by the Secretary of the Department of Internal Affairs; that application for such license shall be made upon a form prescribed and *shall indicate the place* where the weighmaster shall perform this function, and the type and capacity of the scale to be used by the applicant; that each license *shall be kept at the place* where the weighmaster is engaged in weighing; and that such license must be revoked by the Secretary of the Department of Internal Affairs when the weighmaster has lost his employment *at the place of weighing* for which the license has been issued.

The act further provides that where a license has been revoked the employer may substitute another weighmaster in his employ *at the place for which the license has been revoked*, and, in case of the absence or inability of a licensed weighmaster to act, and he is substituted, as above set forth, such substituted weighmaster shall not be authorized to continue as weighmaster *at the place of substitution* for a period in excess of 30 days, unless with the written consent of the Secretary of Internal Affairs.

We think the foregoing requirements of the act of assembly under consideration clearly show that the legislature intended that a weighmaster be licensed for one particular place. Attention is called to the fact that the act throughout speaks in the singular of the location for which a license is issued, as *the place* where the weighmaster shall perform his duties under the license issued to him. If it had intended that more than one location might be placed on a weighmaster's license, it would have used the plural when referring to the place instead of the singular.

We are therefore of the opinion, and you are accordingly advised, that it is not lawful to place more than one location on a weighmaster's license.

Very truly yours,
DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WALTER E. GLASS,
Deputy Attorney General.

OPINION No. 339

Banks and banking—Small or personal loans by bank—Right to charge "insurance" fee—Act of May 28, 1858, secs. 3 and 4.

A bank may not, in a small or personal loan transaction, exact a fee for "insurance" on the loan under an arrangement with a surety company by which a portion of the fee is retained in the bank in the deposit account of the surety company to reimburse the bank for any loss in the particular transaction, or any similar transaction, the surety's liability being limited to the amount on deposit; such a transaction is not only a violation of the Act of May 28, 1858, P. L. 622, secs. 3 and 4, but should be forbidden by the Secretary of Banking in the exercise of his duty to protect the public, since such a charge is forbidden in the case of institutions organized under the Small Loans Act of June 17, 1915, P. L. 1012, or under the Consumer Discount Company Act of April 8, 1937, P. L. 262.

Harrisburg, Pa., April 29, 1940.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested an opinion of this department as to the legality of charges made by banks in small or personal loan transactions of a fee for "insurance" of such loans. The inquiry is accompanied by a copy of a "personal loan service contract" entered into between a surety company and banks, which have in turn contracted to use a copyrighted plan or system, details of which will be outlined hereinafter.

The usual charge for insurance thus obtained is $5.00 per $100, and the undertaking of the surety company under the policy is to save harmless the institution making the loan. This system or plan is advocated as affording an arrangement whereby banks can accept single name paper, this in turn being helpful to borrowers, according to the advocates of the system.

An examination of the contract mentioned above shows, however, that the surety company receives only $2.00 for each $5.00 so collected, the balance of $3.00 being retained in the deposit account of the surety company in the lending bank. In case of a loss the surety company is not called upon to pay the same in the usual manner, the bank in such event merely deducting from the deposit account of the surety company the amount required to make up such loss. Further examination of the contract discloses that should the deposit account thus created be exhausted by the payment of losses, nevertheless the surety company would not be called upon to make any payment, its total liability being limited to the amount of this reserve-deposit.

A further limitation, of advantage to the surety company, is that when the deposit account reaches a figure which represents 10 per-

cent of the outstanding loans, any excess above this 10 percent is paid over to the surety company and becomes the surety company's property outright.

In effect, the surety company merely lends its name to the bank in return for which the surety company receives at least 2 percent on the total personal loan business transacted by the bank, no liability whatsoever attaching to the surety company.

We are of opinion that this plan is not permissible.

In the case of a $300.00 loan, a total of $15.00 is collected by the bank, at least $6.00 of which is paid to the surety company, which in turn gives no consideration except the use of its name, the balance of $9.00, or possibly somewhat less than $9.00 in the event the reserve exceeds the 10 percent figure above mentioned, being paid into the reserve fund. The customers of the bank create this reserve.

Aside from the matter of usury, which we will dwell upon later, this is a proper place for the Secretary of Banking to act to protect the public. It happens that the legislature has passed laws regulating small loan companies and consumer discount companies, one phase of such regulation being the setting of limits to the charges which may be made on loans. The banks which may adopt this plan are banks already under the supervision of the Secretary of Banking. That official can certainly not permit such banks to do an act while operating in the "personal loan" field which would not be proper in the case of these other lending institutions. For neither the Small Loans Act nor the Consumer Discount Company Act contemplates charges of this nature. And the limits set forth in the Consumer Discount Company Act would not permit the charging of such amounts.

It should be noted, also, that the Department of Banking maintains a rigid enforcement in the case of institutions organized under the Small Loans Act and the Consumer Discount Company Act, and if such enforcement is to continue, it is only proper, in fairness to such institutions, that vigilance be exercised in the case of other personal loan transactions, whether or not the other institutions making such loans are required to come within the terms of the Small Loans Act or the Consumer Discount Company Act.

What actually controls, however, is that this practice is a violation of the Usury Law, the Act of May 28, 1858, P. L. 622, (41 PS §§3 and 4), which provides as follows:

> That the lawful rate of interest for the loan or use of money, in all cases where no express contract shall have been made for a less rate, shall be six percent per annum; and the first and second sections of the act passed second March, one thousand seven hundred and twenty-three, en-

> titled "An Act to reduce the interest of money from eight to six per cent per annum," be and the same is hereby repealed.
>
> That when a rate of interest for the loan or use of money, exceeding that established by law, shall have been reserved or contracted for, the borrower or debtor shall not be required to pay to the creditor the excess over the legal rate; and it shall be lawful for such borrower or debtor, at his option, to retain and deduct such excess from the amount of any such debt; and in all cases where any borrower or debtor shall heretofore, or hereafter, have voluntarily paid the whole debt or sum loaned, together with interest exceeding the lawful rate, no action to recover back any such excess shall be sustained in any court of this commonwealth, unless the same shall have been commenced within six months from and after the time of such payment: Provided always, That nothing in this act shall affect the holders of negotiable paper, taken bona fide in the usual course of business.

Under the plan, in the event the bank terminates the contract, the balance of the reserve becomes the property of the surety company.

Under these circumstances, it might be said that in no event does the bank receive any part of the 5 percent premium charged.

It should be borne in mind, of course, that the bank is the party which actually collects the premium from the customer. The collection of this premium increases charges to an amount in excess of 6 percent. If we find that the bank is receiving interest in excess of 6 percent merely on the grounds, however, that the bank is the party which collects from the customer, we could anticipate the contention above suggested that none of this money goes to the bank. The creation of the reserve fund, which protects the bank, is, however, something which is a benefit to the bank, and all of such reserve which is used to pay losses certainly represents money which is exacted from the customer, thus increasing the amount received by the bank to a figure in excess of 6 percent. In the ordinary simple interest transaction the borrower does not pay additionally any sum which goes into a reserve to meet losses. Simpson *v.* Penn Discount Corp., et al., 335 Pa. 172 (1939), which stands for the proposition that:

> * * * The statute against usury forms a part of the public policy of the state and cannot be evaded by any circumvention or waived by the debtor: Moll *v.* Lafferty, 302 Pa. 354, 359. It is immaterial in what form or pretence the usurious interest is covered in the contract: Earnest *v.* Hoskins, 100 Pa. 551, 559. As usury is generally accompanied by subterfuge and circumvention of one kind or another to present the color of legality, it is the duty of the

> court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument. In Hartranft *v.* Uhlinger, 115 Pa. 270, it is said (p. 273): "It is, indeed, wholly immaterial under what form or pretence usury is concealed, if it can by any means be discovered our courts will refuse to enforce its payment."

In the case of Earnest *v.* Hoskins, supra, the lender of money exacted as a condition of the loan that the borrower should purchase from him a piece of land at an exorbitant price. In finding this transaction usurious, the court said, at page 559:

> * * * It is immaterial in what form or pretense the usurious interest is covered in the contract. When a party is compelled to take goods at more than the market price in order to obtain a loan, the transaction is usurious. * * *

Paraphrasing this, we can find that when a party is compelled to pay for a surety contract in order to obtain a loan, the transaction is usurious.

The legislature has seen fit to take out of the class of usurious transactions certain loans, as those made to a corporation (Act of April 27, 1927, P. L. 404 (41 PS §2), as amended by the Act of May 8, 1929, P. L. 1647), and small loans (Act of June 17, 1915, P. L. 1012 (7 PS §751), as amended) but we find nothing in the acts or decisions which would exempt the transaction herein described from the usury statute.

As indicated above, we feel the duty of the Secretary of Banking to protect the public furnishes compelling grounds for you to refuse to permit the use of this system by the banking institutions under your jurisdiction. Additionally, the transaction is usurious.

It is our opinion, that banking institutions under your jurisdiction should not be permitted to exact the 5 percent premium paid to surety companies, as provided in the plan or system above described, or any other similar plan or system.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 340

Amusements—Sunday concerts—Necessity for permit from Department of Public Instruction—Act of June 2, 1933—Broadcasting concert—Charging admission fee.

The Act of June 2, 1933, P. L. 1423, requiring a permit from the Department of Public Instruction for Sunday concerts, and also requiring an accounting of the receipts and expenses thereof, applies only to concerts which are broadcast and for which an admission fee is charged; if not broadcast, or if the concert is free, no permit is necessary.

Harrisburg, Pa., May 8, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: In your recent letter, you requested to be advised whether or not permits must be obtained from the Department of Public Instruction for the broadcasting of musical programs on Sunday.

Your inquiry arises by reason of the passage of the Act of June 2, 1933, P. L. 1423 (4 PS 121 et seq.), which requires that permits and authorization be obtained from the Department of Public Instruction for Sunday concerts rendered or broadcast after twelve o'clock noon.

Section 1 of this act reads:

> Be it enacted, &c., That from and after the passage of this act, it shall be lawful for any musician within this Commonwealth to receive compensation for singing or playing on Sunday in connection with the rendering of any public concert authorized as hereinafter provided, but the compensation paid to any such musician shall not exceed an amount computed at the rate of compensation received by such musician for similar musical services rendered during week-days.

Section 2, which is also particularly pertinent to our problem, provides as follows:

> *If, and when, authorized by the Department of Public Instruction of this Commonwealth, public concerts may be rendered and broadcast anywhere within this Commonwealth on Sunday after twelve o'clock noon;* and it shall be lawful for the person or persons rendering any such concert to charge an admission fee thereto at a rate which it is estimated will cover the expenses of rendering such concert, including light, heat and compensation to ushers, janitors and musicians: Provided, That the cost of light and heat and compensation to ushers, janitors and musicians shall not exceed an amount computed at the rate charged for light and heat and compensation to ushers, janitors and musicians for week-days: And provided further, That should the amount collected for admission fees to any such concert exceed the actual expenses for light, heat and compensation

> to ushers, janitors and musicians, the excess shall be paid to the Department of Public Instruction of this Commonwealth to be employed by it for such public music purposes as it may deem proper. (Italics ours.)

Section 3 reads:

> The Department of Public Instruction may authorize concerts, or series of concerts, to be rendered and broadcast as herein provided; such concerts, or series of concerts, to maintain music of a high order, although not necessarily what is known as sacred music. Whenever the said department shall have authorized any such concert, or series of concerts, to be rendered and broadcast, it shall issue a permit, setting forth its authorization thereof, which permit shall also state the date or dates, hour or hours when, and place or places where, such concert, or series of concerts, shall be held. The Department of Public Instruction shall make a charge of five dollars for every permit issued under the provisions of this section.

It is to be noted that the provisions of section 6 of this act are particularly interesting in that to provide any form of entertainment except music, at any concert rendered under the provisions of this act, is unlawful, and upon conviction punishable by fine or imprisonment, or both.

Section 7 makes it a misdemeanor to fail to pay any moneys received from the proceeds of a public concert, within the provisions of this act, in excess of expenses, to the Department of Public Instruction, or to fail to keep an account of the money received and expended.

The Century Dictionary and Cyclopedia defines a "concert" as:

> A public performance of music in which several singers or instrumentalists, or both, participate; especially, one in which the program consists of detached numbers: also applied to the performance of an oratorio, but not of an opera.

It is obvious that this act under consideration deals with "public concerts" produced either by singing or playing of musical instruments which may be "rendered and broadcast anywhere within this Commonwealth on Sunday after twelve o'clock noon." Of course the music rendered is to be "music of a high order, although not necessarily what is known as sacred music."

The Governor in approving this bill, and thereby making it a law, made the following statement which is most enlightening to the problem:

> This bill does not in any way contribute to the breaking down of Sunday observance. If it did I would not sign it. It

> permits concerts after noon on Sundays only, if, and when, permits therefor have been issued by the Department of Public Instruction, which must approve the programs in advance.
>
> The Department of Public Instruction is not required to grant a license for a Sunday concert in any community which is opposed to Sunday music. Therefore, the department in administering the act can give full weight to local opinion.
>
> The inclusion of anything except music in a program is made a criminal offense punishable by fine or imprisonment, or both.
>
> This bill does not tend to commercialize the Sabbath because nobody can make a profit out of it. It specifically provides that any receipts beyond bare expenses shall be paid into the Department of Public Instruction to be used by it for a public purpose.
>
> Thirty-four ministers of various denominations have urged me to approve the bill, while only two have asked that it be vetoed.

It, therefore, appears that what this act seeks to control is not any and all musical programs broadcast over a radio on Sunday, but only a "public concert" rendered and broadcast, for which concert an admission fee may be charged to cover expenses, but not for the purpose of making a profit.

It is well known that one who performs in this Commonwealth worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, is violating the law prohibiting the same unless there is legislative exemption. Obviously the act we are construing was adopted to remove the general prohibition theretofore in effect in this Commonwealth, which made it illegal for musicians or singers to be employed or paid for aiding to render a public concert which might be broadcast, where fees were charged.

It is our thought that this act has application only to "A public performance of music in which several [or more] singers or instrumentalists, or both, participate," which performance may be broadcast. These participating musicians or singers are compensated for their services and a fee may be charged for admission to cover the expenses of the concert, but not for the purpose of making a profit. The act requires that any profit realized from such a concert, from fees charged as admission, must be turned over to the Department of Public Instruction, which is to use it for public purposes.

The act also specifies that the music must be of high order, although not necessarily sacred. Sight must not be lost of the fact

that no other form of entertainment may be offered with the music on the same program; and that the Department of Public Instruction has the obligation, as well as the right, to approve the program in advance, and may refuse a permit for a musical concert if the commmunity is opposed to it.

Naturally, if no fee is charged for admission to the concert, there is no necessity to render an accounting to the Department of Public Instruction, and there appears no need for obtaining a permit from the Department of Public Instruction, as the act has for its obvious purpose the allowance of a public musical concert on Sunday after twelve o'clock noon, which will not be commercialized by the sponsor.

It is our opinion, and you are therefore advised, that a permit allowing the rendering of a public concert, and the broadcasting of the same, is necessary only where fees are charged for admission, in which case, in addition to first securing the approval of, and a permit for, the program of the public concert, the sponsor must account for all receipts and expenses, and turn over to the Department of Public Instruction all proceeds, less expenses, which are to be used for public purposs.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 341

Workmen's compensation—Claims under schedules established by Act of June 4, 1937—Compromise on basis of schedules established by Act of June 21, 1939—Section 503 of Act of 1939—Relative functions of Insurance Department and Department of Labor and Industry—Necessity for premium adjustment.

1. Section 503 of the Pennsylvania Workmen's Compensation Act of June 21, 1939, P. L. 520, authorizes employes, beneficiaries who are sui juris, or other beneficiaries who are properly represented, to make compromise settlements of workmen's compensation claims arising from accidents occurring between January 1, 1938, and January 30, 1939, inclusive, and therefore based upon the schedules established by the Act of June 4, 1937, P. L. 1552, but such compromise agreements must be based upon the rates provided by the act of 1939; such agreements may, but need not necessarily, be approved by the Bureau of Workmen's Compensation of the Department of Labor and Industry, and no claimant should be compelled to make a compromise.

2. The fact that a workmen's compensation insurance carrier has collected premiums at rates based on the schedules contained in the 1937 act does not

prohibit it from entering into a compromise settlement of a workmen's compensation claim pursuant to the provisions of the 1939 act, even though by such compromise less than the 1937 benefits are paid, but in such event an adjustment should be made by the insurance carrier's returning to the insured a portion of the premiums collected, and such an adustment may be required either by the Insurance Commissioner or by the Department of Labor and Industry.

3. The Insurance Department and the Department of Labor and Industry should cooperate fully in the administration of the workmen's compensation acts and action should not be taken by one without regard to the possibility that the other might take counter-action in the same matter; the administration of section 503 of the act of 1939 falls exclusively upon the Department of Labor and Industry unless an insurance carrier is involved, but in the case of misconduct of an insurance carrier the Insurance Department should take the initiative in the matter of supervision, discipline, or control.

Harrisburg, Pa., May 10, 1940.

Honorable Matthew H. Taggart, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your recent communication, requesting our opinion regarding compromise settlements made under the authority of section 503 of the Pennsylvania Workmen's Compensation Act of June 21, 1939, P. L. 520 (77 PS §1 et seq.).

Said Section 503 provides as follows:

> Section 503. Nothing in this act shall affect or impair any right of action which shall have accrued before this act shall take effect, except that, *because litigation is now pending as to the constitutionality of the compensation schedules contained in the amendment of this act, approved the fourth day of June, one thousand nine hundred and thirty-seven* (Pamphlet Laws, one thousand five hundred fifty-two), *the department is hereby authorized to approve agreements or supplemental agreements*, and the board and referees are hereby authorized to make awards effectuating agreements, *compromising disputes between employers and employes* or their dependents, as to the amount of compensation payable in cases arising out of accidents occurring between January first, one thousand nine hundred and thirty-eight and the effective date of this reenactment of this act, if such agreements or supplemental agreements provide for, or the parties to cases pending before the board of referees have agreed to, the payment of compensation at the rates and for the periods specified in this reenactment of this act. (Italics ours.)

It happens that certain employers or insurance carriers have preliminarily enjoined the operation of the 1937 act, and have paid benefits provided by the act of 1915, as amended and effective prior to the 1937 act, giving bond for the difference between the two

rates of compensation if the court determines that the 1937 schedules are constitutional. Parties who have not secured injunctions enjoy no such protection. It is apparently with this latter group that "compromise settlements" arise.

You specifically ask the following questions:

> 1. What constitutes a "dispute between employer and employee" which would authorize an insurance company to settle a claim on a compromise basis?
>
> 2. In view of the fact that the insurance companies have contracted to pay the full benefits of the Workmen's Compensation Act, and furthermore, have collected premiums on the assumption that such benefits would be paid, can they now make settlements at less than the full benefits originally contracted for?
>
> 3. If so, under what circumstances would they be justified in so doing and what, if any, adjustment of the contract would be made?
>
> 4. What are the powers and duties of the Insurance Department and the Department of Labor and Industry (Bureau of Workmen's Compensation) respectively, in the matter of compromise settlements and supervision of section 503?

To answer your first question, it is necessary to examine carefully section 503 with the object in view of determining what the legislature was attempting. It is true that at the time of this reenactment there was pending in court an attack upon the 1937 Workmen's Compensation Act involving benefits provided thereunder. This proceeding is still pending.

The legislature sought to provide for the contingency of court action adverse to the benefits provided by the 1937 Workmen's Compensation Act. To accomplish this it provided that compromise settlements could be effectuated and authority was given to the Department of Labor and Industry to approve such compromise agreements if the 1939 rates were the basis for such compromise.

It will be noted that section 503 specifically provides that any right of action accruing before the effective date of the act, shall not be impaired in any way. The provision for compromise settlements outlined above is the only exception to this general provision that any right of action shall not be impaired. In other words, the only basis under section 503 of "a dispute between employers and employees, or their dependents," would be the contingency that the court action then instituted would result adversely to the 1937 schedules of benefits.

The purpose of the legislature in authorizing compromise settle-

ments was to provide a way for claimants to obtain settlements and to come into immediate funds if they were content, in view of the litigation, to accept benefits provided by the 1939 schedules. The requirement that the basis of all such settlements be the 1939 schedules, in fact, limits the authority of the Department of Labor and Industry. This establishes a minimum at which such settlements may be effected. The further requirement that the Department of Labor and Industry approve all such settlements assures the result, therefore, that no settlements will be made at less than the 1939 schedules.

The legislature deemed it necessary to establish this limitation. It is rather odd that as a result we have a situation wherein the 1939 benefit rates are utilized in compromise cases arising prior to the effective date of such schedules.

We see no difficulty in this, however, because the legislature has only authorized the settlement of compromises by the Department of Labor and Industry, which in turn is a creature of the legislature. It is to be noted that section 503 states that the Workmen's Compensation Board of the Department of Labor and Industry "may" approve compromise settlements, and that there is no requirement upon the board to approve.

In other words, though the legislature has not attempted to compel compromise settlements it has, in fact, afforded an opportunity to make such settlements to such employees and beneficiaries of employees who may wish to compromise.

The Director of the Bureau of Workmen's Compensation has declared that the department's approval of such compromises will be given only upon convincing evidence by the company that the beneficiary has agreed to a revision "without duress." We are further assured that the department is cautious about the approval of compromise settlements and that the said settlements are not approved when there is any indication of fraud, misrepresentation, a failure of appreciation of a claimant's rights, or duress.

It should also be noted that the cases affected would be those in which the date of accident was between January 1, 1938 and June 30, 1939, inclusive, the date of the accident determining the rights of the party and the effective law not being changed by virtue of the fact that under the schedules certain payments might be made after June 30, 1939.

Your second inquiry suggests that if insurance companies have received a premium based on rates which contemplate liability to pay, in full, benefits provided in the 1937 schedules, the company should not be permitted to effect compromise settlements on a lower basis, even in view of section 503.

The reenacted section 503 does not, of course, refer only to compromise settlements effected by insurance carriers which stand in the place of employers. Self-insurers can enter such compromise settlements. This being the case, our first reaction to the suggestion that an insurance carrier having charged premiums to pay benefits on a certain basis may not pay lesser benefits, is that this would create two classes of employers, those insured under an insurance policy and those self-insured. In the interest of uniformity alone this would prove objectionable.

An insurance company has the same rights as does the employer who is the assured under one of these policies, and in fact in this opinion we have treated the employer and his insurance carrier as one and the same. It would be unfair to penalize an insurance company, even though the employer will not suffer or gain financially by reason of the compromise settlements. In effect, we would still have two classes of employers, those insured under a policy and those self-insured.

Also, as has been developed herein compromise settlements cannot be effected unless all parties are agreeable thereto and the department approves. This brings together all parties who can possibly be affected by such agreements, and as we view the situation there would be no need of justification in prohibiting such a compromise settlement on the grounds suggested.

This brings us to your third inquiry, which is two-fold. You first ask under what circumstances, if any, the insurance carrier can pay less than full benefits, and we feel that the above has completely answered this.

Secondly, you ask what, if any, adjustment of the contract would be made.

It would not be a novel situation if you required the refunding of certain portions of premiums collected where, by reason of court decisions, full benefits have not been accorded. After the decision in the Rich Hill Coal Company case, reported in 334 Pa. 449 (1939), carriers were called upon to refund portions of the premiums collected because their liability was reduced by the Supreme Court declaring, in such case, certain sections of the act of 1937 unconstitutional.

It might be contended that the matter of adjustments of premiums is purely a matter between the insurance carrier and the assured in the case of each policy. But as is well known to all insurance carriers, workmen's compensation insurance rates are established by a bureau, upon which the insurance carriers are represented, and each rate is built upon a basis that the rates be proportionate to the liability assumed. This being the case, carriers cannot be heard to

object to a requirement that part of the premium collected on rates so established should not be refunded in case later developments obviate the necessity of such carrier paying full benefits anticipated by the bureau in establishing the rate.

That part of the rate charged which would fairly represent protection which the insurer by reason of the compromise settlement is not called upon to afford, in effect, is not earned by the insurance company. In the exercise of his jurisdiction over insurance carriers, the Insurance Commissioner can certainly require adjustments in this respect. We are not unmindful that adjustments in this field are not unusual as workmen's compensation insurance is written on a basis of estimated pay roll of employees for the policy period, and final payment of employees for the policy period, and final payment of premium on the basis of actual pay roll. It is for the Insurance Commissioner, therefore, to promulgate orders relative to such adjustments or refunds.

It is suggested, however, that in approving compromise settlements the Department of Labor and Industry should give approval on the basis that such refunds will be required, or in lieu of this the Bureau of Workmen's Compensation should give notice on the occasion of approving compromise settlements that the carrier will be called upon by the Insurance Commissioner to make an adjustment.

Your fourth inquiry opens a rather broad subject, but we feel that we can briefly answer the same by confining our discussion to the instant case as much as possible. Under our statutes both the Insurance Department and the Department of Labor and Industry are concerned with workmen's compensation, and a close cooperation between the two departments in such matters is not only highly desirable but required. (Section 501 of The Administrative Code, Act of April 9, 1929, P. L. 177.) Where possible, one department should disclose its actions to the other department, and if it is anticipated that an action of one department might be counter to an action of the other department, such situation should be avoided.

Of course, the entire matter of approval of agreements and supplemental agreements between employers and employees is the responsibility of the Department of Labor and Industry, but in turn the supervision of companies is the duty of the Insurance Commissioner, and upon the Department of Labor and Industry having discovered that certain companies were making false representations or resorting to "duress" as suggested in Mr. Chesnut's letter of September 7, 1939, such conduct should have been reported to the Insurance Department.

Failure of a company to pay full benefits would be conduct of which the Insurance Commissioner could certainly take cognizance,

but on the other hand the Department of Labor and Industry would be equally interested on this point, as one of its purposes is to secure workmen's compensation benefits for employees and their dependents. Therefore, in the matter of failure to pay full benefits either the Department of Labor and Industry or the Insurance Department, or both, may act.

Of course, if the employer is not represented by an insurance carrier, some of these duties fall upon the Department of Labor and Industry exclusively.

It is our opinion, that:

1. Section 503 of the Workmen's Compensation Act, as reenacted effective July 1, 1939, provides a method whereby settlements between employers (or insurance carriers) and employees can be effected upon a basis of 1939 schedules of benefit if, in view of the attack upon the unconstitutionality of the 1937 schedules, the parties wish to make such agreement. There could be no "dispute" between employer and employees which could justify such a compromise because the 1937 schedules will either stand or fall and all parties will be bound accordingly.

But it is entirely proper for an employee, a beneficiary who is sui juris, or other beneficiary who is properly represented, to make a compromise settlement, and such agreements must be based upon the 1939 rates. The Bureau of Workmen's Compensation, on behalf of the Department of Labor and Industry, need not approve any such compromise since there is no requirement that the bureau must approve. Neither section 503 nor the situation attempted to be covered by the exception contained therein, should be used as a basis for compelling parties to make such compromises.

2. The fact that an insurance carrier has collected premiums at rates based on schedules of "full" benefits does not prohibit the insurance company from entering into a compromise settlement pursuant to the provisions of section 503 even though by such compromise less than full benefits are paid.

3. If for any proper reason it develops that full benefits are not paid, an adjustment should be made by the insurance carrier returning to the assured a portion of the premium collected. It would be proper for the Insurance Commissioner to require such an adjustment by compelling proportionate refunds, but the Department of Labor and Industry may give approval to compromise settlements on the basis that the refunds must be made, or at least give notice that such refunds will be required by the Insurance Commissioner.

4. Full cooperation between the Insurance Department and the Department of Labor and Industry is necessary and required, and

action should not be taken by one without regard to the possibility that the other may take counter action in the same matter.

Where the misconduct of an insurance company is involved, the Insurance Department should take the initiative in the matter of supervision, discipline, or control. Both departments are interested in insurance carriers paying full benefits because the carriers, which are under the supervision of the Insurance Department, have contracted to pay the same, and because the Department of Labor and Industry is interested in obtaining for employees and their dependents, such full benefits. If no insurance carrier is involved, the duties with regard to section 503 fall upon the Department of Labor and Industry exclusively. The matter of approval or disapproval of compromise agreements or settlements is for the Department of Labor and Industry acting through its Bureau of Workmen's Compensation.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.
ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 342

Legislature—Special session of 1940—Right to enact legislation under the Governor's Proclamation relative to the $2,000 bond now required to be signed by relief recipients.

The General Assembly at the present extraordinary session may not, under the Proclamation of the Governor convening the same, enact legislation relative to the $2,000 bond now required to be signed by relief recipients by the Department of Public Assistance.

Harrisburg, Pa., May 13, 1940.

Honorable Samuel S. Lewis, President of the Senate, Harrisburg, Pennsylvania.

Sir: Receipt is acknowledged of the communication of May 8, 1940, addressed to me by William J. Ridge, Chief Clerk of the Senate, wherein it is requested that I comply with a resolution of the Senate adopted May 7, 1940. This resolution is as follows:

Resolved, That the Chief Clerk of the Senate obtain from the Attorney General an opinion on the following question:

May this General Assembly at this Special Session and under the Proclamation of the Governor enact legislation relative to the $2,000 bond now required to be signed by relief recipients by the Department of Public Assistance?

This session of the General Assembly was specially convened by the Governor by his Proclamation dated April 29, 1940, pursuant to the provisions of Article IV, Section 12, of the Constitution. Legislation at extraordinary or special sessions of the General Assembly is restricted by Article III, Section 25, of the Constitution in the following words:

> When the General Assembly shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session.

The foregoing restrictions upon the scope of legislation at such sessions have been judicially construed by our appellate courts. Among the more recent germane cases is that of Commonwealth ex rel. Schnader *v.* Liveright, Secretary of Welfare, et al., 308 Pa. 35, decided by the Supreme Court April 7, 1932. Speaking through Mr. Justice Kephart, the court said in part, beginning at page 58 of 308 Pa.:

> * * * A subject may be so broad or general, having so many ramifications, that the special matter in relation thereto, on which legislation is desired, must be stated in the call. Though a general subject is stated through a specification of a particular matter in connection therewith, this does not open the door for any legislation germane to the general subject beyond the scope of the specification. It must be confined to the specialized matter as interpreted in view of the general subject. * * *

The only portions of the Governor's Proclamation convening the present extraordinary session, relating to public assistance, are those contained in subjects Nos. 1, 5 and 7.

Subject No. 1 of the Proclamation is as follows:

> 1. Appropriations for payment of public assistance and for payment of administrative, auditing and disbursement expenses relating thereto.

Subject No. 5 of the Proclamation is as follows:

> 5. In order to make funds available in the General Fund to meet the appropriations mentioned above, legislation providing for:

(a) The transfer of moneys to the General Fund from various special funds in the State Treasury and the subsequent reimbursement of such special funds out of the General Fund;

(b) Reductions in such appropriations made by the General Assembly at its session of one thousand nine hundred and thirty-nine as may be practicable.

Subject No. 7 of the Proclamation is as follows:

7. Legislation necessary to conform the provisions of the Public Assistance Law to the new definition of the term "dependent children" contained in Title IV of the Federal Social Security Act, as amended.

It is quite clear that we can at once eliminate for the purposes of our present discussion the foregoing subjects Nos. 5 and 7, for the reasons that subject No. 5 relates merely to legislation making available funds to meet any appropriation made pursuant to subject No. 1; and subject No. 7 confines legislation thereunder to such as is necessary to conform the provisions of the Public Assistance Law to the definition of "dependent children" contained in Title IV of the Federal Social Security Act, as amended.

Subject No. 1 of the Proclamation does not relate to the general subject of public assistance. It is confined to the specification of a particular matter in connection therewith, and this particular matter is appropriations. Consequently any legislation enacted under subject No. 1 must be confined to the specialized matter of appropriations in relation to the general subject of public assistance.

It is my opinion, therefore, and you are accordingly advised, that the General Assembly at the present extraordinary session may not, under the Proclamation of the Governor convening the same, enact legislation relative to the $2,000 bond now required to be signed by relief recipients by the Department of Public Assistance.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

OPINION No. 343

Schools—Employes' retirement fund—Election of salary basis—Act of June 20, 1939, sec. 2—Time for election—September 15, 1939—Reasonable time after effective date of act.

The provision of section 2 of the Act of June 20, 1939, P. L. 479, which requires each school employe who makes an election as to his salary basis under the act to give written notice thereof to his employer on or before September 15, 1939, is absolutely void since the act did not become effective until January 1, 1940; but, since it was the legislative intent to afford such employes a certain period of time within which to make an election, a reasonable time after the effective date of the act should be given.

Harrisburg, Pa. May 17, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the requirement of Section 2 of the Act of June 20, 1939, P. L. 479, (24 PS §571), is mandatory or merely directory.

Said section requires that each school employe who makes an election (under the provisions of this section) to contribute to the school employes' retirement fund, either on the basis of the total salary he or she will receive during the effective period of the act, or on the basis of the total salary which he or she received during the year which began July 1, 1938 and ended June 30, 1939, shall notify, in writing, his or her employer on or before September 15, 1939, upon which such salary he or she elects to contribute.

Section 2 of said act provides, inter alia, as follows:

> During the period in which this act is in effect, each employe who is a member of the school employes' retirement system may elect to contribute to the school employes' retirement fund either on the basis of the total salary he or she will receive during the effective period of this act or on the basis of the total salary which he or she received during the year which began July first, one thousand nine hundred thirty-eight and ends June thirtieth, one thousand nine hundred and thirty-nine.
>
> Each employe who makes an election under the provisions of this section shall notify, in writing, his or her employer, on or before September fifteenth, one thousand nine hundred thirty-nine, upon which such salary he or she elects to contribute. Each employer shall thereupon notify the School Employes' Retirement Board, in writing, of the option elected by each such employe.

The act further provides:

> * * * For any year, in order to bring the expenditures of the district within the annual estimate of available revenue, each school board in districts of the first class is hereby empowered to make such general adjustments and reductions in salaries fixed by law, including salaries of the professional employes, as in the judgment of the board may

> be proper and necessary to bring the total of all expenditures within the estimate of revenue to be received * * *.

In Section 4 of the act it is further provided:

> This act shall become effective January first, one thousand nine hundred and forty, and shall remain in force and effect only until December thirty-first, one thousand nine hundred and forty-one.

It appears that the bill, as originally drafted, was intended to become effective immediately upon its final enactment. Although the bill as finally passed, became effective January 1, 1940, it was approved on June 20, 1939. It should be noted that the date of the exercise of the option was fixed as of September 15, 1939.

This question has arisen as result of the fact that on December 1, 1939, the Philadelphia School District decided to reduce the salaries of its school employes as of January 1, 1940.

The question, therefore, turns on the effect to be given to that portion of section 2 of the act of 1939 which provides:

> Each employe who makes an election under the provisions of this section shall notify, in writing, his or her employer, *on or before September fifteenth, one thousand nine hundred thirty-nine,* upon which such salary he or she elects to contribute. * * * (Italics ours.)

In determining whether or not the requirements concerning the date of September 15, 1939, set forth in the act, are mandatory, directory, or absolutely void, we must carefully consider what effect shall be given to the words "on or before September fifteenth one thousand nine hundred thirty-nine," in view of the fact that the act did not become effective until January 1, 1940.

Concerning the fixing of the effective date of a statute, in 59 C. J., Title Statutes, Section 673, page 1137, we find:

> * * * The general rule is that a statute speaks from the time it goes into effect and not otherwise, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. The fixing of a date either by the statute itself or by constitutional provision, when a statute shall be effective, is equivalent to a legislative declaration that the statute shall have no effect until the date designated; and since a statute not yet in effect cannot be considered by the court, the period of time intervening between its passage and its taking effect is not to be counted; but such a statute must be construed as if passed on the day when it took effect. While a statute may have a potential existence, although it will not go into operation until a

> future time, until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void.

This position is sustained by one Pennsylvania case—Thompson *v.* Clearfield County, 2 D. & C. 619 (1922), where Judge Bell states the law to be (page 620):

> * * * A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of its passage. Before that time no rights may be acquired under it; it is equivalent to the legislative declaration that the statute shall have no effect until the designated day: * * *.

In the case of Gilbert *v.* Ackerman, 159 N. Y. 118, 53 N. E. 753 (1899), a case involving limitation of actions, the court said, at page 754 of 53 N. E.:

> * * * The doctrine of these cases would seem to be that, if an act affords a reasonable opportunity for parties to commence actions between the time of its passage and the time when, by its terms, it is to go into effect, the legislative power has been constitutionally exercised. The doctrine rests, evidently, upon the theory that, as the act has become the law of the state upon its passage, all persons are to be presumed to have notice of its provisions, and, if the period of time intervening until it becomes effectual is not to be regarded as a saving period for the enforcement of existing causes of action, there is no reason in the provision for its taking effect at a future day. On the other hand, we have the opinion of Judge Cooley in Price *v.* Hopkin, 13 Mich. 318, in support of the proposition that the statute begins to speak the moment it takes effect, and not before, and, therefore, that the period of time intervening between its passage and its taking effect is not to be counted. In his work on Constitutional Limitations (star page 366), that eminent jurist says that "it is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action." It is true that his opinion in Price *v.* Hopkin had some reference to the provisions of the state constitution, but the decision was not entirely dependent upon that feature. He takes this position: That a statute has not, ex proprio vigore, any force until it becomes the law of the land, and that is when, by its terms, it takes effect; and as, up to that moment, the party is allowed by the existing law a period for the com-

> mencement of his action, if, at the instant that the new statute takes effect, the period is cut off, and the remedy forever barred, then the act is unconstitutional. In his language: "Whether passed at that moment or before [referring to the time of taking effect], we conceive to be immaterial, and that the statute cannot be applied * * * without violating a plain principle of constitutional law." I incline to the view that the position taken by the appellate division in this action is, on the whole, the preferable one. It establishes a simple and salutary rule in the enactment of statutes of limitation, which leaves no room for construction and doubt, and which harmonizes with the principle that recognizes a statute as speaking the moment it takes effect. That a party is chargeable with knowledge of the passage of a statute which alters an existing law, whereby his claim may be affected, is undoubtedly true in law; but I do not consider that that is a sufficient or satisfactory answer to the proposition that when the legislature makes a new statute of limitations, it should make some provision therein that, after the statute takes effect, parties whose rights of action are to be affected by the new law shall have a reasonable period within which to prosecute their claims. It should not be left to supposition and inference from the circumstances.

In 1 Lewis' Sutherland Statutory Construction (2d ed. 1904) section 175 (107), it is said:

> * * * The period between the passage of a law and the time of its going into effect is allowed to enable the public to become familiar with its provisions; but until it becomes a law they are not compelled to govern their actions by it. Thus, an act which was to go into effect at a future day established new periods of time for the limitation of actions. It was held not applicable to a case having several years to run where the act would be a bar the moment it took effect. It could not operate to put the party on diligence before it went into operation. * * *

The effect of all these authorities is that until the act actually becomes operative, it is not obligatory with respect to anyone covered by its provisions.

We may assume that it was the intent of the legislature that the school employes should have sufficient time for giving notice of their election after the passage of the act on June 20, 1939.

Since the Philadelphia school employes could not have known on or before September 15, 1939 that the board would decide on December 1, 1939 to reduce their salaries as of January 1, 1940, it is obvious that such employes had no opportunity to avail themselves of the benefits of their right to elect under the act.

As the act did not become effective until January 1, 1940 the requirement of section 2 that the school employe should give written notice of his election on or before September 15, 1939 could have no force nor effect, and this section must be read as though "on or before September 15, 1939" were not written in the act.

However, as the evident intent of the act was to afford the "employe" a certain period of time within which he might make an election, that is, on or before September 15, 1939, a reasonable time after the effective date of the act should be given such employe to make his election.

We are of the opinion, therefore, and you are accordingly advised that the provisions of section 2 of the Act of June 20, 1939, P. L. 479, (24 PS §571), which requires each school employe who makes an election under the act to give written notice thereof to the employer on or before September 15, 1939, is neither mandatory nor directory, but is absolutely void. Therefore, a reasonable time after the effective date of the act should be given to such employe for giving notice of his election.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 344

Schools—Compulsory attendance—Exceptions—Farm and domestic work permits —Pupils over 14—Completion of "highest grade of the elementary school organization prevailing in the district"—School Code of 1915, sec. 1416, as amended.

1. Under section 1416 of the School Code of May 18, 1911, P. L. 309, as amended by section 4 of the Act of June 24, 1939, P. L. 786, school attendance is compulsory for those of school age, except for (1) a pupil over 16 who is regularly employed during school sessions and who holds an employment certificate issued according to law, (2) a pupil over 15 who is engaged in farm work or domestic services in a private home on a permit duly issued, and (3) a pupil over 14 who has satisfactorily completed the equal of the highest grade of the elementary school organization prevailing in the public school district in which he resides, and who holds a work permit from the Superintendent of Public Instruction.

2. The Superintendent of Public Instruction may not issue a farm or domestic work permit to a pupil over 14 but under 15 who has completed the sixth grade of the elementary school, unless the school district in which he resides

and attends school has in effect a junior high school organization, or a six-year high school program beginning at the termination of the sixth grade.

Harrisburg, Pa., May 27, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction,

Sir: This department has received your communication wherein you request an interpretation of Act No. 352, approved June 24, 1939, P. L. 786, (24 PS §1401 et seq.), with respect to limitations of farm and domestic work permits to school children as provided therein.

You inform us that you have had numerous conferences with, and received many communications from, the Amish and Mennonites of Lancaster County, who are particularly interested in knowing if the law will permit the issuing of a farm or domestic work permit to children who have reached the age of 14 years, and who have finished six grades of public schooling.

You then ask us these questions:

> 1. Is there any legal method or procedure on the basis of which the Superintendent of Public Instruction, acting under authorization of this section of School Law, may construe the sixth grade of the public schools as being "the highest grade of the elementary school organization prevailing" in a public school district which has not made provision for a junior high school organization or for a secondary school program beginning at the termination of grade six?
>
> 2. Is there any other provision or authorization of law under which the Superintendent of Public Instruction may so construe the authority delegated to him by the General Assembly as to enable him to authorize the granting of farm or domestic permits to pupils who have attained to the age of at least fourteen and have completed the sixth grade of the elementary schools but have not completed the remaining grades of the elementary school work offered under the plan of organization prevailing in the district in which the said child or children may reside?

These questions require us to review our laws relating to compulsory school attendance and particularly the Act of May 18, 1911, P. L. 309, section 1414, as amended, (24 PS §1421). In this review we have been guided by the principles enunciated by Chief Justice Kephart in Ehret *v.* Kulpmont Borough School District, 333 Pa. 518 (1939), wherein he says at page 522:

> * * * The Constitution has placed the educational system in the hands of the legislature, free from any interference from the judiciary save as required by constitutional limita-

tions. We may only, in problems such as this, ascertain the legislative intent.

> * * * As we said in Walker's Appeal, 332 Pa. 488: "The fundamental public policy, expressed in the Constitution and underlying school laws, is to obtain a better education for the children of the Commonwealth." The separate sections of the School Code all derive their inspiration from this source. Though containing individual policies in themselves, each is subordinate to this cardinal purpose. * * *

To answer properly the questions propounded by you, it will be necessary to construe the different sections of the various laws in the School Code which we believe have a bearing on the problem.

As you mentioned in your letter, our chief concern is the interpretation of the pertinent provisions of section 1416 of the School Code, as amended by section 4 of Act No. 352, approved June 24, 1939 (Act of June 24, 1939, P. L. 786, (24 PS §1423)). Part of section 4 of this act, which is pertinent to our problem, reads as follows:

> The provisions of this act requiring regular attendance shall not apply to any child who has attained the age of sixteen years, and who is regularly engaged in any useful and lawful employment or service during the time the public schools are in session, and who holds an employment certificate issued according to law; nor to any child who has been examined by any approved mental clinic or by a person certified as a public school psychologist or psychological examiner, and has been found to be unable to profit from further public school attendance, and who has been reported to the board of school directors and excused, in accordance with regulations prescribed by the State Council of Education; nor shall the said provisions apply to any child who has attained the age of fifteen years and is engaged in farm work or domestic service in a private home on a permit issued by the school board or the designated school official of the school district of the child's residence, in accordance with regulations which the Superintendent of Public Instruction is hereby authorized to prescribe: *Provided, That such a permit may be issued to any child who is at least fourteen (14) years of age and has satisfactorily completed, either in public or private schools, the equivalent of the highest grade of the elementary school organization prevailing in the public schools of the district in which he resides, if the issuance of such a permit has first been recommended by the county or district superintendent of schools having supervision of the schools of the district where such child resides, or by the principal of the private school where such child is enrolled, and such reason has been approved by the Superintendent of Public Instruction.* (Italics which is ours represents new matter added by amendatory Act of June 24, 1939, P. L. 786.)

This section, as amended, makes the following classification with relation to compulsory school attendance:

1. Any student or pupil who has attained sixteen years of age, and who is regularly engaged in useful and lawful employment or service during school sessions, and who holds an employment certificate issued according to law, is exempt from compulsory school attendance.

2. The same is true in the case of "any child who has attained the age of fifteen years and is engaged in farm work or domestic service in a private home on a permit" duly issued.

3. An exemption may also be issued to any child fourteen years old that has satisfactorily completed, either in public or private schools, the equivalent of the highest grade of the elementary school organization prevailing in the public schools of the district in which he or she resides, if the issuance of such permit has been approved by the Superintendent of Public Instruction.

We are chiefly concerned with this third group. It is evident that the solution to the problem depends on the meaning of "the equivalent of the highest grade of the elementary school organization prevailing in the public schools of the district in which he resides." This section of itself does not indicate what is "the highest grade of the elementary school organization prevailing" in the district. Reference, therefore, must be made to other sections of the School Code which may indicate to us what constitutes "the highest grade of the elementary school organization prevailing" in the school district.

In considering these various provisions of the School Code (Act of May 18, 1911, P. L. 309, Article IV, Section 401; May 24, 1921, P. L. 1066, Section 1; as amended May 29, 1931, P. L. 243, Section 8; School Laws, Section 401; (24 PS §331), we find that:

> The board of school directors in every school district in this Commonwealth shall establish, equip, furnish, and maintain a sufficient number of elementary public schools, * * * to educate every person, residing in such district between the ages of six and twenty-one years, who may attend; and may establish, equip, furnish, and maintain the following additional schools * * * for the education * * * of persons residing in said district and for the proper operation of its schools, * * * [which] when established, shall be an integral part of the public school system in such school district, and shall be so administered, namely:
>
> High schools.
>
> * * * * *

Nothing in the provisions of the law just cited indicates what grades constitute an elementary school. However, section 1701 of our school laws (Act of May 18, 1911, P. L. 309, Article XVII,

Section 1701; May 20, 1921, P. L. 1036, Section 1; April 7, 1925, P. L. 166, Section 1; 24 P. S. 1581) provides that:

> A complete high school course is one requiring four years beyond *an elementary course of eight years or six years beyond an elementary course of six years.* * * * (Italics ours.)

The remainder of this section sets out in detail the requirements of the various high school and junior high school systems recognized and in operation in this State.

Historically, it is particularly interesting to note the provisions of section 1701 of the School Code in relation to high schools and elementary schools prior to the present effective Act of April 7, 1925, P. L. 166, Section 1. By the Act of May 20, 1921, P. L. 1036, Section 1701 was amended by prefixing to it the following paragraph:

> The term elementary school or elementary course shall apply to all grades not included among those recognized as high school grades in the classification of the Department of Public Instruction. A high school is an organization of grades seven, eight, nine, ten, eleven, and twelve, in cases where such grades or any of them are organized as part of a junior high school, a senior high school, or a six year high school, and are so recognized by the State Board of Education; but where such grades are not so organized, *grades seven and eight shall be classified as elementary grades. A complete high school course is one requiring four years beyond an elementary course of eight years or six years beyond an elementary course of six years.* The Superintendent of Public Instruction shall make such regulations as shall be necessary to insure proper standards for the various grades of the twelve years of the public school course. (Italics ours.)

It will be noted that section 1701 was again amended by Section 1 of the Act of April 7, 1925, P. L. 166, which we have referred to and cited hereinbefore.

The provisions of section 1601 et seq. of Article XVI of the Act of May 20, 1921, P. L. 983, as amended, 24 P. S. 1531, which deal generally with the operation of elementary schools in this Commonwealth, and of the various school laws in effect controlling the payment of salaries of the elementary teachers in the different school districts, do not of themselves, show us what grades constitute the elementary schools of a public school system.

