

Commonwealth of Pennsylvania

OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
Pennsylvania

FOR THE YEARS
1943 and 1944

JAMES H. DUFF, Attorney General

Compiled by
FREDERIC E. RAY
Department of Justice
Harrisburg

OFFICIAL OPINIONS

1943 - 1944

OPINION No. 444

Civil Service—Governor—Federal Government—State Employment Service—Examination—Personnel Records—Merit System—Agency for Appointment—Executive Order—Expenses—Department of Labor and Industry—Compensation Law—The Administrative Code of April 9, 1929, P. L. 177.

The State Civil Service Commission may, upon the request of the Federal government, administer examinations for the state employment service temporarily loaned to the United States employment service for the duration of the war. The administration of unemployment compensation and employment services, are tied together, and the inherently integral relationship has been continued.

Civil service examination services may include certification to the employment service and the keeping of necessary personnel records required in a merit system agency for appointments made as a result of such examinations.

Under section 452 of The Administrative Code of April 9, 1929, P. L. 177, as amended, the State Civil Service Commission was created to administer the provisions of the civil service act of August 5, 1941, P. L. 752. Under section 3 (c) of the act "service of the commonwealth" includes, among others, "all offices and positions now existing or hereafter created in the Department of Labor and Industry charged with the administration of the unemployment compensation law."

Honorable Robert Hall Craig, Chairman, State Civil Service Commission, Harrisburg, Pennsylvania.

Sir: You ask to be advised whether the State Civil Service Commission may, upon the request of the Federal Government, give civil service examinations and render services incidental thereto to the State Employment Service, the employes and facilities of which have been loaned to the United States Government during the present war emergency.

Under section 452 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended by the Act of August 5, 1941, P. L. 781, 71 P. S. § 162, the State Civil Service Commission was created to administer the provisions of the Civil Service Act, the Act of August 5, 1941, P. L. 752, 71 P. S. § 741.1, et seq. Under section 3(c) of the Civil Service Act "Service of the Commonwealth" includes among others "all offices and positions now existing or hereafter created in the Department of Labor and Industry charged with the administration of the Unemployment Compensation Law."

At the time of the passage of the Civil Service Act, the Bureau of Employment and Unemployment Compensation within the Department of Labor and Industry was charged with the administration of

the Unemployment Compensation Law. Though this bureau had two divisions, the Employment Division affiliated with the United States Employment Service, and the Unemployment Compensation Division, the Unemployment Compensation and Employment Service functions were consolidated in a single agency.

On January 1, 1942, in view of the war emergency and the need for a nationally operated employment service for the most efficient utilization of available manpower, the employes and facilities of the State Employment Service were by order of the Governor, on the request of the President of the United States, loaned to the United States Employment Service as a war emergency and for the duration of the war. Under the Federal Security Agency Appropriation Act, 1943, Public Law 647—Title II, which became law July 2, 1942 for the 1942-43 fiscal year, there is a provision as follows:

Provided further, That pending the return to State control after the war emergency of the Employment Service facilities, property, and personnel loaned by the States to the United States Employment Service, no portion of the sum herein appropriated shall be expended by any Federal agency for any salary, to any individual engaged in employment service duties in any position within any local or field or State office, which substantially exceeds the salary which would apply to such position and individual if the relevant State merit system applied and if State operation of such office had continued without interruption." (Italics ours.)

In other words, the State employment offices and services are merely loaned for the duration of the war. On September 17, 1942, the President issued Executive Order No. 9247 transferring the Employment Service functions to the War Manpower Commission, where it is now administered.

Under section 401 of the Unemployment Compensation Act, the Act of December 5, 1936, P. L. (1937) 2897, 43 P. S. § 751, all applicants for unemployment compensation benefits must first register with an employment office before they can become eligible for unemployment compensation benefits. In a telegram from the President of the United States to the governors of several states, under date of December 19, 1941, requesting proper State officials to transfer to the United States Employment Service all of the present personnel records and facilities required for a nationally operated Employment Service, the President of the United States stipulated "these employment offices will continue to service the unemployment compensation agency so that there will be no need to set up duplicate offices." The administration of the two services, namely Unemployment Compensation and Employment Services, are thus tied together, and the inherently integral relationship between the two services has been continued.

Though the Employment Service has been temporarily loaned to the United States Employment Service, it is readily seen that it is still basically a State agency and is ultimately to be operated by the State after the war.

For reimbursement for necessary expenses incurred in the servicing of the State Employment Service temporarily loaned to the United States Employment Service, the Civil Service Commission must look to the Administrative Fund created under section 602 of the Unemployment Compensation Act, *supra*. Under section 602, the Administrative Fund is created for the payment of all costs required for the administration and operation of the Unemployment Compensation Act. Expenses of the examinations and servicing of the Employment Service will be paid by the Social Security Board into the Administrative Fund and from this fund the Civil Service Commission can be reimbursed in the manner provided under section 1003 of the Civil Service Act, *supra*, for services rendered to the Employment Service and expenses incidental thereto.

In view of the foregoing, we are of the opinion that the State Civil Service Commission may, upon the request of the Federal Government, administer examinations for the State employment service temporarily loaned to the United States Employment Service for the duration of the war, and such examination services may include certification to the Employment Service and the keeping of necessary personnel records required in a merit system agency for appointments made as a result of such examinations.

Very truly yours,

DEPARTMENT OF JUSTICE,

E. RUSSELL SHOCKLEY,
Attorney General,

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 445

Public School Employees' Retirement Fund—Superannuation—Cash Refund—Deductions—Annuity Savings Account—Application—Board.

A member of the public school employees' retirement system, who has passed the superannuation retirement age, may receive a cash refund of his accumulated deductions in the public school employees' retirement fund, but the act contains no provisions for the payment of a cash refund in lieu of a retirement allowance.

A contributor to the public school employees' retirement fund, who is an employe sixty-two years of age or older and who retired for superannuation under the act of July 18, 1917, P. L. 1043, as amended, is entitled to a superannuation retirement allowance, but is not entitled to be paid out of the fund created by

the amount of the accumulated deductions standing to his credit in the annuity savings account.

A contributor, even though past the superannuation retirement age, who becomes separated from school service by resignation or dismissal, or in any other way than by death or retirement, is entitled to be paid on demand the amount of his accumulated deductions.

Harrisburg, Pa., January 21, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether a member of the Public School Employees' Retirement System, who has passed the superannuation retirement age of sixty-two years, may receive a cash refund of his accumulated deductions in the Public School Employees' Retirement Fund in lieu of a retirement allowance.

You inform us that your request arises as the result of a recommendation of the Auditor General based upon his report relating to the practice of the Retirement Board concerning cash refunds heretofore allowed to members in lieu of retirement allowances.

The objection of the Auditor General to the payment of accumulated deductions to contributors who had reached compulsory retirement age is based upon a letter dated May 16, 1923, addressed to Dr. H. H. Baish, Secretary of the State Retirement Board, by Honorable Robert Wallace, then Deputy Attorney General, interpreting section 14, paragraph 2 of the Public School Employees' Retirement Act of July 18, 1917, P. L. 1043, 24 P. S. § 2134, which is as follows:

Each and every contributor who has attained or shall attain the age of seventy years shall be retired by the retirement board, for superannuation, forthwith, or at the end of the school term in which said age of seventy years is attained.

In the aforesaid letter, it was stated:

* * * that if the contributor attains the age of seventy years during the months of July or August, or any other time between the yearly school terms, the Retirement Board has no option in the matter but must retire said contributor forthwith, as the intervening time between the school terms does not constitute a part of the school term under the meaning of the said Retirement Act.

It is apparent that the foregoing letter relates to compulsory retirement at age seventy, while the present inquiry deals with superannuation retirement at the option of a contributor who is an employe sixty-two years of age or older. Therefore, the views expressed in the aforesaid letter are not in conflict with the conclusions hereinafter reached.

Your request involves a consideration of the respective rights of a contributor to accumulated deductions and to a superannuation retirement allowance under the provisions of the Act of July 18, 1917, P. L. 1043, as amended, 24 P. S. § 2081 et seq., establishing a Public School Employes' Retirement System.

The right of a member of the Public School Employes' Retirement System, who has reached the retirement age of sixty-two years, to a superannuation retirement allowance, is defined by section 14 of the Public School Employes' Retirement Act, supra, as amended, 24 P. S. § 2133, which provides in part as follows:

Retirement for superannuation shall be as follows:

*Any contributor who is an employe sixty-two years of age or older may retire for superannuation by filing with the retirement board a written statement, duly attested, setting forth at what time, subsequent to the execution of said application, he or she desires to be retired. Said application shall retire said contributor at the time so specified, or, in the discretion of the retirement board, at the end of the school term in which the time so specified occurs. * * ** (Italics ours.)

Section 14 of the act further provides that a superannuation retirement allowance shall consist of an employe's annuity, which shall be the actuarial equivalent of his accumulated deductions and a State annuity as therein calculated in accordance with the method therein set forth.

Section 15 of the act, 24 P. S. § 2137, sets forth the form in which a contributor may receive his benefits in a superannuation retirement annuity payable throughout life, and is in part as follows:

At or before the time of his or her superannuation retirement, any contributor may elect, by written election duly executed and filed with the retirement board, to receive his or her benefits in a superannuation retirement allowance, payable throughout life; or he or she may, on superannuation retirement, elect to receive the actuarial equivalent at that time of his employe's annuity, his or her State annuity, or his superannuation retirement allowance, in a lesser employe's annuity, or a lesser State annuity, or a lesser superannuation retirement allowance, payable throughout life; * * *

It will be observed that the sections of the act relating to superannuation retirement allowances contain no provision whatever for the payment to a contributor of a cash refund, in lieu of a retirement allowance.

Section 1 of the act, as amended, 24 P. S. § 2081, provides that the words "accumulated deductions," as used in the act, shall have the following meaning:

(18) "Accumulated Deductions" shall mean the total of the amounts deducted from the salary of a contributor and paid into the fund created by this act, to the credit of the annuity savings account, together with the regular interest thereon.

The right of a contributor to a refund of his accumulated deductions in the Retirement Fund is an incident only of separation from school service by resignation or dismissal, or in any other way than by death or retirement, and is set forth in section 12 of the Retirement Act, supra, as amended, 24 P. S. § 2125, and is in part as follows:

Should a contributor, *by resignation or dismissal, or in any other way than by death or retirement*, separate from the school service, or should such contributor legally withdraw from the retirement system, he or she shall be paid on demand, from the fund created by this act: (a) the full amount of the accumulated deductions standing to his or her individual credit in the annuity savings account, or, in lieu thereof, should he or she so elect, (b) an annuity or a deferred annuity, which shall be the actuarial equivalent of said accumulated deductions. His or her membership in the retirement association shall thereupon cease. * * * (*Italics ours.*)

From the foregoing provision, it is clear that a contributor who becomes separated from school service by superannuation retirement is not entitled to be paid from the Retirement Fund the amount of his accumulated deductions.

The provisions of the Retirement Act which enable a contributor to receive his superannuation retirement payments through life instead of payment of his accumulated deductions are economically sound.

During the period of active service of a school employe, the tax-paying public contributes to the Retirement Fund to help accumulate a reserve fund which is required to pay a retirement allowance to the school employe when he reaches the superannuation retirement age.

A superannuation retirement allowance is also to the advantage of a contributor. As already stated, the allowance consists not only of an annuity based upon his accumulated deductions but also an additional annuity based upon the contributions made to the Fund by the State.

The purpose for which an Employees' Retirement System is established is to provide a retirement allowance for

* * * employes who have served a long period of time in public employment and have reached an age where through decreased earning power because of impairment of mental or bodily vigor, they are compelled to separate themselves from

active service. *Ret. Bd. of Allegheny County v. McGovern*, 316 Pa. 161, 164 (1934).

The Court further stated, on page 169:

Retirement pay is defined as "adjusted compensation" presently earned, which, with contributions from employes, is payable in the future. The compensation is earned in the present, payable in the future to an employe, provided he possesses the qualifications required by the act, and complies with the terms, conditions, and regulations imposed on the receipt of retirement pay. Until an employe has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived: * * *.

The wise provisions of the Retirement Law are often defeated by improvident contributors who are permitted to withdraw their accumulated deductions from the Retirement Fund and for whose support the taxpayers are later again required to contribute to relief agencies.

In the State Employees' Retirement System a similar situation is met by the provisions of the law which predicate the payment of accumulated deductions upon compliance with the requirements therefor by a contributor before reaching superannuation retirement age.

Nevertheless, there is nothing in the Retirement Act, *supra*, which prohibits a contributor from resigning from school service and receiving the amount of his accumulated deductions under the provisions of section 12 of the act, *supra*.

We are of the opinion that: 1. A contributor to the Public School Employees' Retirement Fund, who is an employe sixty-two years of age or older and who retired for superannuation under the provisions of section 14 of the Act of July 18, 1917, P. L. 1043, as amended, 24 P. S. § 2081, et seq., establishing a Public School Employees' Retirement System, is entitled to a superannuation retirement allowance as defined by the act, but is not entitled to be paid out of the Fund created by the act the amount of the accumulated deductions standing to his credit in the annuity savings account. 2. However, a contributor, even though past the superannuation retirement age of sixty-two years, who becomes separated from school service by resignation or dismissal, or in any other way than by death or retirement, is entitled to be paid

on demand the amount of his accumulated deductions under the provisions of section 12 of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 446

Bureau of Mines—United States Department of the Interior—Federal Explosives Act—Right of State and county officials authorized to administer oaths to act as licensing agents for the Bureau. Act of May 15, 1874, P. L. 186; Constitution Article XII, sec. 2.

State and county officials, authorized to administer oaths, may accept the appointment of the Director of the Bureau of Mines as licensing agents under the Federal Explosives Act, without violating the Constitution or the statutes of the Commonwealth of Pennsylvania.

Harrisburg, Pa., January 26, 1943.

Honorable Edward Martin, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request to be advised as to whether State and county officials, authorized by law to administer oaths, have authority to act as licensing agents for the Bureau of Mines of the United States Department of the Interior. This bureau is charged with the administration of the Act of October 6, 1917 (40 Stat. 385), as amended by the Act of December 26, 1941 (Pub. No. 381, 77th Cong.), known as the Federal Explosives Act.

This act is a wartime act, limited to the war or the emergency, and forbids the manufacture, sale, possession or use of explosives, or the ingredients of explosives, except under licenses issued by the Director of the Bureau of Mines.

The act does not supersede the Pennsylvania statutes and regulations relating to explosives.

Your question is exceedingly important, not only because within this Commonwealth far more persons use explosives than elsewhere in the United States, and because the gross quantities used here are in excess of those used in any other state in the Union, but also because the opportunity for sabotage is also exceedingly great in Pennsylvania by reason of the immense use of our industries in the war effort. It thereby becomes necessary to set up rapidly statewide agencies, acquainted with persons in the various local communities to determine who may safely be intrusted with the use of explosives.

Your question is urgent because a county officer of this Commonwealth has tendered his resignation, assigning as his reason the fear that his continuing service as licensing agent may be in conflict with Article XII, section 2 of the Constitution of Pennsylvania. This section reads 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. The General Assembly may by law declare what offices are incompatible.

The statute in force, pursuant to this constitutional authority, is the Act of May 15, 1874, P. L. 186, 65 P. S. § 1, which reads:

Every person who shall hold any office, or appointment of profit or trust, under the government of the United States, whether an officer, a subordinate officer or agent, who is or shall be employed under the legislative, executive or judiciary departments of the United States, and also every member of Congress, 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, mayor, recorder, burgess or alderman of any city, corporate town or borough, resident physician of the lazaretto, constable, judge, inspector or clerk of election under this Commonwealth: Provided, however, That the provisions hereof shall not apply to any person who shall enlist, enroll or be called or drafted into the active military or naval service of the United States or any branch or unit thereof during any war or emergency as hereinafter defined.

The question immediately arises as to whether the appointment of a State or county officer as licensing agent is the holding or exercising of an office or appointment of trust or profit.

The terms "office" and "appointment" as used in Article XII, Section 2 of the Constitution, are synonymous. An "office" is an appointment with a commission; an "appointment" is an office without one. The distinction is immaterial. *Com. ex rel. v. Binns*, 17 S. & R. 219, 243.

The case of *Finley v. McNair*, 317 Pa. 278 (1935) is helpful in answering this question. The court, on page 281, said:

* * * In determining whether a position is an office or an employment, it is generally said that the "question must be determined by a consideration of the nature of the service to be performed by the incumbent, and of the duties imposed upon him, and whenever it appears that those duties are of a grave and important character, involving in the proper performance of them some of the functions of government, the officer charged with them is clearly to be regarded as a public

one:" * * * Other elements in the problem are whether the duties are designated by statute, whether the incumbent serves for a fixed period, acts under oath, gives a bond, and the source or character of the compensation received.

With these principles in mind, we examine the Federal Explosives Act and find that section 7 of that act reads in part:

The Director may designate as licensing agents persons authorized by law to administer oaths * * *; and wherever possible the Director shall select as licensing agents qualified officers or employes of the several States or of political subdivisions or of public bodies thereof. * * * Such agents may collect a fee of 25 cents for each license issued, and shall be entitled to no other compensation from the United States for their services.

Section 15 of the Federal Explosives Act contains the following provision:

* * * The Director may cooperate with the officers and employes of the several States and of the municipalities and other political subdivisions thereof. When such officers and employes act under the direction of the Director, their acts done in the administration and enforcement of this Act shall be deemed to be fully authorized.

The bureau informs us that no bond or oath is required of licensing agents. A certificate of appointment is sent to them by the Director of the Bureau of Mines, and upon the receipt of this certificate they are entitled to issue licenses.

The intent of Congress with regard to your question is expressed in the Senate report on the bill (77th Cong. Report No. 511) in which it was said:

Since licensing agents are neither officers nor employes, the provision in the 1917 act permitting "removal for cause" has been replaced by a grant of power to revoke the authority of a licensing agent.

The tenure of the appointment of a licensing agent is indefinite, the act itself is of a temporary nature, and the appointment is for the emergency only. State and county officials are appointed because they hold State or county offices, by reason of which office they are authorized to administer oaths. In other words, it is an appointment of the office rather than the individual holding the office.

In view of the above, we conclude that licensing agents are neither the holders of an office or an employment under the Federal Government. We are strengthened in this belief because, under the Federal law, no one may enter the services of the United States as an officer or employe without taking the oath of office as prescribed in 23 Stat. 22,

5 USC, section 16; employment by the Federal Government on a voluntary basis without compensation by the Federal Government is prohibited, and officers of the Federal Government must be appointed as provided by Article II, section 2 of the Constitution of the United States, which reads:

* * * [The President] shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Furthermore, it seems to us that a State or county officer does not become a Federal officer by performing the duties of a licensing agent, but is merely given an additional duty as a State or county officer, in the exercise of the Federal power to commandeer the services of State and county officials in providing for the common defense in time of war.

It is therefore the opinion of this department that State and county officials, authorized to administer oaths, may accept the appointment of the Director of the Bureau of Mines as licensing agents under the Federal Explosives Act, without violating the Constitution or the statutes of the Commonwealth of Pennsylvania.

This department is mindful of the fact that this opinion neither binds nor protects county officers, but they are included herein in an effort to be helpful, with the sincere hope that county officers will willingly join with State officers and the citizens of this Commonwealth in collaborating with the Federal Government to do everything useful and necessary in the war effort.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 447

Appropriation—Mentally defective persons—Cost of support pending acceptance in Polk State School—Liability of Commonwealth—Acts of July 11, 1923, P. L. 998; October 11, 1938, P. L. 63.

When neither a mentally defective person nor his parent or parents are able to defray the expenses of his support in a private institution licensed by the Department of Welfare for the care of such mental patients, such support is to be provided for by annual appropriation of the General Assembly. The expenses of maintenance and operation necessary for the proper conduct of the work of such institutions during the current biennium are payable out of moneys appropriated to the Department of Welfare under Appropriation Act No. 12A of 1941 and the supplement thereto, Appropriation Act No. 74A of 1941.

Harrisburg, Pa., January 28, 1943.

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

Madam: The Department of Justice is in receipt of your request for advice concerning the liability for the costs of the support of the mentally defective persons in private institutions licensed by the Department of Welfare for the care of such mental patients.

In support of your request for advice, you state that you are advised that the city of Pittsburgh and the Allegheny County Institution District have refused to pay for the maintenance of mental defectives committed to licensed schools by the Allegheny County Juvenile Court pending their acceptance in Polk State School; and that the city and county both claim that under the amended Mental Health Act the Commonwealth is liable for the entire cost of maintenance whether or not these persons are actually in a State institution.

Specifically, your inquiry whether or not the Commonwealth is liable for maintenance of mental defectives after the commitment order is signed by the proper court and before the patient is admitted to a State school, and if the answer is affirmative, the appropriation from which such payments can be legally made.

Private institutions have the right to care for mental patients by virtue of the Mental Health Act of July 11, 1923, P. L. 998, Article II, section 201, as amended by the Act of October 11, 1938, Special Session, P. L. 63, section 1, 50 P. S. § 21, which provides in part as follows:

Mental patients in the Commonwealth shall be cared for—

* * * * *

(c) In such semi-State or private institution or places as shall have procured from the department licenses as provided for in this act: * * *.

Your question concerning the liability of the Commonwealth for the support of mentally defective persons arises under the provisions of the Mental Health Act of July 11, 1923, P. L. 998, Article III, section 309, supra, as last amended by the Act of October 11, 1938,

Special Session, P. L. 63, section 1, 50 P. S. § 49, which provides in part as follows:

The superintendent of any State or licensed school for mental defectives may receive and detain any mentally defective person, * * *

* * * the Department of Revenue shall fix the amount, if any, which shall be paid for such support, according to the ability of such parents or parent of the person, or according to the value of such persons' estate, if any, and shall require payment for such support, so far as there may be ability to pay, as a condition to the admission or retention of said person. * * * *When neither the said person nor his parent or parents defray the expense of his support in said school, such support at the school shall be provided for by annual appropriations, at such per capita rates as shall be appropriated by the General Assembly, * * *. (Italics supplied.)*

The express language of section 309, supra, leaves no room for doubt that the ultimate responsibility for support in such cases rests upon the Commonwealth.

The question as to what appropriation is available for the payment of the costs of the support of such mentally defective persons involves a consideration of Act No. 12-A, the General Appropriation Act of 1941, which is in part as follows:

The following sums, or as much thereof as may be necessary, are hereby specifically appropriated from the General Fund to the several hereinafter named agencies of the Executive, Legislative and Judicial Departments of the Commonwealth, for the purposes hereinafter set forth, for the two years beginning June first, one thousand and nine hundred and forty-one, and for the payment of the bills incurred by said agencies and remaining unpaid at the close of the fiscal year ending May thirty-first, one thousand nine hundred and forty-one:

* * * * *

TO THE DEPARTMENT OF WELFARE

* * * * *

For the payment of salaries, wages or other compensation of the superintendents and other employees; for the payment of general expenses, supplies and printing; for repairs, alterations and improvements to plant and equipment; for improvements to lands; for the purchase of equipment, furniture, furnishings and live stock; for expenses of the boards of trustees and incidental expenses, and for all other expenses of maintenance and operation necessary for the proper conduct of the work of the Laurelton State Village at Laurelton, the Pennhurst State School at Pennhurst, the Polk State School at Polk, the Selinsgrove State Colony for Epileptics

at Selinsgrove, and *any other institution* established for the care and treatment of mental defectives and epileptics as authorized and approved by the Secretary of Welfare, the sum of three million eight hundred fifty thousand dollars (\$3,850,000). (*Italics supplied.*)

The words, "any other institution established for the care and treatment of mental defectives," includes private institutions licensed by the Department of Welfare for the care of such mental patients.

The soundness of our conclusions reached herein is not affected by the fact that in determining the amount of the above appropriation, the legislature either did not consider this obligation of the Commonwealth or did not allow a sufficient sum to provide for this purpose.

Our views are in accord with the theory of complete State care and maintenance of indigent mentally ill persons, manifest in various acts of the General Assembly enacted in 1938 and 1939 and in several subsequent opinions of the Department of Justice based thereon.

We are of the opinion, therefore, that, (1) When neither a mentally defective person nor his parent or parents are able to defray the expenses of his support in a private institution licensed by the Department of Welfare for the care of such mental patients, such support is to be provided for by annual appropriation of the General Assembly; and (2) The expenses of maintenance and operation necessary for the proper conduct of the work of such institutions during the current biennium are payable out of moneys appropriated to the Department of Welfare under Appropriation Act No. 12-A, the General Appropriation Act of 1941, and the supplement thereto, Appropriation Act No. 74-A of 1941.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 448

Banks and Banking—Trust Company—Mortgage—Interest—Sinking Fund—Commercial Department of Fiduciary—Security—Pledge of Bonds or Other Securities—Banking Code of May 15, 1933, P. L. 624.

Where a bank and trust company receives under a mortgage indenture or similar instrument funds for the purpose of paying the interest or sinking fund payments, or both, required by said instrument, it is receiving the same as fiduciary, and when such funds are in turn deposited by the corporate trust department of the banking institution in its own commercial banking department, said funds must be secured by a pledge of bonds or other securities as required by section 1108 of the Pennsylvania banking code.

When a bank and trust company holds funds as a fiduciary and such funds are awaiting distribution or investment, it may deposit the same in another bank but if it uses such funds in its own commercial department it must pledge securities to the full value of the money so used for the protection of such moneys.

Claim has been made that it is unnecessary to pledge collateral in the case of such use of such funds, on the grounds that section 1108 refers only to funds which an institution may hold as "fiduciary" within the meaning of the several fiduciaries acts, that is, where the institution is acting as guardian, executor, administrator, committee, or in similar capacities. This theory is inapplicable in that the funds do not belong to an "estate" within the meaning intended by section 108 of the banking code.

Harrisburg, Pa., January 29, 1943.

Honorable William C. Freeman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: We are in receipt of your recent request for an opinion on the following question:

Where a bank and trust company received, under the terms of a mortgage indenture or similar instrument, funds as fiduciary for the purpose of paying the interest or sinking fund payments, or both, required by said indenture, and such funds are in turn deposited by the corporate trust department of the banking institution in its own commercial banking department, does Section 1108 of the Pennsylvania Banking Code require said funds to be secured by a pledge of bonds or other securities?

When a bank and trust company holds funds as a fiduciary and such funds are awaiting distribution or investment, it may deposit the same in another bank but if it uses such funds in its own commercial department it must pledge securities to the full value of the money so used for the protection of such moneys.

This is provided by Section 1108 of The Banking Code, the Act of May 15, 1933, P. L. 624, 7 P. S. §§ 819-1108, as follows:

A bank and trust company or a trust company shall keep all funds, property, or investments, held by it in a fiduciary capacity, separate and apart from the assets of such bank and trust company or trust company. All investments made by a bank and trust company or a trust company, as fiduciary, including fractional interests in investments may be held in the name of such bank and trust company or trust company, or in the name of a nominee of such bank and trust company or trust company, but all such investments shall be so designated, upon the records of such bank and trust company or trust company, that the estate to which such investments belong shall be clearly shown upon such records at all times. Such bank and trust company or such trust company may, however, clear receipts and payments of such funds in the

regular course of business in the same manner as other funds held by it. Funds held by a bank and trust company or a trust company as fiduciary, awaiting investment or distribution, may be deposited in any other institution, in any national banking association, or with any corporation or person in any other state, which is authorized to receive deposits and is subject to the full supervision of the banking authorities of such other state, or, in the case of a bank and trust company, may be used by it in the conduct of its business. *If such funds held by a bank and trust company as fiduciary are used by such bank and trust company in the conduct of its business, there shall be pledged or hypothecated by such bank and trust company, with the trust department of the bank and trust company acting as fiduciary, interest-bearing bonds or other obligations of the United States or those for the payment of the principal and interest of which the faith and credit of the United States is pledged or of the Commonwealth of Pennsylvania, or such other securities as may be approved by the department. The par value of the bonds, other obligations, or securities so pledged or hypothecated to secure funds, or the market value if such market value is less than the par value, shall at all times be equal to an amount not less than the funds so used or deposited, provided that security for such funds shall not be required to the extent that such funds are insured, under the provisions of section 12B of the Federal Reserve Act, approved the twenty-third day of December, one thousand nine hundred and thirteen, its amendments and supplements. If the bank and trust company which has put up such collateral should fail or be taken in possession by the department, the estate from which the funds were taken shall have a lien for the amount of such funds on the bonds, other obligations, or securities so pledged or hypothecated, in addition to their claim against the estate of such bank and trust company, (Italics ours.)*

The question may be restated as follows: Is a bank and trust company holding funds *as fiduciary* when it receives moneys for the purpose of paying interest or sinking fund payments, or both, under the terms of an indenture?

If the bank and trust company is not acting as fiduciary it is free to use such funds without pledging collateral therefor. If, on the other hand, the bank is acting as a fiduciary with respect to such funds, it must pledge collateral.

Claim has been made that it is unnecessary to pledge collateral in the case of such use of such funds, on the grounds that section 1108, *supra*, refers only to funds which an institution may hold as "fiduciary" within the meaning of the several fiduciaries acts, that is, where the institution is acting as guardian, executor, administrator, committee, or in similar capacities.

Those so contending refer to the term "the estate" as it appears in the last sentence of section 1108, quoted above, and urge that the term be given the same common meaning it acquires in references to decedents' estates, minors' estates, et cetera.

In testing the theory that as to such funds section 1108 is inapplicable because they do not belong to an "estate" within the meaning intended by that section, we first resort to definitions of the pertinent terms.

Section 1 of the Uniform Fiduciaries Act of May 31, 1923, P. L. 468, 20 P. S. § 3311, provides that:

(1) In this act, unless the context or subject matter otherwise requires,

* * * * *

"Fiduciary" includes a trustee; under any trust expressed, implied, resulting, or constructive, * * *.

Thus, at least, we have one "fiduciary act" in which there seems to be no intention to set forth limitations as suggested.

Webster's New International Dictionary defines "fiduciary" as:

1. Holding, held, or founded, in trust. 2. Of the nature of a trust; * * *.

The same authority defines the term "trust" as follows:

9. Law. An equitable right or interest in property distinct from the legal ownership thereof; *also a property interest held by one person for the benefit of another.* (Italics ours.)

The term "trustee" is defined by the same authority as:

Law. A person, whether real or juristic, to whom property is legally committed in trust; one entrusted with property for another.

While the definitions given in the Statutory Construction Act of May 27, 1937, P. L. 1019, 46 P. S. § 601, are by the terms of that act applicable only in the case of laws thereafter enacted, definitions as given in such act are enlightening. Thus "fiduciary" is defined as:

An executor, administrator, guardian, committee, receiver, trustee, assignee for the benefit of creditors, *and any other person, association, partnership, or corporation, acting in any similar capacity.* (Italics ours.)

"Trustee" under the Statutory Construction Act, supra, is defined as:

One in whom some estate, interest or power in or affecting property of any description is vested *for the benefit of another.* (Italics ours.)

The above quoted definitions lead us to the conclusion that in holding such funds for the purpose of payment, as above indicated, the corporate trustee is a fiduciary. In view of such definitions, also, we are at a loss to find any basis for the proposition that the term "the estate" as used in section 1108, limits the term "fiduciary" as has been urged.

We have also studied many of the indentures of the type under discussion. We feel that the wording of such indentures is not persuasive upon the question of whether a trust relationship is created, because it would seem that the actual fact which obtains is decisive.

Nevertheless we find that the language of these indentures invariably supports a finding that a trust relationship is created even though, as will be shown hereinafter, the debentures on occasion declare the relationship merely that of debtor and creditor.

We find the indentures, with minor changes, basically identical. As an instance, in an indenture dated June 1, 1928, article III, section 1, in part says the following:

All money in said Sinking Fund, including any interest allowed thereon, shall, until expended as below provided, be held by the Trustee as part of the *trust estate*, and shall be applied by the Trustee, in such manner, at such time or times, and in such amounts as it may consider advisable, to the purchase for said Sinking Fund of Debentures at the lowest prices obtainable, not exceeding 102½% of the principal amount thereof, plus interest accrued thereon to the date of purchase. (Italics ours.)

It is to be noted that the above quoted language makes reference to the "trust estate" in referring to the money in the sinking fund which is held by the trustee.

It is true that the same indenture contains the following provision (Article VII, Section 1 (10)):

(10) Any money received by the Trustee, to be held by it hereunder, may be so held as a *trust account* in its own banking department, and it shall be liable to pay or allow interest thereon only at the rate currently allowed by it on similar deposits. (Italics ours.)

The above quoted language purports to obtain for the trustee the right to use the money in its own commercial department. This has no significance now, because that right is given under section 1108 of the Code. And the reference to such money as a "deposit" has no effect if the trust relationship actually exists. Calling the money a deposit does not make it a deposit.

A similar indenture dated May 1, 1926, contains language on the one hand which shows conclusively that a trust relationship is created, while at the same time other language is used in an attempt to indicate merely a relationship of debtor and creditor. Thus article VIII, section 1, contains the following provisions:

Section 1. Conditions of Acceptance of Trust. The Trustee accepts the trust hereby created and agrees to perform the duties herein required of it, either expressly or by reasonable implication, subject however to the following conditions:

(1) The Trustee shall not be answerable for anything whatever in connection with this trust, except its wilful misconduct or gross neglect.

(2) It shall be paid reasonable compensation for its services in performing the duties and exercising the powers imposed and conferred upon it hereunder, and it shall receive reimbursement for all liabilities, expenses, advances, or payments, reasonably incurred, disbursed, or made by it pursuant to any of the provisions hereof or in the execution of any of the trusts hereby created or in the exercise of any right or power herein imposed or conferred upon it; as security therefor it shall have a lien upon the mortgaged property prior to that of the Bonds.

(3) It may employ agents and attorneys in fact and shall not be answerable, except as to money received by it or by its authorized agents, for the default or misconduct of any such selected by it with reasonable care.

The foregoing language not only speaks of the trust which the trustee accepts, but it sets forth conditions which in turn reflect very generally certain of the rights and duties of fiduciaries as well as limitations which the law of this Commonwealth places upon their liability.

As suggested above, the same indenture, by section (11) of section 1, provides as follows:

(11) Any money received by the Trustee, to be held by it hereunder, may be so held as a general deposit in its own banking department, and it shall be liable to pay or allow interest thereon only at the rate currently allowed by it on similar deposits.

While the language immediately hereinbefore quoted does not refer to the deposit as a "trust account" we are nevertheless unable to consider this provision as an adequate offset to the language above quoted which to us not only aptly describes but establishes a trust relationship.

A third indenture, dated July 1, 1937, provides that the company which is the obligor shall make payments to "sinking fund agents" and then provides that if a bond is not presented for payment, the sinking fund agents shall pay to the corporate trustee the amount due on such unrepresented bonds. This indenture gives to the trustee the right to retain this money "as a general deposit" but "for the benefit of the holder of such bond." The proviso also permits a return of the money to the obligor after a period of ten years. It is quite evident, despite the provision that the money be held as "a general deposit" that at least for this period of ten years the trustee is holding the moneys involved for the benefit of bondholders who may at any time come forward and present the bonds for payment.

Another indenture dated May 1, 1936, contains similar provisions of the conflicting nature above described. Thus, section 2 of article IV of said indenture provides, in part, as follows: .

All money deposited by the Company with the Trustee for the purpose of paying the principal or interest due on any Bond or Bonds shall, until applied thereto, be held by the Trustee *in special trust for the sole benefit of the holders of the Bonds or coupons, respectively, * * ** (Italics ours.)

Likewise, article VIII, section 1 (11) provides as follows:

(11) Any money received by the Trustee, to be held by it hereunder, may be so held as a general deposit in its own banking department, and it shall be liable to pay or allow interest thereon only at the rate, if any, currently allowed by it on similar deposits.

The trust agreements above referred to have been taken at random from a great number of such instruments. There appears little doubt but that there is an intention to set up with the trustee a trust of funds deposited for specific purposes and "for the benefit of others."

We are not, of course, concerned with any situation in which the obligor merely deposits money to pay interest charges or sinking fund requirements and merely instructs or directs a banking institution to make payment thereof and charge the account of the depositor therefor. Your inquiry does not contemplate such a situation.

But because it so aptly illustrates the distinction between a mere deposit for the purpose of paying money on behalf of an obligor, and the arrangement whereby a trust relationship is created, we refer to the case of *Homan v. First National Bank*, 316 Pa. 23 (1934). We quote from that case, page 28, as follows:

The coupons in the instant case were payable by the corporation "at its office or financial agency in the City of Philadelphia." They were not payable out of any trust

fund or even by the trustee under the mortgage, but by the corporation itself. *When each deposit was made the corporation simply authorized the bank to pay for the account of the corporation such maturing coupons as should be presented. No trust relationship was thus created, only that which ordinarily exists between a bank and a depositor, that of debtor and creditor.* If the bank had failed under the situation here existing, with coupons unpaid, it is clear that the loss would have fallen on the Lake Superior Corporation, not on the coupon holders. (Italics ours.)

In view of the foregoing it is our opinion that, where a bank and trust company receives under the terms of a mortgage indenture or similar instrument, funds for the purpose of paying the interest or sinking fund payments, or both, required by said instrument, it is receiving the same as fiduciary, and when such funds are in turn deposited by the corporate trust department of the banking institution in its own commercial banking department, said funds must be secured by a pledge of bonds or other securities as required by section 1108 of the Pennsylvania Banking Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 449

Criminal procedure—Parole—Jurisdiction of Board of Parole—Act of August 6, 1941—Indeterminate, flat and general sentences—Second conviction for crime committed during parole—Jurisdiction as to reparole—Costs of returning parole violators—Payment by Board of Parole—Sources of reimbursement—Acts of June 19, 1911, July 25, 1913, May 1, 1929, as amended May 11, 1931, and June 26, 1939.

1. Section 17 of the Act of August 6, 1941, P. L. 861, vests in the Board of Parole exclusive jurisdiction over all parole cases, whether the prisoner be in a penitentiary, reformatory, county jail, workhouse or house of correction, provided he is serving a maximum sentence or sentences of two years or more.

2. In the case of a prisoner serving an indeterminate sentence, the Board of Parole may grant a parole at the expiration of the minimum term, and in the case of a prisoner serving a flat sentence or a general sentence, may grant a parole immediately upon incarceration; but it may never extend the parole beyond, or terminate it before, the term of the maximum sentence fixed by the court in indeterminate or flat sentences, or by the legislature in general sentences.

3. The Board of Parole may reparole a parolee on his first sentence even after he has been convicted of a second offense during parole, and it may do this either before or after the prisoner has served the minimum term of his second sentence, or, if no minimum has been fixed, has started his second sentence.

4. The expenses incurred in returning parole violators to Pennsylvania penal institutions, county and State, must initially be borne by the Board of Parole and paid out of his appropriation, but may be collected by the Department of Revenue for the general fund (a) in the case of prisoners from a penitentiary, from the trustees thereof under the Act of April 26, 1939, P. L. 1080, (b) in the case of prisoners from industrial schools or the industrial home, from the trustees of such schools or home by virtue of the Act of May 1, 1929, P. L. 1183, as amended by the Act of May 11, 1931, P. L. 109, or the Act of July 25, 1913, P. L. 1311, and (c) in the case of prisoners from county jails; workhouses and houses of correction, from the county in which the prisoners were originally convicted.

Harrisburg, Pa., February 26, 1943.

Honorable Louis N. Robinson, Chairman, Pennsylvania Board of Parole, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting advice concerning the various subjects hereinafter enumerated.

I

(a) Does the Board of Parole have authority under the law to parole prisoners serving flat sentences of over two years in county institutions?

(b) Does the Board of Parole have authority under the law to parole prisoners serving general sentences at male industrial schools and the industrial home for women where the maximum sentence which could be imposed for the crime for which the prisoner was convicted equals or exceeds two years?

II

Where a parolee during parole is convicted of another crime and subsequently sentenced therefor, does the Board of Parole have authority under the law to reparole the prisoner on his first sentence or must the prisoner serve the maximum of his first sentence in full either before starting to serve the second sentence or upon serving the second sentence?

III

What agency or agencies should bear the expenses incurred in returning parole violators to Pennsylvania penal institutions—(a) penitentiaries, (b) industrial schools and the industrial home, (c) county prisons and other county institutions?

We will answer these questions seriatim.

First, it appears necessary however to give some history of the parole system in Pennsylvania in order that a clearer picture may be presented.

Before 1909 this Commonwealth had no system of parole as we now understand that principle of penology. The Act of May 10, 1909, P. L. 495, 61 P. S. § 291, et seq., was the first law directly bearing upon this subject. Under its terms a parole system was set up for prisoners incarcerated in the two penitentiaries.

This act in brief provided that the Board of Inspectors [later Board of Trustees] should call before them at regular meetings prisoners having served the minimum terms of their indeterminate sentences, and that they be given an opportunity to apply for their release on parole.

The board was required to report to the Governor who was authorized to parole in certain cases with the proviso that if during any parole a convict so released, should be convicted of any crime punishable by imprisonment under the law of this Commonwealth, he should in addition to such crime be compelled to serve the remainder of the term [without commutation] which he would have been compelled to serve but for the commutation of the sentence provided for in the act. However, in cases except those where only a payment of a fine was imposed, the Governor had no right to execute any rights granted under the act until after hearing and recommendation of the Board of Pardons.

The same act under its early sections gave to the courts of this Commonwealth, in certain cases, the right after a conviction to suspend sentence and place the defendant on probation upon terms and conditions discretionary with the court.

In the case of parole from a penitentiary, section 14 of the act provided for violation that the prisoner should be returned to the penitentiary for a period equal to the unexpired term of his sentence unless sooner released on probation or pardoned absolutely.

Next was passed the Act of June 19, 1911, P. L. 1055, 61 P. S. § 302, et seq. This act with some enlargement reenacted the legislation of 1909. Its section 10 as amended by the Act of June 3, 1915, P. L. 788, Section 1, 61 P. S. § 305, provided that in addition to the penalty imposed for a crime committed during a period of parole, the prisoner should be required to serve in the penitentiary to which he had been originally committed the remainder of the term [without commutation] which such prisoner would have been compelled to serve but for the commutation authorized for parole. Depending on the second

sentence,* the completion of the first one was either to precede or succeed the second. The act contained the same proviso with regard to the duties of the Board of Pardons as did the act of 1909.