It is, therefore, obvious that there is no universal or State-wide administrative standard for an elementary public school system existing in this Commonwealth, since a school district may have in operation either a junior high school, a six or eight year elementary school

system, depending on the type of high school that the school directors have adopted for their respective district. It is just as obvious that unless a school district has made provision for a junior high school or a six year secondary, or high school, program, beginning with the termination of the sixth grade, that of necessity the highest grade elementary school organization in that school is the eighth grade.

Unless the propositions advanced by you can be brought into harmony with, and within the scope of, the various school laws that we have hereinbefore referred to, it follows that section 1416 of the School Code, supra, as amended by Act No. 352, approved June 24, 1939, does not of itself permit an interpretation which will allow the issuance of a farm or domestic permit to every student in the Commonwealth, even though the student is fourteen years of age and has completed the first six grades of elementary school, unless the school district where the student is attending school has in operation either a junior high school organization or a six year high school course. In the latter cases, the sixth grade of the public school system is "the highest grade of the elementary school organization prevailing" in that particular school district.

Therefore, as we have above indicated, your first query must be answered in the negative unless that school district has in operation a junior high school organization or a six year high school program. Accordingly, the answer to your second query is in the negative because your decision as to what constitutes the elementary grade in each school district is governed by the school program in effect in that school district.

This result will necessarily bring disappointment to our Amish and Mennonite neighbors. They solicited and secured from the General Assembly of 1939 the amendment which they believed would grant you power to exempt their children above the age of fourteen years from the operation of the compulsory school laws. They have urged upon us the same arguments they presented to the legislature. We understand and appreciate their "way of life," and for the vast and valuable contributions they have made to the religious life of Pennsylvania, and to its material prosperity as well, we have profound admiration. We realize that good men are as essential as learned men to a democracy, and a philosophy of life and faith which produces good men the Commonwealth will always encourage and protect. But this department is obliged to find the legislative intent in the words which the law-making body has employed. If our interpretation does not represent the actual, as distinguished from the expressed, intent of the legislature, the next General Assembly will doubtless provide appropriate relief.

It is our opinion, that:

1. The Superintendent of Public Instruction may construe the sixth grade of a public school system as being "the highest grade of the elementary school organization prevailing" in a public school district, only in those school districts which have made provisions for a junior high school organization or a secondary, or high school, program, beginning at the termination of the sixth grade.

2. The Superintendent of Public Instruction has no authority delegated to him by the General Assembly which will enable him to issue a farm or domestic permit to pupils who have attained the age of fourteen years and have completed the sixth grade of the elementary school, unless the school district in which the pupil resides and attends school has in effect a junior high school organization or a six year high school program.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 345

Physicians and surgeons—Specialists—Liability for malpractice—Acts or omissions of consulting physicians—Reliance on consulting physician's diagnosis—Indicating therapy for patient without physical examination—Institute for Control of Syphilis of the University of Pennsylvania—Cooperation with State Department of Health—Consideration of appeal from refusal of certificate for marriage license—Act of May 17, 1939, sec. 3.

1. One holding himself out as a specialist in the treatment of a particular disease must possess and exercise the average degree of skill, care, and diligence possessed and exercised by physicians in the same locality who devote special attention and study the particular disease, its diagnosis and treatment, having regard to the advanced state of the profession at the time, and is answerable not only for his own conduct but for any wrongful acts or omissions of the physician who consults him, of which he is cognizant and which he lets go without objection, or which, in the exercise of reasonable diligence under the circumstances, he should have observed.

2. No physician, and particularly no expert, is entitled to rely on the diagnosis of a serious disease, such as syphilis, as made by another physician; nor can he with impunity make a diagnosis or suggest indicated therapy for a patient he has never physically examined.

3. The members of the Institute for the Control of Syphilis of the University of Pennsylvania would be liable for damages in an action of trespass for mal-

practice for making a diagnosis of, or prescribing treatment for, a patient they have never seen or examined, if such diagnosis or advice should actually result in injurious consequences to the person regarding whom it was made or given, even though their work was done pursuant to arrangement with the State Department of Health, as part of the review of a case in which an applicant for a marriage license has been denied a health certificate by the examining physician, and has appealed to the Department of Health under section 3 of the Act of May 17, 1939, P. L. 148.

Harrisburg, Pa., May 28, 1940.

Honorable John J. Shaw, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We are in receipt of your letter of recent date in which you request our opinion upon the following statement of facts:

The Institute for the Control of Syphilis of the University of Pennsylvania, although a part of the University, is an agency cooperating with the Department of Health for the control of that disease within this Commonwealth. For the services rendered at the request of your department, the director and other members of the Institute will be paid by the Commonwealth out of funds received from Federal grants. The Department of Health proposes to use the facilities of the Institute in cases arising under the administration of the Act of May 17, 1939, P. L. 148, (48 PS §20), et seq. This act, inter alia, prohibits the issuance of a marriage license to any person unless there is produced a statement from a duly licensed physician of this Commonwealth certifying that the applicant is not infected with syphilis; or if infected, is not in a stage of the disease which is likely to become communicable.

Section 3 of the said act provides as follows:

> Any applicant for a marriage license having been denied a physician's statement as required by this act, shall have the right of appeal to the Department of Health of the Commonwealth of Pennsylvania for a review of the case, and the said department shall, after appropriate investigation, issue or refuse to issue a statement in lieu of the physician's statement required by section one of this act.

When an applicant has been denied a certificate by the examining physician and, pursuant to the provisions of section 3 of the act, appeals to the Department of Health, the Secretary or his appointee will be impressed with the duty of determining whether or not a license should issue. To assist in arriving at such conclusion the Department of Health may request an opinion from the Institute on a supplied statement of facts setting forth the history of the applicant's case, his present physical condition, the result of serological tests which have been made and any other pertinent information.

The applicant would not appear at the Institute for examination and the recommendation to your department would, therefore, be based upon facts and findings supplied and made by a physician not connected with the Institute.

As a further part of its program against venereal disease the Department of Health proposes to make the services and facilities of the Institute available to licensed physicians throughout the Commonwealth for the purpose of consultation. For example, the physician treating a person suspected of being infected with syphilis in a given stage may request the Institute to advise him as to the proper treatment required. In these cases too, the Institute would be required to base its recommendation upon a history, symptology or diagnois made and supplied by a physician in no way connected with it.

Under these circumstances you ask to be advised whether the director or any of the members of the Institute would be liable in an action of trespass for malpractice for giving advice by correspondence regarding the care of, or prescribing treatment for, a patient he has never seen or examined, if the advice actually results in unfavorable or injurious consequences to the person regarding whom it was given.

The precise question raised by your inquiry is unique and, so far as we can determine after careful research, has never been adjudicated by the courts of this Commonwealth. There are, of course, many decided cases dealing with the civil liability of physicians for malpractice; but most of these are concerned with situations such as where a physician makes a palpably erroneous diagnosis or a surgeon carelessly leaves a gauze sponge in a wound after an operation. They deal, in other words, with those situations where the physician is guilty of some tortious conduct from which injury results in the performance of a contractual obligation to the patient. Specifically, a patient has been allowed to recover damages resulting from the negligent misdiagnosis of a venereal disease from which he was suffering (Harriott *v.* Plimpton, 166 Mass. 585; 34 N. E. 992 (1896)).

The first appellate court case in this Commonwealth dealing with the liability of physicians and surgeons under such circumstances was McCandless *v.* McWha, 22 Pa. 261 (1853) and the rule therein established has since been consistently followed by our courts.* It

*Potter *v.* Warner, 91 Pa. 362 (1879); English *v.* Free, 205 Pa. 624 (1903); Davis *v.* Kerr, 239 Pa. 351 (1913); Duckworth *v.* Bennett, 320 Pa. 47 (1935); Hodgson *v.* Bigelow, 335 Pa. 497 (1939); Wohlert *v.* Seibert. 23 Pa. Superior Ct. 213 (1903); Krompoltz *v.* Hyman. 70 Pa. Super. Ct. 581 (1919); Remley *v.* Plummer. 79 Pa. Super. Ct. 117 (1922); Barnard *v.* Schell. 85 Pa. Super. Ct. 329 (1925); Veit *v.* Hinchcliff, 90 Pa. Super. Ct. 283 (1926); Moscicki *v.* Shor, 107 Pa. Super. Ct 201 (1932).

is very well stated by the Superior Court in Barnard *v.* Schell, 85 Pa. Super. Ct. 329 (1925) where, at page 334, the court says:

> The duty imposed on a physician or a surgeon is to apply such reasonable skill and diligence as is ordinarily exercised in his profession; and the test of such ordinary care, skill and diligence is that which physicians and surgeons in the same general neighborhood ordinarily have exercised in like cases, having regard to the advanced state of the profession at the time: * * *

Consultation among physicians is common but, under the usual practice, is almost invariably inclusive of an examination of the patient by the consultant. Indeed, it seems to us, one of the very purposes of consultation is the affirmation of one physician's diagnosis by another after a physical examination of the patient. Although there are no Pennsylvania decisions directly in point, the responsibility of physicians jointly engaged is well settled in other jurisdictions.† In Morey *v.* Thybo, 199 Fed. 760 (1912) the court held that:

> * * * Each, in serving with the other, is rightly held answerable for his own conduct, and as well for all the wrongful acts or omissions of the other which he observes and lets go on without objection, or which in the exercise of reasonable diligence under the circumstances he should have observed. * * *

Frequently the consultant is an expert or what is usually known as a "specialist" in some particular line of medical or surgical endeavor or in the treatment of one or more diseases. In such cases the courts of this country have uniformly followed a doctrine of liability similar to the general rule above set forth. In Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323 (1902), it is held that a specialist is "bound to bring to the discharge of his duty to patients employing him as [a] specialist that degree of skill and knowledge which is ordinarily possessed by physicians who devote special attention and study to the disease, its diagnosis and treatment, having regard to the present state of scientific knowledge." (Citing Feeney *v.* Spalding, 89 Maine 111; McMurdock *v.* Kimlerline, 23 Mo. App. 523.)

Even though the patient is not aware that the physician he originally consults proposes to seek the advice of the Institute regarding his condition and treatment—in other words, even though there is no contractual or consensual relationship between the patient and any member of the Institute—nevertheless, we have no doubt that by agreeing to act in a consultative capacity, and to recommend care

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†Harris *v.* Fall, 177 Fed. 79; Keller *v.* Lewis, 65 Ark. 578; Hitchcock *v.* Burgett, 38 Mich. 501 (1878); Brown *v.* Bennett, 157 Mich. 654 (1909).

and treatment, the members of the Institute assume a civil liability comparable to that of a physician in direct charge of the case and in direct contractual relationship with the patient. From an examination of the foregoing authorities it would therefore appear that the possible liability of the personnel of the Institute for malpractice under the circumstances referred to would be measured by the following general rule:

One holding himself out as a specialist in the treatment of a venereal disease must possess and exercise the average degree of skill, care and diligence possessed and exercised by physicians in the same locality who devote special attention and study to the disease, its diagnosis and treatment, having regard to the advanced state of the profession at the time. He is answerable not only for his own conduct, as aforesaid, but for all the wrongful acts or omissions of which he is cognizant of the physician who consults him which he lets go on without objection, or which, in the exercise of reasonable diligence under the circumstances, he should have observed.

In order to discuss more intelligently the professional standards relating to the diagnosis and treatment of the disease, and to recognize more fully the real gravity of the medico-legal responsibilities of the physician who assumes to diagnose and treat it, we believe that a brief discussion of the fundamental methods and problems of diagnosis may be helpful.

Syphilis—one of the most serious of human diseases—is caused by an organism known as "spirocheta pallida." In its early stages its presence is usually denoted by an open lesion of the skin or membranes of the mouth and oral cavity and a "positive" blood Wassermann reaction. Unfortunately these symptoms are not invariably present, even in the early stages, and as the disease progresses it may not be manifested in any form recognizable to the ordinary practitioner of medicine. (And it must be borne in mind that in all probability the majority of the cases which will arise under the act of 1939, supra, will be those involving a history of old, treated and perhaps latent syphilis—difficult of diagnosis and prognosis.)

The fundamental diagnostic tests are (a) the Darkfield examination, i.e. a microscopic examination of the living organism using Darkfield equipment with the ordinary microscope; (b) aspiration of indurated bases of lesions and glands: (c) staining of the organism for microscopic examination; (d) the blood Wassermann reaction; (e) precipitation tests (Sachs-Georgi, Vernes and Kahn technics); (f) spinal fluid examination; (g) the colloidal gold or gold sol test; and (h) the colloidal benzoin test.

Few of these tests can be employed without the use of special laboratory equipment in the use of which the average practitioner

is not skilled and which, in most cases, he does not even possess. It is necessary, therefore, in order to make an intelligent diagnosis, for the average practitioner to refer the patient to a physician or laboratory possessing the necessary equipment or, as is done in most cases, to take a specimen of the patient's blood and send it to a laboratory for examination. We are informed that many physicians use the latter method. It is unfortunate, however, that many practitioners, apparently believing the Wassermann reaction to be infallible, base their conclusions or diagnosis solely upon the report which they receive from the laboratory. It is a known fact that positive reactions do not always denote syphilitic infection. For example, specimens of blood found to produce a positive reaction have been taken from patients suffering with yaws, lepra, tuberculosis, acute exanthemata, pneumonia, trypanosomiases, relapsing fever, advanced malignant cachexia, pernicious anemia, malaria and Weil's disease. Of the blood Wassermann test, Dr. John H. Stokes, author of "Modern Clinical Syphilology," and one of this country's most eminent syphilologists, says the following:

> Few laboratory procedures involve more variables and factors known and unknown than the Wassermann reaction. Not only do the reagents employed vary in strength, but every step must be subject to control, and may vary under the most unsuspected influences. * * * The question as to whether single or repeated positive tests are false cannot be settled, in theory, short of a complete microscopic study of tissues at necropsy.
>
> I have gradually come to recognize that the single positive Wassermann test that is unaccompanied by any other detectable evidence of the disease, either in the form of other positives on numerous repetition or of further clinical or serologic evidence of the disease, on complete examination is likely to be a false or a nonspecific positive.
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> From one-fifth to one-half the syphilis which an average clinician sees will present itself with negative Wassermann credentials, and will have to be recognized by other means or go undetected. * * * We are learning slowly and with travail to accept the negative serum Wassermann test as only an element in diagnosis instead of an infallibility.
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> The [routine] blood Wassermann test is inevitably, from its availability, a species of diagnostic first line of attack * * * in the work of hospitals and group practices. If its limitations can be kept in mind, and it can be used by clinicians as a clue and not a crutch, its extension to the largest possible number of patients has much in its favor.

As we have hereinbefore indicated, the possible liability of the members of the Institute would be based upon the fact that in

diagnosing the ailment of a patient about whom they had been consulted, and for whom they had prescribed treatment, they did not "exercise the average degree of skill, care and diligence possessed and exercised by other physicians in the same general locality who devote special attention and study to the disease, its diagnosis and treatment having regard to the advanced state of the profession at the time." (Baker *v.* Hancock, supra.) What, then, is the standard of care and diligence exercised by other specialists in the same field? It seems to us that this inquiry need be considered only in two correlative aspects; viz, would that standard approve or condone (a) the acceptance of a diagnosis made by a physician concerning whose qualifications the members of the Institute knew nothing, and (b) a recommendation regarding the treatment and care of a patient whom the member has never seen and examined supposedly suffering from a serious disease.

We have been unable to find any medical textbook authority which states categorically that advanced medical concepts either approve or disapprove of the practices above referred to. We have, however, obtained the opinion of several physicians of unquestioned reputation and ability. The consensus of this opinion would seem to indicate that while acceptance of the diagnosis of another physician in minor matters is somewhat common, it is not considered good medical practice in cases of serious illness. In fact, the majority of the physicians informed us that in nothing short of an emergency would they accept any diagnosis without first having personally confirmed it by a physical examination of the patient. Neither would they, therefore, prescribe treatment for a patient whom they had never seen.

It is very interesting also to approach the problem from the standpoint of medical ethics and, in this connection, we direct your attention to "Principles of Medical Ethics" as formulated by the American Medical Association. We quote from page 12 thereof:

> Sec. 4.—When a patient *is sent* to one specially skilled in the care of the condition from which he is thought to be suffering, and for any reason it is impracticable for the physician in charge of the case *to accompany the patient,* the physician in charge should send to the consultant by mail, or in the care of the patient under seal, a history of the case, together with the physician's opinion and an outline of the treatment, or so much of this as may possibly be of service to the consultant; and *as soon as possible after the case has been seen and studied,* the consultant should address the physician in charge and advise him of the results of the consultant's investigation of the case. Both

> these opinions are confidential and must be so regarded by the consultant and by the physician in charge. (Italics ours.)

While it is true that the section above quoted does not, in so many words, forbid the type of consultation with which we are concerned, it does prescribe certain rules of professional conduct which would seem to contemplate in consultations a personal relationship based on a physical examination of the patient by the consultant. Furthermore, we are informed, the Judicial Council of the American Medical Association has repeatedly ruled that a physician who engages in the practice of treating patients whom he has not personally seen is guilty of unethical conduct. These rulings, however, usually involved cases where a physician prescribed by mail to a patient he had never seen and on the basis of information furnished by the patient. However, in its annual report to the House of Delegates of the American Medical Association at the San Francisco Session in 1938, the Judicial Council stated, inter alia, as follows:

> A widespread practice of renting radium for the treatment of patients by physicians not owning or being experienced in the use of radium has caused considerable discussion during the past year. Ordinarily instructions in the technic of the use of the radium are sent by the person furnishing it. Sometimes the radium is furnished by a commercial concern, sometimes by a physician owning it. The advisability of the use of such a powerful agency by those not trained in its use and the ethics involved of prescribing and directing its use by a person who has not examined or seen the person on whom it is to be used has come before the Council. As a result of a rather extensive correspondence both from those favoring its use as described and those opposed, the Judicial Council is of the opinion that the prescribing and directing of its use in the case of a patient whom the prescriber has not examined or seen is an unethical medical procedure. The Council recognizes that advice and help in difficult cases is often furnished by those in a position to be of possible or probable assistance but it believes that the great dangers accompanying the use of radium removes that particular remedy from the field of advice without personal contact with the patient.

At this point we direct your attention to two reported cases which may be helpful to this discussion. The first is Thaggard *v.* Vafes, 218 Ala. 609, 119 Southern 647 (1928). This was an action in trespass against a physician for malpractice resulting in the death of the patient. The evidence showed that the defendant administered neosalvarsan, a drug containing arsenic, without first ascertaining

whether the patient had symptoms indicating inflammation of the brain; that the treatment was dangerous if that condition were present and, if it were, it would have been readily discoverable by an examination of the heart, lungs, kidneys, pulse, and general condition. The neosalvarsan was administered on the faith of a diagnosis by another physician that the patient was suffering from syphilis. On pages 649 and 650 (Southern Reporter) the court said:

> The relation of physician and patient is not necessarily contractual, but may be consensual merely, and whether one or the other, when the physician assumes and undertakes to act in this relation, he incurs the consequent duty, exacted of the relation, that in the practice of the profession he will exercise that reasonable and ordinary care, skill, and diligence exercised generally by members of his profession in the same neighborhood, and a failure to observe this degree of care and diligence is negligence. This rule is elementary, and has its foundation in most persuasive considerations of public policy. * * *
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> We are clear to the conclusion that it cannot be declared, as a matter of law, that a physician may rely upon the diagnosis of another, no matter how skilled, in administering drugs, in the treatment of diseases, that contain a deadly poison. The patient was entitled to have the benefit, judgment, and skill of the physician he had selected, formed from his own diagnosis. * * *

The second case is that of Fortner *v.* Koch, 272 Mich. 273, 261 N. W. 762 (1935), which is also an action in trespass for malpractice. In this case it was shown that the plaintiff had consulted the defendant on June 22, 1931 regarding a swollen knee. The defendant diagnosed the illness as cancer but did not refer the patient to a hospital for routine laboratory examination. There being no improvement, in October 1931 the plaintiff consulted another physician and was advised to go to a hospital for diagnosis. All tests made at the hospital were negative with the exception of the blood Wassermann which was strongly positive. The court, at page 280, said:

> * * * The record also shows that when defendant made the manual examination, plaintiff had symptoms that would lead a physician to suspect cancer, syphilis, simple tumor, abscess, or tuberculosis. The usual practice among physicians and surgeons in Detroit in diagnosing the cause of a swelling such as was on plaintiff's knee when first examined by Dr. Koch in June, 1931, was not only to take a history of the patient, but also have an X-ray made, a blood test taken and a biopsy made. * * * These steps as above stated are not alternate steps in the diagnosis, but all must be done

> in order that the examining physician may arrive at the proper conclusion and prescribe the correct treatment. * * *
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> It is the duty of a physician or surgeon in diagnosing a case to use due diligence in ascertaining all available facts and collecting data essential to a proper diagnosis. The instant case, not being an emergency and the defendant not having used such diligence in availing himself of various methods of diagnosis for discovering the nature of the ailment as are practiced by physicians and surgeons of skill and learning in the community in which he practiced, he must be held liable for the damages due to his negligence.

Although these cases are not directly in point, the theory applied therein is, to us, most persuasive in a discussion of the questions involved in the instant case. We have concluded that no physician, and particularly no expert, is entitled, under the law, to rely on the diagnosis of such a serious disease as made by another physician; that he cannot, with impunity, make a diagnosis or suggest indicated therapy for a patient he has never physically examined. The technic of diagnosis is too difficult, the ramifications of the disease too complex. From a study of the foregoing authorities, as well as from considerations of sound public policy and the rationale of malpractice liability, we believe that a consultant who does not personally confer with and examine a patient accepts at his peril statements and reports made to him by the attending physician. To hold otherwise would be to relieve the consultant of his burden to exercise the due care and diligence required of him by law; under such circumstances "due care" certainly contemplates and requires a diligent oral and physical examination of the patient. This is particularly true when the consultant, an expert in a particular field, relies on the observations and findings of one who is not a specialist.

We are of the opinion, therefore, and you are accordingly advised that the members of the Institute for the Control of Syphilis of the University of Pennsylvania would be liable for damages in an action of trespass for malpractice for making a diagnosis of, or prescribing treatment for, a patient they have never seen or examined, if such diagnosis or advice actually results in injurious consequences to the person regarding whom it was made or given.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 346

Banks and banking—Investment in loans under National Housing Act of June 27, 1934—Loans under title 1, class 3—Effect of insurance to 10 percent of aggregate value—The Banking Code of May 15, 1933, sec. 1012, as amended.

1. Banking institutions under supervision of the Secretary of Banking may not invest in mortgage loans falling within class 3 of title I of the National Housing Act of June 27, 1934, 48 Stat. at L. 1246, unless they meet all the requirements of section 1012 of the Banking Code of May 15, 1933, P. L. 624, as amended by the Act of April 22, 1937, P. L. 349, including the requirement that they do not exceed two-thirds of the actual value of the mortgaged property.

2. The fact that mortgage loans under title I, class 3, of the National Housing Act are insured to 10 percent of the aggregate of such loans does not make them eligible for investment by banking institutions under the supervision of the Secretary of Banking as "insured" loans, within the exception to section 1012 of the Banking Code provided for by the amendment of April 22, 1937, P. L. 349; the word "insured" as used in that section contemplates insurance to the entire amount of the mortgage, as in the case of loans under title II of the National Housing Act.

Harrisburg, Pa., June 3, 1940.

Honorable John C. Bell, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have inquired as to the eligibility of what are known as class 3 loans under title I of the National Housing Act of June 27, 1934, 48 Stat. at L. 1246, for investment by banking institutions under your supervision. This class of loans is established by a regulation of the Federal Housing Administration dated September 1, 1939, which regulation was amended September 25, 1939. The loans so classified are not to exceed the principal amount of $2,500 and the proceeds of such loans must be used exclusively for the purpose of erecting new residential structures. The loan may represent as much as 95 percent of the actual cost of such construction.

The Federal Housing Administration insures each banking institution for 10 percent of the aggregate of all such loans. It is to be noted that loans made under title II of the National Housing Act are insured by the Federal Housing Administration in full, that is, each individual mortgage is 100 percent insured.

Loans under title II have been approved as investments for banking institutions under your supervision by a specific provision in section 1012 of The Banking Code of May 15, 1933, P. L. 624, as amended by section 2 of the Act of April 22, 1937, P. L. 349, namely:

> * * * restrictions imposed by this section shall not apply to bonds secured by mortgages which are insured * * * pursuant to the provisions of the National Housing Act * * * its amendments and supplements, * * *

The only question which confronts us is whether or not these loans are made ineligible by reason of the fact that only 10 percent of the aggregate thereof are insured under the regulation referred to above.

We feel that the complete answer is to be found in section 1012, above cited, as amended April 22, 1937, P. L. 349. Two parts of section 1012 are pertinent, that already quoted above and a preceding part thereof which reads as follows:

> A bank or a bank and trust company shall have the power to lend on the security of, or invest in, bonds secured by mortgages upon real property, but it shall lend upon, or invest in, only such bonds and mortgages as (1) are first liens on unencumbered improved real property including improved farm land, situated within the Commonwealth, and (2) *do not exceed two-thirds of the actual value of such real property,* and (3) become due within ten years after the making of such loan or investment, unless amortized in equal annual installments over a period not exceeding fifteen years after the making of such loan or investment. Any building which is upon, and is included in the valuation of, such real property shall be insured against loss by fire, to the benefit of such bank or bank and trust company by the borrower or mortgagor during the term of the bond, in a company which is authorized to do business in Pennsylvania and is approved by the bank or bank and trust company making the investment. * * * (Italics ours)

It follows, therefore, that inasmuch as mortgage loans under title 1, class 3 of the National Housing Act may exceed an amount equal to two-thirds of the actual value of the mortgaged property, such loans are ineligible. It is to be noted in the case of loans under title I, class 3, the amount of the loans may be 95 percent of the construction costs, and that the limitation upon banks generally is that the loan shall not exceed two-thirds of the actual value of the property, which we take it would include the land and dwelling.

Of course, if a particular Federal Housing Administration mortgage of this class should not exceed an amount equal to two-thirds of the actual value of the property, that is, land and dwelling, it, if otherwise qualified under the provisions of section 1012, would be eligible, regardless of the insurance feature. We are here concerned only with those loans which exceed such a two-third valuation.

Under what we have termed the second pertinent part of section 1012, insurance of each individual loan is contemplated while under the September 1, 1939 regulation of the Federal Housing Administration, the insurance is provided to the extent of 10 percent of the aggregate of such loans.

The chief argument advanced by those who desire approval of such investments is that such loans are insured within the meaning of our act, and therefore eligible, because experience is that losses on this type of loan never exceed the 10 percent thereof which is insured.

Without dwelling upon the fact that this class of mortgage loan is new, and the experience therewith naturally limited, we will say that the argument so advanced falls because our act contemplated only insured individual mortgages, loans under title I, class 3, as indicated, not being provided for when section 1012 was amended April 22, 1937. We can give no interpretation to the word "insured" as used in section 1012 other than that it contemplates insurance of the entire amount of the mortgage.

Under title II of the National Housing Act the mortgage itself is insured while under class 3, title I loans, the insurance runs in favor of the bank and not specifically as to the bond and mortgage securing the loan.

The procedure differs also in that, in loans under title II, the bank acquires a specific mortgage and bond, while in the case of loans under class 3, title I, the transaction is carried out by the execution of a note as the primary obligation to which the bond and mortgage are collateral.

There are, of course, other requirements which a mortgage must meet before a bank may make the investment and these are set out in the language of section 1012 (1) and (3), quoted above, and also by a provision in the Code contained in the same section, which reads as follows:

> * * * *The actual value of the real property shall be determined by two reputable persons, especially familiar with real property values in the vicinity of the particular property to be appraised, selected from or approved by the board of directors.* * * * (Italics ours)

This provision as to appraisers might not be met in the case of class 3 loans under title I.

While we refer herein so far to section 1012 exclusively, this section having specific application to banks and bank and trust companies, what we have said is also applicable to private banks, savings banks, and trust companies, by reason of the provisions of sections 1310, 1208, 1209 and 1001 (b) of The Banking Code, which in effect apply the same rules to all institutions above mentioned.

It is our conclusion that only by legislation, if the same be forthcoming, can such loans be made eligible.

It is our opinion and you are therefore, accordingly advised:

That banking institutions under your supervision may not make investments in mortgage loans coming within class 3, title I of the National Housing Act. Exceptions to section 1012 of The Banking Code do not include such loans. However, should such a loan meet all of the requirements of section 1012, it would, of course, be acceptable.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 347

State Government—State institutions—Disposal of surplus or waste products—Right to exchange for processed products—Administrative Code of April 9, 1929, sec. 511, as amended.

Waste or surplus products of State institutions, such as waste fats, suets, grease, cracklings, bones, meat trimmings, pigskins, and calfskins, must be sold or transferred to other State institutions in accordance with the provisions of section 511 of The Administrative Code of April 9, 1929, P. L. 177, as amended by section 1 of the Act of June 21, 1937, P. L. 1865; they may not be exchanged on a weight or count basis for products processed from that waste material, or for branded products purchased by the contractor and delivered to the institution in lieu of cash.

Harrisburg, Pa., June 4, 1940.

Honorable E. Arthur Sweeny, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: We have your request for advice concerning the following questions:

(1) May waste products be exchanged on a weight or count basis for products processed from that waste material; or

(2) May they be exchanged for branded products purchased by the contractor and delivered to the institution in lieu of cash?

You state that during recent years a practice has grown up in your institutions for the exchange of certain waste materials including grease, fats, bones and hides for processed products such as soaps and leather; and that recently some institutions have varied this practice by having the contractor furnish manufactured products including branded soaps, dishwashing powders and cleaning compounds; and that many of these products cannot be purchased

through the Department of Property and Supplies as standard specifications already exist for similar products.

Although not indicated by the language of your first question, it appears from the material attached to your inquiry that the exchanges referred to are those made with outside dealers and are not transfers by and between State institutions.

The sale and transfer of surplus products are governed by section 511 of The Administrative Code of 1929, the Act of April 9, 1929, P L. 177, as amended by the Act of June 21, 1937, P. L. 1865, (71 PS §191).

With reference to the sale of surplus products, section 511 provides, inter alia, as follows:

> All departments, boards and commissions may sell, for the best price obtainable, but not less than the current market price for similar products, any surplus products of the soil, meats, live stock, timber, or other materials, raised or grown upon or taken from property of the Commomnwealth administered by such departments, boards, or commissions, or their by-products, respectively. * * *

Concerning the transfer of surplus products, section 511 provides, inter alia, as follows:

> * * * Transfers may be made of such products by and between State institutions under the control and management of such departments, boards or commissions.

Surplus products are defined in this section as follows:

> As used in this section, "surplus" shall mean products, meats, live stock, timber, or other materials, or their by-products, respectively, which cannot conveniently and economically be used in connection with the proper maintenance of the institution, park, or other property, administered by the department, board, or commission involved, * * *.

There is no provision in the code for the disposal of waste products as such; but waste fats, suets, grease, cracklings, bones, meat trimmings, pigskins and calfskins mentioned in your inquiry are considered in this opinion as falling within the category of surplus products.

This section further provides for the payment of the proceeds of the sales of any surplus products into the State Treasury, and for the keeping of records of the sales or transfers of such products.

Concerning the manner of making transfers, this section provides as follows:

> The Executive Board shall prescribe rules and regulations prescribing the manner in which transfers shall be made under this section.

We are informed that no rules and regulations for the making of transfers have yet been prescribed by the Executive Board.

The only changes made in this section by the amendment of 1937 were the addition thereto of the provisions relating to transfers and the authority given to the Executive Board to prescribe rules and regulations therefor.

We find no provision in the code for the exchange of products with any outside dealer. To hold otherwise would be to disregard the plain language of the statute.

Section 2405 of the code deals with the sale by the Department of Property and Supplies of unserviceable personal property of the Commonwealth. For the purposes of this opinion, it is considered unnecessary to discuss that section.

As previously stated, section 511 of the code provides for the sale of surplus products and for the transfer of such products by and between State institutions; but we find no authority for the exchange of waste or surplus products with an outside dealer as suggested in your inquiry.

We are, therefore, of the opinion, and you are accordingly advised that:

(1) Waste or surplus products may not be exchanged on a weight or count basis for products processed from that waste material.

(2) They may not be exchanged for branded products purchased by the contractor and delivered to the institution in lieu of cash.

(3) The sale and transfer of surplus products must be conducted in accordance with the provisions of Section 511 of The Administrative Code of 1929, as amended.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 348

Schools—Third class district—Increase in population—Reclassification as second class district—Member of board serving as secretary or treasurer—Necessity for resignation from one office—School Code of May 18, 1911, secs. 107 and 303, as amended.

Since section 303 of the School Code of May 18, 1911, P. L. 309, as amended by the Acts of April 7, 1927, P. L. 170, and May 29, 1931, P. L. 243, provides that in school districts of the second class the secretary and treasurer shall not be members of the board, a member or director of a school board of a third class school district, who is also secretary or treasurer of the board, must elect in which capacity he will serve, as he cannot serve in both, when the district is reclassified as one of the second class, pursuant to the provisions of section 107 of the code as amended by the Acts of July 17, 1917, P. L. 1023, and May 16, 1921, P. L. 555, because of an increase in population reflected in the 1940 census.

Harrisburg, Pa., June 7, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You request us to advise you whether or not a secretary of a school board in a township of a third class school district, where the secretary is also a member or director of the school board, is entitled to remain as secretary to the board if, after the 1940 census, the recorded increase in population will result in the school district being classified as a second class district.

The pertinent sections of the Pennsylvania School Code governing your problem are sections 107 and 303. Section 107 of the said Code, Act of May 18, 1911, P. L. 309, as amended by Acts of July 17, 1917, P. L. 1023, and May 16, 1921, P. L. 555, section 1, (24 PS §27), provides that after the taking of each United States census, the Superintendent of Public Instruction shall reclassify the several school districts of the Commonwealth with relation to the population. The reclassification shall take effect with the beginning of the next school year after the Superintendent of Public Instruction issues the certificate to that effect.

Section 303 of the School Code, Act of May 11, 1911, P. L. 309, as amended by Acts of April 7, 1927, P. L. 170, and May 29, 1931, P. L. 243, (24 PS §214), provides, inter alia, that:

> * * * *In school districts of the second class, the secretary and treasurer shall not be members of the board.* * * * (Italics ours.)

It is clear, therefore, that because of the specific provisions of section 303 of the School Code, a member of the board of directors of a second class school district cannot act as a secretary of that board, although the member may serve as secretary if the school district is of the third or fourth class.

The provisions of section 107, supra, of the School Code, relating to the reclassification of a school district, in effect constitute a reorganization of that school district. It is evident, therefore, that the tenure of a member of a school board of a third class school district

who is also secretary of the board, is subject to the provisions of the laws which provide for reclassification to a second class school district in case of an increase of population, and the consequential prohibition of a school director in a second class school district being a secretary to the school board because of the statutory inhibition. The school director may continue at his option to serve either as a director of the school district or as secretary of the board. He must elect in what capacity he will serve as he cannot serve in both capacities. The election must be made before the beginning of the school year, following the formal reclassification.

It is our opinion, and you are therefore advised, that in view of the provisions of section 303 of the School Code, a member or a director of the school board of a third class school district, who is also secretary of that school board, must elect in what capacity he will serve, as he cannot serve in both capacities, upon the school district being reclassified as one of a second class school district. Of course, the reclassification takes effect with the beginning of the next school year after the Superintendent of Public Instruction has issued the certificate to that effect; and the election by the director must be exercised before the beginning of the next school year.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 349

Attorneys—Right to act as real estate brokers—Necessity for obtaining license—Act of May 1, 1929, as amended—Employment by corporation.

Since section 2 (c) of the Act of May 1, 1929, P. L. 1216, as amended by the Act of July 2, 1937, P. L. 2811, exempts attorneys at law from the requirement that persons acting as real estate brokers or real estate salesmen shall be licensed, a corporation whose chief business is the sale of real estate may properly employ as its agent and representative an attorney at law, even though the attorney is not licensed as a real estate broker.

Harrisburg, Pa., June 17, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have before us your request for an opinion as to whether an attorney at law is permitted to act as agent or representative of a corporation whose chief business is the sale or transfer of real estate, without being licensed under the Real Estate Brokers License Act of May 1, 1929, P. L. 1216, as amended by the Act of July 2, 1937, P. L. 2811, (63 PS §432 et seq.). Your request also states that it has been the policy of your department in relation to attorneys, that they, as exempted individuals, cannot use the right granted to them to qualify for practice as licensed persons for a corporation.

Section 2 (c) of this act, as amended, states:

> 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 * * *

Under date of January 2, 1930, Doctor John A. H. Keith, Superintendent of Public Instruction, was advised by William A. Schnader, then Special Deputy Attorney General, by formal opinion that:

> * * * all of the acts specified in section 2 (a) [of the Real Estate Brokers License Act, supra] may lawfully be performed by real estate brokers, by attorneys at law, * * * or any other person specifically mentioned in section 2 (c) [supra]. 13 D. & C. 439, 441 (1930).

Your inquiry is contained in the following question:

Does the exemption in this statute in relation to an attorney at law prohibit a corporation, whose chief business is the sale of real estate and which must necessarily act through its agents, from employing an attorney at law to handle its real estate business, or must it employ a licensed real estate broker?

> The practice of law *is not limited to the conduct of cases or litigation in court; it embraces the preparation of pleadings and other papers incident to actions and special proceedings,* the management of such actions and proceedings on behalf of clients before judges and courts, and, *in addition, conveyancing.* 5 Am. Jur. 262, 263. (Italics ours.)

In 7 C. J. S. 703, the practice of law is defined in section 3 (*g*):

> * * * The general meaning of the term, "practice law" or "practice of law," is of common knowledge, although the boundaries of its definition may be indefinite as to some transactions. As generally understood, it is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure; *but it is not confined to performing services in an action or proceeding*

> *pending in courts of justice,* and, in a larger sense, *it includes legal advice and counsel, and the preparation of legal instruments and contracts* by which legal rights are secured, although such matter may or may not be depending in a court. * * * (Italics ours.)

In Commonwealth *v.* Branthoover, 24 Pa. C. C. 353 (1899), the court said:

> An attorney-at-law is an officer in a court of justice whose profession and business it is to prepare and try cases in the courts and to give advice and counsel on legal matters to those employing him. It is not a business like the grocery business or like the drug business or *any other business that you may think of,* for the reason that in order that a person may lawfully conduct such business he must have had admission to the bar. * * * (Italics ours.)

An attorney may specialize in real estate should he see fit to do so. It follows, therefore, that the qualifications of a lawyer, because of his legal training, are generally much higher than those of a licensed real estate broker or salesman. Consequently, should a corporation choose to employ an attorney, it would be generally equipping itself with a highly trained and technical man. The intent of the legislature by exempting attorneys at law from the purview of the act, cannot be interpreted to mean that they shall not be qualified to act, but rather that their education, training and qualifications are such that there is no necessity for their being included in the act.

In the case of Young *v.* Department of Public Instruction, 105 Pa. Super. Ct. 153 (1932), at page 159, the court said:

> In view of the purpose of and the necessity for, the Act of 1929, our opinion is that the classification made by it is founded on real and substantial distinctions. Attorneys-at-law are not in the class at which the statute was aimed, because *they had not been the source of the mischief sought to be remedied.* Real estate transactions have been carried on by members of the bar for years as a part of their professional duties performed for their clients and they are responsible to the court for their fidelity to their clients in such circumstances. They are admitted to the bar only after they have established that they possess good moral character and have established their qualifications to practice law. The distinction between real estate brokers and lawyers is well recognized and was sufficient reason for exempting the former from the provisions of the Act. (Italics ours.)

It is our opinion, that an attorney at law may be employed to act

as agent of a corporation, whose chief business is the sale of real estate, without being licensed under the Real Estate Brokers License Act of May 1, 1929, P. L. 1216, as amended by the Act of July 2, 1937, P. L. 2811.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 350

Beauty Culture—Barbering—Licenses—Act of May 3, 1933, P. L. 242.

Persons holding beauty culture licenses may not teach other persons who hold beauty culture licenses for compensation in places not licensed. Licensed schools of beauty culture may teach the use of beauty baths as part of their program of instruction. Newspaper advertisements by barbers or beauty culturists alone do not constitute the practice of barbering or beauty culture.

Harrisburg, Pa., June 25, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request for advice on certain problems affecting the administration of the Beauty Culture Law. We will state your questions as we answer them.

> (1) May persons holding beauty culture licenses teach other persons who hold beauty culture licenses for compensation in places not licensed?

The Beauty Culture Act of May 3, 1933, P. L. 242, section 1, (63 PS §507 et seq.), gives the solution to this question:

> "Beauty Culture" includes any or all work done for compensation by any persons, which work is generally and usually performed by so-called hairdressers, cosmetologists, cosmeticians, beauticians or beauty culturists, and however, denominated in so-called hairdressing and beauty shops ordinarily patronized by women, which work is for the embellishment, cleanliness and beautification of the women's hair, such as arranging, dressing, curling, waving, permanent waving, cleansing, cutting, singeing, bleaching, coloring, pressing, or similar work thereon and thereabout, and the removal of superfluous hair, and the massaging, cleans-

ing, stimulating, manipulating, exercising, or similar work upon the scalp, face, arms or hands, or the upper part of the body, by the use of mechanical or electrical apparatus or appliances or cosmetics, preparations, tonics, antiseptics, creams or lotions, or by any other means, and of manicuring the nails, which enumerated practices shall be inclusive of the term beauty culture but not in limitation thereof.

Section 2 of the act provides:

> Practice of Beauty Culture without Registration Prohibited.—It shall be unlawful for any person to practice or teach beauty culture, or manage a beauty shop, *or to use or maintain any place for the practice or teaching of beauty culture, for compensation, unless he or she shall have first obtained from the department a certificate of registration as provided in this act.* Nothing contained in this act, however, shall apply to or affect any person who is now actually engaged in any such occupation, except as hereinafter provided. (Italics ours.)

Section 8 provides:

> Practice in Beauty Shops Only.—It *shall be unlawful for any person to practice beauty culture for pay in any place other than a registered beauty shop:* Provided, That a registered operator may furnish beauty culture treatments to persons in residences of such persons by appointment. (Italics ours.)

Therefore, the answer to this first question is that persons holding beauty culture licenses may not engage in such occupation for compensation *in places not licensed.*

> (2) May licensed schools of beauty culture teach the use of beauty baths as part of their program of instruction?

The definition of the words "beauty culture," as contained in section 1 of the above act, includes only descriptive forms of beautifying practices in all work done and usually performed by beauticians or beauty culturists, which includes the embellishment, cleanliness and beautification, etc., of the upper part of the body. However, in the latter part of section 1, these detailed practices in beauty culture are not exclusive, for it is provided "which enumerated practices shall be inclusive of the term beauty culture but not in limitation thereof."

Under the title "beauty culture," in Encyclopaedia Brittanica, 14th Edition, page 281, it is recited "Since earliest time cosmetics have played a part in the social life of civilization." The dusky African belle who files her teeth and pierces her nose with pieces of

bone, and the modern Cleopatra who plucks her eyebrows and dyes her toenails, convinces us that the fashions in beauty depend not only upon geography but changes in culture from generation to generation.

It would require a clairvoyant sense to determine even what a year may bring forth in beauty culture fads. Hence the legislator, wise in his day and generation, even above the children of light, doubtless did not limit beauty culture to the cleanliness and beautification of women's hair, the removal of superfluous hair, etc., upon the upper part of the body.

If dyeing of toes or otherwise making pedal extremes attractive lends a sense of beauty to the feminine heart, and this is undoubtedly a part of beauty culture and not related to the upper part of the body, what mere man may rashly say that beauty baths may not be a part of the program of instructions when demanded by the "eternal feminine."

The act specifically does not limit beauty culture to certain named practices but leaves it open so that other beautifying practices may be adopted in harmony with the purpose of the act.

No good reason appears which should deny to such practitioners the right to teach the use of beauty baths.

The answer to the second question, therefore, is that licensed schools of beauty culture may teach the use of beauty baths as part of their program of instructions.

> (3) Does advertisement in a newspaper that one is a trichologist constitute the practice of beauty culture or of barbering?

The advertisements accompanying your letter of inquiry indicate that the advertised specialists are *"trichologists."* The Century Dictionary defines "trichology" as the "science treating of the anatomy, diseases, functions, etc., of the hair." Parenthetically a grave question arises as to whether these trichologists are not practicing medicine and surgery and are, therefore, within the prohibitions of the Act of June 3, 1911, P. L. 639, and its amendments, (63 PS §401 et seq.), unless they are registered physicians and surgeons, if the definition of "trichology" is inclusive of the practices as defined in the Century Dictionary. Incidentally, neither the Barbering Act of June 19, 1931, P. L. 589, nor the Beauty Culture Act of 1933, refer to advertising as a practice of these occupations, nor is it defined as a violation of the act or within its penal provisions. It would be impossible, therefore, to convict anyone charged with practicing either the beauty culture art or the barbering business by simply showing that the defendant advertised himself as a beautician or

barber without the proper license, although that would be competent evidence if in fact the defendant were so practicing but not properly registered.

The answer to the question, therefore, is that newspaper advertisements alone do not constitute the practice of barbering or of beauty culture.

Accordingly we advise you:

(1) Persons holding beauty culture licenses may not teach other persons who hold beauty culture licenses for compensation in places not licensed.

(2) Licensed schools of beauty culture may teach the use of beauty baths as part of their program of instruction.

(3) Newspaper advertisements by barbers or beauty culturists alone do not constitute the practice of barbering or beauty culture.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 351

Crimes—Gambling—Lucky number dance—Disproportion between tickets sold and attendance.

Where tickets for a dance bear numbered stubs which are retained by the sellers, and during the course of the dance numbers are drawn and cash prizes are awarded to the holders of tickets bearing the numbers drawn, whether or not they are present, and, considering the amount of the prizes awarded and the price of the tickets, it would be necessary to sell considerably over 10,000 tickets to meet expenses and the prize money, so that it is apparent that comparatively few purchasers of the tickets were expected actually to attend the dance, the device constitutes a lottery which is violative of sections 601 and 602 of The Penal Code of June 24, 1939, P. L. 872.

Harrisburg, Pa., July 9, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg, Pennsylvania.

Sir: By your communication of June 3, 1940, you request this department to advise you whether sections 601 and 602 of The Penal Code, the Act of June 24, 1939, P. L. 872, (18 P. S. §§4601, 4602),

are violated by the factual situation presented by the following case stated.

Tickets are sold for a dance which is actually held with all paraphernalia necessary for a dance, such as orchestra, etc. The tickets are numbered, and stubs therefrom, also numbered, are retained by the sellers. During the course of the dance a drawing is held of the stubs, and prizes are awarded to the holders of the tickets whose numbers correspond to the numbers of the stubs so drawn. It is not necessary for the purchaser of the ticket, the number of which is announced as a prize winner, to be in attendance at the dance in order to be eligible to receive a prize. The tickets sell for ten cents each. A first prize is given of $500.00, one of $75.00, one of $50.00, one of $25.00, ten of $10.00, and 50 of $5.00.

From the foregoing statement of facts it will be seen that total cash prizes of $1,000.00 are awarded at a dance to which the price of admission is only ten cents. It would thus require 10,000 people purchasing tickets to enable the operators of the dance to take in as much as they gave away. If this is not a lottery, it is a philanthropic enterprise, the proportions of which do not justify its apparent obscurity.

To enable the operators of the project to make a profit would necessitate the selling of tickets considerably in excess of 10,000 so that the cost of employing an orchestra, and other incidental expenses could be met, in addition to the prizes awarded. If the purchasers of the tickets sold were expected to attend the dance, the dimensions of the dance hall would necessarily be gargantuan. Obviously, the vast majority of those who purchase tickets are not expected to attend the dance. In short, the whole scheme is a lottery, not even thinly disguised in the habiliments of respectability. Sections 601 and 602 of The Penal Code, supra, follow:

> Section 601. All lotteries, whether public or private, for moneys, goods, wares or merchandise, chattels, lands, tenements, hereditaments, or other matters or things whatsoever, are hereby declared to be common nuisances. Every grant, bargain, sale, conveyance or transfer of any goods or chattels, lands, tenements or hereditaments, which shall be made in pursuance of any such lottery, is hereby declared to be invalid and void.
>
> Whoever, either publicly or privately, erects, sets up, opens, makes or draws any lottery, or is in any way concerned in the managing, conducting or carrying on the same, is guilty of a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceding five hundred dollars, or undergo imprisonment, by separate or solitary confinement at labor, not exceeding one (1) year, or both.