On the same date was approved the Act of June 19, 1911, P. L. 1059, later amended by the Acts of May 5, 1921, P. L. 379 and May 11, 1923, P. L. 204, 61 P. S. § 314. This law pertained to the authority of the Courts of Quarter Sessions to parole convicts confined to the county jail, house of correction or workhouse in their respective districts. It contained not the power to parole "without commutation," but the power to parole, recommit and reparole.

Release from imprisonment in male industrial schools then known as reformatories was fixed by the Act of April 28, 1887, P. L. 63, 61 P. S. § 485 and authority on this subject was given to the Board of Managers [now Board of Trustees].

The Act of July 25, 1913, P. L. 1311, as amended by the Act of May 14, 1925, P. L. 697, the latter amended by the Act of June 22, 1931, P. L. 859, 61 P. S. § 566, provided for general sentences of women to the industrial home and where they were over twenty-five years of age permitted their parole under the Act of June 29, 1923, P. L. 975, amending the Act of June 19, 1911, P. L. 1055, *supra*. Women under twenty-five years of age were paroled by the Board of Trustees of the institution.

Briefly then up until the creation of the Pennsylvania Board of Parole, the Act of August 6, 1941, P. L. 861, 61 P. S. § 331.1 et seq., the authority to parole prisoners serving terms in State penitentiaries was in the Governor through the Board of Pardons. The authority to parole inmates over twenty-five years of age at the industrial home for women was placed under the same jurisdiction. The board of trustees of male industrial schools could parole prisoners incarcerated in those institutions, as could the trustees of the industrial home parole its prisoners who were under twenty-five years of age. The courts had jurisdiction in the matter of parole of persons serving sentences in county jails, houses of correction and in workhouses.

The Act of August 6, 1941, *supra*, creating the Pennsylvania Board of Parole as of June 1, 1942, gave it exclusive jurisdiction over paroles with the limitation that it could not act where the maximum sentence was less than two years nor could it parole until after the expiration of a minimum sentence.†

* If the second sentence was in the same institution as had been the first then the sentences would be served in sequence. But if the second sentence was in a different institution it was required to be served before the balance of the old sentence.

† See limitations in Sections 21 and 31 which are not pertinent to this opinion.

I

(a) Does the Board of Parole have authority under the law to parole prisoners serving flat sentences of over two years in county institutions?

(b) Does the Board of Parole have authority under the law to parole prisoners serving general sentences at male industrial schools and the industrial home for women where the maximum sentence which could be imposed for the crime for which the prisoner was convicted equals or exceeds two years

Flat sentences are those in which a definite term is prescribed without any minimum sentence.

General sentences are those in which no time is fixed by the court.

Sections 17 and 21 of the Act of August 6, 1941, 61 P. S. §§ 331.17 and 331.21, provide as follows:

Section 17. The board shall have exclusive power to parole and reparole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the same be a state or county penitentiary, prison or penal institution, as hereinafter provided. * * * Provided, however, That the powers and duties herein conferred shall not extend to persons sentenced for a maximum period of less than two years, and nothing herein contained shall prevent any court of this Commonwealth from paroling any person sentenced by it for a maximum period of less than two years: And provided further, That the period of two years herein referred to shall mean the entire continuous term of sentence to which a person is subject, whether the same be by one or more sentences, either to simple imprisonment or to an indeterminate imprisonment at hard labor, as now or hereafter authorized by law to be imposed for criminal offenses.

Section 21. The board is hereby authorized to release on parole any convict confined in any penal institution of this Commonwealth as to whom power to parole is herein granted to said board, except convicts condemned to death or serving life imprisonment, whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby. If at the time a person is paroled he has been imprisoned for a period in excess of the minimum term of imprisonment to which he shall have been sentenced, * * *.¹ The power to parole herein granted to the Board of Parole may not be exercised in the board's discretion at any time before, but only after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardon Board in a sentence which has been reduced by com-

¹The portion herein deleted was declared unconstitutional by the Supreme Court of Pennsylvania in *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 1942).

mutation. Said board shall have the power during the period for which a person shall have been sentenced to recommit one paroled for violation of the terms and conditions of his parole and from time to time to reparole and recommit in the same manner and with the same procedure as in the case of an original parole or recommitment, if, in the judgment of the said board, there is a reasonable probability that the convict will be benefited by again according him liberty and it does not appear that the interests of the Commonwealth will be injured thereby.

Section 17 above clearly extends to the Board of Parole exclusive jurisdiction in all parole cases whether the prisoner be in a penitentiary, reformatory (better termed, industrial school), county jail, workhouse or house of correction providing he is serving a maximum sentence or sentences of two years or more.

Thus, the legislature has taken away from the courts, the Pardon Board and the Trustees of Penitentiaries, all authority to parole except where the prisoner's maximum sentence or combined sentences do not aggregate two years.* And the proviso in section 21 that the power of parole may not be exercised at any time before but only after the expiration of the minimum term of imprisonment obviously does not limit the jurisdiction of the board over prisoners in the various State and county institutions but merely prescribes a limitation upon it where a minimum sentence has been fixed by the court. Clearly, if the court does not fix a minimum sentence then there is no limitation as to the time within which after incarceration the prisoner may be released upon parole.

In the case of a flat sentence of two years or more, i. e., a sentence for a definite period of time the prisoner may be paroled immediately upon the commencement of his term. Likewise in case of a general sentence, i. e., where a prisoner is committed to an industrial school without any definite time being fixed by the court, his parole may be commenced on the day he enters the institution, provided of course that the maximum punishment fixed by the legislature for the offense of which the prisoner was guilty equals or exceeds two years.

However, the Supreme Court speaking through Mr. Justice Stern in *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581 (1942), at page 589 says:

It is only if the duration of sentence is not affected that a parole does not infringe upon judicial power; therefore we are of opinion that the portion of section 21 which attempts to give to the board the power to extend the period of parole beyond the maximum term imposed by the sentence, and section 24 which attempts to give to the board the power to

* Note Sections 21 and 31 referred to supra.

discharge a parolee before the expiration of the parole period, are unconstitutional. * * *

Therefore, while in an indeterminate sentence, i. e., that with a minimum and maximum term, the board may parole at the expiration of the minimum term and in a flat sentence and a general sentence,* may parole immediately upon incarceration, it may never extend the parole beyond the term of the maximum sentence fixed by the court in indeterminate and flat sentence or by the legislature in general sentence. Nor can the board terminate the parole before the expiration of the maximum sentence fixed by the court in the first two instances and by the legislature in the last instance.

II

Where a parolee during parole is convicted of another crime and subsequently sentenced therefor, does the Board of Parole have authority under the law to reparole the prisoner on his first sentence or must the prisoner serve the maximum of his first sentence in full either before starting to serve the second sentence or upon serving the second sentence?

For the answer to this question we must look to the law as it existed before the enactment by the legislature of the current parole law, and to the interpretations which have been given it by our courts, keeping in mind at all times that the Act of August 6, 1941, reposes in the Board of Parole as above demonstrated, exclusive jurisdiction of that subject matter within the modest limitations which it imposes. We must remember that with the exception of those undergoing sentence of less than two years, all prisoners in Pennsylvania are brought under the jurisdiction and control of the Board of Parole; that with the exception above noted, the legislature has formulated a complete and comprehensive penological plan along modern and realistic lines, and in construing that legislation, we are obliged to start with the premise that the subject of parole in all its phases has been completely covered.

In so far as it concerns prisoners who were paroled from a penitentiary, under the Act of 1911, P. L. 1055, and its amendments, if they committed offenses punishable by imprisonment while on parole, they were obliged to serve both the term of the second sentence and the full term of the first one because in that act authorizing the parole of prisoners from the penitentiary, no authority was given to reparole.

In the case, however, of prisoners paroled from a county jail by the court, who committed offenses during parole, there was authority

* The Act of April 26, 1887, P. L. 63, Section 6, 61 P. S. 485, fixed as the duration of maximum general sentence, the maximum period fixed by the legislature for the offense of which the prisoner has been convicted and sentenced.

in the court under the Parole Act of 1911, P. L. 1059 and its amendments, not only to parole but to reparole, to commit and recommit.

This subject was dealt with in considerable detail in *Commonwealth v. Ripka*, 37 D. & C. 315 (1940), and we quote from pages 318 and 319 of the opinion as follows:

* * * It is true that paroles from State Penitentiaries and county institutions are regulated by different acts, the latter being governed by the Act of June 19, 1911, P. L. 1059, and that they do not contain the same provisions. * * * The first of these acts, which regulates paroles from penitentiaries, is rather elaborate in its provisions. The second lays down no rules whatever for the regulation of paroles from the county prison. It is but one paragraph in length, and except, as subsequently amended by the Act of May 11, 1923, P. L. 204, to prescribe regulations for the hearing of petitions for parole, it merely confers upon the quarter sessions courts the power "after due hearing, to release on parole any convict confined in the county jail, house of correction, or workhouse" of its district, and "to recommit to jail, workhouse, or house of correction on cause shown by such probation officer that such convict has violated his or her parole, and to reparole in the same manner and by the same procedure as in the case of the original parole if, in the judgment of said court, there is a reasonable probability that the convict will be benefitted by again according liberty to such convict, and also to again recommit for violation of such parole."

There are no provisions here, such as in the act relating to penitentiaries, prescribing what shall be done upon a violation of parole by a parolee, except that he may be recommitted and repared in the discretion of the court. We think, therefore, that the only reasonable conclusion to be reached from this complete absence of express legislative declaration upon the subject in the second act is that the legislature considered that, by the previous act relating to the penitentiary, it had given to the word "parole" a connotation sufficiently fixed and definite, at least as to basic principles, to render its further definition unnecessary when used in subsequent legislative enactments. In this respect we think that the acts should be interpreted similarly in order that the administration of parole may be uniform, and shall differ only in those particulars in which a legislative intent to distinguish between paroles from penitentiaries and from local county institutions is apparent or reasonably and necessarily to be inferred.

This being so, we find no statutory authority for holding the general consequences of a parole violation to be different in the case of prisoners sentenced to the county prison from those prescribed for penitentiary prisoners, except that, in the former case the power is given to the courts to reparole after commitment for violation of parole, whereas this power

has not been conferred upon the Board of Pardons, the paroling authority in the case of penitentiary prisoners.

And it was with this case before it, as well as those cited in the foregoing opinion, to wit: Commonwealth ex rel. Kent v. Smith, Warden, 323 Pa. 89, 1936 Commonwealth ex rel. Meinzer v. Smith, Warden, 118 Pa. Super. Ct. 250 (1935), that the legislature acted favorably upon the Parole Act of 1941, and stated in its section 17 as follows:

The board shall have exclusive power to parole and re-parole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the same be a state or county penitentiary, prison or penal institution, as hereinafter provided.

Therefore, the construction heretofore placed upon the words commit and recommit is applicable to the interpretation of the present law. Statutory Construction Act of May 28, 1937, P. L. 1019, Article III, Section 33, 46 P. S. § 533. The authority which was previously in the court to reparole on a first sentence after conviction of a second offense during parole as to prisoners in the county jail, is now vested in the Board of Parole as to all prisoners in State or county institutions serving maximum sentences over two years or more.

Specifically, the Board of Parole does have authority to reparole a parolee on his first sentence even after he has been convicted of a second offense during parole and it may do this either before or after the prisoner has served the minimum term of his second sentence or if no minimum has been fixed, has started serving his second sentence.

III

What agency or agencies should bear the expenses incurred in returning parole violators to Pennsylvania penal institutions—(a) penitentiaries, (b) industrial schools and the industrial home, (c) county prisons and other county institutions?

The Act of June 26, 1939, P. L. 1080, 61 P. S. § 309, provides in part as follows:

That whenever it shall appear to the State Board of Pardons that a person who has been sentenced under the provisions of the act, approved the nineteenth day of June, one thousand nine hundred and eleven * * * and its amendments, and released on parole by commutation containing a condition that the convict shall be subject to the terms of the said act, has violated the terms of his or her parole, it shall cause a warrant to be issued for the arrest of said person, * * * shall notify * * * the Department of Justice or the Pennsylvania

Motor Police to send an officer to return him to said penitentiary. All the necessary expenses incurred by such officer in returning such convict to the penitentiary shall be borne by the penitentiary to which he is returned, which expenses shall be refunded to the Department of Justice or the Pennsylvania Motor Police, as the case may be, whose officer or agent makes such return. * * *

The Act of May 1, 1929, P. L. 1183, as amended by the Act of May 11, 1931, P. L. 109, 61 P. S. § 521, provides for the return of parole violators to industrial schools and contains the following:

The cost of executing such warrant shall be paid by the board of trustees.

The Act of July 25, 1913, P. L. 1327, 61 P. S. § 577 with regard to State industrial home for women relating to the return of parole violators provides as follows:

* * * cost of executing the said warrant and returning the prisoner to be paid by the board of managers [now Board of Trustees].

The Act of June 19, 1911, P. L. 1059, as amended, 61 P. S. § 314 pertaining to the right of the courts to parole prisoners contains no provision as to the payment of the cost of returning a parole violator to prison. It follows then that in such instances the prisoners having been committed by the county judge, maintained by the county, paroled by the county judge and recommitted by the county judge, the cost therefor, falls upon the county.

To sum up, before the creation of the Board of Parole the costs of returning parole violators were borne as follows: (a) prisoners from the penitentiary by the trustees of the penitentiary, (b) prisoners from industrial schools and the industrial home by the trustees of the industrial schools and the industrial home, (c) prisoners from county jails, workhouses and houses of correction by the county where the prisoners were originally convicted.

The present parole law makes no provision for the payment of the costs for returning parole violators. Consequently, those costs must fall on the authorities heretofore made liable for them as above indicated.

Since the Board of Parole has exclusive jurisdiction and control of the parole system in Pennsylvania in cases involving maximum sentences of two years or more, then it is responsible for the return of such parole violators as are under its care. In the exercise of its duties and functions, it becomes a practical necessity for the board in the first instance to defray the expenses of returning parole violators.

This, however, does not relieve the various authorities ultimately responsible for these costs from their payment.

Because there is no provision in the law for reimbursing the Board of Parole for such expenditures the initial cost of returning parole violators must be met from the board's appropriations. The various agencies above designated as ultimately liable for these costs advanced by the Board of Parole should be billed accordingly and the funds in reimbursement collected by the Department of Revenue for the account of the General Fund. Act of April 9, 1929, P. L. 343, Article II, Section 206, 72 P. S. § 206 (h). Act of May 6, 1927, P. L. 848, Section 1, 72 P. S. § 3601.

We are of the opinion that:

I

(a) The Board of Parole does have authority under the law to parole prisoners serving flat sentences of over two years in county institutions.

(b) The Board of Parole does have authority under the law to parole prisoners serving general sentences at industrial schools and in the industrial home where the maximum sentence which could be imposed for the crime of which the prisoner was convicted equals or exceeds two years.

II

Where a parolee during parole is convicted of another crime and subsequently sentenced therefor, the Board of Parole does have authority under the law to reparole the parolee on his first sentence.

III

The expenses incurred in returning parole violators to Pennsylvania penal institutions, county and State, are initially upon the Board of Parole and payable out of its appropriation. These costs, however, may be collected by the Department of Revenue for the General Fund (a) in the case of prisoners from the penitentiary—from the trustees of the penitentiary, (b) in the case of prisoners from industrial schools and the industrial home—from the trustees of the industrial schools and the industrial home, (c) in the case of prisoners from county jails,

workhouses and houses of correction—from the county where the prisoners were originally convicted.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 450

Municipalities—Fire department relief fund associations—Funds received from tax on premiums of foreign fire insurance companies—Act of June 28, 1895, as last amended April 30, 1935—Payment to association of outside department affording fire protection—Existence of resident department.

1. A city, borough or township receiving payments of money from the State Treasurer out of the two per cent tax paid upon premiums of foreign fire insurance companies under the Act of June 28, 1895, P. L. 408, as last amended by the Act of April 30, 1935, P. L. 122, cannot pay any part thereof to the relief fund association of a fire department of another municipality which affords it fire protection if the municipality has a fire department of its own or contains one or more fire companies which afford it fire protection and which have relief fund associations.

2. The State Treasurer should not make any payment under the Act of June 28, 1895, P. L. 408, as last amended by the Act of April 30, 1935, P. L. 122, to a municipality which is unable to pass on such payment to an eligible fire company having a relief fund association.

Harrisburg, Pa., March 3, 1943.

Honorable F. Clair Ross, Auditor General, Harrisburg, Pennsylvania.

Sir: By your communication of December 29, 1942 you request us to advise you whether, under the Act of June 28, 1895, P. L. 408, as last amended by the Act of April 30, 1935, P. L. 122, 72 P. S. § 2262, a township may distribute the amount it receives of the two per centum tax paid upon premiums of foreign fire insurance companies, to the relief fund association of any fire company outside the township boundaries furnishing fire protection within the township when such township contains one or more fire companies, having relief fund associations, which furnish fire protection.

The legislation alluded to provides that a township receiving any payment from the State Treasurer of the moneys mentioned shall forthwith pay the amount received to the relief fund association of the fire department, or of such fire company or fire companies, paid or volunteer, now existing or hereafter organized in such township as is or are engaged in the service of the township and duly recognized

as such by the supervisors. It further provides that in a township in which there is no fire department or fire company the amount received by the township shall be forthwith paid to the relief fund association of the fire department or fire company or companies of any near or adjacent city, borough or township, which afford fire protection to the inhabitants of the township.

The foregoing means that any township which has a fire department or which contains one or more fire companies which afford it fire protection must pay the moneys to the relief fund association of said department or companies or both. If the township has no fire department or contains no company affording it fire protection, it is to pay the moneys to the relief fund association of any fire department or company of any nearby municipality which does afford the township fire protection.

The statute contains no exception which would permit a township to pay any of these moneys to the relief fund association of any fire department or fire company outside its boundaries, even though such department or companies afford it fire protection, if the township has any fire department or if any fire company or companies exist within its boundaries and afford it fire protection. The only exception permitting payment to the relief fund association of "outside" departments or companies is in cases where a township has no department of its own which affords it fire protection. It follows, therefore, that the answer to your question is "no."

It is our opinion, therefore, that a city, borough or township receiving any payment of money from the State Treasurer under the Act of June 28, 1895, P. L. 408, as last amended by the Act of April 30, 1935, P. L. 122, 72 P. S. § 2262, may not pay any of such money to the relief fund association of any fire department of any other municipality or to such association of any fire company outside its boundaries which afforded it fire protection if such township has a fire department of its own or contains one or more fire companies which afforded it fire protection, and which have relief fund associations.

It should be noted, of course, that no payment whatever shall or may be made to any city, township or borough, which is unable, pursuant to this opinion, to pass on such payment to an eligible fire com-

pany having a relief fund association. See opinion of this department in 1929-30 Op. Atty. Gen. 25, 13 D. & C. 65 (1929).

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 451

Appropriations—Department of Banking—Building and Loan Association—Cost of Examination—Appropriation of 1933—Accumulated Fund—Repayment into General Fund—Loan—Gift.

The Department of Banking may repay from the banking department fund to the general fund in the State treasury, the amount heretofore expended from the appropriation of \$80,000 made under the general appropriation act of 1933.

Under the appropriation act the sum of \$80,000 was to be paid into the general fund of the State treasury prior to May 31, 1935, from fees and other moneys collected in connection with the building and loan supervision. But the general fund of the Commonwealth has never been repaid and any consideration of the appropriation act can lead only to the conclusion that the money involved was a loan and not a gift.

There is an obligation to repay this money and the mere fact that the time limit has passed in no way eliminates the obligation.

The appropriation made in 1933 was necessitated by the fact that prior thereto building and loan associations were charged only with the amount which represented the direct cost of examinations and the balance of the cost of supervising building and loan associations was defrayed from biennial appropriations from the general fund; but by the Act of May 15, 1933, P. L. 796, building and loan associations were made liable for assessments to cover their share of the general or overhead expenses.

Harrisburg, Pa., March 29, 1943.

Honorable William C. Freeman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have inquired if it would be proper for you to pay into the General Fund in the State Treasury the sum of approximately \$72,000, which was used by your department in supervising building and loan associations and which was the amount spent from an appropriation of \$80,000, made in 1933 for such purposes by Act No. 300-A, known as The General Appropriation Act of 1933. The pertinent part of such Appropriation Act reads as follows:

For the payment of salaries, wages, or other compensation of officers and employes; for the payment of postage, traveling expenses, telephone toll charges, telegrams, newspaper adver-

tising and notices, freight, express, cartage, and other departmental overhead expenses properly chargeable to building and loan supervision, the sum of eighty thousand dollars (\$80,000): Provided, That the said sum of eighty thousand dollars (\$80,000) shall be returned into the General Fund in the State Treasury prior to the thirty-first day of May, one thousand nine hundred and thirty-five, from fees and other moneys collected in connection with building and loan supervision. (Italics ours.)

Ordinarily no biennial appropriation is made to your department, provision having been made in the Department of Banking Code of 1933, being the Act of May 15, 1933, P. L. 565, 71 P. S. § 733-1 et seq., and in previous legislation, for a continuing appropriation to your department of all moneys received by your department for the payment of its expenses.

Section 203 of the Code, supra, reads in part as follows:

*All moneys collected or received by the department, arising from fees, assessments, charges, and penalties, from the sale by the Department of Property and Supplies of unserviceable property originally paid for out of the Banking Department Fund, and from similar sources, are hereby specifically appropriated to the Department of Banking to be used to pay its expenses, * * *.* (Italics ours.)

The appropriation of \$80,000 made in 1933 was necessitated by the fact that prior thereto building and loan associations were charged only with the amount which represented the direct cost of examinations and the balance of the cost of supervising building and loan associations was defrayed from biennial appropriations from the General Fund; but by the Department of Banking Code of 1933, supra, and also by the Act of May 15, 1933, P. L. 796, 7 P. S. § 321 (a) and (b), building and loan associations were made liable for assessments to cover their share of the general or overhead expenses of your department.

Section 1 of the Act of May 15, 1933, P. L. 796, reads in part as follows:

(b) *All the expenses incurred in and about the conduct of the business of the department, including the cost of the regular examinations of corporations and persons under the supervision of the department, the compensation of the secretary, deputies, examiners, and other employes of the department, together with all other general or overhead expenses of the department, shall be charged to and paid by the corporations and persons subject to the supervision of the department, in equitable proportions, at such times and in such manner, as the secretary shall by general rule or regulation annually prescribe: (Italics ours.)*

Section 204 of the Department of Banking Code, *supra*, reads in part as follows:

*All the expenses of the department, including those enumerated in this act or otherwise authorized by law, shall be charged to and paid by all institutions, in such equitable amounts, at such times, and in such manner as the department shall, by general rule or regulation, prescribe. * * **
(Italics ours.)

The appropriation of \$80,000 provided a working fund which would enable the Department of Banking, in the absence of appropriations theretofore made, to continue its supervision of building and loan associations pending the assessment and collection of their equitable part of the overhead from such institutions, as required by the 1933 legislation, *supra*.

It is to be noted that under the appropriation act the sum of \$80,000 is to be paid into the General Fund of the State Treasury prior to May 31, 1935, from fees and other moneys collected in connection with building and loan supervision. But the General Fund of the Commonwealth has never been repaid and any consideration of the appropriation act, above mentioned, can lead only to the conclusion that the money involved was a loan and not a gift. The legislature clearly expressed this intention by providing for repayment and by prescribing a time limit therefor.

That being the case, there is an obligation to repay this money and the mere fact that the time limit has passed in no way eliminates the obligation.

The Banking Department Fund has accumulated from many sources since the establishment of your department in 1891. All moneys received by your department are paid into this fund. Section 203 of the Department of Banking Code, *supra*, provides that moneys in such fund are to be used by your department to defray its expenses. As has been outlined above, the burden of supervising building and loan associations, without the benefit of biennial appropriation, was shifted to your department in 1933, with attendant expenses upon your department. Repayment of the special appropriation made for the original outlay for such expense, in the amount of approximately \$72,000, is in order.

It is our opinion that it will be proper to repay from the Banking Department Fund to the General Fund in the State Treasury, the amount heretofore expended by the Department of Banking from the

appropriation of \$80,000 made to the department under The General Appropriation Act of 1933.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 452

Weights and measures—Sale of vegetables in bunch form—Sale of meat and meat products by the piece—Acts of July 24, 1913, and May 28, 1937.

1. Vegetables not listed in section 6 of the Act of July 24, 1913, P. L. 965, may be sold in bunch form without being marked as to weight or count without violating that act or the Act of May 28, 1937, P. L. 1007.

2. The sale of various pieces of meat or meat products without any notation of weight does not constitute a sale by weight, dry measure, or numerical count, and is therefore violative of the Act of July 24, 1913, P. L. 965, as amended.

Harrisburg, Pa., March 30, 1943.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs,
Harrisburg, Pennsylvania.

Sir: You have asked to be advised on two questions: (1) Whether the sale of vegetables in bunch form and not marked as to net weight or numerical count and (2) whether a sale of various cuts of meat, bacon, hams, bologna, or meat products by the piece and not marked as to net weight, constitute a violation of the Act of July 24, 1913, P. L. 965, as variously amended, 76 P. S. § 242 et seq., usually referred to as the "Commodity Acts."

Section 1 of the said act reads:

The word "commodity," as used in this act, shall be taken to mean any tangible personal property sold or offered for sale.

Section 2 of the said act provides:

* * * All dry commodities, when sold in bulk or from bulk, shall be sold by weight, dry measure or numerical count. * * *

The act in section 2, supra, limits its applicability to sales in bulk or from bulk. Most vegetables are sold by dry measure or weight, and in all such cases the sale is subject to the provisions of the act in question, which in section 6, as amended, 76 P. S. § 246, enumerates a

long list* of vegetables sold by the bushel and prescribes the required weight of the bushel of the commodity when so sold unless sold in standard Pennsylvania containers which are the original packages and filled in accordance with good commercial practice. With none of these vegetables are we concerned.

However, certain other vegetables are commonly and customarily sold by the bunch, as celery, radishes, asparagus, lettuce, water cress, etc. "Bulk" has been defined to be "that which is neither counted, weighed nor measured." *Riggs v. State*, 84 Neb. 335, 121 N. W. 588, 589, 590.

The practice of selling certain vegetables by the bunch has grown up by custom. The purchaser is not concerned with the weight or dry measure, but rather with the physical size of the bunch and the appearance thereof as to freshness and desirability.

The Act of May 28, 1937, P. L. 1007, 76 P. S. § 441 et seq. is entitled in part "regulating the weights and measures in the sale or offering for sale of fruits and vegetables in this Commonwealth." Section 2 of the act reads as follows:

Hereafter it shall be lawful for any person, copartnership, association or corporation to sell or offer for sale at wholesale or retail in this Commonwealth, fruits and vegetables in original unbroken standard containers, as herein defined, but sales in such original unbroken standard containers shall be lawful only if there shall appear thereon a plain and conspicuous statement showing correctly the quantity of fruits and vegetables contained therein in terms of weight, measure in cubical content, or numerical count, and only if the containers shall have been filled or packed in accordance with good commercial practice. If the contents of an original standard container are broken for resale at wholesale or retail, *or if fruits and vegetables are sold in any other manner than in original unbroken standard containers, then such sales shall be lawful only if made by weight or numerical count and in no other manner whatever.* It shall be unlawful for any person, copartnership, association or corporation to sell or offer for sale, at retail, any fruits or vegetables the weight of which is less than that represented. (Italics supplied.)

* * * * *

If the provision in this law with regard to sales by numerical count is to be given any reasonable effect, it must be construed to permit under the limitations of the act of July 24, 1913, *supra*, sales in bunches. The numerical count sales of an article such as parsley, otherwise than by the bunch, demonstrates the fallacy of any other conclusion. The sale of vegetables not mentioned in section 6 of the Act

* Beans, beets, cabbage, carrots, lentils, onions, parsnips, peas, potatoes, rutabagas, spinach, turnips, tomatoes, etc.

of July 24, 1913, P. L. 965, 76 P. S. § 246, above referred to, by the bunch would therefore be sale by numerical count and would not constitute a violation of the acts.

Your second question is whether it is a violation of the provisions of said act, as amended, to sell various cuts of meat, bacon, hams, bologna and meat products by the piece and not marked as to net weight. We understand from your inquiry that sale by the piece of meat, bacon, hams, bologna or meat products is not a sale in package form, because if it is a sale in package form the weight must be marked on the wrapper. The present case concerns a seller who cuts meat into pieces and offers the pieces for sale without any information to the purchaser as to its weight.

Meat is a dry commodity under the definition of "commodity" in section 2 of the act, supra, and as such must be sold by weight, dry measure or numerical count if sold in bulk or from bulk. Customarily meat is sold by weight so that the sale of meat is a sale from bulk as that term is previously defined. In our case there is no uniformity of weight or size of the various pieces. The size and weight depend entirely on the act of the seller in preparing the pieces. The clear intent of the legislature was to protect the purchasing public, as far as possible against dealers' sharp practices which resulted in excessive profits from short weight or short measure sales. In conformity with and in order to carry out this intent we must conclude that the sale of meat, bacon, hams, bologna and meat products by the piece without any notation of weight does not comply with the requirements of section 2 of the act in question, and constitutes a violation of the provisions of the Act of July 24, 1913, P. L. 965, 76 P. S. § 242.

Therefore, it is our opinion that the sale of certain vegetables not mentioned in section 6 of the Act of July 24, 1913, P. L. 965, 76 P. S. § 246, in bunch form and not marked as to weight or count, is not a sale in violation of the provisions of the Commodity Act, the Act of July 24, 1913, P. L. 965. Further, you are advised that the sale of various pieces of meat, bacon, ham, bologna and meat products without any notation of weight is not a sale by weight, dry measure or numerical count, and is forbidden by and therefore a violation of the Act of July 24, 1913, P. L. 965, as amended, usually referred to as the "Commodity Acts."

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ROBERT E. SCRAGG,
Deputy Attorney General.

OPINION No. 453

Sulfanilamide — Derivatives — Sale — Prescription — Physician — Dentist — Veterinarian—Pharmacist—Act of May 12, 1939, P. L. 133.

Under the Act of May 12, 1939, P. L. 133, sulfanilamide and any of its derivatives may not be sold at retail or dispensed to any person except upon the written prescription of a duly licensed physician, dentist or veterinarian.

Harrisburg, Pa., April 6, 1943.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether sulfanilamide or any of its derivatives may be sold except upon the written prescription of a duly licensed physician, dentist or veterinarian.

Section 1 of the Act of May 12, 1939, P. L. 133, 35 P. S. §§ 951-954, provides in part as follows:

The drug known as sulfanilamide and any of its derivatives shall not be sold at retail or dispensed to any person except upon the written prescription of a duly licensed physician, dentist or veterinarian, compounded or dispensed by a registered pharmacist or under the immediate personal supervision of a registered pharmacist; * * *.

The foregoing is quite clear and to the point, and speaks for itself.

It is our opinion, therefore, that sulfanilamide and any of its derivatives may not be sold at retail or dispensed to any person except upon the written prescription of a duly licensed physician, dentist or veterinarian.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

 OPINION No. 454

Parole—Minors sentenced to industrial schools—Prisoners serving general sentence—Parole before expiration of minimum sentence—Parole as of prior date—Parole Act of August 6, 1941.

1. Under section 17 of the Parole Act of August 6, 1941, P. L. 861, the Pennsylvania Board of Parole has jurisdiction over minors under 18 years of age serving sentences at the male industrial schools at Huntingdon and White Hill and at the Industrial School for Women at Muncy, provided that their maximum

term is two years or more, but it does not have jurisdiction over minors merely committed to those institutions.

2. The Pennsylvania Board of Parole may, under section 17 of the Parole Act, discharge prisoners serving general sentences from parole at any time.

3. The Pennsylvania Board of Parole does not have authority to parole or reparole as of a date prior to the date on which the parole or reparole is granted, and specifically does not have authority to parole or reparole as of a date prior to the effective date of the Parole Act.

4. In re Parole, No. 1, — D. & C. —, reconsidered and modified.

Harrisburg, Pa., April 8, 1943.

Honorable Louis N. Robinson, Chairman, Pennsylvania Board of Parole, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting advice concerning the following subjects:

I. Does the Pennsylvania Board of Parole have jurisdiction over minors under 18 years of age, serving sentences at the male industrial schools at Huntingdon and White Hill, and the Industrial School for Women at Muncy?

II. Where a prisoner, undergoing a general sentence at a male industrial school, or the industrial home for women, has been paroled, may he or she be granted a final discharge from parole before the expiration of the period which the legislature has fixed as the maximum term of imprisonment for the crime of which the prisoner was found guilty and sentenced?

III. Does the Board of Parole have authority to reparole on a first sentence, as of a date prior to June 1, 1942, a prisoner sentenced for an offense committed while on parole?

I. To interpret the Parole Act of August 6, 1941, P. L. 861, 61 P. S. § 331-1 et seq., as it applies to children under 18 years of age sentenced to the two male State industrial schools and the female State industrial home, it is first necessary to point out the technical distinction between a sentence and a commitment.

The Act of June 2, 1933, P. L. 1433, as amended by the Act of June 15, 1939, P. L. 394, 11 P. S. § 243 et seq., fixes the age of a juvenile as under 18 years, and provides for the disciplinary and corrective treatment of such minors by "commitment" to the individuals and institutions designated in section 8.

The effect of such commitment upon the juvenile is limited by section 19 of the act, 11 P. S. § 261, as follows:

No order made by any juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by the

criminal laws of the Commonwealth, nor shall any child be deemed to be a criminal by reason of any such order or be deemed to have been convicted of crime. The disposition of a child or any evidence given in a juvenile court shall not be admissible as evidence against the child in any case or proceeding in any other court.

On the other hand a sentence is a punishment by fine or imprisonment, following a conviction. Section 5 of the Act of April 28, 1887, P. L. 63, 61 P. S. § 484, reads as follows:

Any person, who shall be convicted of an offense punishable by imprisonment in the Pennsylvania Industrial Reformatory at Huntingdon, and who, upon such conviction, shall be sentenced to imprisonment therein, shall be imprisoned according to this act, and not otherwise.

Clearly, then, there is a distinction between a juvenile committed to an institution and a juvenile sentenced to an institution. And your problem treats of the children under 18 years of age *sentenced* to the State industrial schools at Huntingdon and White Hill and the State Industrial School for Women at Muncy.

Section 17 of the Parole Act, 61 P. S. § 331.17, reads in part as follows:

The board shall have exclusive power to parole and re-parole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter *sentenced* by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, * * * Provided, however, That the powers and duties herein conferred shall not extend to persons *sentenced* for a maximum period of less than two years, * * *. (Italics ours.)

It is obvious from the foregoing that the jurisdiction of the board is not extended to children "committed" to institutions, but is extended to children "sentenced" to institutions where the maximum term is two years or more.

The prohibition contained in the forepart of section 31 of the Parole Act, 61 P. S. § 331.31, with regard to persons committed, is mere surplusage, while the latter part removes from the board's authority a limited class of persons sentenced. We quote the section, as follows:

Anything herein contained to the contrary notwithstanding, this act shall not apply to persons *committed* to the Pennsylvania Training School, houses of refuge for boys or girls, institutions for the discipline or correction of juveniles, as defined by existing laws, or persons imprisoned in any county jail, workhouse or other penal or correctional institution under *sentence* by an alderman, justice of the peace or magistrate, or committed in default of payment of any fine or of bail.

Under section 14 of the Act of 1933, as amended by the Act of 1939, supra, 11 P. S. § 256, children of 16 years and less than 18 years of age may be tried and convicted in Courts of Quarter Sessions. Therefore, such children may be sentenced to the industrial schools for men and the industrial home for women. It follows that there will be certain minors under the age of 18 years serving general sentences at the above indicated institutions. Over these cases the board does have jurisdiction, providing, of course, that the maximum term fixed by the legislature for the crime of which the minor was found guilty and sentenced, equals or exceeds two years. -

II. In the body of our Formal Opinion No. 449, of February 26, 1943, we stated:

* * * while in an indeterminate sentence, i. e., that with a minimum and maximum term, the board may parole at the expiration of the minimum term and in a flat sentence and a general sentence, may parole immediately upon incarceration, it may never extend the parole beyond the term of the maximum sentence fixed by the court in determinate and flat sentence or by the Legislature in general sentence. Nor can the board terminate the parole before the expiration of the maximum sentence fixed by the court in the first two instances and by the Legislature in the last instance.

This question must be construed as a request for reconsideration of the last clause of the foregoing quotation. That is, may the board terminate the parole of a prisoner undergoing general sentence before the maximum period fixed by the legislature for the offense of which the prisoner had been convicted and sentenced?

Before the creation of the Board of Parole the method of discharging prisoners serving general sentences at the industrial school at Huntingdon was as outlined in section 14 of the Act of April 28, 1887, P. L. 63, 61 P. S. § 513, as follows:

When, in the opinion of the superintendent, after due investigation, and obtaining the opinion of the physician and moral instructor, any person confined in the reformatory has given such evidence, as is deemed reliable and trustworthy, that such person has been so improved by his treatment in said reformatory as to justify his liberation, a certificate of the fact and the opinions of the superintendent, doctor and moral instructor, under their hands and seals, shall be submitted to the boards of managers;¹ when, after due notice to all the managers at the next meeting thereafter, said board shall consider the case of the person so presented; and when the said board shall determine that such person is entitled to his discharge, said board shall cause a record of the case of such person to be made, showing the date of his commitment

¹ Now Board of Trustees.

to the reformatory, the time he has been detained, the cause thereof, a copy of his sentence, the copy of the certificate as aforesaid of the officers, and the action thereon of the board, said record to be signed by the managers and sent to the judge of the court that sentenced said persons to the reformatory, who shall, after consulting the district attorney, and no further reason for detention existing, send, under the seal of the court, to the said board, an order to discharge the said person from said reformatory.

The same general procedure was authorized for the industrial school at White Hill under section 6 of the Act of June 21, 1937, P. L. 1944, 61 P. S. § 545-6, and for the Industrial Home for Women at Muncy, in cases of inmates, under twenty-five years of age, by section 19 of the Act of July 25, 1913, P. L. 1311, 61 P. S. § 570.

In brief then, the power to discharge a prisoner undergoing general sentence at either of the three above indicated institutions was in the board of trustees in two instances and the Department of Welfare in the other instance with the approval of the court.

Under section 17 of the Parole Act of August 6, 1941, 61 P. S. § 331.17, exclusive power to discharge from parole was given to the Board of Parole. We quote the pertinent portion of that section:

The board shall have exclusive power to parole and re-parole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the same be a state or county penitentiary, prison or penal institution, as hereinafter provided. * * *

The power to discharge from parole as used in the act of 1941, is tantamount to the power to discharge from imprisonment as used in the act of 1887. A prisoner not paroled is discharged from prison at the expiration of his maximum sentence. A prisoner on parole, at the expiration of his sentence, is discharged from parole. Both discharges have the same effect. The prisoner has paid his debt to society. And since we held in Formal Opinion No. 449 of February 26, 1943, that the Board of Parole had the right to parole prisoners serving general sentences at the State industrial schools for males and the industrial home for women, it necessarily follows that the board has the authority to discharge them from parole.

The conclusion of Mr. Justice Stern in *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 589 (1942), does not require a negative answer to your second question. He says:

* * * The Board of Parole, therefore, cannot discharge a convict from parole before the expiration of the maximum

term for which he has been sentenced, nor, on the other hand, extend the period of parole beyond that time.

What the court obviously means here is that the prisoner may not be discharged before the expiration of the maximum term *fixed by the court*, because the statement is predicated upon the authority of Commonwealth ex rel. Johnson v. Hallaway, 42 Pa. 446 (1862). And that case stands for the principle that the fixing of the term of sentences is a judicial function. But in case of general sentence, no maximum term is fixed by the court. The legislature has merely provided that the prisoner may not be detained beyond the period which the law fixes as the maximum for which the prisoner could have been sentenced had the court the right to commit on a flat or indeterminate sentence.¹

Moreover, at page 587 of the Banks case we have the following:

* * * The power to grant paroles is not inherent in courts; Pennsylvania courts never had such power until it was given to them by the Act of June 19, 1911, P. L. 1059, and then only with respect to prisoners in county jails and workhouses. What the legislature thus gave it can take away again in whole or in part and vest in some other agency of government. The legislature has exclusive power to determine the penological system of the Commonwealth. It alone can prescribe the punishments to be meted out for crime. It can provide for fixed penalties or grant to the courts such measure of discretion in the imposition of sentences as it may see fit. * * *

It follows if the general sentence may be said to have a maximum term, that maximum term is fixed by the legislature and not by the court. Consequently in discharging from parole or from imprisonment persons serving general sentences, the Board of Parole is exercising authority under a legislative grant to reduce a term which the court never had a right to fix.

Since the Board of Parole is given authority under section 17 of the Parole Act to discharge prisoners from parole, it may exercise that authority at any time after parole in the case of a person serving a general sentence, *i. e.*, where no maximum or minimum term is fixed by the court.² To this extent our Formal Opinion No. 449 of February 26, 1943, is modified.

¹ This subject is discussed at length in Formal Opinion No. 449 of February 26, 1943.

² Provided, of course, that the maximum which the legislature has fixed as punishment for the crime of which the prisoner was guilty, equals or exceeds two years.

III. In Formal Opinion No. 449 of February 26, 1943, we specifically held:

Where a parolee during parole is convicted of another crime and subsequently sentenced therefor, the Board of Parole does have authority under the law to reparole the parolee on his first sentence.

The question now is, whether that authority may be exercised as of a date prior to the effective date of the Parole Act of August 6, 1941, P. L. 861, 61 P. S. § 331.1 et seq., viz., prior to June 1, 1942.

We are of the opinion it may not.

In *Commonwealth ex rel. Morgan v. Smith*, 146 Pa. Super. 352, 357 (1941), the court said, referring to a penitentiary prisoner:

* * * Had he then applied for a parole and it had been granted, he would have started on his sentence-for subornation of perjury and two years thereafter he might have been released on parole. But he did not do so, and *we find no authority for the issuance nunc pro tunc of a constructive parole* as of date of May 30, 1940. Relief beyond that hereinafter stated is a matter for the Board of Pardons. However, he is entitled to apply now for a parole under the sentence to No. 233 March Sessions, 1930, and if granted, he will then start serving the sentence to No. 219 December Sessions 1938, and will be eligible for release on parole when he has served the minimum term of that sentence, to wit, two years. (Italics ours.)