> Section 602. Whoever sells or exposes to sale, or causes to be sold or exposed to sale, or barters or exchanges or causes or offers to be bartered or exchanged, or advertises or causes to be advertised for sale, barter or exchange, any lottery ticket or share, or part thereof, or any lottery policy or any writing, certificate, bill, token or other device purporting or intending to entitle, or represent as entitling the holder or bearer, or any other person, to any prize to be drawn in any lottery, or any part of such prize or any interest therein, or in any newspaper, magazine or periodical owned or controlled by him, publishes or causes to be published, any advertisement of any lottery ticket, share, policy, writing, certificate, bill, token or device, or of any lottery drawing or lottery scheme, or any prospectus, scheme, or other advertisement of any person conducting, managing or controlling any lottery, or acting as agent therefor, is guilty of a misdemeanor, and on conviction, shall be sentenced to imprisonment, by separate and solitary confinement at labor, not exceeding one (1) year, or to pay a fine not exceeding five hundred dollars ($500), or both.
>
> The purchaser of such ticket, policy or device shall not be liable to any prosecution or penalty, by virtue of this or any other law of the Commonwealth, and shall, in all respects, be a competent witness to prove the offense.

Both of the foregoing sections were derived from the Act of March 31, 1860, P. L. 382, (18 P. S. §§1561 and 1562).

In Commonwealth *v.* Banks, 98 Pa. Sup. Ct. 432 (1930), the court had occasion to pass upon sections 53 and 54 of the criminal code of 1860, cited supra. The act of 1860 did not define the term "lottery"; nor does The Penal Code. Consequently it was incumbent upon the court itself to decide what a lottery is. We quote from the opinion of the court, written by Judge Keller, beginning at page 435 of 98 Pa. Sup. Ct.:

> In Com. *v.* Manderfield, 8 Phila. 457, 459, Judge Paxson defined a lottery to be "A scheme for the distribution of prizes by chance," which is practically the same as Webster's definition; and in Com. *v.* Sheriff, 10 Phila. 203, 204, he said: "Whatever amounts to this, no matter how ingeniously the object of it may be concealed, is a lottery." Worcester defines it: "A game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or in other articles." The Century Dictionary says: "In law the term 'lottery' embraces all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., and includes various forms of gambling." In Hull *v.* Ruggles, 56 N. Y. 424, 427, the Court of Appeals defined it as follows: "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held

out to the public, what and how much he who pays the money is to have for it, that is a lottery." This fits our case exactly; so does the definition in Bishop on Statutory Crimes, Sec. 952 (3d Ed.): "A lottery may be defined to be a scheme whereby one, on paying money or other valuable thing to another becomes entitled to receive from him such a return in value or nothing as some formula of chance may determine."

Continuing at page 437 of 98 Pa. Sup. Ct., Judge Keller said:

> In Wilkinson *v.* Gill, supra, (p. 67) the Court of Appeals of New York said: "It is said that the transaction is a wager or bet that certain numbers will draw and is therefore not a lottery. This does not follow. Every lottery has the characteristics of a wager or bet, although every wager or bet is not a lottery. A lottery, game or device in the nature of a lottery, is not excluded from the operation of the statute because it also partakes of the nature of a wager. The courts have uniformly looked beyond the mere form or device of the transaction and sought out and suppressed the substance itself." It was there held that any device of chance in the nature of a lottery is within the prohibition of the statute against lotteries. If there be a scheme for the distribution of prizes by chance among those paying for the privilege, and not an isolated wager, it is a lottery and it can make no difference in principle whether the prize be a specific sum in money, or be proportioned to the amount paid by the purchaser of the ticket or slip; whether one or many persons can choose the same number.

See also Commonwealth *v.* Chirico et al., 117 Pa. Sup. Ct. 199 (1935).

In Commonwealth *v.* Zotter, 131 Pa. Sup. Ct. 296 (1938), President Judge Keller used the following language, beginning at page 298 of 131 Pa. Sup. Ct.:

> The "Numbers" game is a form of lottery. Its mode of operation has been explained in Com. *v.* Banks, 98 Pa. Superior Ct. 432 and Com. *v.* Chirico, 117 Pa. Superior Ct. 199, 177 A. 591. There may be changes made in details from time to time, but the essential plan or scheme remains the same. It needs no house, room, etc., to be set up where people who play it must meet and assemble or where its operations are to be carried on. The number or policy slips can be sold anywhere—on the streets, in barber shops, newsstands, wherever the operators or "bankers" or "backers" can place a "writer" or a "pick-up man"; and the operators do not have to establish a definite place in which to carry on the lottery. All they need is a place in which to keep their books of slips, and to examine the slip copies or carbons turned in to them by the writers and see who, if any, have

> the lucky numbers, as determined by the plan of operation. And this place may be moved about as often as the operators choose. It does not have to have a fixed location from which to operate.

It is quite clear from the foregoing quotations from the authorities that the facts in the instant case disclose what is in reality a variation of the "numbers game"; and it is equally clear thereunder that the numbers game is a form of lottery. It follows, therefore, that the scheme outlined in the statement of facts set forth above is a lottery within the prohibition of sections 601 and 602 of The Penal Code, and you are accordingly so advised.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 352

Public lands—Lands appropriated by Department of Forests and Waters—Flood control—Department of Public Instruction—Reinbursement of school districts —Act of 1921, P. L. 1034; 1929, P. L. 1798; 1923, P. L. 487; 1937, P. L. 43; 1939, P. L. 175; 1939, P. L. 1086.

Certification of the assessed valuation of land of school districts appropriated for flood control purposes shall be made to the Auditor General. The Auditor General is to ascertain the taxes which would have been collected upon such land.

Harrisburg, Pa., July 11, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: By communication of February 7, 1940, you request to be advised whether the Department of Public Instruction, in the matter of reimbursing school districts for lands appropriated by the Department of Forests and Waters for flood control purposes, shall be guided and controlled by:

(1) Act No. 372 of May 20, 1921, P. L. 1034, as amended by Act No. 590 of May 17, 1929, P. L. 1798 (24 PS §386);

(2) The Act of May 31, 1923, P. L. 487 (72 PS §5501 and §5502); or

(3) The Act of March 10, 1937, P. L. 43, which reenacted and amended the Act of August 7, 1936, Sp. Sess. P. L. 106, and which

latter statute was in turn amended by the Acts of May 17, 1939, P. L. 175 and June 26, 1939, P. L. 1086 (32 PS §653-672).

Once it is determined which of the foregoing statutes are controlling in the premises, you wish also to be advised whether you or the Auditor General shall ascertain the amount of taxes which would have been collected upon the assessed valuation (certified as in said legislation provided) of the lands so appropriated.

At the threshold of our inquiry we can eliminate the Act of May 31, 1923, P. L. 487, supra, from further consideration, for the reason that said act contains no mention of, or reference to, school districts.

We appear to be met, also, at the outset, by the necessity of determining how much, if any, of Act No. 372 of May 20, 1921, P. L. 1034, supra, is still effective law. Act No. 590, approved May 17, 1929, P. L. 1798, amended section 1 of Act No. 372 of May 20, 1921, supra. Act No. 591, also approved May 17, 1929, P. L. 1798, declares in section 3 thereof that Act No. 372 of May 20, 1921, is thereby repealed "absolutely"; accord, Historical Note to (24 PS §386). On the other hand, Purdon's Chronological Tables, page 265, indicate that section 1 of Act No. 372 is still law as amended by Act No. 590, whereas section 2 of Act No. 372 is repealed by Act No. 591.

Thus we are faced by the spectacle of two statutes approved on the same day, one of which (No. 590) amends one of the two sections of a prior statute (Act No. 372 of 1921), and the other (Act No. 591) of which purports to repeal the prior statute absolutely.

Act No. 372 of May 20, 1921, as amended by Act No. 590, supra (24 PS §386), reads as follows:

> Whenever the Commonwealth of Pennsylvania, for the purposes of conservation of water, or to prevent flood conditions, or to enlarge its forest reservations, acquires any lands and property within the limits of any school district or school districts, and, by such acquisition, reduces the amount of property within the district taxable for school purposes, the board of school directors shall, immediately after such acquisition, certify to the Auditor General and to the Superintendent of Public Instruction the assessed valuation of such lands and property at the time of such acquisition.

Section 2 of Act No. 372 of May 20, 1921, provides as follows:

> After any such acquisition, the board of school directors shall from year to year, at the time of its annual levy of taxes for school purpose, certify to the Auditor General and Superintendent of Public Instruction the rate of its levy for the next school year. Thereupon the Superintendent of Public Instruction shall ascertain the amount of taxes which would have been collected upon the assessed valuation, cer-

> tified as hereinbefore provided, at the rate of the levy so certified. Upon the ascertainment of such amount, the same shall be paid by the Commonwealth, from time to time, from the general fund.

These inconsistencies of Acts No. 590 and 591 were the subject of an opinion of this department heretofore. Op. Atty. Gen. 1929-30, page 127. In that opinion, dated October 9, 1929, Special Deputy Attorney General (later Attorney General) William A. Schnader, said, inter alia:

> * * * Obviously, Section 1 of the Act of 1921 [Act No. 372, supra] is meaningless and ineffective without Section 2 so that if Section 2 has been absolutely repealed by Act No. 591 of the 1929 Session, the Act of 1921 has been rendered ineffective in its entirety.
>
> * * * * *
>
> Accordingly, Act No. 591 *does not,* in our opinion, have any application to lands and property acquired by the Commonwealth or by the government of the United States *for the purpose of conservation of water or to prevent flood conditions;* and payments by the Commonwealth in lieu of taxes must be made as respects such lands and property on the basis of preexisting law.
>
> With respect to lands acquired by the Commonwealth or by the government of the United States, *for forest reserves, or for the purpose of preserving and perpetuating any portion of the original forests of Pennsylvania* and preserving and maintaining the same as public places and parks, Act No. 591 *is* effective and has superseded all prior legislation. This change became effective as of the date of the approval of Act No. 591, namely, May 17, 1929.
>
> * * * * *
>
> With respect to lands acquired by the Commonwealth for the Pymatuning Reservoir Project, payments cannot be made under Act No. 591 for the reason already indicated. *As to these lands, Act No. 591 is ineffective, both insofar [sic] as it undertakes to provide for payments, and insofar [sic] as it purports to repeal the Act of May 20, 1921, P. L. 1034,* and payments in lieu of taxes will continue to be made to *counties* and *townships,* under the Act of May 31, 1923, P. L. 487, *and to school districts, under the Act of May 20, 1921, P. L. 1034, as amended by Act No. 590 of the 1929 Session.* (Italics supplied.)

However, bearing in mind the last paragraph quoted above, of the aforesaid opinion, we must examine the Act of March 10, 1937, P. L. 43, which reenacted and amended the Act of August 7, 1936, Sp. Sess. P. L. 106, and which latter statute was in turn amended May 17, 1939,

P. L. 175 and June 26, 1939, P. L. 1086, supra. Section 7 of the Act of August 7, 1936, as amended, etc. (32 PS §659), reads in part as follows:

> Whenever any lands or other property is acquired by the Board [the Water and Power Resources Board of the Department of Forests and Waters] to be used *for reservoir purposes,* the board for the assessment and revision of taxes or the county commissioners of the county wherein the same is located, shall, * * * certify to *the Auditor General* the assessed valuation of such lands and other property at the time of such acquisition. After such acquisition, the taxing authority of each *political subdivision* within which such lands or other property is located, shall, from year to year, at the time of their annual levy of taxes, certify to the Auditor General the rate of their respective levies for the next year. Thereupon *the Auditor General* shall ascertain the amount of taxes which would have been collected * * * Upon the ascertainment of such amounts, the same shall be paid by the Commonwealth to the several *political subdivisions,* from time to time, from the General Fund. (Italics supplied.)

The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 PS §501 et seq., defines, in section 101 of article VIII thereof, a "political subdivision" as including a school district. Such definition applies to the term political subdivision when used in any law thereafter enacted, unless the context clearly indicates otherwise. The Statutory Construction Act preceded in time of passage and approval the act of March 10, 1937, supra, which reenacted and amended the act of August 7, 1936, supra. Although political subdivisions are expressly mentioned therein, they are nowhere therein defined; whereas the term "municipality" is defined as *not* including school districts. But, the word "municipalities" is used in section 2 of the act of August 7, 1936, as amended, etc., in connection with petitions to the Water and Power Resources Board by municipalities for the erection of flood control districts; in section 11 of the act of 1936, as amended, etc., in respect to the condemnation of property owned by a municipality; in section 13 of the act of 1936, as amended, etc., with relation to contracts between the Water and Power Resources Board and municipalities pertaining to flood control works or improvements, or to the functions embraced by the act; in section 14 of the act of 1936, as amended, etc., relating to contracts between municipalities and the board; in section 16, etc., treating of the rights of municipalities; in section 17, etc., which speaks of appropriations and donations by municipalities; and in section 18, etc., relating to the incurring or increasing of indebtedness by municipalities.

As indicated, supra, section 7 of the act of 1936, as amended, etc., speaks of the taxing authority "of each political subdivision," and of the payment "to the several political subdivisions" of monies in lieu of taxes lost. It is our conclusion, therefore, that the words "municipalities" and "political subdivisions" are used interchangeably and synonymously in the act of 1936, as amended, etc., supra; that the definition of municipalities as contained in said act must yield to the broader definition of political subdivisions as expressed in the Statutory Construction Act, supra; and that school districts are included within the operation and effect of the act of 1936, as amended, etc.

It follows, as a consequence of our aforesaid conclusion, that whenever land of a school district is acquired by the Water and Power Resources Board *for reservoir purposes,* certification of the assessed value of such land shall be made to the *Auditor General* alone, and the *Auditor General* alone shall ascertain the taxes which would have been collected upon such land.

The foregoing conclusions are in consonance with our previous opinion of October 9, 1929, supra.

It is our opinion, therefore, that certification of the assessed valuation of land of school districts appropriated for flood control purposes shall be made to the Auditor General; that the Auditor General is to ascertain the taxes which would have been collected upon such land; and that in all other respects you are to be guided and controlled by the conclusions herein expressed.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 353

Food and drugs—Milk—Dealers—Necessity for filing bond under Act of May 27, 1937.

Milk dealers do not come within the terms of the Act of May 27, 1937, P. L. 901, requiring dealers in certain types of farm produce to file bonds for the protection of producers.

Harrisburg, Pa., July 12, 1940.

Honorable John H. Light, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to whether or not milk dealers come within the terms of the Act approved May 27, 1937, P. L. 901, 3 PS §41-a, which is entitled:

AN ACT

> For the protection of producers of farm produce; providing for the licensing, the bonding or holding collateral of and the regulation of certain dealers in farm produce, as herein defined, within this Commonwealth; conferring powers, and imposing duties on the Department of Agriculture; providing for appeals and injunctions; and prescribing penalties.

Section 1(c) of the Act of May 27, 1937, supra, reads as follows:

* * * * *

> (c) "Farm produce" includes all *agricultural,* horticultural, vegetable, fruit, and floriculture *products of the soil;* poultry, eggs, nuts, flowers, and honey, but shall not include timber products, tea, coffee or *livestock.* (Italics ours.)

The word "includes" is a word having two shades of meaning and is used in the sense of "and" or "also," as set forth in Weller and Weller *v.* Grange Co., 105 Pa. Super. Ct. 547, at pages 551 and 552. However, the sense in which it is used becomes immaterial so far as we are herein concerned, because of the use of the word "livestock."

The question arises as to whether milk comes within the definition of "farm produce" or "agricultural products," or is included within the term "livestock." The first two terms have been used by the legislature to convey various meanings, as will be seen by a reference to the following acts:

The Statutory Construction Act of May 28, 1937, P. L. 1019, sec. 101, (41) 46 P. S. §601, which does not apply to the act under consideration, reads:

> (41) "Farm Product," any agricultural, horticultural, vegetable, fruit, and floricultural product of the soil, *livestock* and meats, wool, hides, poultry, eggs, *dairy products,* nuts, mushrooms and honey. (Italics ours.)

The Act of April 30, 1929, P. L. 885, 14 P. S. §81, reads as follows in section 1:

> * * * "agricultural products" shall include all agricultural, horticultural, vegetable, fruit, and floricultural products of the soil, *live stock* and meats, wool, hides, poultry, eggs, *dairy products,* nuts, mushrooms, and honey, but shall not include timber products; * * *. (Italics ours.)

The Act of April 14, 1929, P. L. 144, 3 P. S. §32, reads in section 14 thereof, as follows:

> "Farm Product" means any agricultural, horticultural, vegetable, fruit, and floricultural product of the soil, *live stock* and meats, wool, hides, poultry, eggs, *dairy products,* nuts, mushrooms and honey. (Italics ours.)

"Livestock" is defined in 38 C. J. page 70, as domestic animals kept for farm purposes, especially marketable animals, as cattle, horses and sheep.

The term "livestock" is defined in section 2 of the Act of May 11, 1921, P. L. 522, 3 P. S. §462, as follows:

> * * * "livestock" shall include horses, stallions, colts, geldings, mares, sheep, rams, lambs, bulls, bullocks, steers, heifers, *cows, calves,* mules, jacks, jennets, burros, goats, kids, swine, confined domestic hares and rabbits.

It thus appears that cows are not included within the definition of "farm produce," and as "dairy products" have been omitted from the definition of "farm produce," that the legislature did not intend to include milk as one of the products within the definition of "farm produce." It is also to be noted that "livestock," which is the exception in the statute under consideration, is included within the terms of the acts when "dairy products" are included.

The wording of the acts of 1929, supra, indicate that when the Act of May 27, 1937, P. L. 901, was passed the omission of "dairy products" from the definition of farm produce was intentional, and this seems more obvious as the word "livestock," which had been used by the legislature as a companion word of "dairy products," was made an exception.

It may also be noted that the 1937 legislature passed the Milk Control Law of April 28, 1937, P. L. 417, the title to which act provides, inter alia:

AN ACT

> Relating to milk and the products thereof; creating a Milk Control Commission; establishing its jurisdiction, powers and duties, regulating the production, transportation, manufacturing, processing, storage, distribution, delivery and sale of milk and certain products thereof; * * * requiring milk dealers to *file bonds to secure payment for milk to producers.* * * * (Italics ours.)

The requirement that milk dealers file bonds to secure payment for milk to producers is also a requirement of the act under consideration, and we do not believe it to have been the intention of

the legislature to have duplicated the requirements of the law by legislation passed at the same session.

We are, therefore, of the opinion, that milk does not come within the terms of the Act of May 27, 1937, P. L. 901.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 354

WPA projects—Assumption of sponsorship by Department of Mines—Drainage tunnel—Reduction of pumping charges.

The Department of Mines could legally assume the sponsorship of a project to study the feasibility of constructing a drainage tunnel for the purpose of reducing the pumping charges in the middle and lower anthracite mining fields.

Harrisburg, Pa., July 15, 1940.

Honorable John Ira Thomas, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to whether the Department of Mines could legally assume the sponsorship of a W. P. A. Project to study the feasibility of constructing a drainage tunnel for the purpose of reducing the pumping charges in the middle and lower anthracite fields.

Works Progress Administration, Guide to Project Eligibility, Operating Procedure No. G1, Section 7 (Revised February 28, 1939), reads as follows:

> Section 7. *Authority of Sponsor.* A sponsoring agency is considered to have legal authority to perform an act if it derives such authority from a constitutional source, by legislative action, or by virtue of delegation from other public agencies. If authority to prosecute the work is based upon delegation, an explanatory statement shall be submitted.
> * * *

A reading of the foregoing guide shows that a contemplated project must be sponsored by an agency having legal authority derived, inter alia, by legislative action.

Section 1902 of The Administrative Code of 1929 as last amended by the Act of June 1, 1931, P. L. 350, (71 P. S. §502), contains the following language:

> Mines.—The Department of Mines shall have the power, and its duty shall be:
>
> * * * * *
>
> (c) To make such examinations and investigations as may be necessary to enable it to make recommendations upon any matters pertaining to the general welfare of coal miners and others connected with mining and the interests of mine owners and operators in the Commonwealth;
>
> (d) Through a separate bureau, to take such steps as it may deem advisable to promote the welfare of the mining and mineral interests of the Commonwealth, and the use of the mineral products of Pennsylvania. The exercise of this function shall not in any way interfere with the safety work of the department.

Inasmuch as the contemplated project would promote the general welfare of coal miners and others connected with mining, and the interests of mine owners and operators in the Commonwealth, and also promote the welfare of the mining and mineral interests of the Commonwealth, it would be within the purview of the aforementioned statute.

We are accordingly of the opinion that the Department of Mines could legally assume the sponsorship of a project to study the feasibility of constructing a drainage tunnel for the purpose of reducing the pumping charges in the middle and lower anthracite mining fields.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

E. A. DELANEY,
Deputy Attorney General.

OPINION No. 355

Fish—Violation of Fish Act of May 2, 1935—Federal Fish Hatchery property within Pennsylvania—Jurisdiction—Act of June 13, 1883, as amended—United States Criminal Code of 1909, sec. 289.

1. A State fish warden has no authority to make an arrest on a Federal Fish Hatchery for a violation of the Fish Law of May 2, 1925, P. L. 448, sec. 1, since the Commonwealth has consented to the purchase of such land by

the Federal Government and has retained jurisdiction only in the right of execution of certain process, by the Act of June 13, 1883, P. L. 118, as amended.

2. Since the Fish Law of May 2, 1925, P. L. 448, has, by virtue of section 289 of the United States Criminal Code of March 4, 1909, 35, Stat. at L. 1088, become Federal law as applied to a Federal Fish Hatchery property within Pennsylvania, prosecutions for violation of the Fish Law upon a Federal Fish Hatchery in Pennsylvania, may be instituted before the appropriate United States Commissioner.

Harrisburg, Pa., July 15, 1940.

Honorable C. A. French, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your recent inquiry, in which you ask whether or not a State fish warden has the right to make an arrest on the Federal Fish Hatchery property at Lamar, Clinton County, Pennsylvania, for a crime committed on said property.

We understand that the fish hatchery is owned by the Federal Government, having been purchased from private individuals, and that your fish warden made the arrest by reason of the defendant having violated the Act of May 2, 1925, P. L. 448, known as the Fish Law of 1925, (30 P. S. §1), in that he was fishing without a license. This inquiry resolves itself into a question of whether the Federal Government or the Commonwealth of Pennsylvania has jurisdiction over this land.

Article I, Section 8, Clause 17 of the Constitution of the United States reads as follows:

> The Congress shall have Power * * *
>
> * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; * * *

Fish hatcheries, not being enumerated in the above clause, the question arises as to whether or not they are included in the phrase "and other needful buildings." The answer is found in the case of James *v.* Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, in which the Supreme Court interpreted "other needful buildings" as "embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government."

Inasmuch as the Federal Government has created the Bureau of Fisheries, which is under the Department of the Interior, and has directed and authorized investigations on the subject of fish propagation, there would seem to be no doubt that a fish hatchery would be a necessary structure in the performance of the functions of the Federal Government.

The next question which arises is whether or not the General Assembly has given its consent to the purchase of the land on which the hatchery is erected. An examination of the statutes of Pennsylvania reveals none which relate in specific terms to this property. However, we do find the Act of May 5, 1931, P. L. 90, (30 P. S. §181), which reads as follows:

> The Commonwealth of Pennsylvania hereby gives its consent and accords to the Government of the United States and the United States Commissioner of Fisheries, and his duly authorized agents, the right to establish a fish-cultural station in this Commonwealth, and to conduct fish hatching and fish culture at said hatchery in any manner and at any time the said commissioner may consider necessary and proper.

Of course this does not answer the question of jurisdiction, but we think the Act of June 13, 1883, P. L. 118, as amended, (74 P. S. §1), which reads as follows, is in point:

> *The jurisdiction of this State is hereby ceded to the United States of America* over all such pieces or parcels of land, not exceeding ten acres in any one township, ward or city, or borough, within the limits of this State, as have been or shall hereafter be selected and acquired by the United States for the purpose of erecting postoffices, custom houses or other structures, exclusively owned by the general government, and used for its purposes: Provided, That an accurate description and plan of such lands, so acquired, verified by the oath of some officer of the general government having knowledge of the facts, shall be filed with the Department of Internal Affairs of this State, as soon as said United States shall have acquired possession of the same: And provided further, *That this cession is upon the express condition that the State of Pennsylvania shall so far retain concurrent jurisdiction with the United States, in and over all lands acquired or hereafter acquired as aforesaid, that all civil and criminal process*, issued by any court of competent jurisdiction or officers having authority of law to issue such process, and all orders made by such court, or judicial officers duly empowered to make such orders, and necessary to be served upon any person, may be executed upon said land and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid. (Italics ours.)

You will note that the only jurisdiction retained by the Commonwealth of Pennsylvania is the right of execution of certain process, either criminal or civil.

A reservation similar to the one cited in the Act of June 13, 1883, supra, was before the Supreme Court of Pennsylvania in the case of Manlove *v.* McDermott, 308 Pa. 384 (1932), in which the Supreme Court quoted from the opinion of the Superior Court to the effect that similar reservations of the right to serve criminal and civil processes in lands so ceded to the Federal Government have been held not to interfere with the supremacy of the United States over the lands ceded; on the contrary, such action is supported in order that the lands ceded may not become a refuge for persons fleeing from the police or the sheriff.

Although prosecutions for violations of the Fish Law of 1925, supra, committed on the Federal hatchery hereinbefore mentioned, are not punishable in the State courts, this conclusion does not mean that violations of the State laws on Federal lands shall not be prosecuted.

Section 289 of the United States Criminal Code, 18 USCA Section 468, reads as follows:

> Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing or hereafter reserved or acquired, described in section 451 of this title, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.

In the case of Puerto Rico *v.* Shell Company, 302 U. S. 253, 82 L. ed. 235 (1937), the Supreme Court of the United States said, on page 265:

> * * * Prosecutions under that section, [Section 289 of the Criminal Code] however, are not to enforce the laws of the state, territory or district, but to enforce the Federal law, the details of which, instead of being recited, are adopted by reference.

Section 451, referred to in 18 USCA, Section 452, or Section 272 of the United States Criminal Code, reads in part as follows:

* * * * *

> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Appropriate procedings may, therefore, be instituted before the United States Commissioner located in Clinton County, so that the violation of the Pennsylvania law, which law is adopted as Federal law, may be prosecuted in the Federal court.

We are, therefore, of the opinion, that:

(a) A State fish warden does not have the right to make an arrest on the Federal fish hatchery property, owned by the United States, for a violation of the Fish Law of 1925, supra.

(b) Prosecutions for violations of the Fish Law of 1925, supra, which becomes Federal law by reason of section 289 of the United States Criminal Code, may be instituted before the United States Commissioner at Williamsport, Pennsylvania, for prosecution by the Federal authorities.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 356

Brokers—Sale of Federal Housing Administration mortgages—Necessity for licensure under Real Estate Brokers License Act of 1929, as amended—Registration under The Securities Act of 1927, as amended.

A corporation engaged in the business of selling, inter alia, Federal Housing Administration mortgages must secure a license as a real estate broker under the provisions of the Real Estate Brokers License Act of May 1, 1929, P. L. 1216, as amended by the Act of July 2, 1937, P. L. 2811, even though it is already licensed under The Securities Act of April 27, 1927, P. L. 273, as amended by the Act of June 24, 1939, P. L. 748, sec. 6.

Harrisburg, Pa., July 18, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your memorandum in which you ask us to advise you whether or not it is necessary for a brokerage or bonding company, which in addition to selling stocks and bonds sells F. H. A. mortgages, to be licensed under the Real Estate Brokers License Act. You inform us that this company is registered, or licensed under the Pennsylvania Securities Act of April 13, 1927, P. L. 273, as amended by the Act of June 24, 1939, P. L. 748, section 6, (70 P. S. §36).

A study of the Pennsylvania Securities Act reveals that the chief requirements for registration under its provisions are that the applicant be of good repute and that his proposed plan of business be not unfair, unjust or inequitable. In addition, the dealer is required to register for each calendar year as a dealer in securities.

The Real Estate Brokers License Act of May 1, 1929, P. L. 1216, section 6, as amended by the Act of June 26, 1931, P. L. 1410, section 1; and the Act of July 2, 1937, P. L. 2811, section 2, (63 P. S. §436), contains the following provision:

> From and after January 1, 1930, it shall be unlawful for any person, copartnership, association, or corporation to *engage in or carry on the business, or act in the capacity of a real estate broker, or a real estate salesman, within this Commonwealth, without first obtaining a license as a real estate broker or real estate salesman from the department.*
>
> *No person, copartnership, association, or corporation may be licensed* by the department as a real estate broker unless such person and all of the members of any such copartnership or association who are actively engaged in the real estate business and all of the officers of any such corporation who are actively engaged are of the age of twenty-one years and upwards, are citizens of the United States, and shall have served an apprenticeship, as a duly licensed real estate salesman, of not less than two years, in the employ of a duly licensed real estate broker or brokers. (Italics ours.)

Under this provision it is illegal for any person, copartnership, association, or corporation to engage in the real estate business without first procuring a license therefor. In order to procure such a license, it is necessary for the applicant to have served an apprenticeship and pass a State examination.

It is evident that the purpose of this act is to require that the person who desires to be licensed under the Real Estate Brokers License Act be better qualified. This naturally inures to the benefit of the public which he may serve.

It is obvious that before we can answer your question we must first decide whether or not the sale of F. H. A. mortgages constitutes

a transaction within the provisions of the Real Estate Brokers License Act.

Section 2 of the Act of May 1, 1929, P. L. 1216, as amended by the Act of July 2, 1937, P. L. 2811, section 1, (63 P. S. §432), states under the heading of:

> Definitions (a) * * * [That] One act in consideration of compensation, by fee, commission or otherwise, of buying, selling, renting or exchanging any such real estate of or for another, or attempting or offering so to do, *or negotiating a loan upon* or leasing or renting or placing for rent *any such real estate,* or collection of rent therefrom, *shall constitute prima facie evidence* that the person, copartnership, association, or corporation, so acting or attempting to act, is a real estate broker within the meaning of this act. The term "real estate broker" shall also include * * * *all persons who negotiate or offer for sale any mortgage or other security for which real estate is the collateral,* * * * (Italics ours.)

From the clear context of this language, in our opinion it will be necessary for a company which sells F. H. A. mortgages to obtain a real estate brokers license, since it is dealing in securities for which real estate is the collateral. To hold otherwise would allow such a company to engage in the real estate business when its members have not qualified as they are required by the Real Estate Brokers License Act.

The Act of Congress of September 1, 1937, Chapter 896, 50 Stat. 888, 42 USCA Section 1401 et seq., which is commonly known as the Federal Housing Authority Act, provides for the Federal Government to employ its funds and credit, for among other purposes, to remedy the acute shortage of decent, safe, and sanitary dwellings for families of low income. One of the ways in which the purpose of this legislation is accomplished, is to provide for the lending of money, in the form of an F. H. A. mortgage at a lower rate of interest than generally prevails throughout this Commonwealth and the nation, to an individual who qualifies. This low rate of interest makes for a substantial saving to the borrower, and naturally has resulted in many individuals having applied for and secured F. H. A. mortgages to take care of their individual needs.

It is to be noted that the beneficent purposes of the Federal Housing Authority Act are at the most but a very incidental consideration as far as the brokerage or bonding company is concerned, whose chief concern naturally is in realizing the most profit it can in consummating the various transactions of this nature. Therefore, we are not concerned with the activity of a governmental agency in our case, but rather with the activity of a copartnership, association,

or corporation carrying on its private business, including that of a real estate broker, within the provisions of the Real Estate Brokers License Act.

We are therefore of the opinion, that where a brokerage or bonding company, which is registered under the provisions of the Pennsylvania Securities Act, is, among its other business activities, engaged in the selling of F. H. A. mortgages, it must secure a license as a real estate broker under the provisions of the Real Estate Brokers License Act of May 1, 1929, P. L. 1216, as amended by the Act of July 2, 1937, P. L. 2811.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 357

Pennsylvania Turnpike Commission—Policing of turnpike—Right of Governor to assign Pennsylvania Motor Police.

The Governor may assign the Pennsylvania Motor Police to police the turnpike created and constructed under the Act of May 21, 1937, P. L. 774 and the police so assigned may be paid out of funds of the Commission.

Harrisburg, Pa. July 24, 1940.

Honorable Arthur H. James, Governor, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania.

Sir: By your communication of July 11, 1940 you request our opinion as to whether you may, under section 710 (c) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended June 29, 1937, P. L. 2436, (71 P. S. §250), assign Pennsylvania Motor Police to the Pennsylvania Turnpike Commission for the purpose of policing the turnpike authorized to be constructed and maintained under the Act of May 21, 1937, P. L. 774, No. 211, (36 P. S. §652a et seq.), and the Pennsylvania Turnpike Philadelphia Extension Act, the Act of May 16, 1940, Sp. Sess. No. 11; and whether such police, if so assigned, may be paid from funds of the Commission.

Section 710 of The Administrative Code of 1929, supra, as amended, provides in part:

> The Pennsylvania Motor Police shall have the power, and its duty shall be:
>
> (a) Subject to any inconsistent provisions in this act contained, to continue to exercise the powers and perform the duties by law vested in and imposed upon the Department of State Police, the Pennsylvania State Police, and the State Highway Patrol;
>
> (b) To assist the Governor in the administration and enforcement of the laws of the Commonwealth, in such manner, at such times, and in such places, as the Governor may from time to time request;
>
> (c) With the approval of the Governor, to assist any administrative department, board, or commission, of the State Government, to enforce the laws applicable or appertaining to such department, board, or commission, or any organization thereof;
>
> * * * * *
>
> (g) To enforce the laws regulating the use of the highways of this Commonwealth, * * *.

Clearly the Pennsylvania Turnpike Commission comes under subsection (c) of section 710 of The Administrative Code of 1929, supra, and is such a commission of the State Government which may be assisted by the Pennsylvania Motor Police, with your approval, in enforcing the laws applicable or appertaining to such commission.

Section 12 of the Act of May 21, 1937, supra, provides in part:

> * * * Such turnpike shall also be policed and operated by such force of police, toll-takers and other operating employes as the commission may in its discretion employ.

Section 6, subsection (f) of the Act of May 16, 1940, supra, provides in part as follows:

> * * * Such turnpike shall also be policed and operated by such force of police, toll-takers and other operating employes as the commission may in its discretion employ.

That is to say, the commission may, under the law, use the Pennsylvania Motor Police to police the turnpike, if you consent. It may also pay the cost of such policing as part of its operating expenses under section 12 of the act of May 21, 1937, quoted supra, just as it may pay "other operating employes."

It is our opinion that you may assign the Pennsylvania Motor Police to police the turnpike created and constructed under the Act of May 21, 1937, P. L. 774, No. 211, and the Pennsylvania Turnpike Philadelphia Extension Act, the Act of May 16, 1940, Sp. Sess.

No. 11; and that Pennsylvania Motor Police so assigned may be paid out of funds of the Pennsylvania Turnpike Commission.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 358

Public utilities—Special investigation—Duty to reimburse Public Utility Commission for cost—Public Utility Law of May 28, 1937, sec. 1201(a), as amended —Limitation on amount of reimbursement in any one calendar year—Liability for excess in succeeding year.

A public utility must, under section 1201(*a*) of the Public Utility Law of May 28, 1937, P. L. 1053, as amended by section 1 of the Act of September 28, 1938, P. L. 44, reimburse the Public Utility Commission for the entire amount expended by the commission for such salaries, subsistence, and traveling expenses as may be attributable to a special investigation by the commission under that section, and if the amount exceeds one percent of the utility's gross intrastate operating revenues for the preceding fiscal year, the maximum which may be collected in any one calendar year, such excess must be paid in succeeding years.

Harrisburg, Pa., July 30, 1940.

Honorable John J. Siggins, Jr., Chairman, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

Sir: We have the request of the Pennsylvania Public Utility Commission to be advised concerning the proper interpretation of the proviso in section 1201 (a) of the Public Utility Law (Act of May 28, 1937, P. L. 1053, as amended by the Act of September 28, 1938, P. L. 44, (66 P. S. §1461)).

This proviso limits the amount which a public utility shall pay during any calendar year upon its assessed share of the commission's regulatory expenses, to one per centum of the utility's gross intrastate operating revenues during its next preceding fiscal year. The commission particularly desires to know whether the balance of assessments in excess of the one percent limitation for one year may be collected from the utility in subsequent years.

Section 1201 (a) of the Public Utility Law reads as follows:

> Whenever the commission, in the performance of its duties under this act, shall conduct an investigation of the affairs

> of any public utility, involving an examination of the records or facilities thereof, such public utility shall pay to the commission a sum equal to the salaries paid to commission employes while engaged in such examination, together with such traveling and subsistence expenses of said employes as may be directly attributable to such examination: *Provided, however, That the amount so paid by any public utility during any one calendar year shall not exceed one per centum of the gross intrastate operating revenues thereof during its next preceding fiscal year.* (Italics ours.)

This proviso plainly limits only "the amount so *paid* by any public utility *during any one calendar year*" to one percent of the gross intrastate operating revenues.

Therefore, we are of the opinion that the statute does not limit the amount which a public utility may ultimately have to pay for the cost of a special investigation, but merely limits the amount which may be "paid * * * during any one calendar year" on account of such cost.

Accordingly, you are advised that section 1201 (a) of the Public Utility Law requires a public utility to reimburse the Pennsylvania Public Utility Commission for the entire amount expended by the commission for such salaries, subsistence and traveling expenses as may be attributable to a special investigation by the commission under that section; and that the excess over the one percent limitation for each calendar year contained in the proviso of that section should be paid to the commission in succeeding years, in accordance with such one percent limitation, until the entire cost of such investigation has been paid by the public utility.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE W. KEITEL,
Assistant Deputy Attorney General.

OPINION No. 359

State Government—Department of Labor and Industry—Unemployment compensation division—Appointments—Exhaustion of lists of eligibles—Right to make appointments from lists of higher grade and class—Unemployment Compensation Law of December 5, 1938, sec. 208, as amended.

The Secretary of Labor and Industry must make appointments to vacancies in the unemployment compensation division in strict accordance with the pro-

visions of section 208 of the Unemployment Compensation Law of December 5, 1936, P. L. 2897, as amended by the Acts of May 18, 1937, P. L. 658; June 20, 1929, P. L. 458, and May 16, 1940, no. 9, and may not, therefore, other than as to promotions, make civil service appointments in a grade of employment for which the list of eligibles has been exhausted by appointing persons whose names appear on other lists of eligibles of a higher grade and class than that grade to which the appointment is to be made.

Harrisburg, Pa., August 1, 1940.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: By your letter of June 4, 1940, you requested this department to advise you whether you were required to confine your appointments for vacancies arising in grades of employment for which lists have been exhausted to individuals whose names appear on other lists of eligibiles but of higher grades and classes. In your letter you state that under the law certain lists of eligibles were certified to you and appointments made therefrom. You advise that certain of these lists, largely in the lower salary grades, are now exhausted, although other lists of eligibiles in higher salary grades contain names of individuals not yet called or appointed. Vacancies now exist, and from time to time may arise, in lower grades for which the lists have been exhausted. According to your letter, your practice in the past, has been to fill such vacancies by appointing provisional employees, awaiting the establishment of new lists of eligibiles for such positions through the holding of new examinations. You now seek advice as to your right and authority to use "lists of eligibles" certified to you for the higher grades, in making appointments to vacancies existing in lower grades, and for which lower grades, no "lists of eligibles" are now available.

Your authority to make appointments and to employ individuals for the administration of the Unemployment Compensation Law of Pennsylvania is found in section 208 of the Act of December 5, 1936 (1937, P. L. 2897), as amended by the Acts of May 18, 1937 (P. L. 658), June 20, 1939 (P. L. 458) and Act No. 9, approved May 16, 1940.

Taken together, these acts comprise the Pennsylvania Unemployment Compensation Law. By this law, the general assembly has created a statutory civil service status, and has prescribed certain values to accompany that status. But it also, definitely and specifically, has established and prescribed the procedure that must be observed in obtaining or retaining this status and its accompanying rights. These legislative mandates require a strict observance.

By section 208 (a) of that law, the General Assembly has prescribed that:

> No individual shall be appointed or employed by the Department for the purpose of administering this act except as provided in this section.

As part of that established procedure, in section 208 (d), the General Assembly requires that:

> The secretary shall by rules and regulations establish classes of employment, composed of all of the various positions to be created, for the purpose of administering this act, and shall divide such classes into a reasonable number of grades, and shall specify a salary range for each grade. All appointments shall be made at the lowest salary for the grade in which the appointment is made. The secretary may increase the salary of any employe, who has served the probationary period hereinafter required by this act, to not more than the maximum provided for his grade of employment.

And again in section 208 (e) that:

> The secretary shall prescribe, by rules and regulations, the qualifications to be possessed by persons desiring employment in the various grades of employment in the administration of this act. * * *

We are advised that the secretary from time to time, through rules and regulations, has established classes and grades of employment. By those rules and regulations he described the duties of the respective grades of employment, and prescribed, for each grade, the minimum qualifications to be possessed by an applicant therefor. He identified each grade by a definite salary range. Such rules and regulations are official records, public notice thereof was given and they formed the basis upon which the various applicants filed applications, were admitted to competitive examinations, and in proper instances had their names certified on lists of eligibles, for the respective grade for which they were qualified, for appointment.

In section 208 (f) of the law, the legislature imposes certain requirements upon the applicant desiring appointment or employment in the department. That section requires that:

> Every individual desiring employment under the provisions of this act shall file with the board an application, which shall be in a form prescribed by the board, provided that such application shall be the same for all individuals desiring the same grade of employment, and shall be so drawn as to reveal the qualifications as prescribed by the secretary * * * Such competitive examinations shall be in writing, but in arriving at a final rating of applicants for such administrative and professional grades of employment as are so designated by the board, the board may take into

> consideration such experience and personal qualifications as are related to the grades of employment for which applicants are being examined, provided that the same standards shall apply with respect to all applicants in the same grade of employment. * * *

We are also advised that the Unemployment Compensation Board of Review, through its practices, and by its rules and regulations publicly promulgated through official circulars announcing the establishment of positions, the time and place of examination (and in fact printed upon the application itself) required each applicant as a prerequisite to being admitted to examination to "specify (on such application) particularly the positions by number and title * * * for which they desire to be examined." In all instances, the board required of an applicant before admitting him to examination and upon the strength of which lists of eligibles were certified that "a separate application must be filed for each position." And unless an applicant filed such an application, he was not permitted to take an examination, nor was his or her name permitted to be placed on any list of eligibles other than the grade of employment for which such applicant had filed a specific application. For the General Assembly specifically provided in section 208 (f) that:

> Upon receiving *such* application the applicant shall be admitted to the next competitive examination *in the grade of employment* which he or she seeks. (Italics ours.)

And in detailing the method for rating an applicant, the General Assembly prescribed that:

> In arriving at a final rating of applicants for such administrative and professional grades of employment as are so designated by the board, the board may take into consideration such experience and personal qualifications as are related *to the grades of employment* for which applicants are being examined. (Italics ours.)

The legislature has been equally specific as to the duties imposed by it upon the Unemployment Compensation Board of Review. It prescribed the duties of the board in conducting examinations and establishing ratings thereon, and section 208 (i) requires that:

> The board shall certify to the secretary for each administrative district, and for the State as a whole, lists of the names of persons receiving a passing mark, and shall rank such persons in the order of magnitude commencing with the highest rating for the specified grade of employment. Such list shall be known as a list of eligibiles and shall be valid until the next examination is held for the same gade

> of employment, but in no event for a period of less than one year, unless no more than two names remain on a list of eligibiles, in which case a new examination may be held; but those whose names remained on the list of eligibles shall be retained on the new list for a period of at least one year from the date of their original certification.

And again in section 208 (m) that:

> It shall be the duty of the board to certify to the secretary lists of eligibles for all grades of employment as such lists are requested by the secretary, as soon as practical, and to maintain a sufficient number of names on each of such lists to meet all reasonable requirements of the secretary in making necessary appointments under this act.

In section 208 (j) of the law, the legislature definitely defined and limits the secretary's power of appointment and details the method to be followed in making those appointments. In that section the legislature requires that:

> The secretary shall make appointments to positions created under this act, and shall fill vacancies as they may occur from the lists of eligibles certified to him by the board, except with respect to positions filled by promotions as hereinafter provided, and by the appointment of persons exempted by subsection (b) of this section. In making appointments therefrom, the secretary shall select from the three persons ranking highest on the lists of eligibles for the grade of employment in the administrative district, or in the State as a whole, as the case may be, the applicant most suitable for the position in the grade of employment for which a vacancy exists, taking into consideration his experience and personal qualifications with sole reference to merit and fitness for the position to be filled. * * *

There can be no doubt of the intent of the legislature in enacting this law. The establishment of the procedure, the imposition of the mandates evidences that the legislature did not intend, as do some systems of civil service, to permit the use of "comparative lists" in making appointments but rather intended to confine the making of such appointments to those individuals whose names appear on a list of eligibles properly certified for the specific grades of employment to which the appointment is to be made.

In establishing its procedure, the general assembly constantly uses the term "grade" of employment. In so doing, it intended that term to have a definite meaning, even though no specific definition was contained in the law. As used by the legislature, the word "classes" was intended as a general term designating the grouping together of certain grades of employment. Grades of employment,

in reality, describe specific positions, and each grade is identified by its respective duties, qualifications, type of competitive examination, list of eligibles, and definite salary range. The legislature intended each such salary grade falling within a general classification of positions to constitute a separate group of positions for the purpose of application, examination, certification of lists of eligibles, and appointments to civil service positions. Such a concept alone explains the legislative requirements in section 208 (f) that:

> Every individual desiring employment * * * shall file with the board an application, which shall be in a form prescribed by the board, provided that such application shall be the same for all individuals desiring the same grade of employment, and shall be so drawn as to reveal the qualifications as prescribed by the secretary. * * *

and likewise that competitive examinations be in writing:

> But in arriving at a final rating of applicants for such administrative and professional grades of employment as are so designated by the board, the board may take into consideration such experience and personal qualifications as are related to the grades of employment for which applicants are being examined, provided that the same standards shall apply with respect to all applicants in the same grade of employment. * * *

Nor can it be said that the several subsections of this law indicate that the legislature intended those provisions to be merely directory. The terms of these subsections clearly indicate that the legislature intended them to be mandatory and intended that you, as the appointing power, observe rigidly those mandates. The legislature in delegating to you the power of appointment with civil service status requires that you do not exercise that power until and unless all statutory provisions regulating those appointments have been complied with. Other than as to promotions, made in pursuance to the legislative requirements, the law contains no justification for you to make appointments with civil service status to a grade other than from the list of eligibles properly certified to you by the Unemployment Compensation Board of Review for that specific grade.

The very fundamental purpose of the civil service provisions of this law is to regulate and improve civil service by establishing a definite system of selecting individuals on the basis of their special qualifications. To exercise a power of appointment contrary to the provisions of the law would result in the nullification of this fundamental purpose of the law. Such a usurpation of power would imperil the basic competitive principle of civil service and reduce it to little value. It might easily open the door of abuse by the admin-

istrators, and close the door of opportunity provided by the law to those individuals meeting or willing to meet the specifications prescribed by the legislature.

The law nowhere authorizes or permits the use of lists of eligibles certified for higher grades in the making of appointments to vacancies arising in lower grades. The assumption of such an authority would in effect be to exercise the power of reducing an individual from the higher grade for which he is qualified to a lower grade than that for which he filed his application and was examined. Neither by direct citation nor by implication, can this power be read into the law. Had the general assembly intended such a result to be accomplished, it would have so specifically provided in the law. Under such an assumption of power, the competitive feature in civil service would become nullified; favoritism in selection would be a constant threat; interchangeability of lists would be entrusted to individual discretion; and appointments thereunder would assume a haphazard distribution. It is needless to point out how such a departure might well jeopardize the rights of an individual appearing on a list of eligibles to be considered three times when vacancies are to be filled; or the prejudice that might occur to the promotional opportunities of employees in positions; or the serious effect it might have on the seniority rights or service ratings of such an employee. These and many other possibilities might well produce problems in personnel administration of serious and unpredictable proportions. All of these would be violative of the legislative mandate.