We find nothing in the new parole law that would give the board a right which the Morgan case says was denied by pre-existing laws.

Section 32 of the new parole law treats with the cases upon which the board may act. It reads as follows:

The provisions of this act are hereby extended to all persons who, at the effective date hereof, may be on parole or liable to be placed on parole under existing laws with the same force and effect as if this act had been in operation at the time such persons were placed on parole, or became liable to be placed thereon, as the case may be.

What this section obviously means is that the board from and after the effective date of the new parole act has the right to consider all cases where the prisoner is either on parole or eligible for parole. There is no language in this section, or as a matter of fact in any other section of the act, which could be construed to change the law enunciated in the Morgan case.

The limitation in section 21 of the act that the board may parole only after the minimum term fixed by the court is in itself a pro-

hibition against the board's exercise of paroling authority as of a date prior to June 1, 1942. Because had it the right to parole nunc pro tunc the board could circumvent the proviso in section 21 by the simple expedient of paroling on a first sentence to predate the inception of a second sentence and thereby allow the minimum term of the second sentence to expire before June 1, 1942, making the prisoner eligible for parole as of that or some subsequent time before the expiration of the minimum of the second sentence.

With regard to back time cases, *i. e.*, where a prisoner is serving the balance of a first sentence after having been sentenced for a second offense, the board at any time after June 1, 1942, could reparole on the first sentence and permit the prisoner as of that date to start serving the second sentence. But in no case could the board permit the prisoner to start serving his second sentence before June 1, 1942. With regard to the prisoner who on June 1, 1942, was serving his second sentence, the board obviously could not parole until after the expiration of the minimum term of that sentence.

We wish to point out, however, that where a prisoner has served or is serving several consecutive terms under simultaneous sentences, the board may parole on all sentences at the expiration of the total minimum. It may, however, act at the expiration of each minimum sentence.

Commonwealth ex rel. Campbell v. Ashe, Warden, 141 Pa. Super. 408 (1940); Commonwealth ex rel. McGinnis v. Ashe, 330 Pa. 289 (1938).

We are of the opinion, therefore, that:

I. The Pennsylvania Board of Parole does not have jurisdiction over minors under 18 years of age, *serving sentences* at the male industrial schools at Huntingdon and White Hill, and the Industrial School for Women at Muncy. However, juveniles *committed* to these institutions are not under the board's jurisdiction or supervision.

II. Where a prisoner, undergoing a general sentence at a male industrial school, or an industrial home for women, has been paroled, he or she may be granted by the board, a final discharge from parole before the expiration of the period which the legislature has fixed as the maximum term of imprisonment for the crime of which the prisoner was found guilty and sentenced.

III. The Board of Parole does not have the authority to parole or reparole as of a date prior to the date on which the parole or

reparole is granted. In other words, the board cannot act nunc pro tunc.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 455

Sectarian Hospitals—State Funds—Appropriation—Hospital—Sectarian Institution—Department of Welfare—Religious Sect—Trustees—Pennsylvania Constitution, Article III, section 18.

The Secretary of Welfare may not approve payments to a hospital, in Pennsylvania, from State funds to the Department of Welfare, where all the trustees must be active members of the same religious denomination.

The term "sectarian," when used as an adjective, means denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects; especially marked by attachment to a sect or denomination; and the term, in a broader sense, is used to describe the activities of the followers of one faith as related to those of adherents of another. The term is most comprehensive in scope.

Article III, section 18, of the Pennsylvania Constitution provides: "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association."

The Society of Friends is a religious sect or denomination, and its hospital is a sectarian and denominational institution affiliated with and under the domination, control and governing influence of a particular religious sect or denomination.

Harrisburg, Pa., May 12, 1943.

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

Madam: The Department of Justice is in receipt of your request to be advised whether or not the Secretary of Welfare may approve payments to the Jeanes Hospital, located at Fox Chase, Philadelphia, Pennsylvania, from funds appropriated in Act No. 73-A of 1941, making an appropriation to the Department of Welfare for the maintenance of certain hospitals, including the Jeanes Hospital.

You state that the charter, constitution, and bylaws of the Jeanes Hospital indicate that all the members of the Board of Trustees must be members of a Philadelphia Yearly Meeting of Friends, and that

this has raised the question as to the eligibility of the hospital to receive State aid as a nonsectarian institution, especially in view of the rules and regulations of the Department of Welfare, that in order to be eligible for State aid the members of the governing board of an institution may not be restricted to any particular sect or religious group.

You also state that the members of the Board of Trustees, twenty-nine in number, are all members of the Society of Friends and that in order to raise funds annual drives are conducted among Quakers, and that the hospital is managed and operated as a sectarian institution.

In conjunction with your request for advice, you have furnished us with a copy of the charter, constitution and bylaws of the Jeanes Hospital.

The charter of Jeanes Hospital (Charter, Constitution, and By-laws, page 4, paragraph 8), relating to the corporation, provides as follows:

The said corporation is to consist of Thirty-two (32) persons, who shall be adult members of the Philadelphia Yearly Meeting of Friends, that now, 1913, holds its yearly meeting at or near the corner of Fifteenth and Race Streets, in the City of Philadelphia. Any person who ceases to be a member of said Philadelphia Yearly Meeting of Friends shall thereupon cease to be a member of said corporation. Any vacancy in the membership of said corporation shall be filled by election by the members or by the Board of Trustees, from among persons nominated by the respective committees in charge of Boarding Homes of the different Quarterly meetings.

The purpose of the corporation (page 14) is as follows:

That your petitioner was incorporated for the purpose of receiving the real and personal property which constituted the remainder or residue of the Estate of the late Anna J. Jeanes, who died in the City of Philadelphia on the 24th day of September, 1907, leaving a last will and testament dated February 25th, 1907, which was duly probated on the 20th day of September in the Office of the Register of Wills of Philadelphia County in Will Book No. 289, page 271, and which Will, inter alia, provided as follows:

"I give and bequeath the sum of Two hundred thousand Dollars (\$200,000) and my residuary estate to the Incorporated Trustees of the Philadelphia Yearly Meeting of Friends, of which I am a member. The said gift and bequest to be devoted to the establishment and endowment of a general hospital or infirmary for cancerous, nervous and disabling ailments, the said institution to be under the charge

of a joint committee of 'Quarterly Meeting Homes for Aged and Infirm Friends and those in sympathy with us.'"

It will be observed from the terms of the bequest to the Jeanes Hospital that the institution is to be "under the charge of a joint committee of 'Quarterly Meeting Homes for Aged and Infirm Friends and those in sympathy with us.'"

The charter provides (par. 4) that the corporation is to exist perpetually.

The foregoing purpose of the corporation is also set forth in the constitution of the hospital (page 21). The constitution and bylaws for the management of the hospital were established by a joint committee appointed by the respective Quarterly Meeting Committee on Boarding Homes (page 21).

The requirement that members of the association shall be Friends, is also set forth in article 6 (page 22) of the constitution, which is as follows:

Article 6.—Members.

This Association shall consist of Thirty-two (32) persons who shall be adult members of the Philadelphia Yearly Meeting of Friends, that now, 1913, holds its yearly meeting at or near the corner of Fifteenth and Race Streets, in the City of Philadelphia. Any person who ceases to be a member of said Philadelphia Yearly Meeting of Friends, shall thereupon cease to be a member of the Association. Any vacancy in the membership of this Association shall be filled by election by the members or by the Board of Trustees from among persons nominated by the Committee in charge of the Boarding Homes of the Quarterly meetings of which the person creating such vacancy was a member.

Article 7 of the constitution (page 23), relating to trustees, is as follows:

Article 7.—Trustees.

The management of this Association shall be vested in a Board of Trustees composed of Thirty-two (32) members, who shall be chosen by the members of the annual meeting.

The bylaws of the hospital, relating to the Board of Trustees (page 24) provides as follows:

Article 1.—Officers.

Section 1. Board of Trustees. The Thirty-two (32) members of the Board of Trustees shall be elected at the annual meeting in each year and shall serve for a term of one year.

Your request for advice raises the question whether, under the foregoing provisions of the charter, constitution, and bylaws, the Jeanes

Hospital is a denominational or sectarian institution under the domination, control and governing influence of a particular religious sect or denomination, and therefore within the class of institutions to which State appropriations are prohibited by Article III, Section 18, of the Constitution, which is as follows (Purdon's Constitution, page 278):

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

In *Hysong et al. v. School District et al.*, 164 Pa. 629, 646 (1894), the Court said:

The only law we have in this state on the subject is found in the constitution, there being no legislation on the subject-matter involved, * * *.

In Webster's New International Dictionary, Second Edition, Vol. 1, p. 1009, "Friend" is defined as follows:

One of a religious sect who lay especial stress upon the guidance of the Holy Spirit, reject outward rites and an ordained ministry, practice simplicity of dress and speech, and oppose war. They are popularly called Quakers. The Friends in America are divided as follows: (1) Society of Friends (Orthodox), the main body; (2) Religious Society of Friends, which separated from the main body in 1827-8; * * *.

In *Magill v. Brown*, Fed. Cas. No. 8,952, Bright N. P. 346, the Court said:

* * * the "Yearly Meeting" [of Friends] of Philadelphia, a Protestant religious society, has existed from the settlement of the colony, with known and recognized capacity of taking and enjoying property according to the law and usage of the province and state as well as the principles of the common law, * * *.

The words "sect" and "sectarian" have been defined as follows:

In The Century Dictionary and Cyclopedia, Volume VIII, pps. 54-56, paragraph 2:

A party or body of persons who unite in holding certain special doctrines or opinions concerning religion.

In 38 W. & P. 444:

A sect is a class of people believing in a certain religious creed: *Hale v. Everett*, 53 N. H. 9, 92, 16 Am. Rep. 82.

In 36 W. & P. 792:

A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects of people: *State v. Hallock*, 16 Nev. 373, 385.

In 38 W. & P. 445:

The word "sectarian" means "of or pertaining to a sect or sects." *Lowrey v. Territory*, 19 Haw. 123.

* * * * *

The term "sectarian" when used as an adjective, means denominational; devoted to, peculiar to, pertaining to, or promotive of, the interest of a sect, or sects; especially marked by attachment to a sect or denomination; and the term, in a broader sense, is used to describe the activities of the followers of one faith as related to those of adherents of another. The term is most comprehensive in scope. *Gerhardt v. Heid*, 267 N. W. 127, 130, 66 N. D. 444.

* * * * *

Within Const. art. 1, § 1, par. 14, providing that no money shall be taken from the public treasury in aid of any church, sect, denomination, or sectarian institutions, a "religious sect," is a body or number of persons united in tenets and constituting a distinct organization or party holding sentiments or doctrines different from those of other sects or people, and having a common system of faith. Every such sect is "sectarian," and a "church" is an organization for religious purposes or for the public worship of God. *Bennett v. City of La Grange*, 112 S. E. 482, 485, 153 Ga. 428, 22 A. L. R. 1312.

There can be no doubt that the Society of Friends is a sectarian organization and that the Jeanes Hospital is a sectarian and denominational institution.

In *Constitution Defense League v. Baldwin*, 42 Dauph. 169, 177 (1936), the court said:

The constitutional provisions prohibiting appropriations for charitable, educational or benevolent purposes to any denominational or sectarian institution is well understood, and the decisions in interpretation thereof have been uniform, starting with *Collins v. Kephart*, et al., 271 Pa. 428, * * *.

In the case of *Constitution Defense League v. Waters et al.*, 34 Dauph. 237, 242 (1931), the question arose whether the St. Francis Hospital at Pittsburgh was a denominational or sectarian institution, and what was said by the court in that case is equally applicable to the present situation. In that case it was stated:

Ever since the decision of *Collins v. Kephart*, 271 Pa. 428, and ending with *Collins v. Martin*, 302 Pa. 144, the Supreme

Court has not deviated or retired from the position taken that

"The purpose of article III, section 18, of the Constitution of Pennsylvania, which prohibits appropriations for charitable, educational or benevolent purposes 'to any denominational or sectarian institution,' is to prohibit the State from giving any recognition, directly or indirectly, to a religious sect or denomination, in recognition of the set purpose to divorce absolutely church and state.

As held in *Collins v. Kephart*, whether the institution be Lutheran, as in the case of the Passavant Hospital of Pittsburgh, whether it be Episcopalian, as in the case of St. Timothy Memorial Hospital and House of Mercy at Roxborough, Philadelphia; whether it be Jewish, as in the case of the Jewish Hospital of Philadelphia, or whether it be a hospital under the management of the Roman Catholic Church, does not make any difference. It was said by Chief Justice Von Moschzisker, writing the opinion in *Collins v. Kephart*, *supra*, 434:

"When simple words are used in writing the fundamental law, they must be read according to their plain generally understood, or popular, meaning; with this thought in mind, we restate the provision under discussion:- 'No appropriation * * * shall be made for charitable, educational or benevolent purposes to * * * any denominational or sectarian institution.' How could the definite thought that institutions, under denominational or sectarian tutelage shall not receive state aid, be more simply expressed? We cannot doubt that the average voter, when he read these plain words, must have understood that no public moneys could be appropriated, lawfully, to institutions other than those entirely unconnected with any of the various religious sects or denominations; the law, being so written, must be enforced accordingly."

At page 246, the court further stated:

* * * If the real management of the hospital is in denominational hands it is sectarian and denominational, * * *.

Upon appeal to the Supreme Court the decree of the court below was affirmed as of 308 Pa. 150, 153 (1932).

Collins v. Kephart has been followed and approved in *Collins v. Martin et al.*, 290 Pa. 388 (1927), in *Constitution Defense League v. Waters*, 308 Pa. 150 (1932), in *Mercy Hospital of Johnstown v. Lewis et al.*, 24 Dauph. 346; in *Duquesne University of The Holy Ghost v. Lewis*, 26 Dauph. 242, and in *Constitution Defense League v. Baldwin*, 42 Dauph. 169, 178 (1936).

In the case of *Collins v. Martin et al.*, 302 Pa. 144 (1931), the court held that public moneys cannot be appropriated to a foundling

asylum and maternity hospital, where it appears that all of the officers, a majority of the Board of Trustees, and eighteen employees of the institution were Roman Catholics, and that the Board of Trustees were self-perpetuating.

In deciding questions whether certain institutions were sectarian within the meaning of that term, as used in the Constitution, the Supreme Court in the case of *Collins v. Kephart et al.*, 271 Pa. 248 (1921) stated, *inter alia*, as follows:

(Evangelical Lutheran Church at page 435)

The first appeal involves an appropriation to the Passavant Hospital of Pittsburgh, which was founded by the Reverend W. A. Passavant, * * *. It appears that this establishment, and its property, is owned by a Pennsylvania corporation called "The Institution of Protestant Deaconesses," the charter of which provides, "That, as the persons composing the aforementioned society are members of the Evangelical Lutheran Church, and desire to remain unmolested in the free exercise of their religious faith and worship, it is hereby provided that no one shall be elected director or vice-director of the institution who is not a clergyman in good and regular standing in some one of the synods of said church in the United States." This charter was amended * * * declaring that all members must belong to the Evangelical Lutheran Church. In the face of these charter provisions, it is idle to contend that defendant corporation is not a denominational or sectarian institution; * * *.

(Protestant Episcopal Church at page 437)

The next appeal concerns an appropriation to St. Timothy's Memorial Hospital and House of Mercy, a Pennsylvania corporation located in Roxborough, Philadelphia. The charter of this institution provides that membership in the corporation shall consist, *inter alia*, of the rector, church warden and vestrymen, for the time being, of a certain Protestant Episcopal church, called St. Timothy's; * * *.

* * * * *

* * * there can be no doubt that it is a sectarian institution within the meaning of that term as used in the Constitution; * * *.

(Jewish faith at page 440)

The last appropriation we must consider is to the Jewish Hospital Association of Philadelphia, a Pennsylvania corporation whose charter contains the following preamble: "Since there is no institution now in existence within the State of Pennsylvania under the control of Israelites wherein they can place their sick, and where these can enjoy during their illness all the benefits and consolations of our religion, we, the subscribers, and our successors, associate ourselves, etc."

* * * this hospital is a sectarian institution according to the sense in which that term is used in the Constitution.

Further at page 440:

There can be no doubt that all the institutions at bar are worthy charities; but it is equally clear they are within the inhibited class, so far as state aid is concerned. We did not write the Constitution; but, whether agreeing with or dissenting from the rules of public policy there announced, our sworn duty is to enforce them. Those who adopted the restriction against appropriating money to sectarian institutions must change the rule, if desired, either through an amendment to the present Constitution or by making a new one; neither the legislature, acting alone, nor the courts have power so to do.

We are always loath to put a construction on legislation which shows it to be invalid (*Miller v. Belmont P. & R. Co.*, 268 Pa. 51, 62); but, if constitutions are to command general respect and obedience, the people must know that their courts will constantly endeavor to interpret them according to the commonly accepted understanding of the words used therein; and, when this rule is applied to the facts before us, the result is inevitable.

* * * * *

* * * they cannot, in and of themselves, defeat the constitutional provision which "forbids state aid to institutions affiliated with a particular religious sect or denomination, or which are under the control, domination or governing influence of any religious sect or denomination:" *Collins v. Kephart*, 271 Pa. 428, 433; *Constitution Defense League v. Waters et al.*, 308 Pa. 150, 153 (1932).

* * * that the "hospital is a denominational and sectarian institution," and (2) "is affiliated with and under the domination, control and governing influence of a particular religious sect or denomination." * * *: *Constitution Defense League v. Waters et al.*, 308 Pa. 150, 152 (1932).

In view of the foregoing, there can be no doubt that the Society of Friends is a religious sect or denomination, and that the Jeanes Hospital is a sectarian and denominational institution affiliated with and under the domination, control and governing influence of a particular religious sect or denomination.

We are of the opinion that the Secretary of Welfare may not approve payments to the Jeanes Hospital, located at Fox Chase, Philadelphia, Pennsylvania, from funds appropriated in Act No. 73-A

of 1941, making an appropriation to the Department of Welfare for the maintenance of certain hospitals, including the Jeanes Hospital.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 456

Schools—Medical inspectors—Osteopaths—School Code of May 18, 1911, sections 1501 and 1503, as amended—Right of fourth class district to bear expenses.

1. A licensed osteopathic physician is a "physician" legally qualified to practice medicine in this Commonwealth within the meaning of sections 1501 and 1503 of the School Code of May 18, 1911, P. L. 309, as amended, and is therefore authorized and qualified to act as a medical inspector in school districts of the first to fourth classes, inclusive.

2. A fourth class school district has no authority to provide medical inspectors at its own expense, unless the State Department of Health is unable to provide adequate medical inspection because of lack of funds.

Harrisburg, Pa., May 17, 1943.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: Recently you requested our advice as to whether a licensed osteopathic physician is eligible to serve as a school-medical inspector under the provisions of the Pennsylvania School Code.

The Act of May 18, 1911, P. L. 309, Article XV, Section 1501, as amended, 24 P. S. § 1501, provides:

Every school district of the first, second, or third class in this Commonwealth shall annually provide medical inspection of all the pupils of its public schools by proper medical inspectors, to be appointed by the board of school directors of the district in sufficient number to conduct the required inspection in conformity with the standard requirements prescribed by the Commissioner of Health for the medical inspection of schools in such district. Such medical inspection shall be made in the presence of the parent or guardian of the pupil, when so requested by parent or guardian. *All such medical inspectors shall be physicians legally qualified to practice medicine in this Commonwealth, who have had at least two years' experience in the practice of their profession, and shall be paid such amounts as the boards of*

school directors may determine: Provided, That nothing in this act shall preclude the appointment of health officers of municipalities as medical inspectors in the school districts of this Commonwealth. (Italics ours.)

It is obvious that this particular portion of the school laws deals with the appointment of medical inspectors in school districts of the first, second, or third class. The appointment of medical inspectors in school districts of the fourth class is governed by the provisions of the Act of May 18, 1911, P. L. 309, Article XV, § 1503, as amended, 24 P. S. § 1503, which states:

In every school district of the fourth class in this Commonwealth, the State Department of Health shall provide, in such manner as it may determine, medical inspection for all the pupils in the public schools by proper medical inspectors, to be appointed by the State Commissioner of Health, at the expense of said department. In the event that such department, because of lack of funds, is unable to provide adequate medical inspection at its expense, the school district may, at its own expense, provide such medical inspection or additional medical inspection. *All such medical inspectors shall be legally qualified physicians, who have had not less than two years' experience in the practice of their profession.* Such medical inspection shall be made in the presence of the parent or guardian of the pupil, when so requested by parent or guardian. (Italics ours.)

Our problem with your particular inquiry involves an interpretation of the phrases "physicians legally qualified to practice medicine in this Commonwealth" and "legally qualified physicians."

The Statutory Construction Act of May 28, 1937, P. L. 1091, Article VIII, Section 101 (87) 46 P. S. § 601, entitled definition of "Words and Phrases," defines the term "physician" as "an individual licensed under the laws of this Commonwealth to engage in the practice of medicine and surgery in any or all of its branches." The same section defines an "osteopath" as "an individual licensed under the laws of this Commonwealth to practice osteopathy."