It is our opinion that other than as to promotions, you have no authority to make civil service appointments in a grade of employment for which the list of eligibles has been exhausted by appointing persons whose names appear on other lists of eligibles of a higher grade and class than that grade to which the appointment is to be made.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
DAVID R. PERRY,
Special Deputy Attorney General.

OPINION No. 360

Game—Enforcement of Pennsylvania Game and Fish Laws in National forests—Concurrent jurisdiction of State and Federal Governments—United States Constitution, art. I, sec. 8, cl. 17—Act of May 11, 1911, as amended.

1. Article I, sec. 8, cl. 17, of the Constitution of the United States does not,

either expressly or by implication, grant to the Federal Government exclusive jurisdiction over National forests.

2. The Act of May 11, 1911, P. L. 271, as amended by the Act of April 21, 1921, P. L. 257, empowering the Federal Government to acquire National forest reserves in Pennsylvania, and the Act of Congress of March 1, 1911, 36 Stat. at L. 961, as amended, providing for Federal acquisition of such forests, specifically provide for concurrent jurisdiction of the State and Federal Governments over such lands.

2. The Game and Fish Laws of Pennsylvania may be enforced in National forests in Pennsylvania, purchased by the Federal Government pursuant to the Act of May 11, 1911, P. L. 271, so long as such enforcement does not deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and the executive branch of the Federal Government is charged with an affirmative duty to aid in the enforcement of State laws in such forests.

Harrisburg, Pa., August 5, 1940.

Honorable Seth Gordon, Executive Director, Game Commission, Harrisburg, Pennsylvania.

Sir: We have your recent request that opinion dated September 26, 1921, given by this department to the Honorable Gifford Pinchot, then Commissioner of Forestry, by William I. Swoope, Deputy Attorney General, reported in Official Opinions of the Attorney General of Pennsylvania, 1921-1922, at page 247, be reviewed.

You also ask that the opinion of former Deputy Attorney General, M. A. Carringer, to W. Gard. Conklin, Chief, Division of Lands, of the Board of Game Commissioners, dated December 17, 1926, reported in Official Opinions of the Attorney General of Pennsylvania, 1925-1926, at page 219, as well as 8 D. & C. 688, be reviewed.

The opinion first above-mentioned holds that the Game and Fish Laws of the State of Pennsylvania will be superseded on lands purchased by the Federal Government, under the Act of May 11, 1911, P. L. 271, as amended by the Act of April 21, 1921, 32 PS §101, by the laws of the United States.

The second opinion mentioned in your letter holds that the jurisdiction of Pennsylvania as to game and fish is superseded by the laws of the United States and the regulations of the United States Department of Agriculture. This opinion refers specificially to the Allegheny National Forest and the Tobyhanna National Forest; and it also states that this opinion was supported by the opinion of Deputy Attorney General Swoope, given to Honorable Gifford Pinchot, Forest Commissioner, dated September 26, 1921.

In undertaking this review, we will confine ourselves to lands purchased by the Federal Government for National forests, disregarding land purchased for post offices and other buildings.

Under our form of government, the powers of the Federal Gov-

ernment are limited to those granted to it, either expressly or by implication, in the United States Constitution. All other powers are reserved to the State Government.

Turning, therefore, to the Constitution of the United States, we find that Article I, §8, clause 17, reads as follows:

> The Congress shall have Power * * *
>
> To exercise exclusive Legislation in all cases whatsoever, * * * and to exercise like authority, over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful buildings; * * *

National forests cannot be held to be included in the terms listed, or in the term "other needful buildings"; therefore, the United States cannot look to this clause in the Constitution as authority for exclusive jurisdiction over National forests.

No grant of exclusive legislation having been made to the Federal Government, the power is therefore reserved in the state, unless the state has ceded such power. That these cessions can be and have been made will be shown by the following authorities:

In the case of Collins *v.* Yosemite Park and Seed Company, 304 U. S. 517, 82 L. ed. 1505, the court said on page 528:

> * * * *The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders* and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. *Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.* (Italics ours)

In the case of James *v.* Dravo Contracting Company, 302 U. S. 134, 82 L. ed. 155, the Supreme Court held that Clause 17, of Article I, Section 8 of the Constitution of the United States contained no express stipulation that the consent of the state must be without reservation.

In the case of Bowen *v.* Johnston, 306 U. S. 19, 83 L. ed. 455, the Supreme Court said:

> * * * Whether or not the National Government acquired exclusive jurisdiction over the lands within the Park or the State reserved, as it could, jurisdiction over the crimes there committed, *depended upon the terms of the consent or cession* given by the Legislature of Georgia. * * * (Italics ours)

Let us now examine the statutes of Pennsylvania to ascertain the terms of the cession.

We find no statutes referring specifically to the Allegheny National Forest or the Tobyhanna National Forest, but we do find an act which refers to National Forest Reserves in general terms.

The Act of May 11, 1911, P. L. 271, as amended by the Act of April 21, 1921, P. L. 257, 32 PS §101, is entitled:

> AN ACT empowering the United States of America to acquire land in the State of Pennsylvania for National Forest Reserves, by purchase or by condemnation proceedings; and granting to the United States of America all rights necessary for control and regulation of such reserves.

Section 3 of the Act of May 11, 1911, supra, provides that the United States of America is empowered to pass such laws and to make or provide for the making of such rules, of both a civil and criminal nature, and provides a punishment for the violation thereof, as in its judgment may be necessary for the management, control and protection of such lands acquired from time to time by the United States of America under the provisions of this act; *Provided, however, that the authority hereby given shall be subject to all conditions and stipulations and reservations contained in this act.*

Section 1 of the Act of May 11, 1911, supra, empowers the United States of America to acquire by purchase, such lands in Pennsylvania as, in the opinion of the Federal Government, may be needed for the establishment of National Forest Reserves in Pennsylvania, in accordance with a Federal act entitled: "An Act to enable any state to cooperate with any other state or states or with the United States for the protection of the watersheds and navigable streams, and to appoint a commission for the acquisition of lands for the purpose of considering the navigability of navigable rivers, approved March 1, 1911" (16 USCA, Sections 480, 500, 513-519, 521, 552 and 563), and then follows with this reservation:

> * * * provided further, That the Commonwealth of Pennsylvania shall retain a concurrent jurisdiction with the United States in and over such lands, so far that civil process, in all cases, and such criminal process as may issue under the authority of the Commonwealth of Pennsylvania against any persons charged with the commission of any crime, *without or within said jurisdiction*, may be executed thereon in like manner as if this act had not been passed. (Italics ours).

It will be noted that the Act of May 11, 1911, P. L. 271, as amended, 32 PS §101, refers to the Act of Congress empowering the United States to acquire National Forest Reserves. This act of

Congress is the Act of March 1, 1911, Chapter 186, 36 Stat. 961 (16 USCA §§480, 500, 513 to 519, 521, 552 and 563), known as the "Weeks Act" and section 12 of this act, 16 USCA, Section 480, reads as follows:

> The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; *the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction,* nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. (Italics ours).

It thus appears that both the Act of Assembly of the Commonwealth of Pennsylvania and the Act of Congress provided for concurrent jurisdiction.

In addition to preserving specifically the civil and criminal jurisdiction over those public forest reserves possessed by the several states, the Congress of the United States, two years after the passage of the Act of June 4, 1897, 30 U. S. Stat. 34 to 36, which was an act for the administration of National forests, and which contained a provision identical to section 12 of the Weeks Act, supra, 16 USCA Section 480, imposed upon the executive branch of the Federal Government the affirmative duty of aiding in the enforcement upon these areas of the fish and game laws of the states in which such forest reservations are situated.

The Appropriation Act of March 3, 1899, 30 U. S. Stat. page 1074, contains at page 1095, the following provision:

> That forest agents, superintendents, supervisors, and all other persons employed in connection with the administration and protection of forest reservations shall in all ways that are practicable, aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game.

The mandatory duty of aiding in the enforcement of game and fish laws of the states was thus imposed upon all persons employed in the administration and protection of Federal forest reservations.

This mandate of Congress was repeated in the Act of March 4, 1907, 34 Stat. 1269, and in the Act of May 23, 1908, 35 Stat. 259, 16 USCA 553.

On August 13, 1936, the Secretary of Agriculture, acting under the authority created by the acts of June 4, 1897 and February 1, 1905, adopted certain "Regulations of the Secretary of Agriculture relating to the Protection, Occupancy, Use and Administration of

the National Forests," which appear in 1 Federal Register, page 1090, et seq.

Executive recognition that the game and fish laws of the state in which Weeks Act forests are located, are in full force and effect upon the areas comprised within such forests is shown by the following regulation, 1 Federal Register, Page 1092:

> Reg. A-ll. *All forest officers* will co-operate with State officials, in so far as practicable, to enforce *State fire, game and health laws.* They are authorized to accept appointments, without compensation, as deputy State fire wardens, game wardens, and/or health officers whenever, in the judgment of the Chief of the Forest Service, the performance of the duties required by these officers will not interfere with their duties as Federal forest officers. (Italics ours.)

Reg. T-7, 3 Fed. Reg. 782, issued April 15, 1938, reads as follows:

> The following acts are prohibited on lands of the United States within National Forests: Hunting, Trapping, catching, disturbing, killing or having in possession any kind of game animal, game or non-game bird or fish, or taking the eggs of any such bird *in violation of the laws of the State* in which such land is situated. (Italics ours)

This view, in our opinion, is supported also by the following statute:

The Act of March 10, 1934, chapter 54, 48 Stat. 400, 16 USCA 694, provides for fish and game sanctuaries in national forests. This act authorizes the making of rules and regulations and makes it unlawful to hunt or fish upon lands of the United States within the limits of said fish and game sanctuaries. Section 3 of the act (16 USCA 694-b) reads in part as follows:

> When such fish and game sanctuaries or refuges have been established as provided in Section 694 of this title, hunting, pursuing, poisoning, angling for, killing, or capturing or trapping, netting, or any other means or attempting to hunt, pursue, angle for, kill, or capture any wild animals or fish for any purpose whatever upon the lands of the United States within the limits of said fish and game sanctuaries or refuges shall be unlawful except as hereinafter provided, and any person violating any provision of this section or any of the rules and regulations made under the provisions of section 694b shall be deemed guilty of a misdemeanor and shall upon conviction in any United States court be fined in a sum of not exceeding $100 or imprisonment not exceeding six months, or both.
>
> The Secretaries of Agriculture and Commerce shall execute the provisions of this section and sections 694a and 694b of this title, and they are hereby jointly authorized

> to make all needful rules and regulations for the administration of such fish and game sanctuaries or refuges in accordance with the purpose of sections 694 to 694b of this title, including *regulations not in contravention of State laws for hunting, capturing, or killing predatory animals, such as wolves, coyotes, foxes, pumas,* and other species destructive to livestock or wild life or agriculture within the limits of said fish and game sanctuaries or refuges: *Provided, That the present jurisdiction of the States shall not be altered or changed without the legislative approval of such State.* (Italics ours.)

We find, therefore, repeated enactments by Congress, first as to forest reserves created by virtue of the act of June 4, 1897, supra, and second as to forests created by virtue of the Weeks Act, supra, and regulations issued by the executive authorities pursuant thereto, that it was the intention of the Federal legislative and executive branches that the jurisdiction of the states should be preserved.

The question arises as to what is meant by "Concurrent jurisdiction." A definition as given in 12 C. J. 395, is:

> That of several different tribunals, each authorized to deal with the same subject matter. The term is usually applied to two or more courts. * * *

One of the other definitions given is:

> "Concurrent jurisdiction is that jurisdiction exercised by different courts at the same time over the same subject matter and within the same territory, and wherein litigants may, in the first instance, resort to either court indifferently."

In 16 C. J. 62, Section 18, it is said:

> The constitutional power of Congress to enact legislation to define crimes and provide for their punishment implies the power to enact that such legislation shall be exclusive of the statutes of the States, and if it does so expressly or impliedly the states cannot punish such acts as offenses against the state. *Where this is not done, either expressly or by necessary implication, the statute of the state is not superseded by the federal statute, and the same act may be punished as an offense against the United States and also as an offense against the state.* * * * (Italics ours.)

In 16 C. J. 160, Section 185, it is said:

> The rule of comity between the federal and the state courts is the same in criminal as in civil cases; and, where each can take jurisdiction, the one which first gets it holds it to the exclusion of the other.

That the courts have upheld the reserved powers in statutes of cession will be noted from the following:

In the case of Fort Leavenworth R. Company *v.* Lowe, 114 U. S. 525, 29 L. ed. 264, the question was, whether a railroad running into the military reservation of Fort Leavenworth was subject to taxation by the State of Kansas. The United States had had exclusive jurisdiction over the land in question from 1803 by the cession of France until the admission of Kansas into the Union. For many years before such admission the land had been reserved from sale by the United States for military purposes, and occupied as a military post. Until the admission of Kansas the governmental jurisdiction of the United States was complete; but when Kansas came into the Union in 1861, on an equal footing with the original states, the previous military reservation was not excepted from the succeeding jurisdiction of the new state. The Attorney General recommended a state cession of jurisdiction, but it was not given until February 1875, when the Kansas Legislature enacted:

> That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation in said State, as declared from time to time by the President of the United States, saving however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and Reservation; and *saving further to said State the right to tax railroad, bridge,* and other corporations, their franchises and property, *on said Reservation.* * * * (Italics ours)

The Supreme Court of the United States upheld the reserved power of the State of Kansas to tax railroad property in the Reservation. It may be noted, however, that the reserved power of serving criminal or civil process was reserved only as to rights acquired or crimes committed in said state, but outside of said cession and reservation.

In the case of Colorado *v.* Toll, 268 U. S. 228, 69 L. ed. 927, the United States Supreme Court sustained the right of the State of Colorado to enjoin a federal officer from doing acts which the State claimed he had no authority to do in a National park created within the State of Colorado, where there had been no act of cession from the State of Colorado.

In the case of Surplus Trading Co. *v.* Cook, 281 U. S. 647, 74 L. ed. 1091, the Supreme Court said on page 651:

> It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw

> the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.

In James *v.* Dravo Contracting Company, supra, answering the contention that the reservation of concurrent jurisdiction to the state was void, the court said, on pages 146-149:

> But it is urged that if the paragraph be construed as seeking to qualify the consent of the State, it must be treated as inoperative. That is, that the State cannot qualify its consent, which must be taken as carrying with it exclusive jurisdiction by virtue of Clause 17.
>
> (147) It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. Kohl *v.* United States, 91 U. S. 367, 371, 372. In that event, as in cases of acquisition by purchase without consent of the State, *jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses.* Story on the Constitution, Vol. 2, #1227; Kohl *v.* United States, supra, p. 374; Fort Leavenworth R. R. Co. *v.* Lowe, supra; Surplus Trading Co. *v.* Cook, supra; United States *v.* Unzeuta, supra. The result to the Federal Government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and of the State, that the latter should not be entirely ousted of its jurisdiction. *The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to accept exclusive jurisdiction or the State be compelled to grant it in giving its consent to purchases.*
>
> Normally, where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation. * * *
>
> (148) *Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied.* We are

> unable to reconcile such an implication with the freedom of the *State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation.* In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective. * * * (Italics ours.)

Summing up, we conclude that National forests in Pennsylvania purchased by the Federal Government, pursuant to the Act of May 11, 1911, P. L. 271, are not within the enumeration of Clause 17, of Article I, Section 8 of the Constitution of the United States; that Pennsylvania had the authority under the law to make reservations of powers when the cessions granted in the Act of May 11, 1911, P. L. 271, as amended were enacted; and that these reservations have been recognized by the legislative and executive branches of the Federal Government.

We are, therefore, of the opinion, that the Commonwealth of Pennsylvania has, to the extent indicated, retained concurrent jurisdiction over lands sold to the Federal Government for National forests, and the Game Laws of Pennsylvania may be enforced thereon so long as such enforcement does not deprive the United States of the enjoyment of the property for the purposes for which it was acquired. We call your attention again, however, to the fact that this opinion applies only to National forests owned by the Federal Government in Pennsylvania, purchased by the Federal Government pursuant to the Act of May 11, 1911, P. L. 271, as amended.

The opinions reviewed are consequently modified to the extent indicated.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 361

Waters—Act of June 24, 1939—Scope—Wells—Springs—Necessity for filing report under section 3—Industrial concerns—Water companies—Purchase of supply from other water companies, municipalities, or industrial concerns—

Individuals—Effect on permits granted under Act of April 8, 1937—Permit followed by actual taking—Filing of statement.

1. The Act of June 24, 1939, P. L. 842, is the only presently effective authority for the acquisition of water rights, except for rights acquired under the Act of June 14, 1923, P. L. 704.

2. Wells, whether drilled or artesian, are not "surface waters", and therefore do not come within the terms of the Act of June 24, 1939, P. L. 842.

3. Springs may or may not be "surface waters" and therefore within the terms of the Act of June 24, 1939, P. L. 842, depending upon whether they are flowing waters or percolating waters; the former come within the act, but the latter do not.

4. Industrial concerns which incidentally supply water in the community in which they are located under a certificate of public convenience come within the terms of the Act of June 24, 1939, P. L. 842, if they are corporations.

5. Water companies which purchase their supply of water from other water companies, or from municipalities, or from industrial concerns, must file a statement pursuant to section 3 of the Act of June 24, 1939, P. L. 842.

6. Individuals do not come within the terms of the Act of June 24, 1939, P. L. 842, and need not, therefore, file statements under section 3 of the act even though they serve water to the public under certificates of public convenience.

7. Water permits granted under sections 4 to 7, inclusive, of the Act of April 8, 1937, P. L. 258, are voided by the Act of June 24, 1939, P. L. 842, if they were not followed by an actual taking within one year from the passage of the latter act, and, if followed by an actual taking, a statement must have been filed within the year in order to prevent the loss of the rights, but if a statement was filed, following an actual taking, no additional permit is needed, the permits granted under the act of 1937 remaining in full force and effect.

Harrisburg, Pa., August 5, 1940.

Honorable G. Albert Stewart, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: We have your letter of May 15, 1040, in which you ask five questions with regard to the administration of the Act of June 24, 1939, P. L. 842, 32 PS §631, which act relates to the acquisition of rights to divert water from rivers, streams, natural lakes, and ponds, or other surface waters within the Commonwealth.

This act is the only presently effective authority for the acquisition of water rights as appears from section 5 of the act, which reads as follows:

> Section 5. No public water supply agency shall hereafter acquire any water rights except as provided in this act, and any acquisition of water rights hereafter, except as provided in this act, shall be deemed to be unlawful null and void.

with the exception of water rights heretofore or hereafter acquired under the Act of June 14, 1923, P L. 704, 32 PS §591, which refers to water power and water supply permits.

Your first question is:

1. Do wells, drilled or artesian, and springs come within the terms of the above act? [Act of 1939, supra]

Section 1 of the Act of June 24, 1939, supra, defines "water rights" as follows:

* * * * *

> (e) "Water rights" shall mean the right to take or divert water from any rivers, streams, natural lakes and ponds, or other surface waters within or partly within and partly without the Commonwealth of Pennsylvania, except water rights heretofore or hereafter acquired under the Act of June 14, 1923, Pamphlet Laws 704.

Wells and springs, not being specifically included in the definition of the term "water rights," the question arises whether wells and springs are included within the term "surface waters."

Surface waters are defined in 67 C. J. 862, section 286, as "those which fall on the land from the skies or arise in springs, and diffuse themselves over the surface of the ground following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh, and are lost by being diffused over the ground through percolation, evaporation, or natural drainage."

The same authority also states that surface water is a term which has been defined or used variously, and that a few of the definitions impose statements which would imply that it is a term appropriate to be applied to all fresh water upon the surface of the earth, not ponded, which is not that of a water course. Other definitions given are that, in its ordinary sense, it means water collected on the surface of the ground. Inasmuch as the term "or other surface waters" is used in the alternative sense with rivers, streams, natural lakes and ponds, we are of the opinion that the term "surface waters" is used in the sense of meaning waters collected on the surface of the ground.

The phrase "artesian wells" is defined in 5 C. J. 590, as a perforation or boring into the ground, deep enough to reach a subterranean body of water of which the sources are higher than the place where the perforation is made, and so force up to the surface a constant stream of water.

A "well" is defined in 68 C. J. 168, as a hole sunk or drilled into the earth to such a depth as to reach a supply of water.

In view of these definitions, we are of the opinion that artesian wells or drilled wells do not come within the definition of "surface waters," as that term is used in the Act of June 24 1939, supra.

Turning to the question of whether "springs" are within the definition of "surface waters," we find "a spring" is defined in 58 C. J. 1307, to mean "a fountain of water; a place where water by natural forces issues from the ground; a place where water comes naturally to the surface of the ground and flows away; * * * *the term is said to be correctly used to denote the natural source of water supply.*" However, we do not consider that springs are, in all cases, excluded from the terms of the above act, but are of the opinion that they are within the terms of the act, where a stream is created by a spring, which stream flows in a natural channel, and without the act where a spring is diffused over the ground and follows no defined course or channel.

In 67 C. J. 675, §2, it is said:

> * * * *In the absence of statutory regulations or private agreements, all waters are, in contemplation of law, regarded as either flowing or percolating.* The former consists of those bodies, such as lakes or ponds, and streams, which are upon or beneath the surface of the earth, and whose boundaries and courses are well defined and reasonably ascertainable, and whose existence is not of a temporary or ephemeral character. All other waters are percolating waters. * * * (Italics ours.)

In 67 C. J. 836, §252, it is said:

> The general rule vesting the ownership of percolating waters in the owner of the land has been held not to apply to the waters of an artesian basin underlying the lands of several owners * * *.

In 67 C. J. 835, §251, it is said:

> * * * A spring which does not constitute the source of a watercourse, the flow of its waste or surplus being subterranean and concealed and a matter of uncertainty as to direction and volume, belongs to the owner of the land, who may appropriate and use its entire flow, subject to contract or easement rights that may exist in others, even where the waste spreads over the surface for some distance and onto the land of the adjoining owner before going underground. * * *

In the case of Brown *v.* Kistler et al., 190 Pa. 499 (1899) it was said by the lower court, on page 500:

> * * * It is the law that water that is in the earth and finds its way through the soil by percolating or seeping, and has

> not a defined flow in a stream either underground or above the ground is absolutely the property of the man who owns the land in which that water is found; he has the same right to it as he has to anything else in the ground. But where there is a defined stream, whether on or below the surface, a flow of water that is visible, a channel as it has been called in this case, a gutter in which it flows, and it passes through the lands of one to the lands of another below him, there the rule is different; * * *

In 67 C. J. 834, 835, §250, it is said:

> In the absence of express contract or *positive legislation* pertinent and contrary thereto, percolating water existing in the earth is regarded as a part of the soil in which the person owning the land has a property right, * * *. (Italics ours.)

We call attention to section 9 of the act of 1939, supra, which reads as follows:

> Section 9. All public water supply agencies heretofore or hereafter incorporated under the laws of the Commonwealth of Pennsylvania and holding a permit issued by the board under the provisions of this act, shall have the power and may exercise the right of eminent domain as respects the appropriation of the water and the water rights authorized by said permit and land covered by said waters: Provided, however, That such right shall not apply to *private spring and private water supplies.* (Italics ours.)

We are, therefore, of the opinion that springs may or may not come within the terms of the act, depending upon whether or not they are flowing waters or percolating waters; it being understood that the term "percolating waters" includes all waters that pass through the ground beneath the surface of the earth, without a definite channel and not shown to be supplied by a definite flowing stream.

Your second question is:

> 2. Are industrial concerns, which incidentally supply water in the community in which they are located under a certificate of public convenience, affected by this act?

Section 1 of the Act of May 28, 1937, P. L. 1053, known as The Public Utility Law, 66 PS §1101, reads in part as follows:

> (17) "Public Utility" means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:
>
> * * * * *

> (b) Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation;

A certificate of public convenience granted under the circumstances set forth in your second question is evidence of the fact that the industrial concern is a public utility, within the meaning of the Public Utility Law. In the event the industrial concern is a corporation, it then falls within the definition of a "Public Water Supply Agency," which is defined in section 1, (b) of the Act of 1939, as follows:

> (b) "Public water supply agency" shall mean *any corporation* * * * now existing or hereafter incorporated under the laws of the Commonwealth of Pennsylvania, vested with the power, authority, right or franchise to supply water to the public in all or part of any municipality or political subdivision of the Commonwealth of Pennsylvania.

The answer to your second question, therefore, is that industrial concerns which are corporations fall within the terms of the act of 1939.

Your third and fourth questions read:

> 3. Should water companies, purchasing their supply of water from other water companies or municipalities, file a statement pursuant to section 3 of the act?
>
> 4. Should water companies file a statement pursuant to section 3 of the act when their supply is purchased from an industrial concern?

These two questions are answered together, in view of their similarity. Assuming that water companies mentioned in your questions, come within the meaning of a "public water supply agency," as hereinbefore defined, no exemption appears in the act which would eliminate them from the duty of filing a statement as required in section 3 of the act of June 24, 1939, supra. On the contrary, it would appear to be the intent of the legislature to bring such companies within the terms of the act in order to ascertain whether they are exercising rights granted in their charters, and whether the acquisition of water rights has been followed by an actual taking, as set out in section 2 of the act.

Attention is called to the following clause in the preamble of the act of June 24, 1939, supra, which reads:

> Whereas, The public interest requires that sources of water supply appropriated or acquired but not used or not reasonably necessary for future needs should be available for appropriation or acquisition by others requiring such sources.

Water companies which have acquired rights and are not exercising them, such as your questions assume, should file a statement in order that the Water and Power Resources Board may possess this information.

Your fifth question reads:

> 5. Should individuals file statements under section 3 of the act, when such individuals serve water to the public under a certificate of public convenience?

Individuals do not fall within the definition of a "public water supply agency," as hereinbefore set forth. Therefore, individuals do not come within the terms of the act.

Your final question, unnumbered, which we shall designate No. 6, refers to permits granted by the Board pursuant to sections 4, 5, 6, and 7 of the Act of April 8, 1937, P. L. 258, 32 PS §§603-609, which was repealed by the act of 1939, supra. Your question asks whether or not these permits have been voided by the 1939 act. Section 2 of the act of 1939, supra, reads as follows:

> Section 2. Any acquisition of water rights heretofore acquired by any public water supply agency, which acquisition has not been followed by an actual taking from the source acquired either heretofore or within a period of one year after the effective date of this act, is hereby declared null and void and of no effect to the extent required to make water rights from such source available for acquisition under the terms of this act.

Therefore, permits heretofore acquired are null and void which have not been followed by an actual taking, within a period of one year from the effective date of the act, i. e., June 24, 1939.

As to the permits which were issued, and which permits were followed by an actual taking of the water from the source acquired, such public water supply agency should have, within one year after the effective date of the act, i. e. June 24, 1939, produced to the Water and Power Resources Board the information set forth in section 3 of the act of 1939, supra, which reads as follows:

> *Section 3. No acquisition of water rights from a source of supply by any public water supply agency shall be effective to prevent the acquisition of water rights from such source of supply in the future* under the terms of this act, unless, within one year after the effective date of this act, the public water supply agency shall have produced to the board the record upon which such acquisition is founded or a statement of the facts relied upon to show that such acquisition has been lawfully accomplished, and shall have filed in the office of the board, duly certified and acknowledged, transcripts of corporate or other action or proceeding, or

> statement of facts or records relied upon as the basis of a claim of acquisition of water rights, and a sworn statement of an estimate of the amount of water reasonably necessary from said source of water supply for present purposes and future needs, and also such other or additional information as the board may deem necessary: Provided, That prior compliance with the provisions of the Act of 1937, Pamphlet Laws 258, No. 64, by any public water supply agency shall be deemed to be a full meeting of the requirements of this section of this act. (Italics ours.)

The rights under the permits have been lost if these requirements were not fulfilled within one year from June 24, 1939.

Going a step further, and assuming that the requirements of sections 2 and 3, supra, have been complied with, we are of the opinion that the answer to your question is found in 37 C. J. 214, §68, which reads as follows:

> Section 68. Effect of Repeal. As in the case of statutes generally, the repeal of a statute or ordinance, without a saving clause as to existing rights, takes away all rights and remedies given by the repealed statute or ordinance and defeats all pending proceedings for its enforcement, and relieves a person against whom a license or occupation tax has accrued from liability for its payment. * * *
>
> All the privileges permitted by the license, and all the protection given thereby, although yet unexpired, are generally cancelled and revoked by the repeal of the law which authorized its grant, *unless the license, although obtained under the repealed law, is such a license as is required by the new law.* (Italics ours.)

We are, therefore, of the opinion that those licenses or permits are, and will be, in full force and effect, which have been followed by an actual taking of the water, where the licensees have supplied, within one year from June 24, 1939, the information required in the act of 1939.

To summarize, we are of the opinion, that:

1. Wells, whether drilled or artesian, do not come within the terms of the Act of June 24, 1939, P. L. 842, 32 PS §631.

Springs may or may not come within the terms of the Act of 1939, supra, depending upon whether or not they are flowing waters or percolating waters; the former coming within the act and the latter without the act.

2. Industrial concerns which are corporations come within the terms of the act of 1939.

3. Water companies purchasing their supply of water from other water companies or municipalities, must file a statement under the terms of the act of June 24, 1939, supra.

4. Water companies purchasing their supply of water from industrial concerns must file a statement, under the terms of the act of 1939.

5. Individuals do not come within the terms of the act of 1939.

6. (a) Permits are voided which were not followed by an actual taking within one year from June 24, 1939.

(b) In those cases where permits were followed by an actual taking of the water, a statement should have been filed within one year after June 24, 1939, in order to prevent the loss of such water rights from said source of supply.

(c) In those cases where permits have been followed by an actual taking, and a statement has been filed, no additional permit is needed, the permits granted under the Act of April 8, 1937, P. L. 258 being in full force and effect.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 362

State government—State employes in reserve component of United States armed forces—Military service during vacation—Effect on pay.

If a State officer or employe who is a member of a reserve component of the United States Army, Navy, or Marine Corps renders his military service while on his regular vacation, he is entitled to his pay both as a State officer or employe and as a reserve officer, even though his pay received from services rendered as a reserve officer at any time other than during his regular vacation period equals or exceeds his regular pay as a State employe.

Harrisburg, Pa., August 6, 1940.

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

Sir: We have your recent communication wherein you ask us to review Formal Opinion No. 314 issued by this department under date of January 30, 1940. You specifically direct our attention to the third conclusion contained in this opinion, which states:

> If a State officer or employe who is a member of such a Reserve Component renders his military service while on his regular vacation, he is entitled to both his pay as a State officer or employe and as a reserve officer, *but if his pay*

received for services rendered as a reserve officer from the Federal Government at any time other than during his regular vacation period, equals or exceeds his regular pay as a State employe, then he is not entitled to his State pay but merely to his fifteen day leave of absence in any one year. (Italics ours.)

In arriving at this conclusion just quoted, we based that portion of it which we have italicized upon the provisions of Paragraph 5 of Memorandum No. 11, issued by The Adjutant General of this Commonwealth under date of May 11, 1938, (which is set forth at the bottom of page 167 of this volume). Briefly, the provisions of the Adjutant General's memorandum referred to "provides that civil employes in the employ of the Commonwealth are entitled to either their military or civil pay, depending on which they choose to elect; providing, however, that they are entitled to only one pay unless the military service is rendered during their authorized vacation period, in which case the employe or employes would be entitled to both civil and military pay during such period."

At the time we considered the matter set forth in our opinion referred to, supra, and arrived at the conclusions contained therein, we were under the misapprehension, as we have subsequently learned, that the provisions of The Adjutant General's memorandum, supra, were binding upon and controlled the members of the Reserve Component of the United States Army, Navy, or Marine Corps, as well as the members of the Pennsylvania National Guard. A recent study of this matter, however, reveals that there was no legal authority for the issuance of Paragraph 5 of The Adjutant General's Memorandum No. 11 of May 11, 1938, and that, therefore, it is a nullity to the extent that it applies to Federal pay.

Accordingly, Formal Opinion No. 314 is hereby modified so that conclusion No. 3 will read as follows:

If a State officer or employe who is a member of such a Reserve Component renders his military service while on his regular vacation, he is entitled to * * * his pay as a State officer or employe * * *

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 363

Leases—Collection of rentals—Beds of navigable streams—Act of June 25, 1913, P. L. 555; April 14, 1937, P. L. 297; May 25, 1939, P. L. 227.

Harrisburg, Pa., August 28, 1940.

Honorable Roger W. Rowland, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have your letter listing eight active leases upon which the Department of Revenue is collecting the rentals called for in the respective leases. One of the lessees, the American Oil Company, has a lease on the bed of the Monongahela River immediately adjacent to the terminal at Hays, Pennsylvania, covering 640 square feet of river bed, for which it pays the Commonwealth a yearly rental of $25.60.

You call our attention to the Act of April 14, 1937, P. L. 297, 32 PS §610, which provides for the leasing of land within the bed of streams, lakes and other bodies of water, wholly or partly within, or forming part of, the boundary of the Commonwealth, when such land is owned by the Commonwealth. In addition to the lease held by the American Oil Company, above referred to, we assume that the other seven leases mentioned in your letter were also entered into under authority of the above mentioned act.

You further call to our attention that the Act of April 14, 1937, P. L. 297, supra, was repealed by the Act of May 25, 1939, P. L. 227, 32 PS §610, and ask us to advise you whether these active leases should be canceled because the act under which they were authorized has been repealed or whether you should consider these leases as still in full force and effect.

If the Act of April 14, 1937, P. L. 297, above referred to, had been repealed absolutely by the Act of May 25, 1939, P. L. 227, supra, the leases referred to in your letter would not have fallen with it. The rule has frequently been laid down that contract rights vested in individuals by the authority of a statute cannot be divested by its repeal. They are protected under Section 10, of Article I of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contract. Hatfield Township Road, 4 Yates, 392 (1807) Tilghman, C. J.; Commonwealth *v.* Alliance Coal Mining Company, 4 Dauphin County, 220 (1883); White *v.* Meadville, 177 Pa. 643 (1896).

However, the repealing Act of May 25, 1939, P. L. 227, supra, contains the following provision:

> All leases granted under the provisions of said act shall continue in force until terminated or revoked in accordance with the terms thereof, but no such lease shall be renewed or extended.

This is simply the legislative declaration of the effect the repeal of the Act of April 14, 1937, P. L. 297, supra, had on the leases in question. Under the status of this legislation, the leases referred to in your letter remain in full force and effect for their respective terms, but they may not be renewed or extended, and may sooner be terminated for noncompliance with any of the terms of the lease or with any of the provisions of the act under which they were authorized.

In a supplemental letter dated May 13, 1940 you inform us that upon checking with the Department of Revenue you find, in addition to the eight leases referred to in your former letter, that department has twenty-four other leases which it considered terminated; that in eighteen of said leases the lessees had made no payments of rental after the first year; and that these eighteen leases contain a ninety-day cancellation clause, but that the leases have not been canceled by either party.

You further inform us that the other six "leases" are in the nature of temporary lease agreements upon which no rental has ever been paid. From both of your letters it now appears there are eight active leases, so-called, upon which the lessees have paid the rental stipulated therein, and twenty-four nonactive leases, that is, leases upon which the rental has not been paid, six of them being what you describe as temporary lease agreements.

We shall first direct our attention to the six so-called temporary lease agreements, one of which you have submitted with your supplemental letter. These instruments are in no sense leases. They are agreements to execute leases. Until a formal lease is executed, the prospective lessee agrees to report each month to the Secretary of Property and Supplies the amount of gravel and sand dredged from the bottom of the Allegheny River, and to pay the Commonwealth through the Department of Revenue a royalty or fee amounting to ten per centum of the market price of such gravel and sand as may be determined by the Commonwealth. The temporary lease agreement which you have submitted to us bears date of March 26, 1936, which is prior to the passage of the Act of April 14, 1937, supra, and we assume the other five temporary lease agreements referred to in your supplemental letter also bear a date prior to the passage of said act. This act is not retroactive and therefore these temporary lease agreements do not rest on the provisions of said act.

The right of the Commonwealth to enter into leases and charge a rental for dredging sand and gravel from the beds of the navigable streams of the Commonwealth, such as was attempted by the execution of these six so-called temporary lease agreements, was before the Dauphin County Court in the case of McGrady-Rodgers Co.

et al. *v.* Commonwealth, 43 Dauphin County Reports, 275. In that case the plaintiffs had been engaged for a number of years in the business of dredging for sand and gravel in certain navigable rivers of the Commonwealth. The Water and Power Resources Board and the Secretary of Property and Supplies undertook to require the plaintiffs to enter into leases and to pay a rental to the Commonwealth for carrying on the business in which they had previously been engaged, and upon their failure to enter into leases, prosecution was threatened. A bill in equity was filed to restrain the Commonwealth's officers from interfering with the plaintiffs in the prosecution of said business. The court held that the dredging and removal of sand and gravel from the beds of navigable rivers of the Commonwealth between low water marks is a public right which the Commonwealth has recognized and encouraged from time immemorial; and that the regulation or licensing of those so engaged and fixing a charge for the same, or exacting a compensation for the sand and gravel so removed, is exclusively within the power of the legislature and requires express statutory authority; and that since there was no such express statutory authority an injunction should issue, as prayed. Although this case was not appealed, we feel constrained to follow it as a binding precedent. We are, therefore, of the opinion that there is no authority in law supporting these six so-called temporary lease agreements and that they are void.

In your supplemental letter you ask five specific questions which are applicable to the eighteen so-called nonactive leases referred to therein, and the eight active leases referred to in your first letter, which we shall answer in their order without repeating them verbatim. We infer from your letter that these twenty-six leases were entered into under the authority of the Act of April 14, 1937, P. L. 297, 32 PS §610.

You inquire whether you are to consider all of the twenty-six leases active, in view of the Act of May 25, 1939, P. L. 227, 32 PS §610, which repealed absolutely the Act of April 14, 1937, P. L. 297, 32 PS §610. What we have heretofore said in discussing the eight leases referred to in your former letter applies equally to all of the twenty-six leases; they must be considered active according to their terms unless and until terminated, as hereinafter set forth.

Your second question is whether or not the Department of Revenue shall collect the rentals due the Commonwealth on these twenty-six leases in accordance with their respective terms. Since they are valid and subsisting contracts, the rentals due on each lease should be collected by the Department of Revenue so long as it is in effect according to its terms, or until termination in accordance therewith, or as herein specified. However, as the amount of money involved

in each case may be small, every effort should be made to collect the rentals due thereon without suit. After every effort has been made by the Department of Revenue to collect the accrued rentals, all cases in which the rental, or any part thereof, have not been collected should be referred by the Department of Revenue to the Department of Justice for such further action as it may determine is proper under the circumstances.

In your third question you ask whether, if the leases are canceled by mutual consent, the lessees must remove from the river beds and streams the equipment which they have installed, in view of the Act of May 25, 1939, P. L. 227, supra, repealing the Act of April 14, 1937, P. L. 297, supra. What we have heretofore said points the answer to this question. In the event the twenty-six leases, or any of them, are terminated by mutual consent, the situation reverts to that existing prior to the passage of the Act of April 14, 1937, P. L. 297, supra.

In Informal Opinion No. 533, directed to the Chairman of the Water and Power Resources Board, under date of February 18, 1935, we held that under Section 2 of the Act of June 25, 1913, P. L. 555, 32 PS §682, anything which operates to alter the cross section of any stream or to change the course or current thereof is prohibited; and, if the equipment which the respective lessees, or any of them, have installed in the bed of any stream in the opinion of said board has this effect, it may prohibit the same unless and until a proper application is made for a permit as provided by said act and a permit issued as therein provided.

If the Water and Power Resources Board, under the authority vested in it by Section 2 of the Act of June 25, 1913, P. L. 555, supra, should determine that the equipment installed pursuant to said leases does not constitute an obstruction, or operate to alter the cross sections or affect the flow of the stream, then it could issue a permit to the owner in the manner pointed out in Informal Opinion No. 615 dated March 10, 1936. In that event the equipment need not be removed.

You further inquire whether these twenty-six leases, or any of them, may not be canceled, and instead of the Water and Power Resources Board requiring the removal of any property of the lessees in the bed of the stream, it might permit the same to remain under the same arrangements as existed prior to the passage of the Act of April 14, 1937, P. L. 297, supra. This question has been fully covered in what we have heretofore said and does not require specific consideration.

Lastly, you inquire, if our answer to your former inquiry will be that these twenty-six leases were not affected by the repeal of the

Act of April 14, 1937, P. L. 297, supra, may your department as one of the parties, with the consent of the respective lessees, cancel said leases? As we have heretofore pointed out, these leases, or any of them, may be canceled by mutual consent.

We are therefore of the opinion that:

1. The six so-called temporary lease agreements do not depend for their validity upon the Act of April 14, 1937, P. L. 297, 32 PS §610, having been entered into prior to the passage of said act; and they are not affected by its repeal. However, as heretofore pointed out, they were entered into without authority of law and are void. No effort should be made to collect any rentals thereunder.

2. The twenty-six leases entered into by your department pursuant to the Act of April 14, 1937, P. L. 297, 32 PS §610, are not affected by the repeal of said act, but may be continued in full force and effect according to their respective terms and until terminated by your department for breach of conditions or by mutual consent as hereinbefore set forth. They may not be renewed or extended beyond their present terms. It is the duty of the Department of Revenue to collect the rentals called for in the respective leases so long as they remain in force and effect as any other debt due the Commonwealth is collected.

3. The aforesaid twenty-six leases may be canceled by mutual consent, in which event the situation would revert to that existing prior to the passage of the Act of April 14, 1937, P. L. 297, supra. If any or all of said leases are canceled, and if the Water and Power Resources Board should determine that the property of any lessee in the bed of any stream does not constitute an obstruction or operate to alter the cross sections or affect the flow of said stream, said property may remain upon permit issued to the owner by the Water and Power Resources Board, as pointed out in Informal Opinion No. 615, dated March 10, 1936.

4. The effect of the repeal of the Act of April 14, 1937, P. L. 297, by the Act of May 25, 1939, P. L. 227, 32 PS §610, leaves the situation with reference to dredging for gravel, sand, or coal in the beds of the navigable streams of this Commonwealth as it was under the Act of June 25, 1913, P. L. 555, 32 PS §682.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WALTER E. GLASS,
Deputy Attorney General.

OPINION No. 364

Fish—Powers of fish wardens—Entry upon private posted land—Penal Code of 1939, sec. 954—Constitution, art. I, sec. 8, and article XVI, sec. 3.

1. Fish wardens are justified, in the performance of their duties under The Fish Law of May 2, 1925, P. L. 448, in entering upon privately owned land which has been posted pursuant to The Penal Code of June 24, 1939, P. L. 872, when they have reasonable cause to believe that the fish laws are being violated.

2. Article I, sec. 8, of the Constitution of Pennsylvania, providing that the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, does not extend to lands or premises.

3. Since laws pertaining to the protection and preservation of fish are within the proper domain of the police power of the State, and since Article XVI, sec. 3, of the Constitution of Pennsylvania provides that the exercise of the police power of the State shall never be abridged, section 954 of The Penal Code of June 24, 1939, P. L. 872, should not be construed as abridging the powers of fish wardens.

Harrisburg, Pa., September 13, 1940.

Honorable C. A. French, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request to be advised whether or not a fish warden was within his rights, under Section 256 (g) of the Act of May 2, 1925, P. L. 448, as amended, 30 PS §256, known as the Fish Law of 1925, in entering upon land owned privately, and posted under the Act of June 24, 1939, P. L. 872, 18 PS §954, on which land he had reason to believe violations of the Fish Law were occurring.

Section 256 of the Act of May 2, 1925, P. L. 448, supra, reads as follows:

> A fish warden shall have power:
>
> (a) To enforce all the laws of the Commonwealth relating to fish; (b) to execute all warrants and search-warrants for the violation of the fish laws; (c) to serve subpoenas issued for the examination, investigation, and trial of all offenses against the laws relating to fish; (d) to carry firearms or other weapons in the performance of his duties; (e) to search without warrant any boat, conveyance, vehicle, fish-box, bag, coat, basket, or other receptacle for fish, when he has reason to believe that any provision of any law of this Commonwealth relating to fish has been violated; (f) to seize and take possession of any and all fish which may have been caught, taken, or killed at any time, in any manner, or for any purpose, or had in possession or under control, or have been shipped or about to be shipped contrary to the laws of this Commonwealth—fish so seized shall be disposed of in any manner as the Commissioner may direct; (g) *to*

> *enter upon any land or water in the performance of his duty;* (h) to demand and secure proper assistance in case of emergency; (i) to purchase fish for the purpose of securing evidence. (Italics ours.)

Section 270 of the Act of May 2, 1925, P. L. 448, supra, requires fish wardens to *arrest with or without warrant* any person violating any provisions of the act.

Section 2706 of the Act of April 9, 1929, P. L. 177, known as The Administrative Code of 1929, defines the powers of fish wardens, and states in part as follows:

> (g) To enter upon any land or water in the performance of his duty; * * *

At common law, no trespass to property is a crime unless a breach of the peace results.

In 63 C. J. Section 300, under the title "Trespass," it is said:

> No trespass to property is a crime at common law unless it is accompanied by or tends to create a breach of the peace. This is so, although the act be committed forcibly, wilfully, or maliciously. Something more must be done than what amounts to a mere civil trespass, expressed by the terms vi et armis; the peace must be actually broken or the act complained of must directly and manifestly tend to it, as being done in the presence of the owner, to his terror or against his will. But when a trespass is attended by circumstances constituting a breach of the peace, it becomes a public offense subject to criminal prosecution.

However, the General Assembly of Pennsylvania passed the Act of April 14, 1905, P. L. 169, 18 PS §3311, which was repealed and substantially reenacted by Section 954 of the Act of June 24, 1939, P. L. 872, 18 PS §4954, known as The Penal Code, which reads as follows:

> Whoever wilfully enters upon any land, which the owner has caused to be prominently posted with printed notices that the said land is private property, and warning all persons from trespassing thereon, under the penalties provided in this section, shall, upon conviction thereof in a summary proceeding, be sentenced to a fine not exceeding ten dollars ($10), together with the costs of prosecution, and in default of payment of said fine and costs, shall be committed to jail for one (1) day for each dollar of fine imposed.

The act of 1905, supra, which was repealed, but substantially reenacted in The Penal Code, was under consideration in the Superior Court in the case of Commonwealth *v.* Burford, 38 Pa. Super. Ct. 201 (1909), aff'd, 225 Pa. 93 (1909), where the court on page 204 said:

> * * * It requires no resort to artificial rules of construction to arrive at the conclusion that what the legislature here declared to be unlawful was a wilful trespass upon land which had been posted by the owner in the manner indicated by the statute. *It certainly was not the legislative intention to prohibit every entry, whether with or without right, upon land which had been thus posted; and give to the soil a sacred character.* In seeking the legislative intention it would not be reasonable to confine the inquiry to the one clause of the section made up of these words, "It shall be unlawful for any person wilfully to enter upon any land," which has been posted. To do this would be to hold that the owner could not enter upon his own land, nor make any contract permitting any other person to so enter. The notices which the act requires to be posted must warn "all persons from trespassing" upon the lands. Considering the section as a whole its meaning is free from doubt. When the owner has posted upon the land notice warning all persons against trespassing thereon, an intentional trespass shall render the trespasser subject to the penalty imposed by the statute. When thus read the statute contains nothing of which its title did not give that notice required by the constitution. The statute certainly contains nothing from which could be implied a legislative intention to do anything but make subject to a penalty such things as were and always had been trespasses upon land. *The effect of the statute was to declare to be a public wrong and subject to a penalty a thing which had until that time been a private wrong for which the party injured had a remedy by private action.* This act did not change the rights of the owner of the land, nor deprive him of any power to enter into contracts giving to other persons the right to enter upon his holdings, nor can it have any effect upon the rights acquired under any contract with regard to said lands, into which he may enter. * * * (Italics ours.)

The act of 1905 was also under consideration in the case of Commonwealth *v.* Albaugh, 13 D. & C. 401 (1929), in which case the court on page 407 said:

> The word "wilful" used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose [on the part of the defendant] *to do it without authority;* careless whether he has the right or not; *in violation of law;* and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute: * * * (Italics ours.)