Webster's New International Dictionary, Second Edition, states that a "physician" is "a person skilled in physics of the art of healing." "Medicine" is defined as "the science and art dealing with the prevention, cure or alleviation of disease."

In the case of *Commonwealth v. Long*, 100 Pa. Super. 150, 152 (1930), the court, inter alia, stated:

* * * The law is settled in Pennsylvania that the term "medicine" as used in the Act of June 3, 1911, P. L. 639, relating to the right to practice medicine and surgery in the Commonwealth of Pennsylvania, * * * refers to its broad

and comprehensive meaning as the art or science having for its object the cure of diseases and the preservation of health, and that the "practice of medicine" includes all *practice of the healing art*, with or without drugs. * * *. (Italics ours.)

The legislative meaning of this latter word (medicine) when used in the expression practice of medicine, covers and embraces everything that by common understanding is included in the term "healing art."

In *Commonwealth v. Seibert*, 262 Pa. 345 (1918), the Supreme Court concluded that the practice of neuropathy was included within the meaning of the practice of medicine as it was a branch of medicine. Similarly, in *Commonwealth v. Mollier*, 122 Pa. Super. 373, 375 (1936), the court stated:

"The expression "practice of medicine" covers and embraces everything that by common understanding is included in the term healing art." * * *.

The Supreme Court in *Long et al. v. Metzger et al.*, 301 Pa. 449 (1930), stated that the practice of chiropractics was within the meaning of the legislature when applied to the term "practice of medicine."

The broad general meanings of the terms "medicine and surgery" and "healing art" are emphasized by the definitions contained in the Act of June 3, 1911, P. L. 639, section 1, as amended by the Act of August 6, 1941, P. L. 903, 63 P. S. § 401, as follows:

(c) The term "medicine and surgery" as used in this act shall mean the art and science having for their object the cure of diseases of, and the preservation of the health of, man, *including all practice of the healing art with or without drugs*, except healing by spiritual means or prayer.

(d) The term "healing art" as used in this act shall mean the science of diagnosis and treatment *in any manner whatsoever* of disease or any ailment of the human body. (Italics ours.)

It is apparent from all of the foregoing that in this Commonwealth our appellate courts have ascribed a very broad and general meaning to the terms "physician" and "practice of medicine." Inasmuch as the courts have ruled that the practice of neuropathy and chiropractic are included within the meaning of the term of practice of medicine which is synonymous with "everything that by common understanding is included in the term healing arts," we have no hesitation in concluding that a licensed osteopathic physician is a physician who is engaged in the practice of healing arts, which is the practice of medicine.

Our conclusions in this respect are corroborated by the ruling of the Superior Court in the case of *Commonwealth v. Cohen*, 142 Pa. Super. 199, 202 (1940), wherein it stated:

* * * For the purposes of this appeal it is enough to say that the legislature has seen fit to recognize osteopathy as "a complete and independent scientific system" and in the various acts of assembly, *supra*, have given osteopaths the standing of physicians. * * *. (Italics ours.)

Again at page 203, the court said:

* * * Licensed "osteopathic physicians" are "licensed physicians" and, as such, are excepted from the prohibition of the Anti-Narcotic Act. As a general term "licensed physicians" comprehends licensed osteopaths. * * *.

We desire to point out in passing that there is no authority for a fourth class school district to provide medical inspection at its own expense, unless your department is unable to furnish adequate medical inspection because of lack of funds. *Becker et al. v. School District of Upper Moreland Twp., et al.*, 50 Montg. County Law Reporter 244.

While the conclusion reached herein is not the conclusion that would be arrived at by the use of the words and phrases herein analyzed in their usual and ordinary acceptation, yet in view of the decisions of the courts of last resort in Pennsylvania, it is our opinion and you are accordingly advised, that an osteopathic physician, who is licensed as such by the Commonwealth of Pennsylvania, is a "physician qualified to practice medicine" within the meaning and intent of the legislature, and is authorized and qualified to act as a medical inspector in first, second, third and fourth class school districts. However, a fourth class school district may not employ a medical inspector at its own expense, unless the Department of Health is unable to provide adequate medical inspection because of lack of funds.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 457

Training of Nurses—Civilian Defense—Religious Order—American Red Cross—Church and State—Sectarian Instruction—Constitution Article III, section 18.

Members of a religious order may enter certain nurses' training classes being conducted by a State hospital, which is co-operating with the American Red Cross

in allowing nurses' aides to come into the hospital during certain hours of the day to secure their training in aid of civilian defense.

The purposes of Article III, section 18, of the Constitution of Pennsylvania, which prohibits appropriations for charitable, educational or benevolent purposes "to any denominational or sectarian institution," is to prohibit the State from giving any recognition, directly or indirectly, to a religious sect or denomination, in recognition of the set purpose to divorce absolutely church and state.

The proposed program to train nurses for civilian defense does not violate the provisions of the Constitution. There is no appropriation to the religious order whose members desire to enter the training classes. The members of the religious order will attend the classes for the purpose of receiving instructions and not for the purpose of imparting religious or sectarian instruction.

Harrisburg, Pa., May 18, 1943.

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

Madam: We have your request to be advised whether members of a religious order may enter certain nurses' training classes being conducted by the Hazleton State Hospital which is co-operating with the Hazleton chapter of the American Red Cross in allowing nurses aides to come into the hospital during certain hours of the day to secure their training in aid of civilian defense.

You state that the hospital has not assumed any responsibility for compensating such trainees and that their work and training are voluntary and part of the community war effort.

You further state that the case of the Mercy Hospital at Wilkes-Barre indicates that there could be no constitutional objection to an individual citizen (though a member of a religious order) from participating in such a program.

Your request for advice involves a consideration of the purposes of Article III, Section 18, of the Pennsylvania State Constitution, prohibiting appropriations to any denominational or sectarian institution, which is as follows (Purdon's Constitution, page 278):

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

In the case of *Constitution Defense League v. Baldwin*, 42 Dauphin 169, 177 (1936), it was stated as follows:

The constitutional provisions prohibiting appropriations for charitable, educational or benevolent purposes to any denominational or sectarian institution is well understood, and the decisions in interpretation thereof have been uniform,

starting with *Collins v. Kephart et al.*, 271 Pa. 428, which holds:

The purposes of article III, section 18, of the Constitution of Pennsylvania, which prohibits appropriations for charitable, educational or benevolent purposes 'to any denominational or sectarian institutions,' is to prohibit the State from giving any recognition, directly or indirectly, to a religious sect or denomination, in recognition of the set purpose to divorce absolutely church and state.

The section forbids state aid to institutions affiliated with a particular religious sect or denomination, or which are under the control, domination, or governing influence of any religious sect or denomination.

The ordinary understanding of the phrase "sect or denomination" is a church or body of persons in some way united for purposes of worship who profess a common religious faith, and are distinguished from those composing other such bodies by a name of their own.

When simple words are used in the Constitution, they must be read according to their plain, generally understood, or popular meaning.

The proposed program does not appear to violate the foregoing provisions of the Constitution. There is no appropriation to the religious order whose members desire to enter the training classes of the Hazleton State Hospital. The members of the religious order will attend the classes for the purpose of receiving instructions and not for the purpose of imparting religious or sectarian instruction.

Therefore, we experience no difficulty in deciding that members of the religious order may enter the training classes. Any other conclusion would encroach upon the rights given by Section 3 of Article I of the Constitution, which is the declaration of rights (Purdon's Constitution, page 37) and is as follows:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship.

As early as the case of *Hysong et al. v. School District*, 164 Pa. 629 (1894), it was held that the exclusion of a Sister of Charity from employment as a teacher of the public schools, because she was a Roman Catholic, was a violation of the spirit of Article I of the Bill of Rights relating to religious liberty.

If by law any man or woman can be excluded from public office or employment because he or she is a Catholic, that is a palpable violation of the spirit of the constitution; for there can be, in a democracy, no higher penalty imposed upon one holding to a particular religious belief, than perpetual exclusion from public station because of it. * * *:
Hysong et al. v. School District et al., 164 Pa. 629 (1894).

From the foregoing, it must be obvious that these individuals may not be prevented from attending the classes because they happen to be members of a religious order.

While you state that the case of the Mercy Hospital at Wilkes-Barre, *Constitution Defense League v. Baldwin*, supra, indicates that there could be no constitutional objection to an individual citizen (though a member of a religious order) from participating in such a program, we do not find this statement in the report of the case, but we are in accord with the view.

We are of the opinion, therefore, that members of a religious order may enter certain nurses' training classes being conducted by the Hazleton State Hospital which is cooperating with the Hazleton chapter of the American Red Cross in allowing nurses' aides to come into the hospital during certain hours of the day to secure their training in aid of civilian defense.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 458

Parole—Jurisdiction of Board of Parole—Prisoner serving multiple sentences imposed at different terms—Aggregate maximum sentence exceeding two years—Act of August 6, 1941.

The Pennsylvania Board of Parole does not, under section 17 of the Act of August 6, 1941, P. L. 861, have jurisdiction over a prisoner who has been given two or more sentences at different terms of court where the maximum period of none of those sentences equals or exceeds two years, even though such maximum sentences when totaled do equal or exceed two years.

Harrisburg, Pa., May 20, 1943.

Pennsylvania Board of Parole, Harrisburg, Pennsylvania.

Sirs: This department is in receipt of an inquiry under date of April 9, 1943, in which you ask to be advised whether the Pennsylvania Board of Parole has jurisdiction in a case where a prisoner was

sentenced as of the Court of Oyer and Terminer, November Term, 1942, for a period of six to twelve months, and was sentenced as of Oyer and Terminer, December Term, 1942, for a period of three to fifteen months. Generally, you inquire whether the Board of Parole has jurisdiction over a prisoner who has received, at different terms of court, sentences, each of which has a maximum of less than two years but when added they exceed two years.

To answer your question requires an interpretation of the limitations contained in Section 17 of the Act of August 6, 1941, P. L. 861, 61 P. S. § 331.17, from which we quote as follows:

* * * Provided, however, That the powers and duties herein conferred shall not extend to persons sentenced for a maximum period of less than two years, and *nothing herein contained shall prevent any court of this Commonwealth from paroling any person sentenced by it for a maximum period of less than two years*: And provided further, That *the period of two years herein referred to* shall mean the entire continuous term of sentence to which a person is subject, whether the same be by one or more sentences, either to simple imprisonment or to an indeterminate imprisonment at hard labor, as now or hereafter authorized by law to be imposed for criminal offenses. (Italics ours.)

The latter part of the foregoing proviso with regard to adding the maximum of several sentences in order to take the case out of the parole jurisdiction of the courts and put it under the Board of Parole, relates back to "the period of two years herein referred to." It relates then, back to the maximum sentence or sentences of "any court."

The word "court" followed ten words later by the singular pronoun "it," is obviously used in the singular and must be given the meaning in its application to the construction of this section of the Parole Act, which its definition in the singular requires.

In Carter's Estate, 254 Pa. 518, 527 (1916), and McCormick's Contested Election, 281 Pa. 281, 285 (1924), we have the following:

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

The Parole Act treats with persons sentenced by the criminal courts of the Commonwealth. And criminal courts assemble at regular and special terms or sessions.* The termination of a term or session

* Act of April 14, 1834, P. L. 333.

Courts of Quarter Sessions of the Peace, 17 P. S. §§ 351, 352.

Courts of Oyer and Terminer and General Jail Delivery, 17 P. S. § 371.

terminates that criminal court. *Schoeppe v. The Commonwealth*, 65 Pa. 51 (1870). See also cases at Vale, Pennsylvania Digest Criminal Law, section 993.

It follows that when the legislature limited the jurisdiction of the Board of Parole to cases where maximum sentence was two years or more, and then defined the period of two years as the entire continuous term of sentence whether the term be on one or more sentences, it, by necessary implication, adopted the meaning which judicial decisions have given to the word "court." Accordingly, it reserved to the court the power of parole in any case where the entire maximum sentence or sentences meted out at any one term or session did not equal two years. Inferentially then, it forbade the addition of the maximum sentences imposed on any person at different terms or sessions of the court, in order to meet the two-year requirement for Board of Parole action.

In the case of *Commonwealth ex rel. Lynch v. Ashe*, 320 Pa. 341 (1936), the court on page 344 said:

* * * Even a court has no power "to lump two sentences into one" (*Com. ex rel. Miller v. Ashe*, 114 Pa. Superior Ct. 332, 174 A. 295), and certainly the act of the prison authorities in attempting to lump Lynch's two sentences into one is without statutory or other legal support. For prison officials to do this might be a matter of convenience in keeping records and might simplify somewhat the procedure in applications for parole made by those who, like the appellant here, are serving consecutive sentences, but authority to lump such sentences, if such authority is desirable, must be obtained from the legislature. * * *

Authority from the legislature was obtained by the Act of June 25, 1937, P. L. 2093, 19 P. S. § 897, the title and section 1 of which reads as follows:

An act defining the method of computing the aggregate minimum and maximum limits of consecutive sentences imposed upon persons convicted of crime.

Section 1. Whenever, after the effective date of this act, two or more sentences to run consecutively are imposed by any court of this Commonwealth upon any person convicted of crime therein, there shall be deemed to be imposed upon such person a sentence the minimum of which shall be the total of the minimum limits of the several sentences so imposed, and the maximum of which shall be the total of the maximum limits of such sentences.

The constitutionality of the act of 1937, *supra*, was upheld in the case of *Com. ex rel. Lycett v. Ashe*, *Warden*, 145 Pa. Super. Ct. 26 (1941), where the court said on page 31:

* * * And as we read the act it applies only to two or more consecutive sentences imposed at the same time by one court. The Act reads "imposed by any court," not, "by any courts." It matters not whether it is acting as a court of quarter sessions or of oyer and terminer it applies to any court which imposes "two or more sentences to run consecutively . . . upon any person convicted of crime therein." A subsequent single sentence imposed by another court for prison escape, or for crime committed while the convict is on parole, does not fall within its terms, viz., "whenever, after the effective date of this act, two or more sentences to run consecutively are imposed by any court of this Commonwealth upon any person convicted of crime therein," that is, convicted in the court that imposed the consecutive sentences.

The cogency of our construction finds in the foregoing quotations, ample judicial support. Furthermore, it adequately meets the requirements of the legislature itself as enunciated in the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 501, et seq.

Article IV, Section 58, 46 P. S. § 558, reads in part as follows:

All provisions of a law of the classes hereafter enumerated shall be strictly construed:

* * * * *

(7) Provisions decreasing the jurisdiction of a court of record;*

We are therefore of the opinion that the Pennsylvania Board of Parole does not have jurisdiction over a prisoner who has been given two or more sentences at different terms of court where the maximum period of none of those sentences equals or exceeds two years, even though such maximum sentences when totaled, do equal or exceed two years.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 459

State Council of Education—Scholarships—Status of students where entrance to college has been accelerated in accordance with wartime emergency educational plan—Act of July 18, 1919, P. L. 1044.

1. Where a student's entrance to college has been accelerated in accordance with the wartime emergency educational plan established by the Department of Public

* This is declaratory of pre-existing law. *Felt & Co. v. Cook & Hackett*, 95 Pa. 247 (188); *Graver v. Fehr*, 89 Pa. 460 (1879); *Philadelphia v. Edwards*, 78 Pa. 62 (1875).

Instruction, so that the student has been permitted to enter college before the completion of his full high school course for which he receives credit and a diploma or other evidence of graduation upon the certification that he has completed in a satisfactory manner the first year of college work, such a student is eligible to take the scholarship examinations regularly given in the month of May.

2. Where a student to whom a State scholarship has been awarded, has his college course interrupted by entrance into the military service of the United States, such a student after his return or discharge from military service of the United States, is entitled to a continuance of his or her scholarship benefits upon the resumption of his college work, inasmuch as the four-year State scholarship need not be used consecutively.

Harrisburg, Pa., June 1, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: In administering the provisions for the awarding of State scholarships under the Act of July 18, 1919, P. L. 1044, 24 P. S. § 2451, et seq., you are faced with two problems about which you have requested our advice.

Specifically you submit the following questions:

1. If a student's entrance to college has been accelerated in accordance with the wartime emergency policy established by the Department of Public Instruction, the said student having been permitted to enter college before completion of his full high school course but with the understanding that his diploma and other evidence of graduation will be issued upon certification that he has completed in a satisfactory manner his year of college work, is such student eligible to take the scholarship examination regularly given in the month of May?

2. Is a student to whom a scholarship has been awarded under the provisions of this act to lose or retain his right to four full years of scholarship benefits if his college course is interrupted by entrance into the military service of the United States? In other words, is such student, after his return or discharge from military service, entitled to his scholarship benefits upon resumption of his college work?

You have informed us that it is and has been the practice of the State Council of Education to conduct competitive examinations to which high school seniors have been admitted despite the fact that those participating have neither completed all of their last year of high school studies nor graduated from high school at the time. These examinations are given prior to the regular high school graduation. It always has been the practice of the State Council of Education to require satisfactory graduation from high school in order to qualify for the State scholarship. With this background we shall

examine the provisions of the act in order to apply them to your inquiries.

The Act of July 18, 1919, P. L. 1044, 24 P. S. § 2451, et seq., reads as follows:

Section 1 provides:

For the purpose of assisting worthy young men and women graduates of secondary schools of the State to obtain higher education, the State will award competitive scholarships of the value of one hundred dollars per year for four years to enable selected students to attend any institution in the State of Pennsylvania approved by the College and University Council.

Section 2 provides:

Appointments to such scholarships shall be made by the State Board of Education, and the persons entitled to such appointments shall be determined by competitive examination to be conducted under the supervision of the State Board of Education. Due notice of any examination to be held under the provisions of this act shall be given in such manner as the State Board of Education may prescribe.

Section 3 provides:

One scholarship shall be awarded to each county. In any county where there is more than one entire senatorial district, one scholarship shall be awarded for each entire senatorial district.

The act contains no specific provisions concerning the situations which you have presented. Therefore, the intention of the legislature must be determined by application of the general rules of statutory construction.

In the case of *Turbett Township v. Port Royal Borough Overseers of the Poor*, 33 Pa. Super. Ct. 520 (1907), Judge Rice, inter alia, stated at page 524:

* * * The effects and consequences of the proposed construction of a law, as well as its reason and spirit, will be looked into in determining the legislative intent, which is the criterion by which all acts must be construed. Hence, if there is room for construction, the court will prefer that construction which is most consonant with the purpose for which the act was passed. * * *

The following statement from the case of *Big Black Creek Improvement Company v. Commonwealth*, 94 Pa. 450, 455 (1880), was also quoted in the above case.

* * * "statutes are to be construed so as may best effectuate the intention of the makers, which sometimes may be collected from the cause or occasion of passing the statute, and, where discovered, it ought to be followed with judgment and discretion in the construction, though that construction may seem contrary to the letter of the statute."

In the case of *Grime et al., Aplnts., v. Dept. of Pub. Inst. et al.*, 324 Pa. 371, 379 (1936), the Supreme Court in construing the meaning of a statute in order to ascertain the intention of the legislature stated that:

We must consider the Act as a whole and from it determine the real intention of the legislature. We should determine the necessity of the law, the prevailing mischief to be remedied and the object to be attained. The intention is to be taken or presumed to be according to what is consonant to sound reason and discretion. * * *

In enacting the statute with which we are concerned, the legislature evidently intended that the object to be attained was that of assistance to worthy young men and women graduates of secondary schools of our Commonwealth in obtaining a higher education, and accordingly provided for the awarding of competitive scholarships to enable successful candidates to pursue further educational studies in approved institutions, as reference to section 1 readily indicates. The provisions of the same section provide that the State will award these scholarships to "worthy young men and women *graduates of secondary schools of the State.*" Obviously, the recipients of State scholarships must be graduates of secondary schools, but it is just as apparent that the provisions of the act make no requirement that candidates for examination be graduates of secondary schools of our State at the time that they take the competitive examinations.

As a matter of fact, a study of section 2 of the act readily indicates that the State Council of Education shall conduct and supervise the examinations, determine the persons entitled to the appointments and make the appointments. In addition, the legislature has charged the State Council of Education with the duty of prescribing the kind of examination given as well as requiring it to give due notice when the examination will be held.

Correlative with the duties imposed upon the State Council of Education by the legislature are, of course, the apparently delegated discretion and authority which may be exercised by the State Council of Education in preparing, conducting and providing notices of the examination and of selecting and appointing the successful candidates for scholarships. Consequently, the State Council of Education is empowered to decide upon and to adopt such reasonable regulations

as will enable it to carry out the purposes and aims of the legislature in enacting the act in question. When the State Council of Education inaugurated the practice of giving the examinations prior to the regular high school graduation, it was a reasonable and proper exercise of the authority delegated to the State Council of Education enabling it to carry out the mandate of the legislature. Additional authority may be properly exercised so long as it is germane to the subject matter of the statute and will carry out the purpose of the legislation.

Your first question arises by reason of the fact that many students' entrance to college has been accelerated in accordance with the wartime emergency policy established by the Department of Public Instruction. Under this accelerating plan, students have been permitted to enter college before the completion of their full high school course.

Such students are required, however, to satisfactorily complete their first year of college work in order for them to obtain credit for their last year of high school work and thus be credited with having successfully completed their high school or secondary school course. It is our opinion that under such circumstances, the State Council of Education has the authority to allow such students attending their first year of college to take the competitive examination in order to qualify for scholarship.

A contrary ruling would result in deterring such students from participating in an accelerated wartime educational program merely for the sake of rendering themselves-eligible to take the examination. Such a deterrent is obviously undesirable as impairing their availability for whatever services they can render to our nation in its present struggle to preserve itself. Thus, in our opinion, the conclusion we have reached is both logical and consistent with the main purpose of the act, namely, to assist "worthy young men and women graduates of secondary schools of the State to obtain a higher education."

The second question arises by reason of the fact that students to whom State scholarships have been awarded, have had their college courses interrupted upon entrance into the military service of the United States. The question thus arising is, whether or not any such students who, upon the resumption of their college courses, either after their return or discharge from military service, are entitled to a continuance of their scholarship benefits. While we think this question is somewhat premature, we shall nevertheless dispose of it.

The provisions of the act are clear. Section 1, inter alia, reads as follows:

* * * the State will award competitive scholarships of the value of one hundred dollars per year for four years to enable selected students to attend any institution * * *.

We note that nothing is contained in the provisions of the act which can be construed as meaning *four consecutive* years. What the legislature intended was that the successful candidates be awarded scholarships for four years of schooling.

Undoubtedly, the legislature did not intend that the four years of schooling had to be secured consecutively because if it had, it could have so stated in the provisions of the act without any difficulty. It is apparent that the legislature recognized that while ordinarily a student attends college for four consecutive years, nevertheless, there would be occasions where scholarship winners, who, either because of illness, financial circumstances or for some other good reason, would not be able to attend college for four consecutive years, and consequently, the legislature would not wish, therefore, to penalize these students. We can think of no good reason to rule that the four scholarship years must be consecutive.

We are of the opinion, therefore, that under the provisions of the Act of July 18, 1919, P. L. 1044, 24 P. S. § 2451, et seq., (1) Where a student's entrance to college has been accelerated in accordance with the wartime emergency educational plan established by the Department of Public Instruction, so that the student has been permitted to enter college before the completion of his full high school course for which he receives credit and a diploma or other evidence of graduation upon the certification that he has completed in a satisfactory manner the first year of college work, such a student is eligible to take the scholarship examinations regularly given in the month of May. (2) Where a student to whom a State scholarship has been awarded, has his college course interrupted by entrance into the military service of the United States, such a student after his return or discharge from military service of the United States, is entitled to a continuance of his or her scholarship benefits upon the resumption of his college work, inasmuch as the four-year State scholarship need not be used consecutively.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 460

State government—Transmission of fines and penalties by clerks of quarter sessions—Monthly report to the Department of Revenue—Transmission of sums to State Treasurer—Settlement of accounts—The Fiscal Code of 1929, section 901, et seq., as amended June 1, 1931.

1. It is the duty of each clerk of a court of quarter sessions, under section 901 of The Fiscal Code of April 9, 1929, P. L. 343, as amended June 1, 1931, P. L. 318, to file a monthly report of the fines and penalties collected by such court which are payable to the Commonwealth or any of its departments, to disclose the source of such fines or penalties and to transmit a check therefor to the State Treasurer through the Department of Revenue; it is improper for such a clerk to remit such sums directly to the various departments, boards or commissions ultimately entitled to them.

2. Under section 902 of The Fiscal Code, it is the duty of the Department of Revenue each month to settle accounts against the clerks of the various courts of quarter sessions upon receipt of the monthly reports due from such clerks, and procedure upon such settlements is the same as in the case of tax settlements, but final discharge is not granted to the clerks until their accounts and dockets have been audited by the Department of the Auditor General.

Harrisburg, Pa., June 2, 1943.

Honorable F. Clair Ross, Auditor General, Harrisburg, Pennsylvania.
Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sirs: Your departments have jointly asked to be advised as to the procedure to be followed by the various clerks of courts of quarter sessions in the several counties of the Commonwealth, in collecting and transmitting fines and penalties which are payable to the Commonwealth, or any of its departments, boards or commissions.

We understand that in a limited number of instances only, do the clerks of courts of quarter sessions now file monthly reports with the Department of Revenue, and we also understand that in many instances the clerks of courts of quarter sessions remit directly to the various departments, boards or commissions the sums allocable to them under the law.

The failure to make monthly reports to the Department of Revenue has resulted in confusion. In fact, an uncertainty as to procedure has developed. The practice of the clerks of courts remitting directly to departments, boards or commissions is not only illegal, as will be developed hereinafter, but has added further to the confusion which obtains.

The above is the basis, as we understand it, for your request for an opinion.

This matter is covered generally by the Act of April 9, 1929, P. L. 343, as amended by the Act of June 1, 1931, P. L. 318, 72 P. S. § 901 et seq., known as The Fiscal Code. Section 901 of this act provides as follows:

Section 901. Reports to the Secretary of Revenue.—On the first Monday of each month, it shall be the duty of each city and county officer to render to the Department of Revenue, under oath or affirmation, a return of all moneys received during the preceding month for the use of the Commonwealth, designating under proper headings the source from which such moneys were received, and to pay the same into the State Treasury, through the Department of Revenue, less any compensation and reimbursement for expenses allowable by law for having made the collections.

Of course, a clerk of a court of quarter sessions is a county officer and it is not deemed necessary to cite any authority for this proposition. Such clerks are, therefore, amenable to section 901, *supra*.

It follows that it is the duty of each such clerk to make a monthly report to the Department of Revenue showing all receipts of money for the use of the Commonwealth, and designating the source from which such moneys were received. The duty is also upon the clerk to pay such moneys so received into the State Treasury through the Department of Revenue, the clerk being authorized, however, to deduct any item of salary or expense allowable by law for the making of the collections.

Two duties devolve upon the Department of Revenue upon receipt of such monthly checks and reports. The Department of Revenue must determine the department, board or commission to which the funds are allocable, and it must transmit the check itself to the State Treasurer, together with completed transmittal forms from each department, board or commission for the proportionate amount of the funds to which that department, board or commission is entitled. According to established practices of the Department the responsibility for the completion of these transmittal slips is upon the revenue agent in the department, board or commission on the account of which the funds are collected.

Section 902 of The Fiscal Code, *supra*, provides for the settlement of the account against the clerk of the court of quarter sessions upon receipt of each monthly report by the Department of Revenue, and requires the settlement to be forwarded to the Department of the Auditor General for audit and approval, as in the case of tax settlements. Subsequent procedure shall also be the same as in the case of tax settlements. Provision is made in section 901, however, that a final discharge shall not be granted to the clerk of courts until

the accounts and dockets of the clerk shall have been audited by the Department of the Auditor General.

The audit upon which the final discharge shall be granted to the clerk of courts is the audit which the Auditor General makes periodically of the books, dockets and records of such officer, one of these audits being made at least annually. If such an audit is at variance with audits of settlements theretofore made during the period covered by the audit, then upon notice of such variance, and within thirty days thereof, the Department of Revenue shall resettle as in the case of tax resettlements, in accordance with the facts and transmit such resettlement to the Auditor General for approval.

Section 903 of The Fiscal Code, *supra*, provides that in case of failure of the clerk of courts to make the return to the Department of Revenue, the Secretary of Revenue, or his agent, is authorized to examine the accounts of such officer and upon information obtained from such examination, the Department of Revenue shall settle an account against such officer. In such settlement the Department of Revenue shall add not to exceed 50 per centum to the amount of the settlement to provide for any losses which might otherwise result to the Commonwealth from the neglect or refusal of the officer to furnish the return.

The provisions of section 903 are plain and must be followed literally.

Sections 904 and 905, respectively, provide for interest charges which are to be made against the clerk of courts upon the amount which the settlement shows to be due from the officer, and for a resettlement of accounts upon the request of the Auditor General.

In conformity with the requirement of section 902, that a matter of this kind be dealt with in the manner of all tax settlements, it follows that a clerk of a court of quarter sessions is entitled (1) to notice which will afford him opportunity to petition for a resettlement; (2) to petition for a resettlement in case he is dissatisfied with the settlement made; (3) to file a petition for review with the Board of Finance and Revenue; and (4) to appeal thereafter.

It is our opinion that: (1) It is the duty of each clerk of each court of quarter sessions of this Commonwealth to file a monthly report of the fines and penalties collected by such court which are payable to the Commonwealth or any of its departments; to disclose the source of such fines or penalties; and to transmit a check therefor to the State Treasurer *through* the Department of Revenue. Such accounts shall be settled and the funds disposed of in the manner prescribed by The Fiscal Code, being the Act of April 9, 1929, P. L. 343, as amended by the Act of June 1, 1931, P. L. 318. (2) It is improper for a clerk of

such a court to transmit State moneys otherwise. (3) A clerk of such a court who fails or neglects to make such monthly report, or to so transmit his check, is subject to the penalties provided in The Fiscal Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 461

Taxation—Co-operative associations—Corporate net income tax—Capital stock tax—Net earnings tax—Agricultural associations—Agricultural credit associations—Productive and distributive associations—Credit unions—Electrical associations—Incorporated and unincorporated bodies—Corporate Net Income Tax Act of 1935, as reenacted and amended—Capital Stock Tax of 1889, as amended—Net Earnings Tax Act of 1889, as amended.

1. Unincorporated co-operative associations are not subject to the payment of taxes imposed by the Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as reenacted and amended, the Capital Stock Tax Act of June 1, 1889, as amended, or the Net Earnings Tax Act of June 1, 1889, as amended.

2. Co-operative agricultural associations incorporated under the Act of April 30, 1929, P. L. 885, having capital stock, are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and by the Net Earnings Tax Act.

3. Co-operative agricultural credit associations incorporated under the Act of May 25, 1933, P. L. 1027, having capital stock, are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and by the Net Earnings Tax Act.

4. Co-operative agricultural associations incorporated under the Act of June 12, 1919, P. L. 466, as amended, not having capital stock and not conducted for profit, are subject to the payment of taxes imposed by the Net Earnings Tax Act only.

5. Productive and distributive co-operative associations incorporated under the Act of June 7, 1887, P. L. 365, are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and by the Capital Stock Tax Act.

6. Credit unions incorporated under the Act of May 26, 1933, P. L. 1076, as amended, are not subject to the payment of taxes imposed by the Corporate Net Income Tax Act, the Capital Stock Tax Act, or the Net Earnings Tax Act.

7. Electrical co-operative associations incorporated under the Act of June 21, 1937, P. L. 1969, are not subject to the payment of taxes imposed by the Corporate Net Income Tax Act, the Capital Stock Tax Act, or the Net Earnings Tax Act.

8. Generally, all other incorporated co-operative associations are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and the Capital Stock Tax Act.

Harrisburg, Pa., June 28, 1943.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: By your revised letter of March 18, 1943, this department was requested to furnish you with an opinion advising whether cooperative associations of all kinds are liable (1) for Corporate Net Income Tax under the Act of May 16, 1935, P. L. 208, reenacted and amended by the Acts of April 8, 1937, P. L. 227, May 5, 1939, P. L. 64, and May 29, 1941, P. L. 62, 72 P. S. § 3420a et seq., (2) for Capital Stock Tax under the Act of June 1, 1889, P. L. 420, § 21, as amended, 72 P. S. § 1871, and (3) for Net Earnings Tax under the Act of June 1, 1889, P. L. 420, Section 27, as amended by the Act of April 25, 1929, P. L. 668, 72 P. S. § 2241.

The comprehensive nature of your request involves consideration of the foregoing legislation with respect to both incorporated and unincorporated cooperative associations.

Preliminarily it should be noted, as even a cursory examination reveals, that the foregoing tax statutes cover only corporations, joint-stock associations and limited partnerships. Unincorporated cooperative associations do not come within the provisions thereof and hence are not taxable thereunder. The taxability, however, of cooperative associations incorporated under special acts of assembly depends not only upon the construction of the tax statutes involved but also upon the provisions of the various incorporating acts. It is with the taxability of these specially incorporated cooperative associations that we are here chiefly concerned.

In this Commonwealth the Act of April 30, 1929, P. L. 885, 14 P. S. § 81 et seq., provides for the incorporation and regulation of cooperative agricultural associations having capital stock and for the acceptance of its provisions by existing corporations having like purposes.

Section 20 of the Act of 1929, *supra*, 14 P. S. § 100, provides:

No association organized under the provisions of this act shall be liable for the payment of any State tax upon its capital stock, or upon any scrip, bonds, certificates, or other evidences of indebtedness issued by such corporation, and all stocks, bonds, et cetera, issued by such associations shall be exempt from all State taxation; and such associations shall not be required to file with the Auditor General of this Commonwealth the reports relative to such taxes as are or may be

by law required of corporations not exempt from the payment of such taxes.

Under section 21 existing corporations accepting the provisions of this act are entitled to the same privileges and immunities as those organized under it. This act grants these associations no express exemptions from liability for the payment of taxes other than capital stock and loan taxes.

The Corporate Net Income Tax Act of 1935, section 3, as finally reenacted and amended by the act of 1941, *supra*, imposes upon "every corporation" for the privilege of doing business in the Commonwealth, or having capital or property employed or used in the Commonwealth, "a State excise tax at the rate of * * * per centum per annum upon each dollar of net income of such corporation received by, and accruing to, such corporation"; and section 2 of the said act, entitled "Definitions", defines "Corporation" as follows:

"Corporation." A corporation having capital stock, joint-stock association, or limited partnership either organized under the laws of this Commonwealth, the United States, or any other state, territory, or foreign country, or dependency, and doing business in this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of itself, or any person, partnership, association, limited partnership, joint-stock association, or corporation. The word "corporation" shall not include building and loan associations, banks, bank and trust companies, national banks, savings institutions, trust companies, title insurance companies, beneficial life and limited life insurance companies, mutual fire, mutual casualty and mutual life insurance companies, and foreign stock companies registered in this Commonwealth and therein engaged in doing business as life, fire and casualty insurance companies, and surety companies.

It is clear from the plain meaning of the words that incorporated cooperative agricultural associations, having capital stock, fall within the definition of the word "corporation", which expressly includes "a corporation having capital stock." It is equally apparent that they are not numbered among those types of organizations that are expressly excluded from the definition by enumeration. To construe the definition so as to exclude incorporated cooperative agricultural associations, would involve a construction contrary to the plain wording of the statute.

Section 2 of the said act also defines "net income" as follows:

"Net Income." 1. In case the entire business of the corporation is transacted within this Commonwealth, net income for the calendar year or fiscal year as returned to, and ascertained by the Federal Government, subject, however, to any correction thereof, for fraud, evasion, or error as finally

ascertained by the Federal Government: Provided, That additional deductions shall be allowed from net income on account of any Federal taxes paid during such calendar or fiscal year for the preceding calendar or fiscal year, or accrued during such calendar or fiscal year for such year, as the case may be, and on account of any dividends received from any other corporation: * * *.

Section 101 of the Federal Internal Revenue Act of February 10, 1939, c. 2, 53 Stat. 1, amended in other respects October 21, 1942, 26 U. S. C. A. Section 101, expressly provides for the exemption from taxation of various organizations, among which are cooperative agricultural associations under certain conditions, to wit:

(12) Farmers', fruit growers', or like associations organized and operated on a cooperative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose. Such an association may market the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for nonmembers in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases. Business done for the United States or any of its agencies shall be disregarded in determining the right to exemption under this paragraph;

Exemption from Federal taxation under section 101 of the Internal Revenue Code¹ does not preclude taxation by this Commonwealth

¹ Under Regulation 103, section 19.101-1 every organization claiming exemption must file with the collector proof of exemption.

under the Corporate Net Income Tax Act, on the ground that section 2 thereof defines "net income" as "*net income for the calendar year or fiscal year as returned to, and ascertained by the Federal Government.*" (Italics ours.) The base upon which the tax is measured is something separate and distinct from the tax itself. The only purpose of the reference to the income returned to and ascertained by the Federal Government, contained in the State act, was to afford the Commonwealth a fixed base for the measuring of the tax imposed by its own act. That this was its only function was recognized in *Commonwealth v. Warner Bros. etc.*, 345 Pa. 270, 271, 272, 27 A. 2d 62 (1942), wherein the Supreme Court said:

At the outset, it is to be observed that we are not considering an income tax, but an excise tax for the privilege of doing business in the Commonwealth,² based upon net income as returned to and ascertained by the Federal Government * * *. Net income as ascertained is the base upon which the tax is measured, not the tax itself. How it was fixed by the Federal authorities is of no concern to the taxing officers of the Commonwealth nor to its statute. The rate of the income tax may vary, or the method of its computation, but as a base, it is unvarying.

Furthermore, it is now well settled that the definition of "net income", as contained in section 2, constitutes only a part of, and not the whole definition of the term: *National Transit Co. et al. v. Boardman*, 328 Pa. 450, 197 A. 239 (1938). In that case the Secretary of Revenue had refused to permit the plaintiff corporations to file a consolidated return. A peremptory writ of mandamus was awarded against him. On appeal the secretary contended that since the "base of the tax to which the rate is to be applied is the net income as returned to and ascertained by the Federal Government", only such corporations as are permitted by Congress to file consolidated returns may do so under the State statute. The Supreme Court said, pages 454-456:

* * * This contention he derives, as we understand his argument, from part of the definition of "net income" contained in section 2. * * * But a reading of the act shows that the word income has a wider meaning than that attributed by the Secretary. Section 2 provides that the definition of income is not limited to what has already been quoted, if the text of the act indicates a different meaning. From section 4 of the act, we take the following: "* * * it shall be the duty of every corporation, liable to pay tax under this act * * * to transmit to the department, upon a form prescribed, prepared, and furnished by the department, a report under oath or

² "or having capital or property employed or used in this Commonwealth," under the reenacting and amending Acts of May 5, 1939, P. L. 64 and May 29, 1941, P. L. 62.

affirmation * * * of net income taxable under the provisions of this act. Such report shall set forth: (a) A true copy of its return to the Federal Government of the annual net income arising or accruing in the calendar or fiscal year next preceding, or such part or portions of said return, as the department may designate. (b) *If no return was filed with the Federal Government, the report made to the department shall show such information as would have been contained in a return to the Federal Government, had one been made,* and (c) Such other information as the department may require.

The requirement of a copy of the report made to the Federal Government was doubtless for the information of the Secretary in performing his duties: compare *Com. v. Chambersburg Engineering Co.*, 287 Pa. 54, 134 A. 408. * * * (Italics ours.)

The Supreme Court held that the right to file consolidated reports was determined under section 5 of the Corporate Net Income Tax Act, irrespective of Federal legislation: Act of June 22, 1936, c. 690, Section 141, 49 Stat. 1698, amending the Act of May 10, 1934, c. 277, Section 141, 48 Stat. 720, 26 U.S.C.A. Section 141. So, in this case, the question of liability under the Corporate Net Income Tax Act is determined by the provisions of the act itself, even though the base upon which such liability is measured is fixed by a determination made by the Federal Government.

The so-called Net Earnings Tax Act of June 1, 1889, P. L. 420, Section 27, amended by the Act of April 25, 1929, P. L. 668, Section 1, 72 P. S. § 2241, imposes a tax of three per centum upon the annual net earnings or income of "every incorporated company or limited partnership whatever, whether the same be incorporated, formed or organized under the laws of this or any other state or territory, and doing business within this Commonwealth and liable to taxation therein," which is not subject to capital stock (or gross premium) taxes. As pointed out earlier in this opinion, sections 20 and 21 of the act of April 30, 1929, *supra*, expressly exempt cooperative agricultural associations having capital stock and incorporated thereunder, or accepting the provisions thereof, from liability for the payment of capital stock and loans taxes.⁴ It makes no mention of other exemptions. In view of the provisions of that act, and further, in the absence of any express exemption in the Net Earnings Tax Act itself, accruing to the benefit of this particular type of organization, there is no apparent reason for engrafting such exemption upon the said act.

⁴ The exemption granted by this act of 1929 was not repealed by implication through the amendments of May 16, 1935, P. L. 184, and April 8, 1937, P. L. 239, to the Capital Stock Tax Act of June 1, 1889, P. L. 420, section 21, as amended, 72 P. S. section 1871. See Article VI, section 83 of the Statutory Construction Act of May 28, 1937, P. L. 1019, at 1028.

These associations are required, therefore, in accordance with the said act, to make an annual report to the Department of Revenue, setting forth the entire amount of net earnings or income, if any, received during the preceding year, and such other information as the department may require, and pay the amount of tax due, if any, upon such net earnings or income.

Liability under the Net Earnings Tax Act does not avoid for these associations additional liability under the Corporate Net Income Tax Act of 1935, as reenacted and amended, *supra*. The latter act, in section 3, specifically provides that the tax thereby imposed "shall be in addition to all taxes now imposed on any corporation under the provisions of existing law."

Cooperative agricultural credit associations having capital stock, are incorporated and regulated under the Act of May 25, 1933, P. L. 1027, 14 P. S. § 114 et seq. Section 15 of this act carries the identical wording of section 20 of the act of 1929, *supra*. The former section exempts credit associations from the payment of capital stock and loans tax in the same manner as the latter section exempts cooperative agricultural associations having capital stock, from the payment of such taxes. Similarly, all that has been said with reference to the applicability of the Corporate Net Income Tax Act and the Net Earnings Tax Act to cooperative agricultural associations having capital stock, applies with equal effect to cooperative agricultural credit associations.