The act of 1905, supra, was before the Superior Court in the case of Commonwealth *v.* Peterman, 130 Pa. Super. Ct. 497 (1938), in which the court, on page 500, said:

> * * * The intendment of this statute was to impose a penalty for a wilful trespass—an entry upon land without a lawful excuse. * * *

In 63 C. J. section 311, pages 1080 and 1081, it is said, in speaking of the word "wilful" or "wilfully":

> * * * it includes an idea of an "act intentionally done with a wrongful purpose."

It is our opinion that, under the circumstances as you have stated them, the fish warden was not acting without authority, nor in violation of the law nor for a wrong purpose, but on the contrary, was exercising the authority granted to him by the General Assembly for the purpose of performing the duties imposed upon him by the General Assembly.

The Constitution of the Commonwealth of Pennsylvania in article I, section 8, reads as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Does this constitutional provision affect the powers given by the General Assembly to the fish warden? This question has not been decided by the courts, with reference to the Fish Law of 1925, but was before the courts with reference to the Act of July 2, 1895, P. L. 428, 37 PS §121. Section 4 of this act, 37 PS §142, provides that building inspectors, health officers, fire marshals and police officers shall, at all times, have access to every public lodging house.

In the case of Commonwealth *v.* Muir, 180 Pa. 47 (1897), it was held that this authority was constitutional as a legitimate exercise of the police power of the State. That the constitutional provision with regard to unreasonable searches was raised against the act, may be seen from the opinion in the Superior Court, Commonwealth *v.* Muir, 1 Pa. Super. Ct. 578, 580.

The Pennsylvania constitutional provision against unreasonable searches and seizures is similar to the Fourth Amendment to the Constitution of the United States, and while this amendment has no application to State process (Commonwealth *v.* Dabburio, 290 Pa. 174 (1927)), we believe it pertinent to state that the court said in the case of United States *v.* McBride, 287 F. 214 (S. D. Ala. 1922), aff'd, 284 F. 416 (C. C. A. 5th, 1922) cert. denied, 261 U. S. 614, 67 L. ed. 827 (1923), at page 217 of 287 F.:

> When the Constitution says the people shall be secure in their persons, houses, papers, and effects against unreason-

> able searches and seizures, it does not mean to say that the lands of a person shall not be searched, nor that the premises of a person shall not be searched, because we all know that there is a very great difference between one's house and one's land or premises, and the word "house" does not *include lands or premises.* We therefore see that the framers of the Constitution used a restricted word, the word "house" in guaranteeing against unreasonable searches. I take it there *is nowhere any provision against an officer searching one's land or premises without having a warrant* authorizing him to do so. (Italics ours.)

We are of the opinion that this reasoning is applicable to article I, section 8, of the Pennsylvania Constitution.

Article XVI, section 3, of the Constitution of Pennsylvania reads in part as follows:

> * * * the exercise of the police power of the State shall never be abridged * * *.

Laws pertaining to the protection and preservation of fish have been recognized as within the proper domain of the police power of the State. See Lawton *v.* Steele, 152 U. S. 133, 38 L. ed. 385 (1894); Geer *v.* Connecticut, 161 U. S. 519 (1896); and Commonwealth *v.* McComb, 39 Pa. Super. Ct. 411 (1909), 227 Pa. 377 (1910).

It is our opinion that the legislature, in passing section 954 of the Act of 1939, P. L. 872, did not intend to abridge the powers of the fish wardens and did not intend to make it practically impossible to enforce the fish laws, which would be the effect if every owner of land could, by posting, make his land a sanctuary for violators of the fish laws.

Nevertheless, the authority granted to the fish wardens should and must be exercised in a reasonable manner and should not be used as a means of harassing and annoying landowners, nor abused to the extent that the fish wardens' activities become a nuisance.

We are, therefore, of the opinion, and you are accordingly advised that fish wardens are justified in the performance of their duties in entering upon privately owned land which has been posted, pursuant to section 954 of the Act of June 24, 1939, P. L. 872, 18 PS §4954, when they have reasonable cause to believe that the fish laws are being violated.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 365

Criminal procedure—Bail in burglary cases—Right of alderman or justice of the peace to accept bail—Offense formerly constituting breaking and entering—The Penal Code of June 24, 1939, sec. 901—Criminal Procedure Act of March 21, 1860.

A person accused of burglary as defined in section 901 of The Penal Code of June 24, 1939, P. L. 872, may not enter bail before an alderman or justice of the peace, but only before the Supreme Court, a court of common pleas, or a judge thereof, or the mayor or recorder of a city, as provided in the Criminal Procedure Act of March 31, 1860, P. L. 427, sec. 7, regardless of whether, prior to enactment of The Penal Code, the offense charged would have constituted burglarly or breaking and entering.

Harrisburg, Pa., September 16, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg Pennsylvania.

Sir: You have requested us to advise you whether an alderman or justice of the peace may accept bail in cases now defined as burglary, the facts of which, prior to the repeal of section 2 of the Act of April 22, 1863, P. L. 531, No. 526, and the Act of March 13, 1901, P. L. 49, No. 16, and the enactment of The Penal Code, the Act of June 24, 1939, P. L. 872, would have constituted the offense of "breaking and entering."

The Act of April 22, 1863, P. L. 531, No. 526, supra, was amended by the Act of March 13, 1901, P. L. 49, supra, 18 PS §3042. Both of these statutes were repealed by section 1201 of The Penal Code, the Act of June 24, 1939, P. L. 872, 18 PS §5201. As amended, supra, section 2 of the Act of April 22, 1863, P. L. 531, read:

> If any person shall in the day time break and enter any dwelling, house, shop, warehouse, store, mill, barn, stable, outhouse or other building, or wilfully or maliciously, either by day or by night, with or without breaking, enter the same with intent to commit any felony whatever therein, the person so offending shall be guilty of felony, and on conviction be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment by separate or solitary confinement at labor not exceeding ten years.

It will be observed, therefore, that the section above quoted defined two criminal offenses, viz., "breaking and entering" and burglary, the elements of which were different.

The Penal Code, supra, in section 901, 18 PS §4901, however, merged the two offenses into one, to wit, burglary, which it defines as follows:

> Whoever, at any time, wilfully and maliciously, enters any building, with intent to commit any felony therein, is guilty

> of burglary, a felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding ten thousand dollars ($10,000), or to undergo imprisonment, by separate or solitary confinement at labor, not exceeding twenty (20) years, or both.

The Act of March 31, 1860, P. L. 427, section 7, 19 PS §51, provides:

> In all cases the party accused, on oath or affirmation, of any crime or misdemeanor against the laws, shall be admitted to bail by one or more sufficient sureties, to be taken before any judge, justice, mayor, recorder or alderman, where the offense charged has been committed, except such persons as are precluded from being bailed by the constitution of this commonwealth: Provided also, That persons accused, as aforesaid, of murder or manslaughter, shall only be admitted to bail by the supreme court or one of the judges thereof, or a president or associate law judge of a court of common pleas. Persons accused, as aforesaid, of arson, rape, mayhem, sodomy, buggery, robbery or burglary, shall only be bailable by the supreme court, the court of common pleas, or any of the judges thereof, or a mayor or recorder of a city.

The foregoing Act of March 31, 1860 clearly states that a party accused of burglary shall be bailable *only* by the supreme court, the court of common pleas, or any of the judges thereof, or a mayor or recorder of a city.

It is our opinion, therefore, and you are accordingly advised, that any person accused of burglary, as defined in section 901 of The Penal Code, may not enter bail before an alderman or a justice of the peace.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 366

Schools—Transportation of pupils—Jurisdiction over school busses—Vehicles included—Vehicle Code of 1929, sec. 828 (a), as amended—College or universities—Nurses colleges—Industrial schools—Private schools—Transportation to extra-curricular activities—Jurisidiction of Public Utility Commission—Public Utility Law of 1937, sec. 7, as amended.

1. College, university, or nursing college students are not "school children" within the meaning of section 828 (*a*) of The Vehicle Code of May 1, 1929. P. L. 905, as amended by the Act of June 27, 1939, P. L. 1135, defining school buses as vehicles of a specified type used for the transportation of school children, but industrial school or private school students are.

2. A bus neither owned by nor used under contract with a school or school district, but used exclusively for the transportation of school children under contract with their parents, is not a school bus within the meaning of section 828 (*a*) of The Vehicle Code of 1929, nor is it a contract carrier subject to the jurisdiction of the Pennsylvania Public Utility Commission because of the excluding clause in section 7 of the Public Utility Law of May 23, 1937, P. L 1053, as amended by the Act of June 15, 1939, P. L. 387.

3. Buses operating on contract with either public or private schools, so long as they are used for the transportation of school children, are subject to the laws and regulations respecting school buses.

4. Where extra-curricular transportation (such as transportation to athletic contests) is provided under contract with and paid for by a school or school district, and those transported are school children exclusively, the person providing transportation is exempt from the jurisdiction of the Public Utility Commission but is subject to the laws and regulations governing school buses; if, however, the contract is not with nor paid for by a school or school district, the buses, under the same general circumstances, are not school buses, nor are they subject to the jurisdiction of the Pennsylvania Public Utility Commission.

5. Transportation of school children for compensation, other than to and from school, may be rendered by buses operating under commercial registration, and such transportation is not within the jurisdiction of the Pennsylvania Public Utility Commission if the buses are used exclusively for such purposes.

Harrisburg, Pa., September 17, 1940.

Honorable William J. Hamilton, Jr., Secretary of Revenue, Harrisburg, Pennsylvania.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg, Pennsylvania.

Sirs: You have requested us to advise you what are, and what are not, school busses, within the meaning of Section 828 (a) of The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, 75 PS §436(a). The cited legislation follows:

> (a) "School Bus," for the purpose of this section, is any vehicle registered as a commercial vehicle, motor bus, or motoromnibus, or any vehicle having a lineal seating space, including the space for the operator, of more than one hundred (100) inches, and owned by, or used under contract with, any school or school district for the transportation of school children: Provided, That said school bus shall not include motor buses operated by common carriers holding a certificate of the Public Utility Commission, who also oper-

ate such motor buses over routes approved by such commission: And provided further, That such buses comply with the safety regulations of that commission and the State Council of Education of Pennsylvania.

We shall state and answer your questions seriatim.

I

Are busses owned or leased by colleges or universities, school busses?

It will be noted that the definition of school busses, supra, is contained in The Vehicle Code; but the classification of such vehicles is confined to those used for transporting school children.

For a definition of school children we must rely upon common knowledge, understanding and sense, for no statutory definition of the term is available. Such knowledge, understanding and sense tell us that school children are infants under twenty-one years of age who are enrolled in and who are in attendance at any institution of learning or education in the Commonwealth, public or private, except colleges and universities.

The reason for excluding colleges and universities is twofold; first, because such institutions are clearly not part of our primary and secondary school system; and second, because colleges and universities have always been distinguished from primary and secondary schools, and still are. See the Act of June 26, 1895, P. L. 327, 24 PS §2411, et seq., since repealed; and the Act of May 7, 1937, P. L. 585, 24 PS §2421, et seq., relating to colleges and universities.

It follows, therefore, that busses owned or leased by colleges or universities are not, ipso facto, school busses; but it also follows that if such busses are used to transport school children, as hereinbefore defined, they become school busses. This leads us to the next question.

II

How should busses operating under contract with nurses colleges or industrial schools be classified?

As hereinbefore stated in our answer to question No. 1, a college is not a school within the meaning of this opinion or of the statutes under discussion. Nurses colleges, therefore, which operate busses of their own, or which have busses under contract with them, do not come within the scope of the subject legislation. In short, such busses are not school busses.

Busses operated under contract with, or owned by, industrial schools, come within the same classification as any other school bus.

That is, so long as such busses are used for the transportation of school children, as hereinbefore defined, they are school busses. This brings us to your next inquiry.

III

> How should busses carrying school children on contract with the parents of those children and not with the School Board or School District, be classified?

Necessarily, under section 828 (a) of The Vehicle Code, supra, a bus neither owned by nor used under contract with a school or school district, cannot be a school bus.

On the other hand, the Public Utility Law, the Act of May 28, 1937, P. L. 1053, as amended, 66 PS §1101, et seq., provides in section 2 (7), as amended, 66 PS §1102 (7):

> (7) "Contract Carrier by Motor Vehicle" * * * shall not include—* * * (d) any person or corporation who or which provides or furnishes transportation of school children exclusively; * * *

In view of the foregoing, busses which transport school children exclusively, under contract with such children's parents, do not come within the jurisdiction of the Pennsylvania Public Utility Commission. Nor are such busses school busses within the meaning of section 828 (a) of The Vehicle Code. This leads us to your next question.

IV

> Should busses operating on contract with private schools be placed in any different category than busses operated on contract with public schools?

Busses operating on contract with private schools, so long as they are used for the transportation of school children, as herein defined, are in the same category as those operated on contract for public schools. This brings us to your next query.

V

> The Pennsylvania Public Utility Law exempts from the jurisdiction of the Public Utility Commission, "any person or corporation who or which provides or furnishes transportation of school children exclusively;" Does the above exemption include the transportation of school athletic teams and their student followers in each or any of the following situations—
>
> (a) When the extra-curricular transportation is provided under contract with and paid for by the school district.

(b) When the extra transportation is provided under contract with and paid for by the school district.

(c) When the extra transportation is neither provided for in the contract nor paid for by the school district.

School children do not cease to be such when they become members of their school's athletic teams, or when they follow their teams as supporters. Nothing appears in the legislation herein considered which restricts the designation, "school children" to children actually at school. So long as they are school children within the meaning of the conclusions herein expressed, they remain such. Attendance at school, public or private, means enrolled and attending during school hours; it does not mean constant physical presence in school. Where could a bus transport school children except to and from school, or elsewhere? Hence, school children are such so long as they are under twenty-one years of age, and so long as they are enrolled in and are attending a public or private school, as hereinbefore stipulated.

It follows, therefore, in answer to question No. 5 (a) that if the extra-curricular transportation is provided under contract with and paid for by a school or school district, and those transported are school children, and the person or corporation performing the transportation does so for school children exclusively, such person or corporation is not within the jurisdiction of the Pennsylvania Public Utility Commission.

In answer to question No. 5 (b) we assume that by "extra transportation" you mean transportation over territory not originally contemplated at the time of the awarding of the contract by the school or school district, but transportation which is or must be paid for by the school or school district.

Upon this assumption, if the person providing the means of transportation does so for such purpose exclusively, he does not come within the jurisdiction of the Pennsylvania Public Utility Commission.

If such extra transportation, as hereinbefore dealt with in 5 (b), is neither provided for in a contract with nor paid for by a school or school district, the busses used are not school busses; and if the persons operating such busses operate them exclusively for such purpose they do not come within the jurisdiction of the Pennsylvania Public Utility Commission.

VI

May transportation of school groups for compensation other than to and from school be rendered by busses operating under commercial registration?

If by "school groups," as used in the foregoing question, you mean school children, as herein defined, and such children are transported by busses owned by or under contract with a school, as herein defined, it does not matter whether the transportation is to or from the school; and the busses used for such transportation may be under commercial registration and are not within the jurisdiction of the Pennsylvania Public Utility Commission, if they are used exclusively for such purpose. In short, they are school busses within the meaning of section 828 (a) of The Vehicle Code.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 367

Mines and mining—Solid fuels—Weighing—Act of July 19, 1935, as amended —Necessity for sale and delivery—Fuel moving between mine and yard—Necessity for using nearest available weighmaster.

1. The Act of July 19, 1935, P. L. 1356, as amended by the Act of June 24, 1939, P. L. 865, is not directed to sales of solid fuel without delivery, nor to deliveries without sale, but applies only where both sale and delivery are involved.

2. Solid fuel, as defined in the Act of July 19, 1935, P. L. 1356, as amended by the Act of June 24, 1939, P. L. 865, being transported by a mine owner from his mine to his own yard, whether within or without the Commonwealth, need not be accompanied by a weight certificate as required by said acts, unless the fuel is to be there delivered to a purchaser without prior unloading or weighing.

3. Solid fuel, as defined in the Act of July 19, 1935, P. L. 1356, as amended by the Act of June 24, 1939, P. L. 865, being transported to a mine owner's yard from his own mine, whether said yard is within or without the Commonwealth, need not be accompanied by a weight certificate, whether in one or several compartments of the conveyance, unless the fuel is being delivered to a purchaser.

4. A person delivering solid fuel to the purchaser thereof need not obtain a weight certificate from the nearest available licensed weighmaster, unless so directed by a proper official, so long as he has it weighed by some licensed weighmaster before delivery.

Statutes—Interpretation—Interchangeability of "and" and "or".

5. Where the meaning of a statute is plain and there is nothing in it to call for the substitution of "and for" "or", or of "or" for "and", the court is not at liberty to make such a substitution in construing the act.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., September 18, 1940.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Sir: You have requested our opinion upon certain questions arising under the Act of July 19, 1935, P. L. 1356, as amended June 24, 1939, P. L. 865, 76 PS §342, et seq. You inquire:

> 1. Are vehicles or vehicles and trailers, hauling solid fuel from a mine to their own yard or out of the Commonwealth required to have such vehicle or vehicle and trailer accompanied by a weight certificate while in transit on the highway? Can this be termed as "start out for delivery" as per Section 2 of this Act?
>
> 2. Are vehicles or vehicles and trailers, having several compartments hauling solid fuel from a mine to their own yard or out of the Commonwealth required to have each lot in each separate compartment of the vehicle or vehicle and trailer accompanied by a weight certificate?
>
> 3. Upon the sale of solid fuel, can a vehicle or vehicle and trailer travel the highway for any distance to a scale of their own choice, or must the solid fuel be weighed at once upon the nearest available scale operated by a licensed weighmaster?

The Act of July 19, 1935, as amended, supra, is:

> AN ACT to regulate the sale and delivery of solid fuel, * * *.

For example, the legislation in question does not apply to a gift of solid fuel. In Commonwealth *v.* Troanovitch, 25 D. & C. 471, 472, (1936), it was said of the act of July 19, 1935:

> * * * [It] could not apply to a gift of solid fuel (coal), as it relates to a *sale and delivery* of solid fuel, * * *. (Italics supplied.)

It follows, therefore, that for the regulatory statute to apply there must be a *sale* of solid fuel. Must there be also a *delivery?*

Section 2 of the Act of July 19, 1935, 76 PS §343, provides in part:

> It shall be unlawful to *sell* solid fuels excepting by weight. No person shall *sell or deliver, or start out for delivery,* * * * (Italics supplied.)

Section 3 of said statute provides in part:

> No person, *upon the sale* of solid fuel, *shall deliver, or cause to be delivered, or to be started out for delivery,* any solid fuel, without each lot, in each separate compart-

ment of any vehicle or vehicle and trailer, being accompanied by a weight certificate, issued by a licensed weighmaster, on which shall be distinctly expressed:

* * * * *

(b) The name of the *seller;*
(c) The name of the *purchaser;*

* * * * *

In all cases the weight certificate shall be delivered to the *purchaser.* (Italics supplied.)

Section 4 of said act provides, in part:

Where any person shall, * * * be unable to *deliver* solid fuel to the *purchaser* originally designated * * * he may, * * * substitute * * * another *purchaser:* * * *. (Italics supplied.)

Section 5 of the act provides in part:

Any weights and measures official * * * who finds any quantity of solid fuel ready for or in process of *delivery,* * * * shall thereupon determine the weight of the solid fuel, * * *. (Italics supplied.)

Section 7 provides in part:

* * * It shall be unlawful for any person to deliver solid fuel without a weight certificate, or to permit any diminution of the load of solid fuel before its *delivery* to the *purchaser* or *purchasers* thereof or to fail, neglect or refuse to deliver a correct and lawful weight certificate to the *purchaser* of solid fuel. (Italics supplied.)

Section 10 of the act of July 19, 1935, which exempted the sale and distribution of solid fuel to persons residing within ten miles of the point of production, from the operation of the act, with certain exceptions, was repealed by the Act of May 28, 1937, P. L. 1003.

A discussion of the interchangeableness of "and" and "or" is contained in Endlich on the Interpretation of Statutes (1888), section 305. The learned author concludes that "where the meaning of the act is plain, and there is nothing in it to call for the substitution, [of 'and' for 'or', or of 'or' for 'and'], the court, in construing the act, is not at liberty to make it."

We think the intent and meaning of the foregoing legislation are clear and free from doubt.

First, it is an act to regulate the *sale and delivery* of solid fuel. Title of Act.

Second, it is unlawful under the act to *sell* excepting by weight. Section 2.

Third, no delivery shall be made, or caused to be made, *upon the sale,* without weight certificates. The certificate must name the *seller* and *purchaser,* and must be handed to the *purchaser.* Section 3.

Fourth, delivery may be made to a substituted *purchaser.* Section 4.

Fifth, solid fuel may not lawfully be delivered without a weight certificate to the *purchaser or purchasers.* Section 7.

The obvious intent of the legislature in enacting the regulatory measures under examination *was to protect buyers of solid fuel.* The transactions contemplated were *sales* of solid fuel, *plus deliveries* thereof. In short, the legislature meant precisely what it said when it declared the statute to be "an act to regulate the *sale and delivery* of solid fuel." It is not an act to regulate the sale alone of solid fuel; it is not an act to regulate the delivery only of solid fuel; it is an act to regulate the sale *and* delivery of solid fuel.

It is the *purchaser* who is entitled to the weight certificate, not the one to whom solid fuel is *delivered,* although the act presupposes a delivery *and* a sale. A sale without a delivery is reductio and adabsurdum, for it would render the statute meaningless; and, it is common knowledge that except for sales of solid fuel in place, a manual delivery always is part of a sale of solid fuel. A delivery without a sale, is, of course, not within the purview of the act. Commonwealth *v.* Troanovitch, supra.

To summarize: the Act of July 19, 1935, P. L. 1356, as amended, is not directed to sales of solid fuel without delivery, nor to deliveries of solid fuel without sales. It is directed at sales and deliveries of solid fuel. Consequently, unless a delivery of solid fuel is part of a sale thereof, such delivery is not subject to the act. With these principles in mind, the answers to your questions should be apparent. We shall take them up seriatim.

1. Solid fuel being hauled from a mine to the mine owner's coal yard need not be accompanied by a weight certificate unless it is being sold, or delivered to a purchaser. A starting out for delivery takes place only when the delivery is being made to a buyer. The same reasoning applies to transportation from a mine within the Commonwealth to a point without it, for, although this would constitute interstate commerce, *it is the starting out for delivery* to a purchaser without a weight certificate that is forbidden. That is to say, if a sale is made to a buyer without the Commonwealth, the fuel does not begin to move in interstate commerce until it starts out for delivery. And, in any event, there is no discrimination between deliveries to purchasers inside the Commonwealth and those outside.

That solid fuel being hauled from a mine in Pennsylvania to a purchaser without the State must be accompanied by a weight certificate was clearly indicated by the General Assembly in the amendment of June 24, 1939, P. L. 865, supra, which provides in part:

> Whenever any bordering state requiring licenses and weight certificates for solid fuel recognizes licenses and accepts weight certificates issued by licensees of this Commonwealth, such licenses and weight certificates of such state shall be recognized and accepted in this Commonwealth.

2. The answer to Question No. 1 is the answer to this query.

3. Section 5 of the subject legislation provides in part:

> Any weights and measures official * * * who finds any quantity of solid fuel ready for or in the process of delivery, *may* direct the person in charge of the solid fuel to convey the same to the nearest available accurate scales * * * (Italics supplied.)

That is, if the proper official has reason to believe solid fuel being conveyed is in the process of delivery to a purchaser, he may direct the person in possession of the fuel to proceed with it to the nearest available accurate scales for weighing. Unless so directed, however, the act does not require the person in charge of such solid fuel to have it weighed at the nearest available scale operated by a licensed weighmaster. So long as the person delivering the fuel to the purchaser has it weighed by a licensed weighmaster before delivery, he may, unless directed otherwise by a proper official, have it weighed by any licensed weighmaster.

See also our Formal Opinion No. 308 dated January 5, 1940.

It is our opinion, therefore, that:

1. Solid fuel, as defined in the Act of July 19, 1935, as amended June 24, 1939, P. L. 865, being transported by a mine owner from his mine to his own yard need not be accompanied by a weight certificate as required by said statutes, unless said fuel is to be there delivered to a purchaser without prior unloading or weighing. This is true whether the mine owner's yard is within or without the Commonwealth.

2. Solid fuel, as defined supra, being transported to a mine owner's yard from his own mine, whether said yard is within or without the Commonwealth, need not be accompanied by a weight certificate, whether in one or several compartments of the conveyance, unless the fuel is being delivered to a purchaser.

3. A person delivering solid fuel to the purchaser thereof need not obtain a weight certificate therefor from the nearest available licensed weighmaster unless so directed by the proper official.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 368

State Government—Department of Public Instruction—Duty to render advice—Administrative Code of April 9, 1929, sec. 1302 (d)—Legal advice.

Section 1302 (*d*) of The Administrative Code of April 9, 1929, P. L. 177, requiring the Department of Public Instruction to give advice, explanation, instruction, and information relative to the school laws, was not intended and should not be interpreted to require or authorize the department to furnish legal advice to anyone.

Harrisburg Pa., September 19, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you what are the limits of your duties under Section 1302 (d) of Article XIII of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 PS §352, with respect to requests for legal advise. The portion of the statute cited makes it the duty of the Department of Public Instruction:

> (d) Whenever required to give advice, explanations, construction, or information, to the district officers and to citizens relative to the school laws, the duties of school officers, the management of the schools, and all other questions and matters calculated to promote the cause of education;

Your above communication recites that you receive a large number of requests for legal advice, and you have been attempting to answer the same on the theory that you were required so to do under the foregoing statutory provision. Inevitably a major portion of the requests for legal advice received by you is transformed into requests to this department in your behalf for the same advice, so that it may be passed on to the original inquirers when obtained from us.

Section 1302 (d) of The Administrative Code of 1929, supra, was derived from section 1302 of The Administrative Code, the Act of

June 7, 1923, P. L. 498. Similar provisions were contained in the Act of May 18, 1911, P. L. 309, sections 1006 and 1014, 24 PS §§908 and 909. These sections pertaining to the Superintendent of Public Instruction, were as follows:

* * * * *

> He shall, whenever required, give advice, explanations, construction, or information to the district officers and to citizens relative to the school laws, the duties of school officers, the rights and duties of parents, guardians, pupils, and officers, the management of the schools, and all other questions and matters calculated to promote the cause of education.

* * * * *

> He may, when requested, give decisions and interpretations of the school law, which shall be valid and binding in like effect as law until reversed by proper judicial authority.

In Wells Township School District's Directors, 297 Pa. 242 (1929), the Supreme Court, in referring to sections 1006 and 1014 of the act of 1911, supra, stated at pages 246 and 247 as follows:

> * * * The sections relative to the superintendent's advice, above quoted, concern administrative matters and have nothing to do with substantive or governmental acts. * * *

* * * * *

> * * * We therefore hold that under the sections above quoted, authority is conferred on the superintendent of public instruction to advise in matters of an administrative nature, * * *.

We conclude from this that the legislation under discussion does not enjoin upon you the duty of giving legal advice to anyone, nor did the legislature intend so to do.

The giving of legal advice is the practice of law. The practice of law "includes legal advice and counsel." Eley *v.* Miller, 7 Ind. App. 529, 34 N. E. 836 (1893); See also Childs et al. *v.* Smeltzer, 315 Pa. 9 (1934). In Shortz et al. *v.* Farrell, 327 Pa. 81 (1937), it was said at page 85:

> * * * Where the application of legal knowledge and technique is required, the activity constitutes such practice [the practice of law] * * *. It is the character of the act and not the place where it is performed which is the decisive factor.

And, we may add, it is the kind of advice given, and not the kind of a person who gives it, lawyer or layman, which determines whether such advice is legal advice.

It is fundamental that a layman may not engage in the practice of law. Childs et al. *v.* Smeltzer, supra; In re Opinion of the Justices, 289 Mass. 607, 194 N. E. 313, (1935).

Indeed, the Act of April 28, 1899, P. L. 117, as amended April 17, 1913, P. L. 80 and April 24, 1933, P. L. 66, 17 PS §1608, makes it unlawful for any person who has not been admitted to practice in a court of record, to practice law, or to hold himself out to the public as entitled to practice law.

The Act of July 12, 1935, P. L. 708, No. 271, 17 PS §1610, makes it a misdemeanor punishable by fine and imprisonment for anyone to practice law without being a member of the Bar of a court of record.

In the face of the authorities cited we cannot possibly construe section 1302 (d) of The Administrative Code of 1929, supra, as either authorizing or directing you to render legal advice to anyone. Another and conclusive reason why we cannot do so is because it is inherent in the judicial department (the courts) of government to control the practice of law. In re Opinion of the Justices, supra.

In petition of Joseph P. Splane, 123 Pa. 527 (1889), wherein it was held that an attorney is an officer of the court, and whether an individual is to be admitted to the Bar or excluded therefrom is a judicial question, it was said by Mr. Chief Justice Paxson, at page 540 of 123 Pa.:

> If there is anything in the constitution that is clear beyond controversy, it is that the legislature does not possess judicial powers. They are lodged exclusively in the judiciary as a coordinate department of the government. The executive and legislative departments can no more encroach upon the judicial department, than the latter can encroach upon them. Each department, in our beautiful system of government, has its own appropriate sphere, and so long as it confines itself to its own orbit the machinery of government moves without friction.
>
> We have too much respect for the legislature to suppose it would ever intentionally step over the line which divides the different departments, but slight encroachments may sometimes occur through inadvertence. In such cases it is the province of the judiciary to correct them. It is our duty to see that the checks and balances provided by the constitution are preserved. * * *

Section 902 of Article IX of The Administrative Code of 1929, 71 PS §292, provides as follows:

> The Department of Justice shall have the power, and its duty shall be:
>
> (a) To furnish legal advice to the Governor, and too all administrative departments, boards, commissions, and officers of the State Government, concerning any matter or

thing arising in connection with the exercise of the official powers or the performance of the official duties of the Governor, or such administrative departments, boards, commissions, or officers;

(b) To supervise, direct and control all of the legal business of every administrative department, board, and commission of the State Government.

Pursuant to said section, it is the duty of this department to furnish legal advice, when so requested, to you as the head of an administrative department of the Commonwealth, concerning matters pertaining to the exercise of your official powers or duties.

Section 512 of Article V of The Administrative Code of 1929, 71 PS §192, provides in part as follows:

> Whenever any department * * * shall require legal advice concerning its conduct or operation, * * * it shall be the duty of such department, * * * to refer the same to the Department of Justice.
>
> It shall be the duty of any department, * * * having requested and received legal advice from the Department of Justice * * * to follow the same, and, when any officer shall follow the advice given him by the Department of Justice, he shall not be in any way liable for so doing, * * *

It is our opinion, in view of the foregoing section 512 of the code that, since an official of the State government who has requested and received legal advice from this department, is bound thereby and is relieved from all liability for following such advice, this department has no duty to advise any person who is not (1) bound by its advice when given, and (2) protected by such advice when followed.

It is our opinion, therefore, and you are accordingly advised that under section 1302 (d) of The Administrative Code of 1929, you are not required to, and should not, furnish legal advice to anyone.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 369

Hatch Act—Concerning the effect on State employes of the Act of Congress of August 2, 1939, c. 410, 53 Stat. 1147, 18 USCA. sec. 61, et seq., as amended July 19, 1940.

Harrisburg, Pa., October 10, 1940.

To All Departments, Boards and Commissions.

Sirs: This department is in receipt of various communications requesting opinions concerning the effect on State employes of the Act of Congress of August 2, 1939, c. 410, 53 Stat. 1147, 18 U. S. C. A. Section 61, et seq., as amended July 19, 1940, commonly known as the Hatch Act.

The original Hatch Act of August 2, 1939, is entitled:

AN ACT

To prevent pernicious political activities.

The effect of this original act on State employes was set forth in our Formal Opinion No. 301. The present opinion will concern itself only with the effect, if any, of the amendatory act of July 19, 1940, on State employes of departments, boards and commissions which are financed in whole or in part by Federal loans or grants.

At the outset, it may be well to note that the title of the amendatory act reads as follows:

AN ACT

To extend to certain officers and employees in the several States and the District of Columbia the provisions of the Act entitled "An Act to prevent pernicious political activities", approved August 2, 1939.

Preliminarily, we should point out that the Commonwealth of Pennsylvania presently has stringent laws to prevent pernicious political activities, as follows:

(1) Anti-Macing Act of April 6, 1939, P. L. 16, 25 PS §§2374 and 2375. The enactment of this law was promised by the Governor in his campaign and it was one of the first statutes passed in his administration.

(2) Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended by the Act of June 26, 1939, P. L. 1091, Section 13 (b), 62 PS §2513; as well as Section 2504-A (i) of The Administrative Code of 1929, as added by the Act of June 24, 1937, P. L. 2003, 71 PS §667.

(3) Pennsylvania Liquor Control Act, as last reenacted and amended by the Act of June 16, 1937, P. L. 1762, Section 302 C, 47 PS §744-302.

(4) Act of June 3, 1937, P. L. 1225, Section 207, 34 PS §1311.207 (The Game Law).

These laws are still in force.

Generally, it may be stated that the Hatch Act, as amended, can be divided under two headings:

(1) The penal sections. These are sections 1 to 7 inclusive, 13 and 20 and pertain to pernicious political activity. They add new provisions to the Criminal Code of the United States. These sections are to be enforced by the United States Department of Justice. Penalties for violations thereof consist of fines and imprisonment.

(2) Sections restricting political activity. These are sections 9, 12 and 13 and they limit political activities of officers and employes of the executive branch of the Federal, State and local governments. These sections are enforced administratively by the Federal agencies concerned; or, if civil service employes or State or local agencies are affected, by the United States Civil Service Commission. The penalty imposed for violations of these sections is dismissal of the employe, and, on refusal of a State agency to dismiss, the withholding of certain funds equal to two years' compensation of the particular officer or employe involved (See section 12 (b) of the Hatch Act).

As this opinion will only be concerned with State employes in their capacity as such employes, attention should be called to the fact that there are only two sections of the Hatch Act which are concerned with State agencies and employes; namely, section 2, prescribing pernicious political practices, and section 12, restricting political activity on the part of certain State employes.

Section 2 of the act applies to any person employed in an administrative position by a state, *in connection with any activity which is financed in whole or in part by federal loans or grants,* and the prohibition of this section is directed to the employe using his *official authority* to interfere with or affect the election of a President, Vice-President, Presidential Elector, Member of the Senate, Member of the House of Representatives, etc. It reads, in part, as follows:

> It shall be unlawful for * * * (2) *any person employed in any administrative position by any State, by any political subdivision or municipality of any State, or by any agency of any State or any of its political subdivisions or municipalities* (including any corporation controlled by any State or by any such political subdivision, municipality, or agency, and any corporation all of the capital stock of which is owned by any State or by any such political subdivision, municipality, or agency), *in connection with any activity which is financed in whole or in part by loans or grants made by the United States,* or by any such department, independent agency, or other agency of the United States, *to use his official authority* for the purpose of interfering with, or affecting, the election or the nomination of any candidate for the office of President, Vice-President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or insular possession. (Italics supplied.)

Section 12 (a), which applies to an officer or employe of a state or local agency *whose principal employment is in connection with any activity which is financed in whole or in part by a Federal loan or grant,* is as follows:

> *No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency* shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices. (Italics supplied.)

Thus it is seen that the prohibition in the above section 12 (a) is directed:

(1) To the officer or employe using his official authority or influence for the purpose of interfering with the nomination or election of any candidate for office, or affecting the result thereof.

(2) To the officer or employe coercing, commanding or advising any other officer or employe to pay, lend or contribute anything of value to a party organization; and this is followed by a general prohibition against partisan activity in political management or political campaigns.

It is apparent that there is nothing in this paragraph or any part of the Hatch Act which would prevent voluntary contributions to the general political committees by a state employe who may be under the provisions of the Hatch Act, but such an employe may not solicit contributions from another employe.

In connection with section 12 (a), it should be noted that section 15 provides that the prohibition contained in section 12 (a) against taking an active part "in political management or in political cam-

paigns" shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission had theretofore determined were, at the time this section took effect, forbidden on the part of employes in the classified civil service of the United States.

Under section 12 (f) it is stated that, for the purposes of section 12, the term "State or local agency" means the executive branch of any state, municipality or other political subdivision of any state, or any agency or department thereof. Thus the officers and employes of the legislative branch of the government, as well as the officers and employes of the judicial branch of the government, are not included. Exemptions in the executive branch are listed under section 12 (a), as follows:

> * * * For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil service system; (3) officers holding elective offices.

There are several general observations which should be made concerning section 2 of the Hatch Act, which, as above stated, refers to any person employed in an administrative position by any state "in connection with any activity which is financed in whole or in part" from Federal funds.

(1) The employment designated is in connection with an activity financed in whole or in part out of Federal funds but no reference is made to the manner or method of payment. From this it must be inferred that it makes no difference whether the department or bureau is financed from funds owned by the Federal Government and disbursed by the State Treasurer, or out of funds owned by the State Government which have been donated to it by the Federal Government.

(2) The prohibition is limited to the use of "official authority" on the part of the employe. The inference here would seem to be that such employe might use his personal influence as distinguished from his official authority, in legitimate political activity.

(3) The State employes are restricted from participating in the election of Federal officials only, not State or local officials. Thus it might be deduced that there is no prohibition in section 2 of the Hatch Act against State employes engaging in political activities in connection with the election of State or local officers. Just where the dividing line can be drawn is a matter of speculation. The

County chairman who is attempting to further the interests of the entire ticket will probably come under the prohibition in section 2, whereas the worker seeking to advance the candidacy of an aspirant for the office of Auditor General, State Treasurer, or other State or local office would not come under the prohibition. Obviously, section 2 marks an attempt by Congress to exercise its power over Federal elections only.

When section 12 of the Hatch Act is examined in the light of the foregoing comments under section 2, we find the following:

(1) The prohibition of section 12 (a) relates to State employes employed in connection with any activity financed in whole or in part by Federal funds. The emphasis is again on the financing and not upon the method of payment. A new limitation is here introduced, since the prohibition is restricted to State employes whose "principal employment" is in connection with these federally financed activities. The meaning of the term "principal employment" is plain and unambiguous; see Toxaway Hotel Company *v.* Smathers & Company, 216 U. S. 439, 54 L. Ed. 558 (1910), where the court, in disposing of the contention of whether the hotel company was a corporation "principally engaged" in "trading" or "mercantile pursuits," stated: (L. Ed. 562)

> It may have been engaged in doing two distinct kinds of business. But unless this corporation was "engaged principally" in mercantile pursuits, it was not amenable to the act. *"Engaged principally" are plain words of no ambiguous meaning.* They need no construction. Amenability to the statute must turn upon the facts of the case where, as here, the same corporation was engaged in "mercantile pursuits" in addition to inn keeping. *There is no way to settle whether it was "engaged principally" in the one or the other but by a comparison of the two.* * * * (Italics supplied.)

A few comparisons seem appropriate. Section 12 (a) would certainly not apply to State employes whose duties in connection with federally financed projects are part time or incidental. For example, an engineer who gave a small amount of time to a federally financed project while the major portion of his time was given to his own private business would not come under the prohibitions of section 12 (a). Also, a State employe who was employed a small part of his time on a federally financed project and employed a major part of his time on purely State work would be without the provisions of section 12 (a) of the Hatch Act. This is evidenced in the case of employes in the Department of Public Assistance. In that department there is a division of functions into Old Age Assistance, Aid to Dependent Children, Blind Pensions and General Assistance. The first two categories are federally aided;

the last two are financed entirely with State funds. If the main part of an employe's time was spent in connection with the former two programs, that is, Old Age Assistance and Aid to Dependent Children, then, since his principal employment would be in connection with an activity financed in part by Federal funds, he would come under section 12 (a) of the Hatch Act. If, however, the major part of an employe's time was used in connection with the latter two programs, that is, Blind Pensions and General Assistance, then his principal employment would not be in connection with an activity financed in whole or in part by Federal funds and, therefore, he would not come under the provisions of section 12 (a) of the Hatch Act.

(2) Again we find that the prohibition is against the use of official authority, but, added thereto, is the further prohibition, "No such officer or employee shall take any active part in political management or in political campaigns."

(3) Section 12 (a) does not restrict the prohibition against political activity to the election of Federal officials. The basis of the Federal power in section 12 (a) seems to be the use of Federal funds, and not the regulatory authority of Congress over Federal elections. This conclusion is borne out by reference to paragraph (b) of section 12, which permits the withholding of certain Federal funds where offenses under the act have been established.

In applying the foregoing general discussion of the Hatch Act to the particular departments, boards and commissions of our State government which are financed in whole or in part from Federal funds, it should first be noted that the determination of persons or classes of persons subject to sections 2 and 12 of the act, which are applicable to State employes, will depend in most instances on the factual situation in each particular case. A complete classification of State and local officers or employes within the scope of these provisions of the statute would be impracticable.

From the language used in section 2, namely, "in connection with any activity which is financed in whole or in part by loans or grants made by the United States," or any Federal agency, it is clear that employes of all departments, boards and commissions, financed in whole or in part by Federal funds, come under its ban.

Section 12 (a), however, is limited to State employes *whose principal employment* is in connection with the federally financed activity. These words of limitation "principal employment," though important, are not defined. However, it can be stated that if the Federal grants are allocated to a particular bureau or division of a department for a particular activity, and that activity is carried on through a separate agency clearly defined, then the prohibitions of

section 12 (a) of the Hatch Act could affect only the employes of that particular bureau or division and not the employes of the department as a whole. It also follows, as above stated, that if the major portion of an employe's time is in connection with a bureau, division or department financed in whole or in part with Federal funds, then such employe comes within the provisions of section 12 (a) of the Hatch Act; but if only a minor portion of such employe's time is spent in connection with such federally financed activity and the major portion of his time is given to private enterprise or to a State activity or project, then such employe does not come under the provisions of section 12 (a) of the Hatch Act. However, employes in the latter class would come under section 2 of the Hatch Act because under that section the mere fact that the employment is in connection with an activity financed in whole or in part with Federal funds, no matter how small the contribution, brings the employe under the Hatch Act.

With these general observations in mind as a background, we shall now consider the effect, if any, of sections 2 and 12 (a) on employes of the various departments, boards and commissions of the Commonwealth.

I

The Governor's Office

The activities and functions of the Governor's Office are in no respect financed by Federal funds. While it is true that the Budget Secretary exercises budgetary control over the activities of those administrative departments, boards and commissions whose functions are financed in whole or in part by Federal grants, the performance of this duty is merely incidental and in no way can be considered as the "principal employment" of the Budget Secretary. It follows, therefore, that the Secretary to the Governor, the Budget Secretary and the employes in the Governor's Office and of the Executive Board are not amenable to sections 2 and 12 of the Hatch Act.

II

Department of Agriculture

The Department of Agriculture receives no funds from the Federal Government. Some of the employes, however, receive salaries from the Commonwealth of Pennsylvania and also from the Federal Government. These employes are members of and contribute to both the State and Federal Retiremnt Funds. In so far as these persons are employes of the Federal Government and receive salaries from the Federal government, they come within sections 2 and 12 of the Hatch Act.

III

Department of the Auditor General

The Department of the Auditor General operates wholly out of Commonwealth funds appropriated by the General Assembly, and does not in any manner receive or use any Federal funds. Appropriations to the Department of the Auditor General are made from the General Fund for the regular operating expenses of the department, including an allocation by the Governor for expenses in connection with public assistance auditing.

The personnel of the Department of the Auditor General, therefore, does not come within the Hatch Act. The Auditor General, being an elected head of an executive department, is exempt from the provisions of the second sentence of section 12 (a). Nor is he subject to the remainder of section 12 (a). And, since his department is not financed in whole or in part by Federal funds, the Auditor General does not come within section 2.

IV

Department of Banking

In the regular functions of the Department of Banking there are no federal funds, whether arising from loan or grant, used in any way, and for the most part, therefore, the personnel of this department is not under the Hatch Act.

By statute, however, the Secretary of Banking is made receiver of all closed banks, and an interesting situation develops, because in the liquidation of certain closed institutions, funds are advanced by way of loans by the Reconstruction Finance Corporation or the Federal Deposit Insurance Corporation, for the purpose of carrying on the work of liquidation.

The Secretary of Banking has informed us that in the case of one institution the FDIC made a loan to a State banking institution which was being liquidated, to permit transfer of its assets, including the cash proceeds from the loan, to another institution in consideration of the assumption of the deposit liabilities of the bank which was being liquidated, and that in addition thereto the FDIC loaned the further sum of $50,000 to the institution which was being liquidated so that the latter sum would remain and be available for the Secretary of Banking to be used in the administration of the remaining affairs of the institution. This particular institution operated a trust department, a safe deposit department, and a title insurance department, and while the deposit liability was taken care of by the loan from the FDIC, there was considerable administration expense in the matter of the three departments above specified.

It happens, of course, that in so making the loan above mentioned, the FDIC was taking care of its own liability to the extent that it had insured the deposits but, as is well known, that insurance extends only to a maximum of $5,000 in each account and the loan above mentioned was in an amount large enough to take care of all the deposit liability of the bank which was being liquidated.

In this particular situation the Secretary of Banking employed a number of people and payment of salaries of such personnel has been made in part from the sum of $50,000 above mentioned.

We have, therefore, a situation in which there are State employes engaged in an activity which is financed in part by the loan of $50,000 above mentioned, the activity being the liquidation of this particular bank. In addition thereto the liquidation was materially aided by the larger loan above mentioned, this larger loan permitting the elimination of the entire deposit liability of the bank in one stroke.

We feel that in the case of this institution the loan of $50,000 and the uses to which it was put would alone control and that most certainly any employes of the Secretary of Banking engaged in the liquidation of this particular institution would be within the provisions of both sections 2 and 12 of the Hatch Act.

We do not propose to pass upon each situation where moneys from the RFC or FDIC are received and used by the Secretary of Banking for the benefit of the particular institution, as we think the above illustrates amply the various situations which obtain.

It happens that all closed State banking institutions are not the recipients of Federal loans for purposes such as that above outlined, some liquidations being conducted entirely with funds of the closed institution, which expenses so incurred are, of course, chargeable against and collected from the particular closed institution. Of course, even in the case of a Federal loan, the same will be repaid from the assets of the closed bank, if any of such funds are available after liquidation is completed. We do wish to say, however, that there is little or no difference between moneys advanced by the RFC and moneys advanced by the FDIC. These two agencies of the Federal Government operate somewhat differently in the matter of advances to liquidating banks and in the case of the RFC the collateral for the loan is liquidated by the State Department of Banking, which in turn is compensated for such service; but fundamentally, regarding employes in a closed institution which benefits from a Federal loan, there is no distinction.

It happens also that the Department of Banking has established a central liquidating office which operates as headquarters for the liquidation work of practically all of the closed banking institutions.

A few closed banks are liquidated individually. The personnel of this central liquidating office would, therefore, be engaged in an activity part of which pertains to liquidating institutions which are receiving Federal loans, even though in many of the individual banks, the liquidating of which is being administered by such personnel, no Federal funds have been obtained. The personnel of this central liquidating office would come within the provisions of sections 2 and 12 of the Hatch Act.

Two reasons have been suggested as grounds upon which employes of the Department of Banking engaged as above recited could be considered as not within the provisions of the Hatch Act. One such suggestion is that the entire matter of liquidation of closed State banks being for the benefit of depositors and other creditors of such banks, and in no way for the benefit of the Commonwealth, the personnel of such banks are not employes of the Commonwealth.

We dispose of this suggestion by citing the fact that the employes are appointed by the Secretary of Banking and that, as outlined above, the Secretary of Banking which under statute becomes receiver of these banks by virtue of his being a State official. An interpretation which would attempt to remove personnel of closed banks from the category of State employes would, in our opinion, be an attempt to reach an unwarranted narrow interpretation, whereas if a broad view is taken of such personnel, all doubt about their being employes of the Commonwealth of Pennsylvania is removed.

The second suggestion above referred to is that the RFC and FDIC only interest themselves in these liquidations because they have a financial stake arising either from previous loans, stock ownership, liability of an insurer, etc., and that therefore the activity amounts only to a concerted or joint action on behalf of the Federal agency making the loan and the Secretary of Banking, the purpose of such joint action being to clear up any situation into which the Department of Banking has been brought by operation of the statute and into which the Federal agency involved has been brought because of such financial interest. Of course, in some cases loans have been made by the RFC to banks after closing, this being done to enable the payment of dividends to depositors in advance of the time such dividends would be payable from the ordinary liquidation of the institution's assets. It would seem to make no material difference, however, whether the loan was made before or after closing and whether it was made by the FDIC or RFC, because the important and determining fact remains that the administration of the liquidation of the particular institution is aided by Federal loans.

We have no difficulty in finding that both the FDIC and RFC

are "agencies of the United States" or "Federal agencies" as contemplated in the Hatch Act.

The matter of liquidating State institutions is, of course, not the principal employment of the Secretary of Banking and, as has been pointed out, only a part of the institutions being liquidated are recipients of Federal loans. There would seem, therefore, to be no question but that so far as section 12 of the Hatch Act is concerned, the Secretary of Banking and his deputies would not come within the purview of the Hatch Act. It would seem, however, that the Secretary of Banking and any of his deputies who are engaged in the work of liquidating closed institutions which receive loans would be employed in an administrative position by the Commonwealth in connection with an activity which is financed in part by loans made by an agency of the United States and that, therefore, the Secretary of Banking and his deputies so engaged could come within the provisions of section 2 of the Hatch Act.

We would say also that the personnel engaged at particular closed institutions which have not been recipients of Federal loans would, of course, not come within the provisions of the act, but that personnel engaged in banks which have received Federal loans or advances for administrative purposes are clearly within sections 2 and 12 of the act. Properly to apply the provisions of the Hatch Act in a given situation will require each employe to determine whether the particular closed bank in which he is employed has or has not been the recipient of Federal loans as above outlined. As stated above, the personnel of the central liquidating office comes within the provisions of both sections 2 and 12 of the Hatch Act.

V

Department of Commerce

The activities and functions of the Department of Commerce are in no respect financed by Federal funds. The Secretary of Commerce and the various officers and employes in the department are, therefore, not amenable to any of the provisions of the Hatch Act.

VI

Board of Fish Commissioners

The activities and functions of the Board of Fish Commissioners are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

VII

Department of Forests and Waters

The Federal Government makes two appropriations to the De-

partment of Forests and Waters. One appropriation is received and disbursed by the Division of Protection; and the other is received and disbursed by the Division of Management.

Federal moneys received or disbursed by the Division of Protection are expended for supplies, equipment, repairs and personal expenses in connection with fire prevention work. Many of the employes in this division are part time employes, who receive small sums of money from time to time, but whose means of livelihood are derived from other sources. Inasmuch as section 12 of the Hatch Act applies to employes whose principal employment is in connection with activities which are financed by grants made by the Federal Government, we are of the opinion that section 12 of the Hatch Act does not apply to those part time employes whose principal employment is not in connection with the activities of this department. Section 12 of the Hatch Act, however, in our opinion, does apply to all employes of the division who spend the major portion of their time in connection with the activities of the division.

We understand that the Federal moneys received or disbursed by the Division of Management are used for the extension of the nurseries maintained by the department. All employes whose principal employment is in connection with this activity are within the terms of section 12 of the Hatch Act. However, it does not apply to any part time or other employes who do not spend the major portion of their time in connection with the activities of this division.

A contribution is made by the Federal Government of $50,000 for a two-year period to this department to cover partial maintenance of the Nautical Schoolship under the direction of the Navigation Commission for the Delaware River. If the activities of the Commission are principally in connection with the Nautical Schoolship, the employes thereof are within the terms of section 12 of the Hatch Act.

The employes of the above three units, employed in an administrative position, come under the provisions of Section 2 of the Hatch Act, since they are employed in connection with an activity financed in part by Federal grant. The latter ruling would apply to the Secretary of Forests and Waters, though he does not come under section 12 of the act, since his principal employment is not in connection with these three units financed in part by Federal funds.

VIII

Pennsylvania Game Commission

The only Federal funds which the Pennsylvania Game Commission receives are apportionments from the Pittman-Robertson Act,

known as the "Federal Aid in Wild Life Restoration Act." Various research projects have been undertaken as a result of these Federal grants, but the bulk of the money is used for the acquisition of desirable State game lands, through the Division of Lands, which become a part of Pennsylvania's State Game Refuges and public hunting ground system.

Section 12 of the Hatch Act would apply to those employes whose principal employment was in connection with the surveys and research projects financed by Federal grants. However, some of the employes on these surveys are per diem and part time employes who have other sources of income from which they derive most of their livelihood. Section 12 of the Hatch Act would not apply to the latter group.

All employes of the Division of Lands and those employed on surveys and research projects come under the provisions of section 2 of the Hatch Act, since they are employed in connection with an activity financed in part by Federal grant. The Executive Director of the Pennsylvania Game Commission comes under section 2 of the Hatch Act.

As hereinbefore cited, employes of the Pennsylvania Game Commission are prohibited from political activity by section 207 of the Act of June 3, 1937, P. L. 1225, 34 P. S. §1311.207, which reads as follows:

> While retaining the right to vote as he may choose and to express privately his opinion on all political subjects, no salaried employe of the commission shall take any active part in political management or in political campaigns, nor shall he use his official authority or influence for the purpose of interfering with an election or affecting the results thereof, or for the purpose of coercing the political action of any person or body, nor solicit, demand or receive contributions or assessments to be used for political purposes. Violation of this provision shall subject such employe to immediate dismissal.

IX

The General State Authority

The General State Authority was created by the Act of June 28, 1935, P. L. 452, as amended, 71 P. S. §1707-1, et seq., for the purpose of constructing, improving, maintaining and operating public buildings, sewage treatment works for State institutions, etc., for the use of the Commonwealth, etc. It is a public corporation of the Commonwealth of Pennsylvania.

This activity is financed partly from Federal funds, partly from loans from State lending agencies, and partly from State appropriations.

Since the Authority's work and activity are unified in one purpose, namely, the construction and operation of projects for the use of the Commonwealth, and this activity is financed in part with Federal funds, the officers and employes who devote the major portion of their time to the work of the Authority come under sections 2 and 12 of the Hatch Act.

The corporation is governed by a board of directors consisting of ten officials of the State Government, some of whom are elected and some appointed. These members of the Authority receive no compensation but only receive their traveling expenses. It is obvious from this fact, and the further fact that all but three of the members of the Authority are merely ex-officio and all the members of the Authority give the major part of their time to other employment, that this membership in the Authority does not constitute their principal employment. Therefore, they would not be amenable to section 12 of the Hatch Act, but would come under the provisions of section 2 of the Hatch Act.

X

Department of Health

For the fiscal year of July 1, 1940, to June 30, 1941, the United States Government has allocated to the Department of Health the sum of $1,630,000. While a part of this sum is designated to be used for specific purposes such as, for example, the sum of $400,000 for Maternal and Child Health and Crippled Children's Services, a considerable portion thereof, subject only to budgetary approval by the Federal authorities, may be used for the extension of the general work of the department.

While the greater part of the entire grant is expended for the work of the Bureau of Health Conservation and the Bureau of Maternal and Child Health, there are at least a few employes in each of the Bureaus of Sanitary Engineering, Vital Statistics, Public Health Nurses, Mental Sanitation, and in the offices of the Comptroller, whose salaries are paid either wholly or in part from this fund. In fact, the Division of Public Health Education in the Bureau of Health Conservation, the Bureau of Tuberculosis Control and the Division of School Medical Inspection in the Bureau of Maternal and Child Health, constitute the only administrative offices in the department whose activities and functions are not financed entirely or partially by the grant made by the Federal Government. Those persons employed in an administrative capacity in the bureau and two divisions referred to are, therefore, the only persons in the department who are not employed in "connection with any activity

which is financed in whole or in part" by a grant made by the Federal Government.

It follows, therefore, that those persons employed in an administrative capacity in the remainder of the department are subject to the provisions of section 2 of the Hatch Act, and by "administrative capacity" we mean the Secretary of Health, the Deputy Secretary of Health, the heads of the various boards or divisions and any other person exercising control or direction over the activities or duties of a subordinate or subordinates.

When we consider section 12, we find that though it includes all officers and employes, it is limited, as above stated, to those whose *principal employment* is in connection with any activity which is financed in whole or in part by Federal grant. As has already been stated, every bureau, except the Bureau of Tuberculosis Control, and every division, except the Division of Public Health Education and the Division of School Medical Inspection, is the recipient of Federal funds and the activities and functions therein, are, at least partially, financed by the Federal Government. It is immaterial that only a few persons in a division or unit are receiving their salary wholly or in part from Federal funds. The test is whether the agency is financed in whole or in part with Federal funds; if it is, then employes whose principal employment, that is, the main part of their time, is in connection with the particular activities of the division or unit involved, are bound by the provisions of section 12. It is obvious, therefore, that into this category will fall not only the Secretary of Health, the Deputy Secretary of Health, the heads of the various bureaus and divisions and all others employed in an administrative capacity, but also every other employe in the department except those persons whose principal employment is in connection with the work of the Bureau of Tuberculosis Control, the Division of Public Health Education and the Division of School Medical Inspection.

The departmental administrative boards, to wit: the State Board of Undertakers, the Sanitary Water Board, and the State Board of Housing, and the departmental administrative advisory board, the Advisory Health Board, receive no Federal funds and the act, therefore, has no application to those officers and employes whose principal employment is in connection with the activities and functions of those boards.

XI

Department of Highways

By the Act of April 5, 1917, P. L. 37, 36 PS §§2641-2643, the Commonwealth of Pennsylvania assented to the provisions and con-

ditions of the Act of Congress providing for Federal aid to the various states in the construction of roads. The Federal funds received are paid into the Motor License Fund under the authority of section 302 (11) of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 PS §302 (11), which requires the Treasury Department to credit to the Motor License Fund all money received "from contributions by the Federal Government * * * for the improvement, maintenance, and rebuilding of highways within this Commonwealth." The money in the Motor License Fund has been appropriated to the Department of Highways for the construction, reconstruction, maintenance and repairing of State highways by section 5 of the Act of May 1, 1929, P. L. 1046, as renumbered and amended by the Act of June 29, 1937, P. L. 2412, 72 PS §3564.

At present the Department of Highways receives Federal aid funds for construction work on a 50% reimbursement basis; for example, the department pays for the project out of motor license funds and is then reimbursed by the Federal Government for 50% of the construction costs. In addition, the department receives Federal funds on certain grade crossing elimination projects, many of which are not located on the State highway system. These latter projects are authorized by the Act of January 2, 1934, P. L. (Sp. Sess.) 173, 36 PS §§2715-2718, and reimbursement is received for 100% of the cost thereof from the Federal Government. It also appears that the Planning Bureau and the Forestry Unit receive Federal aid, and these will be discussed in detail, infra.

All salaries and expenses of all the activities of the Department of Highways are paid out of the Motor License Fund and the various activities involving Federal aid are financed by reimbursing the Motor License Fund.

In determining the extent to which section 12 (a) of the Hatch Act applies to the officers and employes of the Department of Highways, we must refer again to the interpretation of the words, "whose principal employment is in connection with any activity which is financed in whole or in part" out of Federal funds. The words "principal employment," as hereinbefore stated, plainly do not include employes whose employment in connection with a federally financed activity is not the main part of their assignment. This is established by contrasting these words with the words in section 2, which refer simply to persons "employed * * * in connection with any activity which is financed in whole or in part with Federal funds." Therefore, the status of the employes of the Department of Highways under section 12 (a) of the Hatch Act becomes a mixed question of law and of fact, depending upon each individual employe's principal employment. Consequently, we are able only to lay down in general

the rules applicable to the various activities of the Department of Highways.

Clearly, the employes of the Planning Bureau of the Department of Highways come under the provisions of section 12 (a), since a portion of their salaries is received from federal funds. Likewise, the WPA unit engaged in supervising the expenditure of the WPA funds comes within section 12 (a) because the principal employment of its employes is devoted to supervising projects financed primarily from Federal WPA funds. Likewise, the employes of the Forestry Unit come under section 12 (a) since Federal funds are used to finance certain forestry projects entered into by this unit.

It is equally clear that the employes of the Department of Highways engaged in maintenance and repair of State highways do not come within the provisions of section 12 (a) of the Hatch Act. This ruling is clear when we note that their principal employment is not in connection with an activity financed in whole or in part by Federal funds. On the contrary, the work of repair and maintenance is financed entirely out of State funds, and no reimbursement is received from the Federal Government for this work.

Except for the aforementioned units and divisions, the balance of the personnel of the Department of Highways presents a very complex picture with regard to the Hatch Act. These remaining units, broadly speaking, deal with the construction work, the supervisory work, and the miscellaneous work of handling the business and legal activities of the department.

We understand that the Federal aid construction projects represent about 50% of the total construction work done by the department. In other words, the engineering unit, right-of-way unit, construction unit, testing laboratory, bridge unit and other activities participating in the construction of State highways spend at least 50% of their time in connection with federally financed activities; that is, Federal aid highway construction. Since it has been estimated that the forces of the department engaged in construction work do spend at least half of their time in such activities, we are of the opinion that such forces come within the provisions of section 12 (a) relating to principal employment in connection with federally financed activities. Of course, employes of the grade crossing unit unquestionably come within the scope of section 12 of the act, since the major part of their work is in connection with grade crossing elimination projects financed entirely out of Federal funds.

The employes of the department who engage in work with the Pennsylvania Turnpike Commission likewise would come within the provisions of section 12 (a), since the work of that commission has been financed in part out of Federal funds.

As to the remaining general supervisory and miscellaneous activities of the Department of Highways, we are of the opinion that section 12 (a) does not apply because the principal employment of those officers and employes is in connection with the general work of the department and not in connection with federally financed activities. It is true that the Secretary of Highways, the Chief Engineer and the Assistant Secretary of Highways do spend a portion of their time in connection with Federal aid projects. However, when consideration is given to the many other activities of the department which engage their attention, we are of the opinion that the federally financed activities do not constitute their principal employment and that, therefore, they are not included within the scope of section 12 (a) of the Hatch Act. The same ruling is applicable to the legal bureau, the township unit, the personnel unit and publicity unit, and is applicable also to the office of the comptroller.

Accordingly, we are of the opinion that those employes of the Department of Highways who spend the major part of their time in connection with federally financed activities are subject to the provisions of section 12 (a) of the Hatch Act; this group includes the construction unit, WPA unit, forestry unit, Pennsylvania Turnpike unit, grade crossing unit, and all other units engaged in the work of construction. On the contrary, the maintenance division does not come within section 12 (a) of the Hatch Act because there is no connection with any federally financed activity and the remainder of the officers and employes of the department do not come within said section 12 (a) of the Hatch Act because their *principal* employment is not in connection with the federally financed activities of the department (with certain individual exceptions noted, supra)

All persons employed in an administrative capacity in the Department of Highways, including the Secretary of Highways, are subject to the provisions of section 2 of the Hatch Act.

XII

Insurance Department

The activities and functions of the Insurance Department are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any provisions of the Hatch Act.

XIII

Department of Internal Affairs

The activities and functions of the Department of Internal Affairs are in no respect financed by Federal funds, and, therefore, the

various officers and employes in the department do not come within the provisions of the Hatch Act.

XIV

Department of Justice

The activities and functions of the Department of Justice are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within the provisions of the Hatch Act.

XV

Department of Labor and Industry

The Department of Labor and Industry has two services which are financed in whole or in part by Federal funds as follows:

(1) The Bureau of Employment and Unemployment Compensation at the present time is wholly financed by the Federal Government. This is permissible under Section 302 (a) of Title III of the Federal Social Security Act, the Act of August 14, 1935, c. 531, 49 Stat. 626, 42 U. S. C. A. Section 502 and Section 602 of the Pennsylvania Unemployment Compensation Law, the Act of December 5, 1936 (1937), P. L. 2897, as amended, 43 PS §842.

(2) The Bureau of Rehabilitation is financed partly by the Federal and partly by the State Government; the Federal Government matching the State's appropriation.

The Department of Labor and Industry is composed of a number of separate divisions and bureaus. Of these divisions and bureaus, the Bureau of Employment and Unemployment Compensation and the Bureau of Rehabilitation are the only two which are financed in whole or in part from Federal funds. Since this is so, it is clear that only the officers and employes of these two agencies could come within the prohibitions of sections 2 and 12 of the Hatch Act.

Since all employes in these two bureaus are full time employes who devote their entire time to their employment, all such employes would come under section 12 (a), since their principal employment is thus in connection with an activity financed in whole or in part with Federal funds.

The employes of the above two bureaus, namely, the Bureau of Employment and Unemployment Compensation and the Bureau of Rehabilitation, employed in an administrative position, come under the provisions of section 2 of the Hatch Act, since they are employed in connection with an activity financed in whole or in part by Federal grant. The latter rule would apply to the Secretary of Labor and Industry, though he does not come under section 12 of the act,

since his principal employment is not in connection with the two bureaus financed in whole or in part with Federal funds.

XVI

Pennsylvania Liquor Control Board

The activities and functions of the Pennsylvania Liquor Control Board are in no respect financed by Federal funds, and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

As hereinbefore cited, employes of the Pennsylvania Liquor Control Board are prohibited from political activity in section 302 (c) of the Pennsylvania Liquor Control Act, as last reenacted and amended by the Act of June 16, 1937, P. L. 1762, supra.

XVII

Department of Military Affairs

The Department of Military Affairs is financed in certain respects by Federal grants and loans, which may be divided into the following categories:

(1) Officers and enlisted men of the Pennsylvania National Guard not in active Federal service. This class receives sums ranging from $1.00 to $10.00 per week for armory drills, and for field training, sums ranging from $7.00 to $140.00 per week for two or three weeks, paid by the United States Property and Disbursing Officer for Pennsylvania. These are part time employes whose principal employment is not the work described, and under no reasonable construction of the act in question could they be construed as affected by section 12 of the act.

(2) Caretakers of armories and arsenals paid in full by Federal funds. In this case, it is our opinion that such caretakers would be State employes whose principal employment is in connection with an activity financed in whole or in part by the Federal funds, and that, therefore, they are affected and controlled by section 12 of the Hatch Act.

(3) Approximately ten employes paid on an hourly pay roll, only when they work, a total of $300.00 to $400.00 per month, paid by the United States Property and Disbursing Officer for Pennsylvania. Because of the amount of compensation paid and the part time nature of the work, this employment would not appear to be the "principal employment" of these persons, and, therefore, they would *not* be subject to the provisions of section 12 of the Hatch Act.

(4) The Soldiers' and Sailors' Home at Erie receives substantial Federal aid. Clearly the board of trustees and the employes there are under sections 2 and 12 of the Hatch Act .

The Adjutant General, the Deputy Adjutant General and all other employes in administrative positions in the department come under the provisions of section 2 of the Hatch Act.

XVIII

Milk Control Commission

The activities and functions of the Milk Control Commission are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

XIX

Department of Mines

The activities and functions of the Department of Mines are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

XX

Pennsylvania Motor Police

The activities and functions of the Pennsylvania Motor Police are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

Though the Pennsylvania Turnpike Commission is paying for a unit of the Pennsylvania Motor Police for the purpose of policing the highway, such payments are made out of tolls collected on the turnpike and are not paid from Federal funds.

XXI

Department of Property and Supplies

Since the Department of Property and Supplies is not financed in whole or in part with Federal funds, the various officers and employes do not come under any of the provisions of the Hatch Act.

Mention should be made of certain employes paid from the General Fund which supervise Works Progress Administration projects. Since the work of these supervisors is advisory merely, and additionally this Works Progress Administration activity is only incidental to their main employment, it is obvious that their principal employment is not in connection with an activity financed in whole or in part by grants or loans of the United States, and such employes do not come under either section 2 or 12 of the Hatch Act.

XXII

Department of Public Assistance

Under Titles I and IV of the Federal Social Security Act, the Act of August 14, 1935, c. 531, 49 Stat. 620, 627, 42 U. S. C. A. Sections 301-306, 601-606, the Department of Public Assistance receives grants for old age assistance and for the administration of old age assistance; also for aid to dependent children and for the administration of aid to dependent children, as follows:

Old age assistance—50% of grant.
5% of the 50% for administration.
Aid to dependent children—50% of grants.
50% of administration expenses.

The Department of Public Assistance also administers a program of blind and general assistance. The General Fund biennial appropriation for 1939-1941 amounted to $193,910,000, of which only $17,500,000 was contributed by the Federal Government.

When the outlay for old age assistance and aid to dependent children programs of $17,500,000 is compared with the outlay for general assistance of $193,910,000, it is readily seen that the principal employment of this department as a whole is not the expenditure of Federal funds to carry out the joint programs of old age assistance and aid to dependent children, but rather the expenditure of State funds in carrying through the blind and general assistance programs. The real test, however, is whether the major portion of the employe's time is spent in the administration of old age assistance, aid to dependent children, blind pensions or general assistance. In this department, as stated above, there is an automatic division of function into this fourfold classification. These categories are made necessary and prescribed by Titles I and IV of the Federal Social Security Act, the act of August 14, 1935, supra. The first two services, namely, old age assistance and aid to dependent children, are financed on a fifty-fifty basis by the Federal and State Governments; the latter two, namely, blind pensions and general assistance, are financed entirely with State funds. Therefore, if the major portion of the employe's time is spent in connection with the former two services; that is, old age assistance and aid to dependent children, then his principal employment would be in connection with an activity financed in part with Federal funds and such employe would come under the provisions of section 12 of the Hatch Act. If, however, the major part of the employe's time is given to the latter two programs, that is, blind pensions and general assistance, then such employe's principal employment would not be in connection with an activity financed in whole or in part with

Federal funds and, therefore, such employe would not come under the provisions of said section 12.

Employes paid entirely from State funds, namely, those handling the Relief Work Program and the Federal Surplus Commodities Program, obviously do not come under the provisions of the Hatch Act.

Since the members of the Employment Board are paid on a per diem basis and devote only a small part of their time to the work of the board, their principal employment is not in connection with the work of the board and thus the members of the Employment Board do not come under the prohibitions of section 12 of the Hatch Act.

All employes of the Department of Public Assistance, except the two units financed entirely from State funds, namely, the Work Relief Program and the Federal Surplus Commodities Program, come within the provisions of section 2 of the Hatch Act, since these employes are employes employed in an administrative position in connection with an activity financed in part with Federal funds.

By way of summary, we may state the following:

(1) Officers and employes who spend the major part of their time in the administration of Old Age Assistance or Aid to Dependent Children come under the provisions of section 12 of the Hatch Act.

(2) Officers and employes who spend the major portion of their time in the administration of Blind Pensions or General Assistance do not come under the provisions of section 12 of the Hatch Act.

(3) Employes under the Work Relief Program and the Federal Surplus Commodities Program financed from State funds, and also members of the Employment Board, who do not spend the major portion of their time in the work of the Department of Public Assistance, do not come within the provisions of section 12.

(4) All persons employed in administrative positions in the department, including the Secretary of Public Assistance, are subject to the provisions of section 2 of the Hatch Act, since they are employed in connection with an activity financed in part by Federal grant.

As hereinabove cited, employes of the Public Assistance Department are prohibited from political activity by section 2504-A (i) of the Act of June 24, 1937, P. L. 2003, and section 13 (b) of the Act of June 24, 1937, P. L. 2051, as amended by the Act of June 26, 1939, P. L. 1091.

XXIII

Department of Public Instruction

The activities and functions of the Department of Public Instruc-

tion may be grouped into three main classifications for our purposes.

I. Group I consists of those employes who receive their pay in whole or in part from Federal funds. These are included under the following sections:

A. Vocational Education
   1. General Administrative
   2. Agriculture
   3. Home Economics
   4. Trade and Industrial
   5. Public Service Institute
   6. Distributive Occupations
   7. Teacher Education

B. Vocational Rehabilitation
   1. General Administrative
   2. Case Production and Service

C. Vocational Education of Defense Workers
   1. General Administration

(A.) The employes in this classification are those who are employed full time and whose salaries are paid in part by the Commonwealth and in part by the Federal Government. These employes receive the full means of their livelihood from their occupation, which is full time, and this would, therefore, be their "principal employment." Since their "principal employment" is in connection with an activity financed in whole or in part by a Federal grant or loan, they are affected and controlled by the provisions of sections 2 and 12 of the Hatch Act.

(B.) We also find under this general classification those employes who are paid in part by the State and in part by the Federal Government, but whose employment is only part time. If the employment of these individuals is not their "principal employment," then they would not be controlled by the provisions of section 12 of the Hatch Act.

The controlling factor in this case is not that the employment is part time, but whether or not it is their "principal employment." In ascertaining this fact, if we find that their part time employment consists of the major part of their employment, then clearly they are within the provisions of the Hatch Act. If their part time employment is but a minor part of the whole of their employment throughout the year, then they are exempt from the provisions of section 12 of the act. They would, however, be subject to section 2 of the act.

(C.) We are also concerned with still another group which is included in this main classification. Here we are concerned with those

whose "principal employment" is in connection with some federally financed activity, although employed in State activity as well. Such individuals are within the provisions of sections 2 and 12 of the Hatch Act, if their duties with relation to a federally financed project are not incidental and are not a minor part of their work.

II. The second main group includes those State officers and employes whose salaries are paid in full from funds allocated by the Commonwealth, but whose duties involve both State and Federal activities either in a supervisory capacity or as an employe in connection with a Federal project financed in whole or in part by the Federal Government. Here the test is whether the "principal employment" deals with State activities or with Federal duties. If the "principal employment" consists of State duties, then such a person is not within the provisions of section 12 of the Hatch Act. In those cases, however, where the major activity or "principal employment" of the person is concerned with Federal duties, then such a person obviously is bound by section 12 of the Hatch Act. All persons employed in an administrative position come under the provisions of section 2.

III. The third and last main classification in the Department of Public Instruction is composed of officers and employes who neither receive nor use any Federal funds, but to whom appropriations are made entirely from the General Fund for the regular operating expenses of the department. To these the act, therefore, has no application. Included in this group are, of necessity, all those who do not fall within either of the first two main classifications.

The employes of the above groups employed in an administrative position come under the provisions of section 2 of the Hatch Act, since they are employed in connection with an activity financed in whole or in part by Federal grant. The latter rule would apply to the Superintendent of Public Instruction, though he does not come under section 12 of the act, since his principal employment is not in connection with the above activities financed in whole or in part with Federal funds.

XXIV

Pennsylvania Public Utility Commission

The activities and functions of the Pennsylvania Public Utility Commission are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

XXV

Department of Revenue

Though the Department of Revenue receives Federal funds, the

department acts only as a conduit to route such funds into the State Treasury.

However, though the Department of Revenue receives no Federal aid or Federal money, two bureaus should be further considered, as follows:

(1) Bureau of Motor Vehicles. Federal money in the Motor License Fund may incidentally become mixed with that part of the fund used to finance the Bureau of Motor Vehicles.

With regard to the Motor License Fund, it is not believed that the use of this fund by the Bureau of Motor Vehicles is sufficient to make the employes of the bureau subject to section 2 and 12 of the Hatch Act, since such Federal moneys in the Motor License Fund are received by way of reimbursement for construction of highways, and the activity performed by the Bureau of Motor Vehicles is not in any sense an activity financed by Federal funds. This grant by the Federal Government for construction of highways is fully discussed under the Department of Highways.

(2) Division of Aeronautics. With regard to Federal aid in connection with the Division of Aeronautics, such aid is only received in the construction of new airports. At present only one such airport is under construction, i.e., Black Moshannon, and only one man employed by the division is engaged in supervising the construction work. The remaining employes of the division do not have their principal employment in connection with any federally financed activity and, therefore, are not amenable to section 12 of the Hatch Act. Since said employes are not engaged in any activity financed in whole or part by Federal funds, but on the contrary are employed entirely in supervising the maintenance of State-owned airports and airways and in inspection and other policing duties in connection with Pennsylvania aeronautics, they also are not within section 2 of the Hatch Act.

XXVI

Department of State

The activities and functions of the Department of State are in no respect financed by Federal funds and, therefore, the various officers and employes do not come within any of the provisions of the Hatch Act.

XXVII

Treasury Department

The Treasury Department maintains a separate bureau to handle disbursements of money on behalf of the Unemployment Compensation System, which is administered by the Department of Labor

and Industry. As that bureau is financed in whole with Federal funds, all employes of the bureau come within the provisions of section 2 and 12 (a) of the Hatch Act.

The other activities of the Treasury Department are not financed in whole or in part by Federal funds, hence it follows that the officers and employes assigned to such activities do not come within the Hatch Act.

Since the State Treasurer's principal employment is not in connection with an activity financed in whole or in part by Federal funds, he is not subject to the provisions of section 12 (a).

The State Treasurer does, however, come within the prohibitions of section 2 of the Hatch Act, since he is an administrative employe whose work is in connection with an activity financed in whole by Federal funds, to wit: the Bureau of Unemployment Compensation of the Treasury Department.

XXVIII

Department of Welfare

The only Federal funds received by the Department of Welfare are for the Rural Extension Unit in the Bureau of Community Work, which supervises Child Welfare Service in various counties of the State. Funds are received under section 521 of title V of the Federal Social Security Act, the Act of Congress of August 14, 1935, c. 531, 49 Stat. 633, 42 U. S. C. A. Section 721. The funds pay 100% of the salaries and traveling expenses of the State staff of the Rural Extension Unit, the Child Guidance Center in Harrisburg, and certain child welfare workers in the counties.

In some cases the county commissioners pay part of the salaries; in other cases they pay all the salaries and traveling expenses. The State Department of Welfare and various county commissioners furnish rent, heat, light, equipment, etc.

This department also has many WPA and National Youth projects scattered in and about the various institutions.

Therefore, sections 2 and 12 of the act would appear to apply to all officers and employes of the Rural Extension Unit, whose principal employment is in connection with this activity which is financed by Federal funds. Since there are four divisions or units in the Bureau of Community Work, the principal employment of the Director of the Bureau would not be in connection with the Rural Extension Unit and, therefore, the Director of the Bureau would not come under section 12 of the Hatch Act but would come under section 2 of said act.

The Secretary of Welfare would obviously be exempt from the provisions of section 12, since his principal employment is not in

connection with the Rural Extension Unit. He would, however, come under the provisions of section 2.

The foregoing opinion is prepared for the information of the various State departments. It undertakes to interpret a Federal statute, and, therefore, unlike other opinions of this department, it does not bind or protect the various officials of the State departments. The opinion is advisory merely, and is written and released to meet the exigencies produced by the amendment of the Hatch Act.

The opinion has been restricted to the determination of the applicability of the Hatch Act to the various officers and employes of the Commonwealth. We have not attempted to interpret the provisions of the act beyond that purpose, nor have we attempted to advise those officers and employes who are within the Hatch Act of the degree of freedom of political action still available to them. Section 15 of the act provides:

> The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

Thus a mass of rulings made by the United States Civil Service Commission become incorporated by reference into the act. Manifestly we cannot, within the limits of this opinion, set forth all these rulings. We should, perhaps, call attention to the one ruling on which there have been many specific inquiries, namely, on the making of contributions to political campaign funds by Federal and State employes. Though section 12 of the Hatch Act prohibits solicitation and coercive pressure, the act does not prohibit voluntary contributions. It is the opinion of this department that even an employe affected by the act is permitted to make a voluntary contribution to his or her party. The ruling of the United States Civil Service Commission (see rule 17, page 7) is in accord with our opinion on this point. (For all the rulings see Form 1236 of the United States Civil Service Commission, entitled "Political Activity and Political Assessments of Federal Officeholders and Employees.") An attempt has been made to supply some information upon that point by circulating copies of the circular of the United States Civil Service Commission recently, which will be understood as supplementing the information herein contained.

It is also not the province of this department to pass on the constitutionality of the law; that is the duty of the proper tribunal. Rather, it is our duty to support Federal and State laws until a higher authority rules to the contrary.

SUMMARY

In view of the foregoing, we are of the opinion, that State departments affected by the Hatch Act divide themselves into two categories:

I. Those departments which receive no financial aid and, therefore, are not within any of the provisions of the Hatch Act, as follows:

1. The Governor's Office.
2. Department of the Auditor General.
3. Department of Commerce.
4. Board of Fish Commissioners.
5. Insurance Department.
6. Department of Internal Affairs.
7. Department of Justice.
8. Pennsylvania Liquor Control Board.
9. Milk Control Commission.
10. Department of Mines.
11. Pennsylvania Motor Police.
12. Department of Property and Supplies.
13. Pennsylvania Public Utility Commission.
14. Department of Revenue.
15. Department of State.

II. The remaining thirteen departments, which are financed in whole or in part with Federal funds and whose officers and employes are, therefore, in some measure, subject to sections 2 and 12 of the Hatch Act, as above expressed. It should be recalled, however, that the application of section 2 is confined to only those employed in administrative positions, that is, to those who exercise some power of control or direction over subordinates. Summarizing, these thirteen departments of the State government are affected by the Hatch Act, as follows:

1. DEPARTMENT OF AGRICULTURE

Those State employes who are also Federal employes are subject to sections 2 and 12.

2. DEPARTMENT OF BANKING

The closed banks division is partially under the act.

(a) Employes of individual banks receiving loans are subject to sections 2 and 12.

(b) Employes of central offices of the closed bank division are subject to sections 2 and 12.

(c) The Secretary of Banking is subject to section 2.

(d) Deputy secretaries engaged in liquidating closed institutions which receive loans are subject to section 2.

3. Department of Forests and Waters

Employes of the Division of Protection, Division of Management and the Navigation Commission of the Delaware River, whose principal employment is in connection with the work of these divisions, are subject to sections 2 and 12.

The Secretary of Forests and Waters is subject to section 2.

4. Pennsylvania Game Commission

Employes whose principal employment is in connection with survey and research are subject to sections 2 and 12.

Employes of the Division of Lands in administrative positions, and the Executive Director of the Commission, are subject to section 2.

5. The General State Authority

Employes of the Authority are subject to sections 2 and 12 of the act.

The members of the Authority are subject to section 2.

6. Department of Health

With the exception of officers and employes of the Division of Public Health Education in the Bureau of Health Conservation, the Bureau of Tuberculosis Control, the Division of School Medical Inspection in the Bureau of Maternal and Child Health and of the departmental boards, namely, the State Board of Undertakers, the Sanitary Water Board, the State Board of Housing, the Advisory Health Board, all officers and employes of the department, including the Secretary of Health and the Deputy Secretary of Health, are subject to section 2 (limited to administrative positions) and section 12.

7. Department of Highways

Officers and employes engaged in the *maintenance* of State highways do not come within the provisions of either section 2 or section 12 of the act. Those employes of the department engaged in the *construction* of State highways come within the scope of both sections 2 and 12. The remaining officers and administrative employes of the department, including the Secretary of Highways,

come within the terms of section 2 of the act but not within the terms of section 12 thereof.

8. The Department of Labor and Industry

The employes of two bureaus, the Bureau of Employment and Unemployment Compensation and the Bureau of Rehabilitation, are subject to sections 2 and 12 of the act.

The Secretary of Labor and Industry is subject to section 2 of the act.

9. Department of Military Affairs

(a) Officers and enlisted men in the Pennsylvania National Guard are not subject to the act.

(b) Caretakers of armories and arsenals, paid in full by Federal funds, are subject to sections 2 and 12 of the act.

(c) Part time employes whose principal employment is not in connection with a federally financed project are not subject to the act.

(d) Boards of trustees and employes of the Soldiers' and Sailors' Home at Erie are subject to section 12 of the act.

(e) The Adjutant General and the Deputy Adjutant General and all other employes in administrative positions are under section 2 of the act.

10. Department of Public Assistance

Employes whose principal employment is in connection with federally aided projects, namely, Old Age Assistance and Aid to Dependent Children, are subject to sections 2 and 12 of the act.

Employes whose principal employment is in connection with the other services of the department, namely, General Assistance and Blind Pensions, are not subject to section 12 of the act.

Employes paid entirely from State funds, namely, the Work Relief Program and the Federal Surplus Commodities Program, are not subject to any provisions of the act.

Though employes of the Employment Board may come under the provisions of the act, the members of the board, since their principal employment is not in connection with the Employment Board, are not subject to the provisions of the act.

11. Department of Public Instruction

Employes whose principal employment is in the field of vocational education, vocational rehabilitation and vocational education of defense workers come under the provisions of section 12 of the act,

while those who serve in an administrative capacity over them are governed by the provisions of sections 2 and 12.

Employes whose principal employment is not in connection with a Federally financed project do not come under the provisions of section 12 of the act.

Members of the various professional licensing boards and all other employes of the State who are paid entirely by State funds do not come under the provisions of the act.

The Superintendent of Public Instruction is subject to section 2 of the act.

12. TREASURY DEPARTMENT

The employes of the bureau handling disbursements of money on behalf of the Unemployment Compensation System come under sections 2 and 12 of the act.

The State Treasurer is subject to section 2 of the act.

13. DEPARTMENT OF WELFARE

The Supervisor and employes of the Rural Extension Unit are subject to sections 2 and 12 of the act.

The Director of the Bureau of Community Work and the Secretary of Welfare are subject to section 2 of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

OPINION No. 370

State employes—Oath of allegiance.

(1) The Governor may require the officers and employes of his office, as well as those persons employed by him for the Executive Board to take the oath. (2) The heads of the several administrative departments and the several independent administrative and departmental administrative boards and commissions may require the employes therein to take the oath with certain exceptions. (3) The Pennsylvania Liquor Control Board may require its employes to take the oath. (4) The Pennsylvania Liquor Control Board, the Secretary of Labor and Industry and the Employment Board of the Department of Public Assistance may, by rule or regulation, prescribe, as one of the qualifications of employment by the Liquor Board, the Bureau of Employment and Unemployment Compensation and the Department of Public Assistance, respectively, that persons making application for employment therein be required to take the oath.

Harrisburg, Pa., October 15, 1940.

Honorable Arthur H. James, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication in which

you ask to be advised whether all State employes under your jurisdiction may be required to take the following oath of allegiance:

> I, ... do solemnly swear (or affirm) that I will support, obey, and defend the Constitutions of the United States and of the Commonwealth of Pennsylvania.
>
> That I do not and will not, as long as I am an employe of the Commonwealth, solicit or hold membership in any organization that advocates the overthrow of the Government of the United States nor engage in any activities designed to weaken the framework of our form of government.

In using the words "employes under (your) jurisdiction" we assume that you mean all persons employed in your office, in the several administrative departments of the State Government, as set out in section 201 of the Act of April 9, 1929, P. L. 177, 71 P. S. §61, known as The Administrative Code of 1929, (except the Department of the Auditor General and the Treasury Department), by the Executive Board, the Pennsylvania Motor Police, and by the several independent administrative and departmental administrative boards and commissions.

So far as we can ascertain, the precise questions raised by your inquiry have never been adjudicated by the courts of this Commonwealth. A similar situation, however, existed in the case of Harding *v.* Pinchot et al., 306 Pa. 139 (1932). In that case plaintiff, who had held a commission as a notary public for many years, refused, in her application for reappointment, to subscribe to a pledge "that she would 'loyally support the policies approved by the people of the Commonwealth in the election of 1930.'" Governor Pinchot refused to make the appointment and a suit in equity was instituted to enjoin him from insisting on the pledge as a condition thereto. The bill was dismissed by the court below and the decision affirmed by the Supreme Court on appeal. Because the opinion is, we think, decisive of the fundamental question here involved, we set it out at length:

> * * * These two acts [Act of March 5, 1791, 3 Smith's Laws 6 and Act of February 19, 1873, P. L. 36] empower the governor to judge the number and personality of those appointed by him to be notaries public in this State. Inasmuch as these appointments are entirely subject to his discretion, he may refuse to appoint for reasons best known to himself or for no reason, and what is true of original appointments is applicable to reappointments.
>
> As to the legality of the pledge in question, which the governor has promulgated, we have only to say it appears so capable of various interpretations that we are at a loss to know what its exact legal significance is, if in law it has any. Whether "the policies" referred to indicate the

policies of a political party or those of an individual or individuals elected to office in 1930, or both, and whether or not any such policies are reducible to terms of sufficient exactitude to make the pledge legally significant, are matters we seriously question. Our view of the interpretation the governor may place on the words of the pledge could not be more than a surmise upon our part. Accordingly, we are powerless either to interpret the phrase or hold that it is intrinsically illegal. "Equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person or to political right": Bispham's Equity, 10th edition, page 64. Miss Hamilton was not possessed of a right to be appointed a notary public, no matter how meritorious her application may have been.

* * * * *

In answer to statements made by the attorney general at bar regarding immunity of the governor, it may be well to repeat that when we, in the past, refrained from issuing judicial process against the governor, in deference to the fact that he represents a co-ordinate branch of the government (Hartranft's App., 85 Pa. 433), this court did not divest itself of power to issue judicial process to him in an appropriate case. The rule enunciated in the Hartranft Case was that, where it was sought to compel the governor by judicial process and he made answer that the decree prayed for would interfere with the proper performance of his executive duties, the courts would not issue mandamus to compel him to act. However, it should not be forgotten that the people are sovereign and their Constitution is the fundamental law. That Constitution provides: "All courts shall be open: and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay": Article I, section 11. This court has at no time declared that, in our bounden duty to protect the Constitution and constitutional rights of Pennsylvania citizens, we may not in extreme cases restrain even the governor. Although it is true that we will not issue judicial process to the chief executive except in a case of magnitude, yet where his action is in conflict with constitutional provisions, it is still the law that we retain the power thus to proceed should he act unconstitutionally so as to divest private rights or dispose of public property: Mott *v.* P. R. R. Co., 30 Pa. 9, 33. "It is idle to say the authority of each branch is defined and limited in the Constitution, if there be not an independent power able and willing to enforce the limitations * * * From its every position, it is apparent that the conservative power is lodged with the judiciary": Chief Justice Gibson in DeChastellux *v.* Fairchild, 15 Pa. 18, 20.

We have frequently issued or sustained process to high officials of the State of lesser rank than the governor: Com. *v.* Lewis, 282 Pa. 306; Busser *v.* Snyder, 282 Pa. 440; Com. *v.* Snyder, 279 Pa. 234; Mott *v.* P. R. R. Co., supra. * * *

It therefore becomes necessary to ascertain, first, the official in whom has been vested the power of appointing the employes under consideration and, second, whether or not the power to appoint is circumscribed or entirely discretionary. It is also necessary to consider whether or not the oath to be required is "intrinsically illegal." Although the appointing power in the case of Harding *v.* Pinchot et al., supra, happened to be the governor, we are of the opinion that under similar circumstances the decision in that case would apply to and control any other high official of the State Government vested by law with wide discretionary powers of appointment.

Section 211 of The Administrative Code of 1929, supra, provides as follows:

> The Governor shall appoint, to serve at his pleasure, a Secretary to the Governor, a Budget Secretary, and such consultants, experts, accountants, investigators, clerks, stenographers, messengers, watchmen, and other employes, as may be required for the proper conduct of the work of his office, and of the Executive Board, and shall fix their salaries, wages, fees, or other compensation.

It will be observed that the above section vests in you wide discretion with respect to the appointment of officers and employes in your office, as well as those persons employed by you for the Executive Board. In the words of the Supreme Court, in Harding *v.* Pinchot et al., supra:

> * * * Inasmuch as these appointments are entirely subject to * * * [your] discretion, * * * [you] may refuse to appoint for reasons best known to * * * [yourself] or for no reason, and what is true of original appointments is applicable to reappointments.

Furthermore, the persons so employed by you serve only at your pleasure and you may remove them from their positions at any time, for any reason. Consequently, you may, as a condition to appointment or continued employment, require such employes to take any pledge or oath you deem necessary and proper, save only that the same is not "intrinsically illegal" (Harding *v.* Pinchot et al., supra).

Section 214 of The Administrative Code of 1929, supra, provides as follows:

> * * * the heads of the several administrative departments, except the Auditor General and State Treasurer, and the independent administrative boards and commissions, shall appoint and fix the compensation of such directors, superintendents, bureau or division chiefs, assistant directors, assistant superintendents, assistant chiefs, experts, scientists,

> engineers, surveyors, draftsmen, accountants, secretaries, auditors, inspectors, examiners, statisticians, marshals, clerks, stenographers, bookkeepers, messengers, and other assistants and employes as may be required for the proper conduct of the work of their respective departments, boards, or commissions. 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.

It will be noticed that, pursuant to the foregoing provisions of The Administrative Code of 1929, generally the heads of the several departments comprising the executive branch of the State Government are vested with broad discretionary powers in the appointment of the personnel of their respective departments. It is true that you must approve the number and compensation of such employes before the appointments are effective but, nevertheless, the head of the department remains the appointing power. They, like you, may appoint, or refuse to appoint, for reasons best known to themselves, or for no reason at all. These officers are, of course, subject to be summarily removed by you (article VI, section 4 of the Constitution of Pennsylvania). The reason for this rule is clearly stated in Commonwealth ex rel. Kelley *v.* Sheridan et al., 331 Pa. 415 (1938), at page 421:

> * * * It is obvious that the main constitutional purpose was to allow officials to dismiss at pleasure the subordinates whom they had appointed, and thus be able to have under them at all times persons who would carry out their policies and directions loyally and efficiently.

And in Commonwealth ex rel. Schofield *v.* Lindsay, 330 Pa. 120 (1938), at page 123 the court said:

> Article VI, section 4, of the Constitution is an expression of a governmental principle which is supported both by reason and authority. It is a tenet of good government that except in those cases where the public welfare requires that an official charged with important governmental functions should be protected against interference on the part of the executive and in those cases where special classes of public servants, such as policemen and firemen, are placed under civil service protection, the power of removal is correlative with the power of appointment. The liability to summary removal attaches with manifest appropriateness to those subordinates who occupy close confidential relations with their superiors in the public service. * * *

As you may remove the officers appointed by you, *they* may remove, subject to exceptions hereinafter noted, those whom they have appointed. In Glessner's Case, 289 Pa. 86 (1927), at page 90, the court says:

> Under the common law it is the rule that the tenure of ministerial officers in general is during the pleasure of the appointing power, unless the law clearly provides otherwise. "An officer is not appointed for his own sake, but for that of the public. If he misbehaves, the sooner he is removed the better, because the country suffers every moment that he continues in office * * * Never was it supposed, in Pennsylvania, either before or since the revolution, that it was proper for ministerial officers to hold by any stronger tenure than the pleasure of the persons through whom they received their appointment, except in special cases where by law it was provided otherwise. This long continued custom is powerful evidence of the law; particularly in the United States, where every freeman stands on the same proud footing, where offices are sought with avidity, and where there is neither inclination to submit to executive oppression, nor danger in resisting it": Com. *v.* Bussier, 5 S. & R. 451, 461. In the case of Field *v.* Com., 32 Pa. 478, we also find a statement (page 481) that "where an appointment is during pleasure, or the power of removal is entirely discretionary, there the will of the appointing or removing power is without control, and no reason can be asked for, nor is it necessary that any cause should be assigned." * * *

See also Commonwealth ex rel. Smith *v.* Clark et al., 331 Pa. 405 (1938).

Subordinate officers and employes in the several administrative departments, boards and commissions being appointed by the head of the department or by the board or commission, as the case may be, it follows, upon the authority of the foregoing cases, that they can be removed from their positions at any time or for any reason by the appointing power. Consequently, as in the case of those officers and employes appointed directly by you, the appointing power may, as a condition to appointment or continued employment, require officers and employes alike to take any pledge or oath which you desire them to take provided, of course, that the same is not "intrinsically illegal." Your assurance that a department head will require employes in his department to take the required oath is, obviously, that you can summarily dismiss such officer in the event he does not comply with your request.

An examination of the oath which you propose shall be taken by employes of the several administrative departments, boards and commissions convinces us that it is one that any person loyal to his country and to the principles of the American form of government

should be proud to take. The first paragraph thereof pledges the employe to support the Constitutions of the United States and the Commonwealth of Pennsylvania. Since all persons in this Commonwealth are bound by these, the fundamental, organic laws of our Nation and State, and since the Constitution of Pennsylvania (article VII) requires all senators and representatives and all judicial, state and county officers to take a similar oath, one could hardly say that it is illegal. Considering the second paragraph, is it illegal to require a person who is earning his very livelihood from the Commonwealth of Pennsylvania, who is living a free and independent life under the protection of the laws of the Commonwealth of Pennsylvania and the laws of the United States, and who is secure in his right to enjoy the benefits of American institutions, to take an oath that he will not engage in or advocate the overthrow of the Government of the United States? To state this question is to answer it. The Supreme Court of this Commonwealth in Commonwealth *v.* Widovich et al., 295 Pa. 311 (1929), at page 317 said:

> Whatever may have been the understanding of Section 2 [Constitution of Pennsylvania], the Civil War definitely decided that no change in the form of government can come about through secession or the withdrawal of a part of the people from our scheme of government. * * * The established government is the government of all the people; any change in its form should come from the majority, and the Constitution points the way to effect such a change. * * * The legislature, under the police power, to preserve the State's republican form of government, to suppress insurrection and to maintain the safety, peace and order of its citizens, may enact laws to suppress acts or attempts to commit acts of violence toward the government; it may prohibit the teaching or advocacy of a revolution or force as a means of redressing supposed injuries, or effecting a change in government. * * *

To require a pledge from an employe not to engage in an enterprise which the legislature of this Commonwealth has declared to be unlawful, could hardly be said to be "intrinsically illegal."

The Act of December 5, 1936, P. L. (1937) 2897, 43 PS §751, known as the "Unemployment Compensation Law," the Act of November 29, 1933 (Special Session) P. L. 15, known as the "Pennsylvania Liquor Control Act," and the Act of April 9, 1929, P. L. 177, as amended by the Act of June 24, 1937, P. L. 2003, (71 PS §664), which established the Department of Public Assistance, contain provisions for the selection of personnel and established, in the above-named departments, so-called civil service or merit systems. The employes in these departments were originally appointed to their positions, and now hold them, under and subject

to such provisions. The Unemployment Compensation Law, supra, provides, inter alia, as follows:

> Section 208. Civil Service; Selection of Personnel; Additional Duties of Secretary and Board. * * *
>
> * * * * *
>
> (o) The Secretary may, * * * summarily dismiss any employe of the department engaged in the administration of this act, who has been finally convicted of an offense in connection with his duties in the administration of this act, or of any felony or any crime involving moral turpitude.
>
> The secretary may * * * dismiss any employe of the department engaged in the administration of this act for delinquency or misconduct in his or her duties under this act.

It will be observed, therefore, that an employe of the Bureau of Employment and Unemployment Compensation may be summarily dismissed by the Secretary of Labor and Industry for (a) conviction of an offense in connection with his duties in the administration of the act, (b) conviction of a felony or any crime involving moral turpitude, or (c) delinquency or misconduct in his duties under the act.

The provisions of this act are mandatory upon the Secretary of Labor and Industry and he cannot, therefore, dismiss an employe of the aforesaid bureau for the reason that such employe refuses to take the oath which we are now considering. However, section 208 of the said act provides, inter alia, as follows:

> (e) The secretary shall prescribe, by rules and regulations, the qualifications to be possessed by persons desiring employment in the various grades of employment in the administration of this act. * * *

By virtue of this provision the Secretary of Labor and Industry undoubtedly has the authority to adopt a rule which would make it mandatory for every future applicant for a position in this bureau to subscribe or take the required oath. Failing to do so, he would of course, be ineligible for appointment for the reason that he did not possess the qualifications prescribed by the secretary's rules and regulations.

The Administrative Code of 1929, supra, as amended by the Act of June 24, 1937, P. L. 2003, 71 PS §61, et seq. and supplemented by the Act of June 24, 1937, P. L. 2051, as amended, 62 PS §2501, et seq., known as the Public Assistance Law, and the Pennsylvania Liquor Control Act, supra, both contain provisions similar to the one above referred to and give the Employment Board in the Department of Public Assistance and the Pennsylvania Liquor Control

Board, respectively, the authority to prescribe, from time to time, by rule or regulation, the qualifications to be possessed by persons desiring employment. Upon request by you, these boards would, therefore, have a similar power to adopt a rule or regulation requiring applicants for positions to take the oath referred to as one of the required qualifications. Unlike the Unemployment Compensation Law, supra, however, these acts contain provisions which confer upon the Governor summary power of removal of persons employed thereunder when such action is deemed to the best interests of the public service. These provisions undoubtedly confer upon you the right to remove employes in the Department of Public Assistance, upon recommendation of the Secretary, and the Pennsylvania Liquor Control Board, in your discretion, should they refuse to take the required oath.

In view of the foregoing, we are of the opinion:

1. That you may require the officers and employes in your office, as well as those persons employed by you for the Executive Board, to take the oath set forth on the first page of this opinion.

2. That, at your request, the heads of the several administrative departments of the State government and the several independent administrative and departmental administrative boards and commissions may require the employes therein to take the aforesaid oath. Provided, however, that as to present employes in the Bureau of Employment and Unemployment Compensation, subject to the above civil service provisions, there is no effective way of enforcing this requirement.

3. That, at your request, the Pennsylvania Liquor Control Board may require its employes to take the aforesaid oath.

4. That the Pennsylvania Liquor Control Board, the Secretary of Labor and Industry and the Employment Board in the Department of Public Assistance may, by rule or regulation, prescribe, as one of the qualifications of employment by the Pennsylvania Liquor Control Board, the Bureau of Employment and Unemployment Compensation and the Department of Public Assistance, respectively, that persons making application for employment therein be required to take the aforesaid oath.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 371

State Government—Examination of applicants for unemployment compensation division—Prescription of minimum qualifications by Secretary of Labor and Industry—Necessity that application show qualifications—Preparation of lists of eligibles—Propriety of oral examination or rating for experience—Propriety of announcing approximate number of positions to be filled—Unemployment Compensation Law of 1936, sec. 208(e), (f), and (i), as amended.

1. The Secretary of Labor and Industry should, under section 208, subsections (*e*) and (*f*) of the Unemployment Compensation Law of December 5, 1936, P. L. (1937) 2897, as amended by the Act of May 18, 1937, P. L. 658, prescribe by rules and regulations the qualifications to be possessed by persons desiring employment in the administration of the act, although such qualifications cannot include any requirements regarding scholastic education or training, and all applications should be so drawn as to reveal that the applicants possess the qualifications prescribed, since only such applicants should be admitted to examination.

2. In preparing and certifying lists of eligibles, the Unemployment Compensation Board of Review should, in accordance with section 208(*i*) of the Unemployment Compensation Law of 1936, prepare and certify lists of eligibles for the State as a whole and for employment service districts only; county lists should not be prepared.

3. The Unemployment Compensation Board of Review may not, under section 208(*f*) of the Unemployment Compensation Law of 1936, give an oral examination or rating for experience and personal qualifications to any person who has failed to pass the written examination, but after an applicant has passed the written examination the board may, in its discretion, consider experience and personal qualifications through an oral examination in arriving at a final rating.

4. In making public announcements of the holding of competitive examinations for applicants for employment in the administration of the Unemployment Compensation Act, the Unemployment Compensation Board of Review may, as a matter of administrative policy, include a statement of the approximate number of positions to be filled from the lists resulting from the examination.

Harrisburg, Pa., October 16, 1940.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of August 16, 1940, in which you request this department to advise you on the following problems:

1. Whether under the Unemployment Compensation Law, the Act of December 5, 1936, P. L. 2897, as amended, 43 PS §751 et seq., only those applicants who meet the minimum qualifications established by the Secretary of Labor and Industry, under the law may be admitted to competitive examinations.

2. In preparing and certifying lists of eligibles, is the Unemployment Compensation Board of Review required to certify county lists of eligibles, or may it prepare and certify lists of eligibles for the State as a whole and employment service districts only?

3. Under the Unemployment Compensation Law, is the Unemployment Compensation Board of Review required to grant an oral examination or a rating for experience to any individual who fails to pass successfully a written competitive examination?

4. In making public announcement of the holding of competitive examinations, is it proper to include in such public announcement a statement of the approximate number of positions to be filled from the lists of eligibles prepared from the results of such an examination?

The civil service and selection of personnel for the Pennsylvania Bureau of Employment and Unemployment Compensation is governed by section 208 of the Unemployment Compensation Law, the Act of December 5, 1936, P. L. 2897, as amended by the Act of May 18, 1937, P. L. 658, the Act of June 20, 1939, P. L. 458 and Act No. 9, approved May 16, 1940, 43 PS §751, et seq.

The answer to your first inquiry is found in section 208 (e) and section 208 (f) as follows:

> (e) The secretary shall prescribe, by rules and regulations, the qualifications to be possessed by persons desiring employment in the various grades of employment in the administration of this act. The qualifications shall be such as will best promote the most efficient administration of this act, * * *
>
> (f) Every individual desiring employment under the provisions of this act shall file with the board an application, which shall be in a form prescribed by the board, provided that such application shall be the same for all individuals desiring the same grade of employment, *and shall be so drawn as to reveal the qualifications as prescribed by the secretary.* * * * Such competitive examinations shall be practical in their character and, so far as may be possible, shall relate to those matters which will fairly test the relative capacity and fitness of persons examined to discharge the duties of the service into which they seek to be appointed, but no applicant shall be required to be possessed of any scholastic education or training in order to be permitted to take any competitive examination or to be appointed to any position. * * * (Italics ours).

By virtue of the foregoing sections of the act, the secretary has the responsibility of prescribing qualifications for persons desiring employment in the various grades of employment in the administration of the Unemployment Compensation Act. Since these qualifications are the standards which must be met, they become the minimum qualifications that an applicant must possess in order to be permitted to take the competitive examination. In setting up qualifications, however, the secretary is prohibited from requiring that

the applicant be possessed of any scholastic education or training in order to be permitted to take the competitive examination.

It is thus imperative that the applications shall be so drawn as to reveal qualifications as prescribed by the secretary, since only those applicants whose applications do show the qualifications prescribed by the secretary may be admitted to examination.

The answer to your second question is found in section 208 (i) which provides as follows:

> (i) *The board shall certify to the secretary for each administrative district, and for the State as a whole, lists of names of persons receiving a passing mark,* and shall rank such persons in the order of magnitude commencing with the highest rating for the specified grade of employment. * * * (Italics ours).

Under the law the board is thus required to certify to the secretary only for each administrative district and for the State as a whole. In section 208 (e) the secretary, in prescribing qualifications for employes, is required to set up certain standards of citizenship and residence for persons applying for positions, for the State as a whole and for administrative districts. As there is no provision regarding county lists, there is no requirement or authority for certification of county lists, and lists are limited to the State as a whole and administrative districts.

The answer to your third query is found in §208 (f) as follows:

> (f) Every individual desiring employment under the provisions of this act shall file with the board an application, which shall be in a form prescribed by the board, provided that such application shall be the same for all individuals desiring the same grade of employment, and shall be so drawn as to reveal the qualifications as prescribed by the secretary. In no case shall the board require of the applicant any information pertaining to his race, creed, color, or political affiliations. Upon receiving such application the applicant shall be admitted to the next competitive examination in the grade of employment which he or she seeks. * * * Such competitive examinations shall be in writing, but in arriving at a final rating of applicants for such administrative and professional grades of employment as are so designated by the board, *the board may take into consideration such experience and personal qualifications as are related to the grades of employment for which applicants are being examined,* provided that the same standards shall apply with respect to all applicants in the same grade of employment: * * * (Italics ours).

It is clear from the wording of this section, namely, "such competitive examinations shall be in writing," that this provision is

mandatory and that the written examination is the sine qua non for eligible lists. However, under this section, the board, within its discretion, may consider experience and personal qualifications, the latter of which are best ascertained through an oral examination. Though it is necessary for an applicant to pass a written examination, experience and personal qualifications may be considered through an oral examination in arriving at a final rating.

With reference to the fourth question, since this is obviously administrative policy, it is a matter for your department to determine. Though there is no express authority in the law that a statement of the approximate number of positions to be filled from lists of eligibles prepared from the results of such examination should be given or not, if it would appear desirable for your department, in making public announcement of competitive examinations, from the point of view of administrative efficiency, to include a statement of the approximate number of positions to be filled, it could be so included.

In view of the foregoing, we are of the opinion that:

(1) The answer to your first question is in the affirmative. Only such persons may be admitted to examinations under the Unemployment Compensation Civil Service System as are found to meet the minimum qualifications established by the Secretary of Labor and Industry for the positions for which they apply.

(2) Lists of eligibles for the State and administrative districts only should be prepared, county lists should not be included.

(3) The answer to your third question is in the negative. No person who fails to pass the written examination can be given an oral examination or rating for experience and personal qualifications. It is only after the applicant has passed the written examination that the board, within its discretion, may, in arriving at a final rating, consider experience and personal qualifications through an oral examination.

(4) As stated above, as a matter of administrative policy, announcements of examinations, where possible, could include a statement of the approximate number of positions to be filled from the lists resulting from such examinations.

Very truly yours,

DEPARTMENT OF JUSTICE
CLAUDE T. RENO,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 372

Beverages—Registration of beverage companies—Operation of several plants—Necessity for more than one registration—Act of May 14, 1925, as amended—Statutory purpose.

1. It is not necessary that each plant operated by an out-of-State bottling or manufacturing concern be registered with the Department of Agriculture under the Act of May 14, 1925, P. L. 730, as amended by the Act of June 25, 1937, P. L. 2140; only one registration of all beverages manufactured or bottled by each person, association, copartnership, or corporation is required, regardless of residence.

2. The intention of the General Assembly in passing the Act of May 14, 1925, P. L. 730, as amended by the Act of June 25, 1937, P. L. 2140, was to require the registration of beverages rather than of bottling plants or places of manufacture.

3. The Act of May 14, 1925, P. L. 730, as amended by the Act of June 25, 1937, P. L. 2140, is a health measure and is not to be interpreted as a revenue-producing act.

Harrisburg, Pa., October 16, 1940.

Honorable John H. Light, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request asking whether each plant operated by an out-of-state bottling or manufacturing concern is required to be registered with the Department of Agriculture, by reason of the Act of May 14, 1925, P. L. 730, as amended, 31 P. S. §§761 to 780, inclusive, known as the Carbonated Beverages and Still Drinks Law.

Your inquiry no doubt arises from section 2 of the Act of May 14, 1925, supra, as amended, 31 P. S. §762, which reads in part as follows:

> It is unlawful for any person to import into this Commonwealth for sale any carbonated beverage or still drink which is not registered with the Department of Agriculture.

The act above referred to is entitled:

> AN ACT
>
> For the protection of the public health in the manufacture and sale of carbonated beverages and still drinks; providing for the registration thereof; prohibiting the sale, offering or exposing for sale, exchange or giving away thereof in certain cases unless registered; regulating the manufacture, bottling, preparation, mixing, and compounding of carbonated beverages or still drinks, and the sale and dispensing thereof; creating a special fund in the State Treasury; and providing penalties.

Section 2 of this act of 1925, as amended, supra, reads:

> It is unlawful for any person to sell, offer, or expose for sale, or exchange or give away, or have in possession with intent to sell, any carbonated beverage or still drink, * * * unless the same has been registered with the Department of Agriculture. * * *

Section 3 of the act of 1925, as amended, supra, 31 P. S. §763, reads:

> *Any person,* whether a resident or nonresident of this Commonwealth, *manufacturing or bottling any carbonated beverages or still drinks shall register such beverages with the Department of Agriculture* by filing an application for such purpose on a form to be prescribed by the Department of Agriculture. Such application shall state (a) the name and address of the applicant, (b) the location of his manufacturing or bottling plant, (c) the name of each beverage to be registered, and (d) such other information as may be required by the Department of Agriculture. The application shall be accompanied by a fee of fifty dollars. *The Department of Agriculture shall issue to each applicant a certificate of registration for all carbonated beverages or still drinks manufactured or bottled by him.* Such registration shall expire one year from the issuance thereof, unless renewed annually by the payment of a fee of fifty dollars.
>
> The Department of Agriculture may revoke any registration whenever it is determined by it that any of the provisions of this act or any other act relating to carbonated beverages or still drinks have been violated. (Italics ours).

Section 4 makes it unlawful to label, mark or cap unregistered beverages.

Section 5 declares what ingredients may be used in making beverages, and defines adulteration of beverages.

Section 6 requires the marking of containers or artifically flavored or colored beverages.

Section 7 requires the display of cards with the information mentioned in section 6.

Section 8 requires the marking, labeling and capping of bottles showing the name and address of the manufacturer or bottler.

Section 9 requires the cleansing of all bottles with a specified solution before being used.

Section 10 prohibits the use of bottles in which the metal or rubber parts of the stopper come in contact with the beverage.

Sections 11, 12, 13, 14, 15, 16 and 17 are of a similar nature and deal with beverages, their manufacture, and care after manufacture.

Section 2, first above referred to, indicates the intention of the

General Assembly to require the registration of beverages rather than bottling plants or places of manufacture. Of course, we could not inspect or legislate in connection with out-of-state plants.

As a result of our study of the act, we are of the opinion that the General Assembly has emphasized and required the registration of beverages, rather than the registration of the plants of the manufacturer or bottler.

It will be noticed from a reading of section 3 of the act of 1925, supra, 31 P. S. §763, that the form of application requires that the location of the manufacturing or bottling plant be stated. This, of course, by virtue of the provision of the first section of the act, includes the plural and it seems to us that if the General Assembly intended each plant to be registered, a separate application would be required for each registration, or there would be some other provision in this section specifically stating that there must be an application or a registration for each plant.

Attention is also called to the sentence in the third section, which reads:

> * * * The Department of Agriculture shall issue to each applicant *a certificate of registration for all carbonated beverages or still drinks manufactured or bottled by him.* * * * (Italics ours)

This law is a health measure passed by the General Assembly pursuant to its police powers. It should not, therefore, we believe, be interpreted as a revenue producing act.

During the same sessions of the General Assembly when this law was being amended, the General Assembly passed the Act of May 21, 1937, P. L. 788, 31 P. S. §7400, known as the Sanitary Container Law. That act is entitled:

> AN ACT
>
> For the protection of the public health, and the prevention of fraud and deception, requiring clean, sanitary establishments for the manufacture, preparation or bottling of non-alcoholic drinks and liquid foods, including clean, sanitary ingredients and containers; regulating the maintenance and operation of such establishments, and the use of containers; prescribing penalties; and providing for injunctions in certain cases.

The act of 1937, supra, covers bottling establishments of the kind referred to in the act of 1925, supra, and if it was the intention of the General Assembly to require registration of bottling establishments, it seems to us it would have been required in the act of 1937, supra, which treats so fully with bottling establishments.

You call our attention to the case of Commonwealth *v.* Childs Dining Company, 32 Pa. Super. Ct. 467 (1907). This case does not apply, as the act under consideration was a mercantile license act and these acts have always been interpreted to include each and every place or establishment made the subject of the tax.

We are, therefore, of the opinion that you should require only one registration of all beverages manufactured or bottled by each person, association, copartnership or corporation, regardless of residence.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 373

Brokers—Real estate brokers' and salesmen's examinations—Failure—Right to take further examinations—Limitation on number—Act of July 2, 1937, sec. 3.

1. An applicant for a real estate broker's license, who took and failed an examination in July of 1937, may, under the provisions of the Act of July 2, 1937, P. L. 2811, sec. 3, take another examination even though he had previously taken and failed to pass an examination in January of 1936; but if he fails to pass the second examination after the effective date of the Act of 1937, he is ineligible to take a similar examination until a period of two years has elapsed.

2. Where an applicant for a real estate broker's or salesman's license has failed to pass two successive examinations after the effective date of the Act of July 2, 1937, P. L. 2811, he may, under section 3 of that act, after the expiration of two full years, take one further examination but not two; the words "similar examination," as used in the section, refers to the type rather than the number of the examinations.

Harrisburg, Pa., October 21, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your recent communication, in which you request our opinion on the following statement of facts:

In January, 1937, and in July, 1939, an applicant took examinations for a real estate broker's license, pursuant to the provisions of the Act of May 1, 1929, P. L. 1216, as amended, 63 P.S. §431, et seq., known as the "Real Estate Brokers License Act." The applicant

failed to pass both examinations. Section 1(c) of the Act of May 16, 1935, P. L. 170, 63 P.S. §437, which amended the original Real Estate Brokers License Act in effect at the time the applicant took the first examination, provided inter alia as follows:

> * * * Any individual, who fails to pass the examination at two successive examinations, shall be ineligible for a similar examination, until after the expiration of one full year from the time such individual took the last examination: Provided, however, That any applicant who fails to pass a salesman's examination shall be ineligible to apply for, or operate under a temporary broker's certificate.

This section of the act was again amended by the Act of July 2, 1937, P. L. 2811, 63 P. S. §437 and, at the time the applicant took the second examination, the following provision was in effect:

> * * * Any individual, who fails to pass the examination at two successive examinations, shall be ineligible for a similar examination, until after the expiration of two full years from the time such individual took the last examination.

Specifically, you now ask to be advised whether the applicant has failed "two successive examinations" within the meaning of the Act of July 2, 1937, supra, and if he must wait two years from July, 1939 before he is entitled to take another examination for a license.

It is evident that had the applicant taken the second examination prior to July 2, 1937, he would have had to wait but one year before he could take a similar examination. Under the provisions of the present law, had he taken two examinations since July 2, 1937, and failed both, he would have to wait until two years after the last examination before he would be eligible to take another.

The question now arises whether this applicant has failed two successive examinations within the meaning of the provision of the 1937 amendment, and must, therefore, wait two years to take another examination, or whether he has taken and failed but one examination under the 1937 amendment.

In answering these questions as to whether the provisions of the amendatory Act of July 2, 1937, P. L. 2811, section 3, 63 P. S. §437 (c), or those of the amendatory Act of May 16, 1935, P. L. 170, section 1, 63 P. S. §437 (c), control, it is apparent that we are dealing with the interpretation of a procedural act. It is clear, therefore, that the provisions of the last amendment on this subject govern our conclusions. In light of this fact, we are of the opinion that the applicant under discussion has failed but one examination under the provisions of section 3 (c) of the Act of July 2, 1937, P.

L. 2811; and therefore he is entitled to take another examination. If he fails to pass this examination he will of course be ineligible to take another until two years have elapsed.

Your second question arises by reason of the uncertainty that exists as to the extent to which the act limits the number of examinations the individual may be eligible to take.

Section 3 (c) of the Act of July 2, 1937, P. L. 2811, 63 P. S. §437, contains the following provision:

> * * * Any individual, who fails to pass the examination at two successive examinations, shall be ineligible for a similar examination, until after the expiration of two full years from the time such individual took the last examination.

It will be noted that this provision indicates that the individual shall be ineligible for a *similar examination.* The question arises whether this means one examination, or whether it means that after the expiration of two full years, an individual is again eligible to take two examinations. The term "examination" in this provision is singular in number. The question has been raised as to whether the term "similar examination" merely refers to the type of examination or to the number of examinations that the individual may again be eligible to take.

The word "similar" is defined in Bouvier's Law Dictionary as follows:

> Similar. Denotes partial resemblance, and also *sameness in all essential particulars;* Com. *v.* Fontain, 127 Mass. 454. (Italics ours)

Words and Phrases, Volume 5, Fifth Series, 1932-1939, page 363, states:

> The word "similar" is a synonym for the word "like." Castell *v.* United States, 20 F. Supp. 175, 179.

The Statutory Construction Act of May 28, 1937, P. L. 1019, article III, section 33, 46 P. S. §533, states this rule:

> General words shall be construed to take their meanings and be restricted by preceding particular words.

It is apparent that the legislature by the term "similar examinations" as used in the provisions of the Real Estate Law, not only intended to limit the number of examinations, but also specified the interval which must elapse before the individual who has failed two successive examinations can take a reexamination. This interval has been set at two years by the legislature in such a case. There-

fore, the term "similar examination" does not mean two more examinations, but another "like" examination.

It is therefore our opinion that:

1. An applicant for a real estate broker's license who took an examination in July, 1939, which he failed, under the provisions of the Act of July 2, 1937, P. L. 2811, section 3 (c), 63 P. S. §437, is entitled to take another examination. The fact that he took an examination in January, 1936, which he also failed, does not take this right away from him. If he fails the second examination he is ineligible to take a similar examination until a period of two years has elapsed.

2. The term "a similar examination" as contained in the provisions of section 3 (c) of the Act of July 2, 1937, P. L. 2811, 63 P. S. §437, means that an applicant for a real estate broker's or salesman's license is not eligible to take another "like" examination, after he has failed two in succession, until two years have elapsed.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 374

Corporations—Nonprofit corporation—Propriety of name—Inclusion of word prohibited by Nonprofit Corporation Law of 1933—Prior user—Amendment of title.

A corporation which had, prior to the enactment of the Nonprofit Corporation Law of May 5, 1933, P. L. 289, a title which included one of the words prohibited by section 202 of that act, may, under section 5 of the act, amend its title as provided in section 701, and in the new title continue to use the prohibited word.

Harrisburg Pa., October 30, 1940.

Honorable S. M. R. O'Hara, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Madam: We have your request for an opinion, in which you inform us that the Societa' Di Mutuo Soccorso San Silvestro Abruzzo e Molise, a nonprofit corporation organized under the laws of Pennsylvania by decree of the Court of Common Pleas No. 4 of Philadelphia, entered to No. 3398 March Term, 1917, presents an application for registration of a proposed new corporate name.

You also state that the new name is "Societa' Italiana Di Mutuo Soccorso San Silvestro;" that the word "Mutuo" is in the Italian language, which translated into the English language means "mutual;" and that this word as part of the corporate name of a nonprofit corporation is prescribed by section 202 of the Nonprofit Corporation Law of 1933.

Specifically, you request to be advised whether the Department of State may grant registration as a proposed new corporate name, the title "Societa' Italiana Di Mutuo Soccorso San Silvestro," for a nonprofit corporation.

Reference to the charter discloses that "the purposes for which the corporation is formed are to encourage a social and brotherly feeling, to accumulate a fund from dues and assessments of its members to be applied for their relief when sick and to provide for their burial and that of their wives after death."

The Nonprofit Corporation Law, the Act of May 5, 1933, P. L. 289, article II, section 202, as amended by the Act of July 17, 1935, P. L. 1130, 15 PS §2851-202, provides in part as follows:

> Section 202. The Corporate Name. A. The corporate name may be in any language, but must be expressed in English letters or characters. The corporate name shall not imply that the corporation is an administrative agency of the Commonwealth, or of the United States, or is subject to the supervision of the Department of Banking or of the Insurance Department, and shall not contain the word * * * "insurance," "mutual," * * *.

Certain organizations are not included within the provisions of the act, as appears by reference to section 4 thereof, which provides in part as follows:

> This act does not relate to, does not affect, and does not apply to:
>
> * * * * *
>
> (2) Beneficial, benevolent, fraternal and fraternal benefit societies, having a lodge system and a representative form of government, or transacting any type of insurance whatsoever.
>
> * * * * *
>
> (4) Any corporation which, by the laws of this Commonwealth, is subject to the supervision of the Department of Banking, the Insurance Department, the Public Service Commission, or the Water and Power Resources Board.

As the corporation under discussion is not engaged in any of the activities mentioned, it is not excluded from the provisions of the act.

Your inquiry, therefore, resolves itself into the question of whether or not the Department of State may grant registration as a proposed new corporate name, the title of a nonprofit corporation containing the name "Mutuo," to a corporation which used the word "Mutuo" in its corporate name prior to the Nonprofit Corporation Law in 1933.

It would seem that the prohibition of the use of the word "mutual" is based upon the fact that banking and insurance corporations are not within the scope of the Nonprofit Corporation Act. (15 P. S. §2851-4-(2) and (3). Some others are also excluded.

The applicant is apparently either a beneficial society or a fraternal society. Yet not all of these are under the supervision of the Insurance Commissioner as certain exemptions are set out in both The Fraternal Benefit Society Act of July 17, 1935, P. L. 1092, section 34 and Beneficial Society Act of June 4, 1937, P. L. 1643, section 13. (See 40 P. S. §§1113 and 1084).

Whether or not this particular group is a fraternal society, etc., is a question which can be determined only upon a consideration of all relevant facts, and ordinarily this question should be determined by the Department of State.

It would seem first, therefore, that the Department of State should determine if this applicant is or is not subject to the supervision of the Insurance Commissioner; that is, if it is or is not exempted. If *not* exempted it would seem change of name has to come through the Insurance Department—then on to the Department of State for recordation.

The right of a nonprofit corporation to adopt a new name is conferred by section 701 of the Nonprofit Corporation Law, which provides in part as follows:

> Amendment of Articles Authorized—A nonprofit corporation, upon application to the court in the manner hereinafter provided in this article, may amend its articles for any or all of the following purposes:
> (1) To adopt a new name subject to the restrictions heretofore provided in this act.

One of the restrictions referred to is the prohibition of the use of the word "mutual" as part of the corporate name, as set forth in section 202 of the Nonprofit Corporation Law, above quoted.

It might be argued, inasmuch as this corporation has enjoyed the use of the word "Mutuo" since its incorporation in 1917, that the corporation has acquired property rights which should be protected, especially in view of section 5 of the act (15 PS §2851-5), which provides in part as follows:

> Section 5. Saving Clause—A. This act shall not impair or affect any act done, offense committed, or right accruing, accrued, or acquired, or liability, duty, obligation, penalty, judgment or punishment incurred, prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted, or inflicted as fully and to the same extent as if this act had not been passed.

Under the circumstances herein set forth, it appears to us that the present corporation may amend its title as indicated; and thereby, the word "Mutuo" remains in the new corporate name.

This results from the fact that section 5, saving rights acquired before enactment of the law, is controlling and, to that extent, modifies the provisions of sections 202 and 701 of the act.

However, this applies only to corporations incorporated before the passage of the act with an objectionable word in their names; section 5 does not invest corporations, organized prior to the passage of the act which have no objectionable word in their titles, with power to amend *now* by including an objectionable word in their names.

All prior opinions on this subject inconsistent herewith are hereby overruled.

We are of the opinion, therefore, and you are accordingly advised that a corporation which had, prior to the enactment of the Nonprofit Corporation Law, a title which included one of the words prohibited by section 202 of that law, may amend its title, and in the new title continue to use the objectionable word.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 375

School—Nonprofit corporation to build school building—Lease to school district—Right of district to sell land to corporation—Validity of lease—Term—Renewal provisions—Obligation for maintenance and upkeep—Obligation to rebuild in event of fire—Limiting rentals and expenses to current revenues—Provisions relating to default.

1. A school district may, under section 602 of the School Code of May 18, 1911, P. L. 309, its supplements and amendments, sell and convey land which it owns for a fair consideration, and such a sale may be to a nonprofit corporation

formed for the purpose of building and renting a school house to the district, provided the consideration is fair.

2. A school district may, under section 602 of the School Code, its supplements and amendments, lease land or buildings from an individual or corporation, and the corporation may be one formed for the express purpose of building a school house and renting it to the district.

3. A school district may properly enter into a lease for a school building for a period of 30 years, there being no constitutional or statutory provisions in Pennsylvania limiting the time for which such a lease may be made.

4. A school district does not incur indebtedness, within the meaning of the constitutional provisions limiting the power of municipal corporations to contract debts, by entering into a long-term lease for real estate, even though the lease requires it to pay for the maintenance and upkeep of the property, provided that the rentals and other expenses are payable only from the current revenues of the district and from none of its other funds.

5. A school district may not, in leasing a school building, bind itself to pay the balance over the proceeds of insurance of the cost of reconstructing the building in the event of destruction by fire, since such an obligation would increase its debt.

6. Where a lease for a school building between a nonprofit corporation and a school district provides that, in the event of default by the district, the lessor's only remedy is to take back the building and collect whatever rent there may be due from the district's current revenues only, the lease is proper even though under the terms of the trust indentures between the lessor and the trustee ror its bondholders the latter may, upon default by the lessor, declare all the principal and interest due immediately, seize possession of the premises and sell them at public or private sale, if it is clearly provided that the trustee in so doing takes subject to the condition that the rents, expenses, and costs can be paid by the district from its current revenues only.

7. A lease for a school building between a nonprofit corporation and a school district may properly provide that, upon the expiration of its term, the district shall have the right of renewal from year to year upon the same terms and conditions until the bonded indebtedness of the lessor is fully paid, and thereafter for the annual rental of $25, provided that the district in no way obligates itself to purchase the premises.

Harrisburg, Pa., November 12, 1940.

Honorable Francis B. Haas, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: In your recent memorandum you inform us that you are desirous of being advised if your department can approve a contract providing for the leasing of a school building to a school district by a holding company.

You also inform us that you have received many inquiries on similar plans from various school districts in this Commonwealth, but that you are only requesting us to advise you on the inquiry that you received from East Buffalo Township, Union County, Pennsylvania, which calls for a discussion of the general principles of

law which are applicable to the particular plans submitted to you for approval.

From a study of the various legal instruments, and of the information furnished us, we find that there has been organized in East Buffalo Township, Union County, Pennsylvania, a nonprofit corporation known as the School Association of East Buffalo Township for the purpose of purchasing a tract of land from the school district of the said township, issuing bonds in an amount not more than forty thousand ($40,000) dollars, erecting school buildings, and leasing the said school buildings to the said school district. This plan is similar to what is known in Pennsylvania as the Troy Plan; and is also similar to what has recently been enacted by the legislature as The General State Authority and Municipality Authority plans.

The Troy Plan has been used in approximately forty (40) school districts in Pennsylvania. Under this plan a school district that has borrowed up to the limit of its indebtedness (either the 2% or 7%) and still requires further finances for new buildings, obtains the organization of a nonprofit corporation by the citizens of the district. This corporation, by bond issue, raises the money required for the erection of the buildings and leases this building to the school district for a term of years. After the bond issue is paid by the nonprofit corporation, the practice has been for the corporation to transfer the school building and land to the school district.

We shall answer your questions as we state them:

I

> Can the association obtain the land for the proposed building from the municipality or school district?

In Mansfield Borough School District *v.* Mansfield High School Association, 9 D. & C. 113 (1926), the school district agreed to sell the real estate to the association by fee simple deed, for the consideration of one ($1.00) dollar. The court decided that this was the only reason that the plan should not be approved. Its discussion applies to the East Buffalo Township plan:

> We must not forget that the school board is not dealing with an individual, but with a corporation, and that, because of this, the dealings must be at arm's length.
>
> * * * * *

In the present case, it is agreed that the school district shall sell and convey to the association the required land for a consideration of $500. There is no doubt that, under the provisions of the Act of May 18, 1911, P. L. 309, article VI, section 602, its supplements

and amendments, 24 PS §672, 24 PS §672 (a), a school district may sell and convey land which it owns for a fair consideration.

This sale of land from the district to the association can be considered as a sale of land for a valuable consideration, even though it be part of a plan of financing, provided that the consideration is fair and adequate. Upon its fairness or adequacy, we pass no opinion.

II

Can a school district lease a building and land for school purposes from the association?

The association has power to lease land or buildings owned by it to the school district of East Buffalo Township by reason of the fifth paragraph of its articles of incorporation, which provides: "To sell and convey, lease as lessor, and otherwise dispose of all or any part of its property and assets."

Under the provisions of the Act of May 18, 1911, P. L. 309, article VI, section 602, its supplements and amendments, 24 PS §672, page 180, the school board has the power to lease land or buildings from an individual or corporation. In the following case, the court has upheld the power of a school district to rent buildings and real estate from a corporation: Mansfield Borough School District *v.* Mansfield High School Association, 9 D. & C. 113 (1926).

While it is obvious that the association has the power to lease the land and buildings it owns to the school district, which has the right to rent them, there are several correlative inquiries relating to the proposed lease on which we will now comment.

III

Can the school district bind itself by a lease for thirty (30) years without violating the provisions of article IX, section 10 of the Constitution?

In the Mansfield School case, supra, the lease was for a period of forty (40) years and the court held, on pages 117 and 118 of the report:

> The third proposition, viz: Can a school board enter into a lease for a school building for a term of forty years under conditions such as are set out in these proceedings?
>
> The court is convinced that the school district is empowered to enter into such a lease.
>
> The instant case justifies this conclusion.
>
> Here the school board finds as a fact that a high school building is necessary, and yet it cannot construct such building because of financial inability. The board has the opportunity, however, of leasing a building that will meet

all the requirements of the school district, providing it will agree to rent the building for a term of forty years.

After due consideration, the members of the board unanimously, and very wisely, agree that the best interests of the school district will be conserved by accepting said offer.

Under section 401 of article IV of the Act of May 18, 1911, P. L. 309, 329, it is provided that the board of school directors in any school district shall establish, equip and maintain a sufficient number of elementary schools, etc., and may establish high schools, etc., as they, in their wisdom, may see fit to establish. Whether the word "may," as used in this section relating to the establishment of a high school, should be construed as "shall," is not necessary to determine in this case, although we believe that whenever the school directors unanimously decide in their wisdom that a high school is necessary, the erection or the leasing of such a building should be mandatory.

* * * * *

So far as this court can find, there is no constitutional or statutory provision in Pennsylvania limiting the time for which leases may be made.

* * * * *

In the Appeal of the City of Erie, 91 Pa. 398, the city bound itself in a lease for a market house for 25 years; the court, while not approving the lease, held that such a lease, *regardless of the term if payale from the current revenues,* is not an increase of the indebtedness. This same legal principle has been upheld time and again, as is indicated by the following cases, the two Kelley *v.* Earle cases, 320 Pa. 449 (1936), and 325 Pa. 337 (1937), respectively, providing for a 30 year lease; Williams *v.* Samuel, 332 Pa. 265 (1938), providing for a 30 year lease.

In Gemmill *v.* Calder, 332 Pa. 281, 284 (1938), the lease for a sewer project provided for a term of 26 years. Mr. Justice Shaffer, in discussing article IX, section 10 of the Constitution, held:

* * * * *

This section of the Constitution has no application. It is expressly provided that the obligations of the Borough of Swarthmore under the agreement are to be met from current revenues. A contract which can be fully met from current revenue is not within the prohibition of this section: * * *

It is evident, therefore, that the school district can bind itself for a lease of thirty (30) years, as long as the rental imposed upon it can, and is to be, met from the district's current revenue.

It is to be well noted, however, that in the sixth paragraph of the agreement, beginning at page 9 of the resolution and the lease at page 20 of the resolution, there is additional rental, being upkeep and maintenance, to be paid by the school district. While such provisions are usually found in contracts of The General State Authority, we believe that some change is necessary in this case to meet the legal requirements relating thereto. We must keep before us at all times the fact that one of the controlling features of our problem is whether, in this case, the school district is creating a debt which is chargeable to its borrowing power.

In the phraseology used in both the contract and the lease, there are one or two provisions which the courts might interpret as creating a debt which would be chargeable to the borrowing capacity of the school district. These are provisions six b and six b 2 of the agreement and corresponding sections of the lease, which provide for the insurance of the building by the school district for the full value of the building and the proceeds payable to the association. Care should be exercised to see that the property be insured for its full value, for otherwise it might well be that the school district would be obligating itself to pay the balance to reconstruct the building in the event of a fire. Second, that if the building is burned the association shall use the proceeds of the insurance and apply the same to the cost of reconstruction of the building, and the school district shall pay the balance. To illustrate our point, let us suppose that the entire cost of the construction of the building will be $40,000 and that in fifteen years, when the rentals up to that point will have amortized half of the original cost, the buildings were to burn down. If the insurance, at that time, would be in the amount of half of the original cost, the insurance recovered would be $20,000, and the school district, by signing the lease, would be obligating itself to pay the additional $20,000. Such obligation might carry it beyond its 2% and 7% constitutional borrowing capacity. This obviously would be illegal, and we are of the opinion that the school district could not so obligate itself at this time for, as we understand it, it is practically up to the limit of its 2% and 7% borrowing capacity now and, therefore, this provision should be eliminated from both the contract and the lease, or modified. It would seem to us that the contract and lease could be changed to take care of such a situation by providing that in the event of a loss by fire the building association is to rebuild the building, and the rate of rental which is to be paid for thirty years would be extended for a sufficient additional number of years instead of being reduced to $25 a year, as now stated in the contract.

The remainder of the contract and lease seems to us to be in good order and contains no provision which would create an indebtedness chargable against the borrowing capacity of the school district. The first and most important feature of contracts and leases of this nature is the phraseology used in the agreement or lease. By that, we mean the agreement or lease must be couched in such words that school district is not obligating itself to a debt which is chargeable to its borrowing capacity. The courts have repeatedly said that if the current expenses can be taken care of out of current revenue, then the obligation is not charageable to the borrowing capacity of the school district, but where the obligation cannot be paid in the fiscal year, then it does create a debt which is chargeable to its borrowing capacity. It is, therefore, easy to see how, if the school district were to agree to pay half the cost of the reconstruction of the building, it could not be paid out of the current revenue and, therefore, would be a debt chargeable to its borrowing capacity.

IV

> Do the provisions, in the agreement or the lease, or in the trust agreement providing for the event of default, in any way make it possible that a debt will be created against the school district of East Buffalo Township?

From a study of the various documents submitted to us, we notice that the only thing that the association can do to the school district is to take back the building, and collect whatever rent there may be due from the current revenues only. Under the decisions in the Kelley *v.* Earle cases, supra, there is no possible way by which this lease can create a debt against the municipality. Our conclusion in this respect is strengthened by reference to the following:

Under article 4 of the trust agreement, beginning on page 52 of the resolution, the trustee and bondholders have the following remedies against the association, upon default by the association:

1. To declare all the principal and interest due immediately.
2. To take possession of the premises and do with the said premises as the said trustee or bondholders may see fit.
3. To sell the said property at public or private sale.

However, the above remedies against the association are given subject to the provision as found in the trust agreement on page 55 of the resolution, which briefly provides that the trustee for the bondholders, in case he takes possession for the bondholders by reason of default in the rent, takes subject to the conditions that the rent, expenses and costs can only be paid from the current revenue; and that all unpaid taxes for the year when the default

occurs shall be liable regardless of the year in which taxes are collected.

In addition to the above provision, we find that the trust agreement provides, on page 70 of the resolution, that the trustee for the bondholders agrees to be bound by the provisions of the lease entered into by and between the association and school district, in that in the event of default in the payment of rent, payment is to be expected only from the revenue realized during the current year when the default occurred.

It will be seen, therefore, that as against the association, the trustee and bondholders have practically every remedy the law allows, but, should the trustee or bondholders take over the property of the association, they are bound by the provisions of the lease and agreement providing for default by the school district, to the remedies allowed the association against the district. These provisions in our opinion eliminate the objections, with reference to the remedy against the municipalities, which were raised by the Supreme Court in the case of Gemmill *v.* Calder, supra, page 285. We believe, therefore, that no debt will be created against a school district in the event of default.

V

What effect do the renewal provisions in the agreement and lease have as to the validity of those instruments, and as to the relationship between the school district and the association?

The agreement and lease provide that should the bonded indebtedness of the association not be fully paid at the end of the term of the lease, the school district shall have the right and privilege of renewing the said lease from year to year on the same terms and conditions; that after the said bonded indebtedness is fully paid, then the school district shall have the option of renewing the lease from year to year on the same terms and conditions, except that the rental shall be but twenty-five ($25.00) dollars a year.

We specially note that there is no provision for the resale or assignment of the property to the district after the indebtedness is paid. In Kelly *v.* Earle, 320 Pa. 449 (1936), at page 455, it is found that the contract between the Authority and the State provided "(c) that at the expiration of the term of the lease and upon payment of the rent stipulated therein, title to the said waterworks to be transferred or conveyed to the Commonwealth of Pennsylvania, free and clear of all encumbrances, together with the site or sites upon which the same is to be erected. * * *"

It was partly because of this stipulation in the first Kelley *v.* Earle case, in that it so obviously was attempting to do something indirectly which could not be done directly, that the lease between the Authority and the State was held unconstitutional. When this objectional feature was eliminated, as it was in the case involved in the second Kelley *v.* Earle case, 325 Pa. 337 (1937), the lease was approved.

A similar provision was also approved in the case of the Mansfield Borough School District *v.* Mansfield High School Association, supra.

The other objections that were raised in the first Kelley *v.* Earle case, supra, have been avoided in the plan that you have submitted to us. Therefore, we need not concern ourselves with an extended discussion as to whether or not the agreement and lease between the school association of East Buffalo Township and the school district increased the school district's indebtedness, or with the fact that the school board pays for the maintenance and upkeep of the proposed new buildings as affecting the validity or constitutionality of the agreement or lease; nor is the plan as submitted contrary to the provisions of article IX, sections 7, 8 and 10 of the Constitution of Pennsylvania, because in the following cases the courts have held that this arrangement does not increase the indebtedness of the school district: Appeal of the City of Erie, supra; Wade *v.* Oakmont Borough School District, 165 Pa. 479 (1895); McKinnon *v.* Mertz, 225 Pa. 85 (1909); Rettinger *v.* Pittsburgh School Board, 266 Pa. 67 (1920); Mansfield Borough School District *v.* Mansfield High School Association, supra; Tranter *v.* Allegheny Co. Authority, supra; both cases of Kelley *v.* Earle, supra; Campbell *v.* Bellevue School District, 326 Pa. 197 (1937); Dorman *v.* Philadelphia Housing Authority, 331 Pa. 209 (1938); Williams *v.* Samuel, supra; Gemmill *v.* Calder, supra.

Any of the other constitutional objections which have been raised to the General State Authority cannot possibly be applied to a contract and lease between a municipality and a private corporation.

In conclusion we desire to emphasize that this opinion relates only to the specific facts herein considered; and that this opinion does not purport to be applicable to other cases of a similar nature. That is to say, any other contracts which may be somewhat similar must stand on their own facts. The phraseology of each of the various agreements, lease and contracts must decide whether or not a school district may enter into a contract and lease with a nonprofit corporation such as the holding company in this case.

We are of the opinion, that:

1. A school district may sell and convey land which it owns for a fair consideration.

2. A school board has the power to lease land for buildings from an individual, or a corporation, such as the School Association of East Buffalo Township.

3. The lease presented to us for consideration is legal in the following respects:

The school district can bind itself to a lease for thirty years, as there are no constitutional or statutory provisions in Pennsylvania limiting the time for which leases can be made.

Since the rent is payable out of the current revenues, it is not an increase or "the incurring of indebtedness" within the meaning of the constitutional provisions limiting the power of municipal corporations to contract debts.

4. The lease is not legal in so far as provisions 6 (b) and 6 (b) 2 are concerned, inasmuch as they provide for the replacement of a school building in case of destruction by fire, and unless adequate fire protection by the school district can be secured, it would result in the school district obligating itself to reconstruct the building. This would doubtless carry the school district beyond its constitutional borrowing capacity, if the reconstruction costs could not be paid out of the current revenues. In this respect, the terms of the lease must be eliminated or modified in relation to the school district's obligation to pay the balance of the costs of reconstructing the building in the event of destruction by fire.

5. The provisions in the agreement or lease, and in the trust agreement, providing remedies in the event of default, do not create a debt against the school district. These provisions merely provide that the only thing which the association may do is to take back the buildings and collect whatever rent may be due from the current revenues only.

6. The renewal provisions in the agreement and lease are legal. They merely provide that the school district enter into a lease for the rental of a building for which it pays a moderate annual rental, and do not provide for the purchasing of a building on the future credit of the school district.

7. The agreement and lease do not, excepting as we have hereinbefore mentioned under conclusion No. 4, provide for an increase in the indebtedness of the school district, inasmuch as the rentals and other expenses are payable only from the current revenues of the school district and from none of its other funds.

8. The agreement and lease are legal even though they provide that the school district, in addition to paying the annual rentals, must pay for the maintenance and upkeep of the proposed new building.

9. The agreement is not contrary to the provisions of sections 7, 8 and 10 of article IX of the Pennsylvania Constitution; nor do any of the other constitutional objections raised against the General State Authority apply to our case, inasmuch as we are concerned merely with the contract and lease between a municipality, a school district, and a private corporation, the School Association of East Buffalo Township.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 376

Conscription—Justices of the Peace—Notaries Public.

1. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a justice of the peace within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was elected.

2. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a notary public within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was commissioned.

Harrisburg, Pa., December 9, 1940.

Honorable J. Paul Pedigo, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your recent communication requesting our advice upon the following questions, viz:

1. What will be the effect of conscription for, or voluntary enlistment in, the armed forces of the United States on the status of a person duly elected and qualified as a justice of the peace within this Commonwealth?

2. What will be the effect of conscription for, or voluntary enlistment in, the armed forces of the United States on the status of a person duly appointed and qualified as a notary public within this Commonwealth?

We will discuss these questions seriatim and consider them not only from the standpoint of the possible effect of the absence of a

justice of the peace or notary public for a period of one year or more from the district for which he was elected or appointed, but also from the standpoint of the possible incompatibility which might exist between their respective offices and service in the armed forces of the United States.

1. Article V, section 11 of the Constitution of Pennsylvania, which provides for the election of justices of the peace, contains no stipulation with respect to the manner in which the office is to be conducted or the situs thereof. However, this constitutional provision is supplemented by the Act of February 22, 1802, P. L. 75, 42 PS §171, providing that no justice of the peace may act unless he shall reside within the limits of the district for which he was commissioned, and by the Act of June 21, 1839, P. L. 376, 42 PS §172, providing that during the continuance in office justices of the peace are required to keep their offices in the ward, borough or township for which they shall have been elected.

It is obvious, therefore, that the laws of this Commonwealth not only contemplate but require that a justice of the peace reside and keep his office in the district for which he was elected and commissioned. While we do not here decide the question, it would seem to follow logically that if a justice of the peace did not, in fact, maintain his residence and office in the district for which he was elected, such neglect would be sufficient reason for his removal from office. This, it seems to us, would certainly be the case in the event the justice never established an office in the district or, having done so, permanently abandoned the same.

It seems to follow just as logically, however, that if a justice of the peace, having the necessary residence requirements and having established an office within the district, is forced to remove from the district for a limited period of time, and with every intention of returning to it and resuming his duties, such absence would not constitute sufficient reason for his removal from office (see 10 Dauphin County Reporter 98). Being an elected officer, his removal can be accomplished only as provided by article VI, section 4 of the Constitution of Pennsylvania which provides, inter alia, that "* * * All officers elected by the people, * * * shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."

The case of In Re Bowman, 225 Pa. 364 (1909), was concerned with the Act of May 25, 1907, P. L. 257, which conferred upon the several courts of common pleas of this Commonwealth the power to declare vacant the office of a justice of the peace who failed, for a period of six months, to reside in the district for which he had been elected. Mr. Bowman took a vacation trip to Europe and was

gone for more than the period allowed by the statute. An application to the court of common pleas of the proper county to remove him from office was granted. On appeal to the Supreme Court it was held, without discussing the merits of the case, that the act was repugnant to the provisions of article VI, section 4, supra, and that if the defendant was to be removed from office, such removal could be accomplished only in the manner prescribed thereby. It has been held also in Swanck's case, 16 County Court Reports 318 (1895), and in Huth's case, 4 Dist. Reps. 233 (1895), that the Governor, on his own motion, has no authority to remove an elective officer who, by reason of physical or mental disability, is forced temporarily or permanently to abandon his office.

We are of the opinion, therefore, that the Acts of February 22, 1802 and June 21, 1839, supra, require a justice of the peace to maintain both his residence and office in the district for which he was elected. However, we are just as clearly of the opinion that these acts do not prohibit a temporary absence from such an office after one has been legally established. Certainly it was not the legislative intent that a justice of the peace could not take a vacation, or could not be ill for an extended period of time, without placing his office in jeopardy. More clearly, it could not have been the legislative intent that a justice of the peace who, in a time of national emergency, was conscripted for military service or voluntarily joined the armed forces of the United States, should lose his office because he had temporarily abandoned it in the service of his country. In any event, the only manner in which the question could be raised would be in accordance with the provisions of article VI, section 4, supra; the Governor, on his own motion, has no authority to remove.

The second aspect of the question relating to justices of the peace arises by reason of the following constitutional and statutory provisions, viz:

Article XII, section 2 of the Constitution of Pennsylvania provides as follows:

> No member of Congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. * * *

Section 1 of the Act of May 15, 1874, P. L. 186, 65 PS §1 provides that:

> Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, whether a commissioned officer or otherwise, a sub-

> ordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, * * * is hereby declared to be incapable of holding or exercising, at the same time, the office or appointment of justice of the peace, notary public, * * * under this commonwealth.

This department, as well as the several courts of this Commonwealth, has beeen repeatedly called upon to decide questions arising under the aforesaid constitutional and statutory provisions relating to the possible incompatibility of offices and employment under the State and Federal Governments. A careful examination of the opinions of this department and of the reported court cases has, however, failed to disclose that the precise question here involved has ever been decided or adjudicated.

One of the controlling cases in this Commonwealth, and the one that in our opinion controls the answer to your inquiry, is that of Commonwealth, ex rel. Bache *v.* Binns, 17 Sergeant & Rawle 219 (1828). In that case the defendant, Binns, who was an alderman in the City of Philadelphia, and who was the editor of a daily newspaper in said city, received authorization to print in his said newspaper the orders, resolutions and laws which were from time to time approved and ratified by the Congress of the United States. Quo warranto proceedings were instituted against him for the purpose of ousting him from his office as alderman on the ground that his appointment from the Federal Government was incompatible with the exercise of his duties as alderman. The rule for the writ of quo warranto was discharged by the Supreme Court and, because the case is decisive of the questions here involved, we quote from the opinions filed, at some length. At page 224 the court said:

> * * * If such shall be decided to be the meaning of the law, every one sees that it may go very far to proscribe some very essential operations of the national government in Pennsylvania. Every justice of the peace or alderman, who is employed, on behalf of the United States, to issue a warrant for felony committed on the seas, robberies, or thefts upon the mail, or any other crime against the United States, will come directly, in the capacity of agent, or as a person employed, under the penalty of the act. Every constable who ventures to execute such warrant will incur the same forfeiture. Every juror who serves in the United States' courts is employed under the judiciary department. Every militiaman who is called into the public service is directly employed under the executive. *Was it ever heard of, that a justice, constable, burgess or alderman, was exempted from the muster roll, because service under the United States was incompatible with his state office?* * * *
>
> But what seems the most inadmissible part of the doc-

> trine is yet to be mentioned. By separating the words in the law of office or appointment of trust or profit, from the words relative to agency or employment, we should make it wholly immaterial, whether there is any profit or trust in the case or not, so that, without any contract at all, one of the state officers, named in the law, by volunteering his services under any department of the federal government, or *if he should happen to be detected in time of war, in the ranks,* or at work upon some fortification, under the federal government, though without any pay, yet, being clearly employed, he would as clearly come under this construction of the act. * * * (Italics supplied)

And at page 246 the court said:

> Indeed, to give the act of 1802 the latitude of construction contended for on the part of the relator, would, in my opinion, constitute every one an officer under the United States, who should, in pursuance of an agreement, print and publish a notice, or perform any other service for any of the departments, or their agents. Such could not have been the design of the convention who framed the constitution of Pennsylvania, nor of the legislature who passed the act of 1802; and upon the principle of construction applicable to that act, as a penal statute, we are not authorized to indulge in a latitude of interpretation, for the purpose of embracing a case, which might even appear to be within the reason of its provisions, but which was not within its terms. Whether we regard the term office, as it is defined by local authorities, or as it is employed in the constitution and laws of the United States, or as it is explained by decisions upon other sections of the constitution of Pennsylvania, in which it is used, or finally, according to the common acceptation of the word, it does not appear to me, that the printing and publishing of the orders, resolutions, public laws, treaties, etc., of the United States in the Democratic Press, in pursuance of the letters of the secretary of state, is an office or appointment, within the true intent and meaning of the act of assembly in question; and under all the circumstances shown to the court, it cannot be said, that the respondent, as editor of that paper, holds an office or appointment under the government of the United States. * * *

While it is true that this case was decided before the adoption of our present Constitution or the enactment of the Act of May 15, 1874, supra, yet the provisions of the law under which it was decided were almost identical with those we are now interpreting. While vigorous dissents were filed to the majority opinion, in none of these did the dissenter express the view that employment in the militia or in any other such position would constitute an office or

appointment of profit or trust under the United States Government within the meaning of the constitutional and statutory provisions, then effective.

After careful consideration of Commonwealth, ex rel. Bache *v.* Binns, supra, other reported cases and the opinions of this department, we are clearly of the opinion that voluntary enlistment in the armed forces of the United States would not constitute such employment under the United States as would render the person so enlisted incapable, at the same time, of holding the office of justice of the peace under this Commonwealth. If this be true with respect to persons voluntarily enlisting, it is even more true with respect to those who are conscripted for military service.

2. There is no constitutional provision respecting the office of notary public within this Commonwealth; the appointment, qualifications and tenure of persons appointed to the office are provided for by the Act of March 5, 1791, 3 Sm. L. 6, as variously amended, 57 P. S. §1, et seq.

After carefully considering the various laws pertaining to notaries public, we have been unable to find any provisions pertinent to the present inquiry with the exception of the following, viz:

Section 2 of the Act of March 5, 1791, supra, provides, in part, as follows:

> * * * the governor shall appoint and commission a competent number of persons, of known good character, integrity and abilities, as notaries public, for the commonwealth of Pennsylvania, to reside within such place or places, within this state, as the governor shall in and by the respective commissions direct; * * *

The amendment made by the Act of June 6, 1893, P. L. 323, 57 P. S. §111, provides that:

> It shall be lawful for any person heretofore appointed, or who shall hereafter be appointed, a notary public, and whose commission direct him to reside in any city or borough in any of the counties of this commonwealth in which any said city or borough may be located, to have his domicile in any part of said county or of the adjoining counties: Provided, That he shall keep an office in the said city or borough or county named in his commission.

It is evident, therefore, that the above quoted statutory provisions not only contemplate, but require, a notary public to maintain an office in the district for which he is commissioned and a residence in any part of the county in which he is commissioned or in an adjoining county. Without expressly deciding the point at this time, we believe that if a notary public commissioned for a particular

district failed to establish an office in such district and to maintain permanently a residence in the county in which said district is located, or an adjoining county, such neglect would be sufficient justification for his removal from office. However, as we have heretofore stated with respect to justices of the peace, we are of the opinion that the aforesaid statutory provisions contemplate a permanent failure to establish a legal office and residence and not a situation such as where a notary public were to close his office during a vacation or illness or, as in the instant case, during the period of time he is serving with the United States Army, whether by conscription or voluntary enlistment. In other words, we do not believe that it was the intention of the legislature that a notary public should lose his office merely because, for a temporary period of national emergency of even indeterminate length, he was compelled to close his office and remove from the district, with the consequent inability to perform his official duties.

Notaries public, not being elective officers, are not in the same category as justices of the peace, hereinbefore discussed. Their removal is governed by article VI, section 4 of the Constitution of Pennsylvania, which provides that:

> * * * Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed. * * * (Commonwealth ex rel. *v.* Likeley, 267 Pa. 310 (1920))

We have frequently advised that notaries public, being appointed by the Governor, may be removed by him at any time and for any reason which, to him, justifies such action. The Governor, therefore, could remove any notary public even for the reason that he had been conscripted for military service or voluntarily enlisted in the armed forces of the United States. Whether the Governor would desire to take such action, of course, is a decision purely personal to him and on it we express no opinion.

However, what we have heretofore said with respect to the possible incompatibility which might exist were a justice of the peace to enlist in, or be conscripted for, military service, applies with equal force to those persons who are holding commissions as notaries public. The provisions of article XII, section 2 of the Constitution of Pennsylvania, supra, and of the Act of May 15, 1874, P. L. 186, supra, are just as applicable to notaries public as they are to justices of the peace; so is the legal theory underlying the opinion of the Supreme Court in Commonwealth ex rel. Bache *v.* Binns, supra. In view of this fact we need only conclude that the office of notary

public is not incompatible with service in the armed forces of the United States, whether that service be voluntary or involuntary.

In view of the foregoing, we are of the opinion that:

1. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a justice of the peace within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was elected.

2. Conscription for, or voluntary enlistment in, the armed forces of the United States during the present emergency will not affect the status of a person holding a commission as a notary public within this Commonwealth provided, however, such person intends, upon the termination of his service with the United States, to resume the duties of his office in the district for which he was commissioned.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
FRED C. MORGAN,
Deputy Attorney General.

OPINION No. 377

State employes—Effect of National Guard Act and Selective Service and Training Act.

1. An appointive officer or employe regularly employed by the Commonwealth, who is a member of the Pennsylvania National Guard and who is called into Federal military service by the President, under the provisions of the National Guard Act of August 23, 1940, is not entitled to his State pay during the period of such service. He is, however, entitled to the benefits of the Act of June 7, 1917, P. L. 600, provided he has dependents and complied with all of the requirements of this act. This is true in all cases, irrespective of the military rank.

2. An appointive officer or employe of this Commonwealth, who is a member of a reserve component of the Army, Navy, or Marine Corps, and is regularly employed in the service of this Commonwealth at the time he is ordered into the active military service of the Federal Government, is entitled to have paid to his dependents one-half of his salary (but in no event to exceed $2,000 per annum), in accordance with the provisions of the Act of June 7, 1917, P. L. 600, supra. This is true as to all State officers and employes, regardless of the military rank held. The benefits of this act do not accrue until the individual is actually ordered into active duty by the Federal military service, and then only if he meets the other requirements of the act.

3. During the interval that State employes, who are members of the Na-

tional Guard or of a reserve component of the Army, Navy, or Marine Corps, are in the Federal military service, under the provisions of the National Guard Act of August 23, 1940, or the Selective Training and Service Act of 1940, supra, neither the provisions of section 1 of the Act of July 12, 1935, P. L. 677, nor section 68 of the Act of May 17, 1921, P. L. 869, are operative.

4. A State employe who is regularly employed by the Commonwealth at the time of his enlistment or draft into the military service of the United States, under the provisions of the Selective Training and Service Act of 1940, is entitled to the benefits of the Act of June 7, 1917, P. L. 600, supra, provided he has dependents and complies with the requirements of the act.

5. It is mandatory to reinstate in his employment a probational or permanent civil service employe of any department of the State Government, or of a county board of assistance, or any appointive officer or employe, regularly employed by the Commonwealth, who is called into active military service of the United States under the provisions of the Selective Training and Service Act of 1940, or the National Guard Act. If such returning employe is willing to take another position equally satisfactory to him, the full intendment and purpose of the law is accomplished and such an arrangement may properly be made.

There is no duty to reemploy a provisional employe upon his return from his military or naval service. Whether it would be desirable to do so is a matter of policy.

Harrisburg, Pa., December 9, 1940.

To All Departments, Boards and Commissions:

Sirs: This department is in receipt of various communications requesting an opinion as to the effect on State employes of the Act of June 7, 1917, P. L. 600, 65 PS §111 et seq., the Act of May 17, 1921, P. L. 869, 51 PS §95, and the Act of July 12, 1935, P. L. 677, 49 PS §32, in view of the enactment of the Act of Congress of August 23, 1940, known as the National Guard Act, and the Act of Congress of September 16, 1940, known as the Selective Training and Service Act of 1940.

Preliminarily, we should point out that in this opinion we shall concern ourselves only with the effect of the aforesaid statutes on State employes and not consider their effect on officers or employes of any county, municipality, township, or school district within the Commonwealth.

The National Guard Act, briefly, makes the various State National Guard units a part of the Federal armed forces. It authorizes the President to order the members of the various State units into Federal military service for the duration of the present national emergency and provides that they stand relieved from duty in the National Guard of the several states as long as they remain in active Federal military service.

For present purposes, it suffices to point out that the "Selective Training and Service Act of 1940" provides for the conscription

into Federal military service of all men in this Nation between the ages of twenty-one and thirty-six years.

Section 1 of the Act of June 7, 1917, P. L. 600, supra, reads:

> That whenever any appointive officer or employe, regularly employed by the Commonwealth of Pennsylvania in its civil service, or by any department, bureau, commission, or office thereof, * * * *shall in time of war or contemplated war* enlist, enroll, or be drafted in the military or naval service of the United States, or any branch or unit thereof, he shall not be deemed or held to have thereby resigned from or abandoned his said office or employment, nor shall he be removable therefrom during the period of his service, but the duties of his said office or employment shall, if there is no other person authorized by law to perform the powers and duties of such officer or employe during said period, be performed by a substitute, who shall be appointed by the same authority who appointed such officer or employe, if such authority shall deem the employment of such substitute necessary. * * *

Section 2 of the same act provides in part:

> Any said officer or employe, so enlisting, enrolling, or drafted, and having a dependent or dependents as aforesaid, may, at the time of his enlistment, enrollment, or draft, or immediately thereafter, file with the head or chief of the department, bureau, commission, or office in which he is employed, a statement in writing, executed under oath, setting forth the fact and date of his enlistment, enrollment, or draft, his intention to retain his said office or employment, and to resume the duties thereof after the expiration of his service in the military or naval service, or any branch or unit thereof; and the names and addresses of his wife, children, and dependent parent or parents, if any such he have; *and requesting and directing that one-half of the salary or wages of his said office or employment, not exceeding two thousand ($2,000) dollars per annum, shall be paid during his service in the military or naval service or any branch or unit thereof as follows:* * * * (Italics ours)

The words in section I of the act most pertinent to this discussion are:

> * * * whenever any appointive officer or employe, regularly employed by the Commonwealth of Pennsylvania * * * shall in time of war or *contemplated war* enlist, enroll, or be drafted in the military or naval service of the United States, or any branch or unit thereof, * * * (Italics ours)

It is apparent that, as a prerequisite to the operation of the statute, this country must be either at war or in a "time of * * * contemplated war." It cannot be said that we are at "war" within the commonly accepted meaning of that word. Are we, then, in a "time of * * * contemplated war"?

Webster's New International Dictionary, Second Edition, Unabridged, defines the word "contemplated" as follows: "To have in view as contingent or probable or as an end or intention; to look forward to."

The word "contemplated" has neither acquired a peculiar and appropriate meaning, nor is it defined by the Statutory Construction Act, so it should be construed according to its common and approved usage. See section 33 of article III of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 PS §533, entitled "Construction of Words and Phrases." While it is true that the Statutory Construction Act was enacted long after the Act of June 7, 1917, supra, this provision of the Statutory Construction Act merely enunciates a legal proposition long since established.

Congress, in enacting the Selective Training and Service Act of September 16, 1940, supra, providing for the common defense of our country by increasing the personnel of the armed forces of the United States and providing for its training, stated:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

The word "imperative," it seems to us, clearly refers to the urgency of the present situation; the need to be prepared if we are attacked by a foreign nation. Congress undoubtedly must have been convinced that an emergency existed in passing this act and the National Guard Act; there can be little doubt that it had "in view as contingent or probable" war, in which the United States might be engaged in the near future. The fact that the emphasis has been placed on preparation for a defensive war is immaterial. We are clearly of the opinion, therefore, that this country is in a "time of * * * contemplated war" and that the provisions of the Act of June 7, 1917, P. L. 600, are in effect.

Because of the nature of the inquiries received, it is at this point necessary to group State employes into three classes, viz: (1) those who are members of the National Guard of Pennsylvania, (2) those who are members of a Reserve Component of the Army, Navy, or Marine Corps, and (3) those who at present have no connection with the military service of the Commonwealth or of the United States.

The application of the act in question to these three groups will be discussed seriatim.

1. An examination of the inquiries that have been put to us indicate that there are two main questions relating to the National Guard:

> (a) Are State employes, who are members of the Pennsylvania National Guard and who are called for one year's service with the Federal military forces under the Federal National Guard Act, entitled to any State pay during this period?

It is apparent that the ruling in Formal Opinion No. 314 does not govern the present circumstances, because the services which are now and will be rendered by members of the National Guard are not under the provisions of Section 68 of the Act of May 17, 1921, P. L. 869, but under Federal legislation which places them in Federal service for the duration of this present "national emergency."

We have already concluded that the provisions of the Act of June 7, 1917, supra, are effective because we are in a "time of * * * contemplated war." Therefore, in view of the provisions of this act, if a State officer or employe, who is regularly employed by the Commonwealth and is a member of the National Guard, is ordered into active military service of the United States he is personally not entitled to receive his State pay. If he has dependents, however, they are entitled to be paid one-half of his salary up to $2,000 in accordance with the provisions of this act.

It may be argued that service in the Federal military forces by members of the National Guard is incompatible with their State employment, and that, therefore, they would not be entitled to any State pay. We need only to refer to our Formal Opinion No. 376, wherein we pointed out that as yet none of the courts in this Commonwealth have expressed "the view that employment in the militia or any other such position would constitute an office or appointment of profit or trust under the United States within the meaning of the constitutional and statutory" prohibitions of our Commonwealth. We also believe that when a member of the National Guard is ordered into the Federal service by the President it is tantamount to being drafted into the service, as provided by the Act of June 7, 1917, supra.

> (b) Shall State employes, who are members of the National Guard, be paid according to the provisions of the Act of June 7, 1917, P. L. 600?

As we have indicated in our discussion on the previous question, the answer to this question is in the affirmative. Any State employe

who has dependents, who is regularly employed by the Commonwealth, and who is a member of the National Guard when he is ordered into Federal military service, is entitled to have paid to his dependents one-half of his salary up to $2,000 in accordance with the provisions of the Act of June 7, 1917, supra. This is true as to all State officers and employes, regardless of the military rank held. The benefits of this do not accrue, however, until the individual is ordered into actual military service of the United States, and then only if he meets all the requirements set forth in this act.

> 2. Are State employes, who are members of a Reserve Component of the Army, Navy, or Marine Corps and who are ordered into Federal military service under the Selective Training and Service Act of 1940, entitled to any State pay, and do the provisions of the Act of July 12, 1935, P. L. 677, 49 PS §32, apply during the period of this military service?

Any State employe in this classification, upon being ordered into the Federal military service under the provisions of the Selective Training and Service Act of 1940, is entitled to the full benefits of the Act of June 7, 1917, P. L. 600. He is, however, entitled to these benefits only after he has been called into active duty by the Federal military service and upon full compliance with the various provisions of this act.

Under date of January 30, 1940, our department issued Formal Opinion No. 314, in which we construed the Act of Assembly No. 255, approved July 12, 1935, P. L. 677 (49 PS §32), which provides as follows:

> Section 1. Be it enacted, &c., That all officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any reserve component of the United States Army, Navy, or Marine Corps, *shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year* during which they shall, as members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces. (Italics ours)

In this opinion, we ruled, inter alia, that:

> 2. A State officer or employe who is a member of a Reserve Component of the Army, Navy, or Marine Corps, and as such a member is engaged in the active service of the United States or in field training ordered or authorized by the Federal forces, he is entitled to a leave of absence for each day of such service up to fifteen days in

any one year, without loss of pay, time, or efficiency rating regardless of the length of employment of the State employe during that year.

Obviously, the provisions of the Act of July 12, 1935, supra, do not have any application when an employe is ordered into military service under the Selective Training and Service Act of 1940. That act contemplates only the usual two weeks training during a calendar year, and not the long period of Federal military service which will be required during the present emergency.

The same arguments which prevailed in the case of the National Guard are applicable in relation to State employes who are members of a Reserve Component of the Army, Navy, or Marine Corps, as there is no incompatibility in receiving any State benefits while in Federal military service.

3. Would the same ruling apply to State employes who enlist, enroll, or who are drafted into military service at this time?

It is apparent that this group is made up of those State employes who at the time of the enactment of the Selective Training and Service Act of 1940, had no connection with the military service of the Commonwealth or of the United States. In such cases, if the State employe has dependents and is regularly employed by the Commonwealth at the time of his enlistment or drafting into the military service of the United States, the benefits provided by the Act of June 7, 1917, P. L. 600, supra, are also available to him if he complies with the requirements of the act.

We have yet to consider the effect of the Act of June 7, 1917, P. L. 600, supra, on civil service employes of the Commonwealth who are called into Federal military service either under the Selective Training and Service Act of 1940, or the National Guard Act, supra. State employes subject to civil service laws of this Commonwealth are classified as "permanent, probational or provisional."

Generally speaking, a "permanent" civil service employe is one that has rendered satisfactory service during the required probationary period and has been appointed permanently, so that he or she can be dismissed only in accordance with the provisions of the law provided in such cases.

A "probational employe" is one who has qualified for appointment by passing the examination and meeting any other requisites of the civil service job, and is then appointed to the position for a probationary period which, if satisfactorily passed, results in a permanent appointment.

The answer to the present question is contained in section 1 of

the Act of June 7, 1917, P. L. 600, supra, and this department has previously ruled thereon. See opinion of the Attorney General on page 739 of the Report and Official Opinions of the Attorney General of Pennsylvania, 1917-1918, where it is said:

> It must be quite clear from the provision referred to such employe that "he shall not be deemed or held to have thereby resigned from or abandoned his said office or employment, nor shall he be removable therefrom during the period of his service," and from the further reference that the duties of such officer or employe during said period, be performed by a "substitute," that the cessation of the relationship between the State and any such officer or employe must be deemed to be only a temporary suspension, it being the clear intendment of this legislation to give this statutory assurance to officers and employes of the state entering into the military or naval service of the United States, that their positions will be held for them, and that they are not to suffer loss of the same because of their sacrifices in the interests of the Republic and humanity.
>
> You are accordingly advised, that it is mandatory upon your Board to reinstate, in his original employment, any employe who either enlisted, enrolled or was drafted in the military or naval service of the United States, or any branch or unit thereof. Of course it goes without saying, that if such returning employe is willing to take another position equally satisfactory to him, the full intendment and purpose of the law is accomplished, and such an arrangement may properly be made.

A "provisional employe" is a temporary appointee who can be retained only until an employe can be appointed from the eligible list in accordance with the provisions of the various applicable laws. It follows, therefore, that such an employe is not one who is "regularly" employed by the Commonwealth. He occupies a somewhat similar position to employes on State highways who are not regularly employed, or physicians temporarily employed at State sanatoria. See the opinion of the Attorney General on page 300 of the Report and Official Opinions of the Attorney General of Pennsylvania, 1917-1918.

It would consequently appear that there is no legal duty to reemploy a provisional employe upon his return from his military or naval service. Whether it would be desirable to do so is a matter of policy upon which we express no opinion.

We are of the opinion:

1. An appointive officer or employe regularly employed by the Commonwealth, who is a member of the Pennsylvania National Guard and who is called into Federal military service by the President, under the Provisions of the National Guard Act of August 23,

1940, is not entitled to his State pay during the period of such service. He is, however, entitled to the benefits of the Act of June 7, 1917, P. L. 600, provided he has dependents and complied with all of the requirements of this act. This is true in all cases, irrespective of the military rank.

2. An appointive officer or employe of this Commonwealth, who is a member of a Reserve Component of the Army, Navy, or Marine Corps, and is regularly employed in the service of this Commonwealth at the time he is ordered into the active military service of the Federal Government, is entitled to have paid to his dependents one-half of his salary (but in no event to exceed $2,000 per annum), in accordance with the provisions of the Act of June 7, 1917, P. L. 600, supra. This is true as to all State officers and employes, regardless of the military rank held. The benefits of this act do not accrue until the individual is actually ordered into active duty by the Federal military service, and then only if he meets the other requirements of the act.

3. During the interval that State employes, who are members of the National Guard or of a Reserve Component of the Army, Navy, or Marine Corps, are in the Federal military service, under the provisions of the National Guard Act of August 23, 1940, or the Selective Training and Service Act of 1940, supra, neither the provisions of Section 1 of the Act of July 12, 1935, P. L. 677, nor Section 68 of the Act of May 17, 1921, P. L. 869, are operative.

4. A State employe who is regularly employed by the Commonwealth at the time of his enlistment or draft into the military service of the United States, under the provisions of the Selective Training and Service Act of 1940, is entitled to the benefits of the Act of June 7, 1917, P. L. 600, supra, provided he has dependents and complies with the requirements of the act.

5. It is mandatory to reinstate in his employment a probational or permanent civil service employe of any department of the State Government, or of a County Board of Assistance, or any appointive officer or employe, regularly employed by the Commonwealth, who is called into active military service of the United States under the provisions of the Selective Training and Service Act of 1940, or the National Guard Act. If such returning employe is willing to take another position equally satisfactory to him, the full intendment and purpose of the law is accomplished and such an arrangement may properly be made.

There is no duty to reemploy a provisional employe upon his return from his military or naval service. Whether it would be

desirable to do so is a matter of policy upon which we express no opinion.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 378

Liquor Control Law—Licensed importers—Breweries—Sale direct to military and naval reservations in Pennsylvania.

1. That importers of liquor, licensed under the Pennsylvania Liquor Control Act, may not sell or deliver liquor, as defined in said act, direct to military or naval reservations in Pennsylvania, regardless of whether such reservations are owned, leased or controlled by the United States.

2. Breweries, importing distributors and distributors, licensed under the Beverage License Law, may not sell malt or brewed beverages, as defined in said law, on credit or without requiring the cash deposits stipulated in the law, to military or naval reservations in Pennsylvania, regardless of whether such reservations are owned, leased or controlled by the United States; provided, in so far as the cash deposits are concerned, that such beverages are to be resold or consumed within such reservations.

Harrisburg, Pa., December 9, 1940.

Honorable William S. Rial, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: By your communication of November 8, 1940 you request us to advise you (1) whether Pennsylvania licensed importers of liquor may sell and deliver liquor direct to military and naval reservations in Pennsylvania on federally owned or leased land under Federal control; and (2) whether Pennsylvania licensed breweries, importing distributors or distributors, of malt or brewed beverages, may sell such beverages on credit and without requiring a cash deposit on containers, to military or naval reservations in Pennsylvania on federally owned or leased land under Federal control.

As examples of the military or naval reservations you inquire about, you cite the United States Navy Yard at Philadelphia, the Middletown Air Depot and the U. S. Medical School at Carlisle.

We shall first answer your inquiry pertaining to liquor. The manufacture, importing and sale of liquor are governed in this Commonwealth by the Pennsylvania Liquor Control Act, the Act of November 29, 1933, Sp. Sess. P. L. 15, as reenacted and amended,

47 PS §744-1 et seq. We shall use the term "liquor" as we assume you use it, namely, as defined in said act.

Article IV, section 415, of the Pennsylvania Liquor Control Act, as reenacted and amended, 47 PS §744-415, relating to importers of liquor, provides in part as follows:

> Such licenses shall permit the holders thereof to bring or import liquor from other states, foreign countries or insular possessions of the United States, and purchase liquor from manufacturers located within this Commonwealth, *to be sold outside of this Commonwealth or exclusively to Pennsylvania Liquor Stores within this Commonwealth.*
>
> All importations of liquor into Pennsylvania *by the licensed importer* shall be consigned to the *Pennsylvania Liquor Control Board or the principal place of business or authorized place of storage maintained by the licensee.* (Italics supplied)

The foregoing statutory language is clear and unambiguous. No licensed importer may sell any imported liquor, or liquor manufactured in Pennsylvania, unless he sells such liquor *outside* of this Commonwealth, or unless he sells it to Pennsylvania Liquor Stores. Such importer may not, therefore, sell such liquor direct to military or naval reservations in Pennsylvania, regardless of whether the United States owns, leases or controls such reservations. Because the United States owns or leases land in a state, or exercises exclusive jurisdiction over land within a state, such land does not cease to remain a part of said state. See R. E. Collins et al. *v.* Yosemite Park & Curry Company, 304 U. S. 518, 82 L. ed. 1502 (1938).

It likewise follows that such importer of liquor may not deliver imported liquor direct to such reservations because the statute hereinbefore quoted clearly states that all importations by him must be consigned either to the board or to his authorized place of storage or principal place of business.

Your second question relates to malt or brewed beverages. The manufacture, importing and sale of malt or brewed beverages in this Commonwealth are controlled by the Beverage License Law, the Act of May 3, 1933 P. L. 252, as reenacted and amended, 47 PS §84 et seq. We use the term "malt or brewed beverage" as defined in said law.

Section 23 (V) of the Beverage License Law, as amended, 47 PS §100f (V), provides that it shall be unlawful:

> For any licensee, * * * to sell, * * * any malt or brewed beverages *except for cash*, excepting credits extended by a hotel or club [as defined in said law] to bona fide registered guests or members. * * * Nothing herein contained

> shall prohibit a manufacturer from extending * * * credit * * * to customers or purchasers who live or maintain places of business *outside of the Commonwealth* * * *: Provided, however, That as to all transactions affecting malt or brewed beverages *to be resold or consumed within this Commonwealth,* every licensee shall pay and shall require cash deposits on all returnable original containers which contain not more than one hundred twenty-eight fluid ounces. (Italics supplied)

A military or naval reservation is not a club or hotel, as defined in the Beverage License Law. Nor are military or naval reservations in Pennsylvania customers or purchasers who live or maintain places of business outside the Commonwealth.

It is equally clear from the foregoing extract from the Beverage License Law that no licensee under said law, be it brewery, importing distributor, or distributor, may sell any malt or brewed beverage to be resold or consumed in Pennsylvania unless such licensee requires the cash deposit stipulated. As hereinbefore indicated, "within this Commonwealth" means just what it says; and the naval and military reservations under discussion are within this Commonwealth.

It follows, therefore, that it is our opinion, and you are accordingly advised:

1. That importers of liquor, licensed under the Pennsylvania Liquor Control Act, may not sell or deliver liquor, as defined in said act, direct to military or naval reservations in Pennsylvania, regardless of whether such reservations are owned, leased or controlled by the United States.

2. Breweries, importing distributors and distributors, licensed under the Beverage License Law, may not sell malt or brewed beverages, as defined in said law, on credit or without requiring the cash deposits stipulated in the law, to military or naval reservations in Pennsylvania, regardless of whether such reservations are owned, leased or controlled by the United States; provided, in so far as the cash deposits are concerned, that such beverages are to be resold or consumed within such reservations.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 379

State employes—Working days—Calendar days—Military service—Leave of absence with pay.

1. The term "days" as used in the Act of July 12, 1935, P. L. 677, refers to working days as hereinbefore defined, and not calendar days.

2. Hourly employes of the Commonwealth are, if so employed at the time they are called into military service under the provisions of the Act of May 17, 1921, P. L. 869, entitled to leave of absence with pay in accordance with section 68 of said act.

Harrisburg, Pa., December 16, 1940

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

Sir: We have your communication wherein you request us to advise you on two questions:

> 1. Does the term "days" used in the Act of July 12, 1935, P. L. 677, refer to calendar days or to working days, meaning Monday to Friday, inclusive? It has been customary to consider salaried employes' pay as covering the full calendar month or year. Fractional months' pay has been given as fractions of thirty or thirty-one, depending upon the number of days in the month, and not as fractions of the number of working days the month happens to contain.

Section 1 of the Act of July 12, 1935, P. L. 677, 65 PS §114, provides:

> That all officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any reserve component of the United States Army, Navy, or Marine Corps, *shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year* during which they shall, as members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces." (Italics ours)

As we pointed out in our Formal Opinion No. 314, which was subsequently modified by Formal Opinion No. 362, for an officer or employe of the Commonwealth, or of any political subdivision thereof, to be qualified under this section, it is necessary that he be engaged as a member of a reserve component in active service of the United States or in field training ordered or authorized by the Federal forces.

It would appear that the word "day" would mean an ordinary calendar day. However, a careful study of the act itself calls for

a different conclusion. Referring to section 1 of the Act of July 12, 1935, P. L. 677, supra, we find these words contained therein:

> * * * all officers and employes * * * *shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year* * * * (Italics ours)

Section 221 of The Administrative Code of April 9, 1929, P. L. 177, as amended by the Act of June 21, 1937, P. L. 1865, 71 PS §81, provides:

> Office hours. All administrative offices of the State Government shall be open for the transaction of public business at least eight hours each day, except Saturdays, Sundays and legal holidays. * * *

Section 222 of The Administrative Code of 1929, as amended, supra, 71 PS §82, relating to working hours and vacations, provides in part:

> * * * The annual leave of absence with pay shall be inclusive of Saturdays, Sundays and legal holidays.

It is clear from the statutory questions aforesaid that in so far as office hours are concerned, and working hours and vacations, Saturdays, Sundays and legal holidays are to be excluded in the computation thereof. This leads us to the conclusion that when the word "days" is used in a statute with reference to employes working for the Commonwealth, it means the days during which they are employed, that is, working days, and does not include holidays, Saturdays and Sundays.

Therefore, officers and employes of the Commonwealth would not be receiving the fifteen days' leave of absence from duty under the Act of July 12, 1935, supra, unless said fifteen days' leave of absence would be composed only of actual working days.

We will now consider your second question:

> 2. Are employes paid by the hour included in the category which Informal Opinion No. 1060 holds are entitled to various types of military leave along with employes compensated by the day?

In referring to Informal Opinion No. 1060, we note that the inquiry there was "whether a state employe, who is paid upon a per diem basis, is entitled to be paid for the time that he is absent from his duties, while serving as a member of the Pennsylvania National Guard engaged in active service or in field training," which question we answered in the affirmative. We are, therefore, concerned

with the effects of the provisions of section 68 of the Act of May 17, 1921, P. L. 869, 51 PS §95, as they concern an employe paid by the hour. This section reads as follows:

> All officers and employes of the Commonwealth of Pennsylvania, members of the Pennsylvania National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall, as members of the Pennsylvania National Guard, be engaged in the active service of the Commonwealth or in field training ordered or authorized under the provisions of this act.

A study of the language of this section indicates that the legislature placed no limitation on the type of officers and employes to which it applied. It is also interesting to note that there is no requirement that the State employe be one who is "employed for continuous service" as is the case under section 222 of The Administrative Code of 1929, which provides that those who are employed for continuous service are entitled to an annual leave of fifteen days with pay during the calendar year.

From the information that has been furnished us, we understand that there are two general classes of State employes. One consists of permanent employes who are regularly employed on a full time basis. All others are temporary employes who are employed per diem or paid by the hour. Per diem employes are engaged to work by the day for the duration of the particular task for which they are hired. Their pay is based on each day's work with no extra pay for any overtime. The employes paid by the hour differ from the per diem employes only in the fact that their pay is based on the total number of hours they work. While neither of these types (hourly and per diem) of employes is regarded as permanent, it is often the case that they are retained for continuous service by the Commonwealth in their respective tasks for many consecutive days and months, and in some cases even for periods exceeding a year.

In our opinion the *fact* of employment, not its duration, is the true test determining factor; and a careful review of Informal Opinion No. 1060 convinces us that the arguments therein advanced in favor of per diem employes apply with equal force to hourly employes. No reason is apparent to us why the two kinds of employes should be treated differently with respect to the question under discussion.

In short, so long as any one is employed by the Commonwealth, he is, under the Act of May 17, 1921, P. L. 869, entitled to leave

of absence with pay while engaged in active service of the Commonwealth or in field training ordered or authorized under said act, so long as he is a State employe at the time he is called into service.

We are of the opinion, therefore, that:

1. The term "days" as used in the Act of July 12, 1935, P. L. 677, refers to working days as hereinbefore defined, and not calendar days; and

2. Hourly employes of the Commonwealth are, if so employed at the time they are called into military service under the provisions of the Act of May 17, 1921, P. L. 869, entitled to leave of absence with pay in accordance with section 68 of said act.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 380

Unemployment Compensation Law—Transfer of employes from Central Administrative Office to district offices.

1. An employe may be transferred from the Central Administrative Office to a district office if such employe possesses the residential qualifications for the district in which the vacancy exists as prescribed and established by section 208 (e) of the Unemployment Compensation Law, the Act of December 5, 1936 (1937), P. L. 2897, as amended, and is of the same class and grade, with the same salary range, and performing the same duties as the vacancy to be filled.

2. An employe may not so transferred where such transferee does not, as required by section 208 (e) of the Unemployment Compensation Law, supra, possess the residential qualifications for the district in which the vacancy exists.

Harrisburg, Pa., December 19, 1940.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of October 30, 1940 requesting advice as to your authority, under the Unemployment Compensation Law, to make transfers of persons employed in the Central Administrative Office to district offices. More specifically, you inquire whether you may transfer an employe of the same class and grade and with the same salary range,

and performing the same duties, from the Central Administrative Office to the district office:

1. Where such proposed transferee possesses the residential qualifications for the district in which the vacancy exists; and

2. Where such proposed transferee does not possess the residential qualifications for the district in which the vacancy exists.

Your authority to make selections of personnel for the administration of the Unemployment Compensation Law of Pennsylvania is found in section 208 of the Unemployment Compensation Law, the Act of December 5, 1936 (1937), P. L. 2897, amended by the Act of May 18, 1937, P. L. 658, June 20, 1939, P. L. 458, and Act No. 9, approved May 16, 1940, 43 PS §771, et seq.

Under this section, a statutory civil service system is established, and certain procedures which are prescribed therein must be followed.

Section 208 (e) provides that the secretary shall prescribe qualifications for employes and imposes certain residential requirements as follows:

> (e) The secretary shall prescribe, by rules and regulations, the qualifications to be possessed by persons desiring employment in the various grades of employment in the administration of this act. The qualifications shall be such as will best promote the most efficient administration of this act, and shall provide that persons applying for positions in the offices designated by the secretary as central administrative offices (which shall include all those having jurisdiction throughout the State) shall be citizens of the United States and shall have been legal residents of Pennsylvania for a period of not less than one year before making application, and persons applying for positions in district offices (which shall include all those whose jurisdiction is limited to a particular district created under the provisions of this act) shall be citizens of the United States and *shall have been legal residents of Pennsylvania for a period of not less than one year, and in the district in which such office is located for a period of not less than six months, before making application.* (Italics ours)

Under section 208 (j), as amended, the secretary must make appointments from lists of eligibles, and in making selection, the following method is specified:

> (j) The secretary shall make appointments to positions created under this act, and shall fill vacancies as they may occur from the lists of eligibles certified to him by the board, except with respect to positions filled by promotions as hereinafter provided, and by the appointment of persons exempted by subsection (b) of this section. In making

appointments therefrom, the secretary shall select from the three persons, ranking highest on the list of eligibles for the grade of employment in the administrative district, or in the State as a whole, as the case may be, *the applicant most suitable for the position in the grade of employment for which a vacancy exists, taking into consideration his experience* and personal qualifications with sole reference to merit and fitness for the position to be filled. If, upon inquiry by the secretary, a person on the list of eligibles is found to be not available for employment or cannot be located, his name shall not for the time being be considered among the three names from which a choice is to be made. For the second vacancy, the secretary shall make selection from the highest three persons remaining on such list of eligibles who have not been within his reach for three separate vacancies. The third and any additional vacancies shall be filled in like manner.

Vacancies in positions subject to the provisions of this section, whether such positions be newly created or vacated for any reason by any former incumbent, shall be filled, in so far as practical, by promotions from among employes holding positions in the lower grades. In all cases, an employe to be promoted shall possess the qualifications specified for the position, and shall have served not less than six months (including service during any probationary period, but not including service during any provisional employment) in a position under the provisions of this act. Promotions shall be based on merit and upon the superior qualifications of the employe to be promoted as shown by his or her previous service record under this act. The secretary may promote an employe to a higher position to which such employe has been certified as eligible by the board, provided that the board shall, in certifying such employe, satisfy itself that the employe possesses the qualifications prescribed by the secretary for the higher position. Before making such certification, the board may require any employe or employes to take such qualifying or competitive examinations as the board may prescribe.

Though there is no express provision regarding transfers, this section 208 (j) prescribes that the secretary shall appoint the applicant most suitable for the position in the grade of employment for which the vacancy exists, taking into consideration his experience, and also provides for promotions from a lower to a higher grade. Under such power, it would appear that the secretary has the power to transfer employes from the Central Administrative Office to district offices, but only if employes have the requisite qualifications; that is, the transferee must not only be in the same class and grade, with the same salary range and perform the same duties as the vacancy to be filled, but such employe must also

possess the residential requirements prescribed by section 208 (e) of the Unemployment Compensation Law, supra.

In view of the foregoing, we are of the opinion, and you are accordingly advised:

1. An employe may be transferred from the Central Administrative Office to a district office if such employe possesses the residential qualifications for the district in which the vacancy exists as prescribed and established by section 208 (e) of the Unemployment Compensation Law, the Act of December 5, 1936 (1937), P. L. 2897, as amended, and is of the same class and grade, with the same salary range, and performing the same duties as the vacancy to be filled.

2. An employe may not be so transferred where such transferee does not, as required by section 208 (e) of the Unemployment Compensation Law, supra, possess the residential qualifications for the district in which the vacancy exists.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 381

Child Labor Law—Radio broadcasting stations—Employment of minors under sixteen years of age.

Minors under sixteen years of age, employed in radio broadcasting stations located within the boundaries of the State, if paid for such services, are amenable to the provisions of the State Child Labor Act, the Act of May 13, 1915, P. L. 286, as amended July 19, 1935, P. L. 1335, 43 PS §41, et seq.

Harrisburg, Pa., December 20, 1940.

Honorable Lewis G. Hines, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of August 12, 1940 requesting advice as to whether the Pennsylvania Child Labor Act, the Act of May 13, 1915, P. L. 286, as amended July 19, 1935, P. L. 1335, 43 PS §41, et seq., is applicable to minors under sixteen years of age employed by radio broadcasting stations.

The purpose of the Child Labor Act, supra, as set forth in its title, is to provide for the health, safety and welfare of minors.

Section 2 of said Child Labor Act provides:

> No minor under sixteen years of age shall be employed or permitted to work in, about, or in connection with, any establishment or in any occupation except that a minor between the ages of fourteen and sixteen years may be employed as hereinafter provided in such work as will not interfere with school attendance: Provided, however, That nothing contained in this section shall be construed as superseding or modifying any provisions contained in section seven of the act to which this is an amendment.

In section 1 the term "establishment" is defined to mean:

> That wherever the term "establishment" is used in this act, it shall mean any place within this Commonwealth where work is done for compensation of any kind, to whomever payable: * * *

Radio broadcasting stations clearly come within the term "establishment" as defined in the Child Labor Act.

It is well established that a state, in the exercise of its police power, has authority to regulate employment of its minors. It may legislate to regulate such employment even if such legislation may affect interstate commerce, and the frequency of certain stations may be such that they may be considered to be engaged in interstate commerce. For authority for this proposition that a state may establish reasonable regulations for the protection of the health and safety of its citizens, even though such legislation may affect interstate commerce, see New York, N. H. & H. R. Co. *v.* State of New York, 165 U. S. 628 (1897).

It is conceded that state jurisdiction may be superseded if employment in a broadcasting studio was ruled to be interstate commerce, but even if such employment was so construed, the state would still retain jurisdiction until Congress acted.

The only pertinent Acts of Congress are the Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended U. S. C. A., Title 47, Sections, 151, et seq., creating the Federal Communications Commission and the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1060, U. S. C. A., Title 29, Sections 201, et seq.

The Federal Communications Commission, created by the Communications Act of June 19, 1934, supra, was created to regulate radio broadcasting. The jurisdiction of this Commission was considered in the case of Black River Valley Broadcasts, Inc. *v.* Frank R. McNinch et al., 307 U. S. 623 (1939), reported below in 101 Fed. 2d. 235, where the court said, at page 237:

> * * * The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence. Federal Radio Commission *v.* Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166.

The Federal Communications Commission has been engaged primarily in granting permits or licenses, and it has not acted relative to the regulation of hours of minors broadcasting in radio stations located within a state.

The Fair Labor Standards Act, the Act of Congress of June 28, 1938, supra, provides certain measures for the control of the employment of minors, and in section 12 prohibits shipment in commerce of any goods produced in an establishment employing oppressive child labor. What constitutes "oppressive child labor" is defined by the rules and regulations of the Childrens' Bureau of the United States Department of Labor. The Federal authorities have not occupied the field of enforcement of child labor standards in the field of radio employment. Therefore, the Pennsylvania Child Labor Law applies.

For authority on the point that in the silence of Congress, state law governs, see H. P. Welch Company *v.* State of New Hampshire, 306 U. S. 79 (1939), where the court said:

> * * * It cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. * * *

It should perhaps be noted that the Federal Fair Labor Standards Act, supra, does not, in any event, prevent the State from enforcing its own child labor laws establishing higher standards than the standards established under the Federal act, for section 18 of the Fair Labor Standards Act, supra, provides:

> Sec. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum work-week lower than the maximum

> work-week established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

Since neither the Communications Act of 1934, nor the Fair Labor Standards Act of 1938, contain definite provisions applicable to the employment of minors in radio broadcasting stations, and as the Federal Government has not occupied the field of radio employment, the Pennsylvania Child Labor Act continues to be controlling.

In view of the foregoing, we are of the opinion that minors, under sixteen years of age, employed in radio broadcasting stations located within the boundaries of the State, if paid for such services, are amenable to the provisions of the State Child Labor Act, the Act of May 13, 1915, P. L. 286, as amended July 19, 1935, P. L. 1335, 43 PS §41, et seq.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
M. LOUISE RUTHERFORD,
Deputy Attorney General.

STATUTES CITED

CASES CITED

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* Voided by Dauphin County Court of Common Pleas in July, 1940, on grounds, inter alia, that Insurance Department practices for long period of years established contra interpretation.

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