Cooperative agricultural associations incorporated under the Act of June 12, 1919, P. L. 466, Section 1, as amended May 1, 1929, P. L. 1201, Section 1, 14 P. S. § 41, et seq., having no capital stock and not conducted for profit are clearly not within the meaning of the word "corporation" as defined by the Corporate Net Income Tax Act, *supra*. Hence, these associations are free from liability for payment of said tax. Furthermore, they are expressly exempted from the Capital Stock Tax Act of June 1, 1889, P. L. 420, Section 21, as amended, 72 P. S. § 1871. However, not having been expressly exempted from the Net Earnings Tax Act, but rather included therein by reference (see page 8, *supra*), they are, like cooperative agricultural associations incorporated under the Act of April 30, 1929, *supra*, required to make an annual report to the Department of Revenue, despite the fact that they have presumably no taxable net earnings.⁵

Cooperative associations, productive and distributive, incorporated under the Act of June 7, 1887, P. L. 365, Section 1, 14 P. S. § 1, et seq., or availing themselves of the provisions of the said act, have

⁵ This requirement is similar to the proof of exemption required by the Federal taxing authorities (see footnote 1).

capital stock and clearly fall within the meaning of the word "corporation" as defined by the Corporate Net Income Tax Act, *supra*. Hence, these associations are liable for the payment of the said tax. These associations, unlike cooperative agricultural associations incorporated under the Act of April 30, 1929, are not expressly exempted by their incorporating act from capital stock taxes; hence, they come within the Capital Stock Tax Act, *supra*, but correspondingly are not subject to the complementary Net Earnings Tax Act, *supra*.

Cooperative associations incorporated as credit unions under the Act of May 26, 1933, P. L. 1076, as amended by the Act of May 18, 1937, P. L. 713, 14 P. S. § 201, et seq., are, under section 23 of said act, not subject to taxation except as to real estate owned by them.

Nonprofit cooperative associations incorporated under the "Capital Electrical Cooperative Corporation Act" of June 21, 1937, P. L. 1969, 14 P. S. § 251, et seq., or availing themselves of the provisions of the said act, are, under section 31, required to pay a license fee but are exempt from all other State taxes of whatever kind or nature.

Generally, all incorporated cooperative associations, other than those specially incorporated and subject to or free from taxation as discussed above, come within the provisions of the Corporate Net Income Tax Act, *supra*, and the Capital Stock Tax Act, *supra*.

The taxability of all incorporated cooperative associations of whatever kind is thus determined with a view to accomplishing a two-fold objective—first, to foster the lawful endeavors of true cooperative associations, and secondly, to protect competitive business corporations from the consequences of granting unqualified immunities from taxation to incorporated associations operating beyond the scope of true cooperative activities.

We are of the opinion, therefore, that:

1. Unincorporated cooperative associations are not subject to the payment of taxes imposed by the Corporate Net Income Tax Act, the Capital Stock Tax Act, or the Net Earnings Tax Act.

2. Cooperative agricultural associations incorporated under the act of April 30, 1929, having capital stock, are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and by the Net Earnings Tax Act.

3. Cooperative agricultural credit associations incorporated under the act of May 25, 1933, having capital stock, are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and by the Net Earnings Tax Act.

4. Cooperative agricultural associations incorporated under the act of June 12, 1919, as amended, not having capital stock and not conducted for profit, are subject to the payment of taxes imposed by the Net Earnings Tax Act only, if net earnings should result.

5. Productive and distributive cooperative associations incorporated under the act of June 7, 1887, are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and by the Capital Stock Tax Act.

6. Credit unions incorporated under the act of May 26, 1933, as amended, are not subject to the payment of taxes imposed by the Corporate Net Income Tax Act, Capital Stock Tax Act, or the Net Earnings Tax Act.

7. Electrical cooperative associations incorporated under the act of June 21, 1937 are not subject to the payment of taxes imposed by the Corporate Net Income Tax Act, the Capital Stock Tax Act, or the Net Earnings Tax Act.

8. Generally, all other incorporated cooperative associations are subject to the payment of taxes imposed by the Corporate Net Income Tax Act and the Capital Stock Tax Act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

DAVID FUSS,
Deputy Attorney General.

B. B. BASTIAN,
Deputy Attorney General.

OPINION No. 462

Public School Employee's Retirement System—Refund of balance of accumulated deductions in annuity savings account—Formal Opinion No. 445 discussed—Act of July 18, 1917, P. L. 1043.

Where any member of the Public School Employee's Retirement System who has passed the optional superannuation retirement age of sixty-two years, and who has not yet reached the compulsory retirement age of seventy, applied for, and obtained, a superannuation retirement allowance under the provisions of section 14 of the Retirement Act, acting upon the advice of the Public School Employee's Retirement Board that he should do so, in the belief and upon being advised by the board that the board could not refund his accumulated deductions, neither he nor his personal representatives should now be prevented from obtain-

ing the balance of his accumulated deductions, less the retirement allowance payments already received, upon compliance with the terms of section 12 of the Retirement Act, in conformity with Formal Opinion 445 of the Department of Justice, dated January 21, 1943.

Harrisburg, Pa., June 29, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the balance of the accumulated deductions in the annuity savings account may be refunded to members of the Public School Employees' Retirement System in certain cases which have arisen since the issuance of Formal Opinion No. 445, dated January 21, 1943.

Formal Opinion No. 445 was addressed to you by the Department of Justice in response to your request for advice as to whether a member of the Public School Employees' Retirement System who has passed the superannuation retirement age of sixty-two years may receive a cash refund of his accumulated deductions in the Public School Employees' Retirement Fund, in lieu of a retirement allowance.

The right of a contributor to a refund of his accumulated deductions in the Retirement Fund is an incident only of separation from school service by resignation or dismissal, or in any other way than by death or retirement, and is set forth in section 12 of the Public School Employees' Retirement Act of July 18, 1917, P. L. 1043, as amended, 24 P. S. § 2125, and is, in part, as follows:

Should a contributor, *by resignation or dismissal, or in any other way than by death or retirement*, separate from the school service, or should such contributor legally withdraw from the retirement system, he or she shall be paid on demand, from the fund created by this act: (a) the full amount of the accumulated deductions standing to his or her individual credit in the annuity savings account, or, in lieu thereof, should he or she so elect, (b) an annuity or a deferred annuity, which shall be the actuarial equivalent of said accumulated deductions. His or her membership in the retirement association shall thereupon cease. * * * (Italics ours.)

In Formal Opinion No. 445, *supra*, the Department of Justice reached the following conclusions:

1. A contributor to the Public School Employees' Retirement Fund, who is an employee sixty-two years of age or older and who retired for superannuation under the provisions of section 14 of the Act of July 18, 1917, P. L. 1043, as amended, 24 P. S. § 2081, et seq., establishing a Public School Employees' Retirement System, is entitled to a superannuation retirement allowance as defined by the act, but is

not entitled to be paid out of the fund created by the act the amount of the accumulated deductions standing to his credit in the annuity savings account.

2. However, a contributor, even though past the superannuation retirement age of sixty-two years, who becomes separated from school service by resignation or dismissal, or in any other way than by death or retirement, is entitled to be paid on demand the amount of his accumulated deductions under the provisions of section 12 of the act.

We are informed that your present request for advice arises out of the following circumstances:

Prior to the receipt of the aforesaid opinion, you had been informing school employes who continued in active service after the optional retirement age of sixty-two years, that you could not refund their accumulated deductions, and that it would be necessary for them to apply for a superannuation retirement annuity. In a number of cases, the employes applied for retirement allowances after having been told that a cash refund of the accumulated deductions could not be given.

You now have two requests for information, and you believe that additional requests may later be received from time to time, from school employes who applied for a retirement allowance after having been informed by the board that they could not receive a cash refund of their accumulated deductions, as to whether they may now be paid the balance of their accumulated deductions after taking into consideration the amount of the retirement allowance payments they have already received. In one case, the retired employe has died and the executor of her estate has applied for payment of the balance of the accumulated deductions.

Accordingly, you now request advice as to whether the balance of the accumulated deductions may be refunded in these instances.

In view of the foregoing, your request for advice presents no serious difficulties. No distinction should be made between an employe who becomes entitled to his accumulated deductions and another, likewise entitled, but who is deprived thereof by the action of the Public School Employes' Retirement Board. Therefore, any employe who applied for, and obtained, a superannuation retirement allowance, acting upon the advice of the board that he should do so, and in the belief that the board could not refund his accumulated deductions, should not now, and especially in view of Formal Opinion 445, *supra*, be prevented from obtaining his accumulated deductions, upon compliance with the terms of section 12 of the Retirement Act.

However, it must be remembered, as stated in conclusion "1" of Formal Opinion 445, *supra*, that a contributor who retired for superannuation under section 14 of the act, is entitled to a superannuation retirement allowance, but *is not* entitled to be paid his accumulated deductions; and, as further stated in conclusion "2" of said opinion, a contributor who becomes separated from school service by resignation or dismissal, or in any other way than by death or retirement, *is* entitled to be paid his accumulated deductions under the provisions of section 12 of the act.

In other words, a contributor who maintains the status of a superannuation retirement annuitant *may not* be paid the amount of his accumulated deductions, but a contributor *may* be so paid who has become separated from school service by resignation or dismissal, or any of the other methods indicated in section 12 of the Retirement Act.

It must be borne in mind also that the views herein expressed, and the conclusions reached in Formal Opinion No. 455, *supra*, relate to superannuation retirement at the option of a contributor who is an employe sixty-two years of age or older, and not to employes who have reached the age of seventy when retirement is compulsory under section 14, paragraph 2 of the Retirement Act.

We are of the opinion that where any member of the Public School Employees' Retirement System who has passed the optional superannuation retirement age of sixty-two years, and who has not yet reached the compulsory retirement age of seventy, applied for, and obtained, a superannuation retirement allowance under the provisions of section 14 of the Retirement Act, acting upon the advice of the Public School Employees' Retirement Board that he should do so, in the belief and upon being advised by the board that the board could not refund his accumulated deductions, neither he nor his personal representatives should now be prevented from obtaining the balance of his accumulated deductions, less the retirement allowance payments already received, upon compliance with the terms of section 12 of the Retirement Act, in conformity with Formal Opinion 445 of the Department of Justice, dated January 21, 1943.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 463

State Council of Education—Scholarships—Supplementing Formal Opinion No. 459.

Formal Opinion No. 459 is hereby supplemented to the extent that a student to whom a State scholarship has been awarded, may be made entitled to the full benefits thereof, by rule of the State Council of Education, when inducted into military service of the United States prior to the date of his actual admission to college.

Harrisburg, Pa., July 1, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: We have your communication of June 7, 1943, requesting that we supplement Formal Opinion No. 459, addressed to you under date of June 1, 1943.

In Formal Opinion No. 459, we advised you, *inter alia*, that:

Where a student to whom a State scholarship has been awarded, has his college course interrupted by entrance into the military service of the United States, such a student after his return or discharge from military service of the United States, is entitled to a continuance of his or her scholarship benefits upon the resumption of his college work, inasmuch as the four year State scholarship need not be used consecutively.

Since the issuing of this ruling it appears that one of the winners of the State scholarship award has been ordered for immediate induction into the armed forces of the United States, and that there is a strong likelihood that several other winners will also be inducted prior to the commencement of the coming college year.

We have been informed by you that the State Council of Education has adopted, and for some years has been governed by, the following rule pertaining to State scholarships:

Should a successful candidate fail to enter college during the fall term of the year in which he receives the award, the scholarship shall be forfeited.

In case of rejection or forfeiture of the award the scholarship shall be given to the candidate standing next highest on the list in his county, provided the candidate has a satisfactory standing and can comply with the conditions under which the awards are granted.

You now request our advice whether, under these circumstances, the ruling contained in Formal Opinion No. 459 is applicable where a student to whom a State scholarship has been awarded is inducted into the military service of the United States prior to the date of his actual admission to college.

There is no logical or legal reason for depriving such a student of the same considerations, rights and benefits, which we have ruled a scholarship winner is entitled to if his course of study in college has been interrupted by his entrance into military service. The fact that a scholarship winner is prevented from commencing his college course by reason of entrance into military service, should not operate to his disadvantage. However, in view of the existence of the aforesaid rule of the State Council of Education, it will be necessary so to amend or change it in order to avoid penalizing the winners of State scholarships, who are called for service into the armed forces prior to their entrance into college.

We are of the opinion, therefore, that Formal Opinion No. 459 is hereby supplemented to the extent hereinbefore set forth, namely, that a student to whom a State scholarship has been awarded, may be made entitled to the full benefits thereof, by rule of the State Council of Education, when inducted into military service of the United States prior to the date of his actual admission to college.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 464

Schools—Retirement fund—Computation of length of service—World War I veteran—Failure to serve in expeditionary force—Amendment of April 23, 1929, to Public School Employes' Retirement Act of 1917, section 11.

A contributor to the public school employes' retirement fund, who was not a member of the American Expeditionary Force in World War I or in activities connected therewith and who did not go abroad, but who was either enlisted or drafted into and served in the Army in the United States, is entitled to credits for such services in computing the length of service of a contributor for retirement purposes under the amendment of April 23, 1929, P. L. 638, to section 11 of the Public School Employee's Retirement Act of July 18, 1917, P. L. 1043.

Harrisburg, Pa., July 13, 1943.

Honorable Francis B. Haas, Superintendent, Department of Public Instruction, Harrisburg, Pennsylvania.

Sir: We have your request for advice concerning the case of a teacher in the public schools of Philadelphia, who entered the military service of the United States in 1917, was discharged therefrom in

1918, but subsequently returned to the public school service and has been engaged in teaching ever since.

In your letter of May 10, 1943, you state that the question which you desire to have answered is:

Do the provisions of the Act of April 7, 1925, P. L. 162, as amended by the Act of April 23, 1929, P. L. 638, permit credit allowances to such teacher as "a member of the American Expeditionary Force in the World War, or in activities connected therewith approved by the Retirement Board?"

In a letter of the Secretary of the Public School Employes' Retirement Board, dated April 15, 1943, the question, as stated, is whether this teacher can be given credit in the retirement system for the service he rendered as a member of the United States Army in the First World War, even though he did not go abroad.

You have attached to your request a statement of the important facts to be considered, and which are substantially as follows:

The subject was appointed as a teacher in Philadelphia, November 1, 1914; he continued in that capacity until he entered the United States Army, September 18, 1917, was discharged therefrom December 30, 1918, taught in the Philadelphia schools a part of the year 1918-19, separated from public school service during the latter year, returned to public school service October 1, 1934, and has been engaged in school service ever since that time.

Although he was not a member of the American Expeditionary Force, he has requested credit in the Retirement System for the period during which he was in the United States Army. He bases his claim on the provisions of the Act of April 23, 1929, P. L. 638, amending the act of 1917, *supra*.

You also call our attention to the Act of April 7, 1925, P. L. 162, and an interpretation thereof by the Department of Justice given in letter dated February 10, 1926, by Honorable Frank I. Gollmar, Deputy Attorney General, to Doctor H. H. Baish, Secretary of the Public School Employes' Retirement Board.

You inform us that no opinion by the Department of Justice has been given since the Act of April 23, 1929, P. L. 638, and that a careful study of the act leaves the Retirement Board in doubt as to its application.

Section 11 of the original act of 1917, *supra*, was, in part, as follows:

Section 11. In computing the length of service of a contributor for retirement purposes, under the provisions of this act, full credit shall be given to each contributor by the retire-

ment board for each school year of service as an employe, as defined in section one, paragraph seven of this act, * * *

This section of the act was amended by the act of 1925, *supra*, so as to include in computing the length of service of a contributor for retirement service full credit:

* * * for each school year for which credit is not otherwise provided for in this act and during which the contributor was a member of the American Expeditionary Force in the World War, or in activities connected therewith approved by the retirement board. * * *

The section was again amended in 1929, *supra*, so as to include further contributors:

* * * who were either enlisted or drafted into the Army, Navy, Marine Corps, or the Enlisted Nurses' Corps of the United States. * * *

As stated, the amendment of 1925, *supra*, relating to contributors who were members of the American Expeditionary Force in the World War, was interpreted by letter of Deputy Attorney General Gollmar, *supra*. The question therein was raised whether the act of 1925 permitted retirement credits for war services rendered by school employes who did not leave this country during World War I. •

In that opinion it was held, *inter alia*, as follows:

* * * I am of the opinion, however, that the amended part of this paragraph 4 of the Act includes, (insofar as it relates to war activities), only those employes who were actually across the waters with the American Expeditionary Force and does not include those engaged in war activities remaining in this country.

It is admitted that the contributor in this case was not a member of the American Expeditionary Force in the World War, but that he was in the Army of the United States from September 18, 1917 to December 30, 1918, even though he did not go abroad. Therefore, the sole question raised by your request appears to us to be whether or not the contributor is entitled to retirement credits for war services by virtue of the amendment of 1929, *supra*. There is no doubt in our minds that the legislature, having extended the benefits of service credits, by the amendment of 1925, to members of the American Expeditionary Force, fully intended to extend such benefits to persons enlisted or drafted in the other branches of the service of the United States, as enumerated by the amendment of 1929. Consequently, the contributor in this case, being included within the latter class, is entitled to the benefits of the amendment. The language is so clear and plain that no other construction can be given to the words used; otherwise, the amendment of 1929 would be meaningless.

We are of the opinion, therefore, that a contributor to the Public School Employees' Retirement Fund who was not a member of the American Expeditionary Force in World War I, or in activities connected therewith, and who did not go abroad, but who was either enlisted or drafted into, and served in the Army of the United States, is entitled to credits for such services in computing the length of service of a contributor for retirement purposes, under the provisions of section 11 of the Public School Employees' Retirement Act of July 18, 1917, P. L. 1043, 24 P. S. § 2124, as last amended by the Act of April 23, 1929, P. L. 638.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 465

Schools—Employees on military leave—Payments to School Employees' Retirement Fund—Act of August 1, 1941—Constitutionality.

The Act of August 1, 1941, P. L. 744, is invalid only insofar as it provides for payments to dependents of State employees in the military service and is valid in its requirement that school districts or vocational school districts to pay into the School Employees' Retirement Fund on behalf of public school employees who have been granted leaves of absence and have been inducted into the military or naval service in time of war or National emergency, in addition to the contributions otherwise required by law, the full amount of the contribution required by law to be paid by the employees, so that such employees' retirement rights shall in no way be affected by such leave of absence.

Harrisburg, Pa., July 27, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: We have your request for advice concerning the effect of the decision of the Supreme Court of Pennsylvania in the case of *Kurtz v. City of Pittsburgh et al*, 346 Pa. 362 (1943), upon the constitutionality of the Act of August 1, 1941, P. L. 744, relating to the rights and privileges of public school employees who have been granted leaves of absence for military or naval service in time of war or national emergency.

You call our attention to the fact that it would be most unfortunate if public school employees, who have been granted leaves of absence because they had volunteered or had been called for military or naval

service, should lose their service credits in the Public School Employees' Retirement System while they are engaged in such services.

Specifically, you inquire:

Do the retirement benefits of the Act continue valid and effective and if so must the employing school district or the Commonwealth as the case may be:

(a) pay the full retirement contributions (advancing the retirement contributions for the employe as well as the contribution the employer usually makes);

(b) pay only the contributions which the employing agency would regularly pay;

(c) pay no portion of the contributions to the Retirement Fund, and

(d) if the employing school district or the Commonwealth can pay no portion of the retirement benefits, may the employe elect to pay the full contributions himself to the retirement system if he so desires?

The aforesaid act which reserves all rights and privileges of public school employes granted leaves of absence, who shall volunteer or be called for military or naval service in time of war or during a state of national emergency, is the Act of August 1, 1941, P. L. 744, 24 P. S. § 2371.1 et seq., the title to which is as follows:

AN ACT

Requiring school boards in all school districts, and boards of directors of all vocational school districts, to grant *leaves of absence to all school employes who shall volunteer or be called for military or naval service in time of war or during a state of national emergency*; preserving certain contracts, salaries, increments, retirement rights, seniority, State contributions and grants to local school boards, eligibility lists, réemployment; authorizing school boards and boards of directors of vocational schools to employ substitutes in place of such employes; requiring school districts and vocational school districts to make additional payments into the School Employees' Retirement Fund; *reserving all rights and privileges of employes granted leaves of absence* under the provisions herein, and superseding or repealing all contrary laws. (Italics ours.)

Section 1 of the act is, in part, as follows:

It is hereby declared to be the intention of this act that *such employes so affected shall retain all of the rights and privileges they shall have acquired prior to assignment to service under said Federal statutes*, or any such rights and privileges they would have acquired or received, if they had not been assigned to such service; it is intended that such

employees assigned to such service shall be considered in all respects to be continuing in the service of the school board or board of directors of vocational schools for which they were last working prior to such assignment to military or naval service. (Italics ours.)

Section 3 (e) of the act relating to the payment of the retirement contributions, states, inter alia, as follows:

(e) The *school district* or vocational school district shall pay into the *School Employees' Retirement Fund* on behalf of each such employe, in addition to the contributions required by law to be made by it, the full amount of the contribution required by law to be paid by the employe, *so that such employe's retirement rights shall in no way be affected by such leave of absence.* * * * (Italics ours.)

Section 3 (e) further provides:

* * * In all cases where any part of the salary of any employe is payable to his dependents under the provisions of this act, the school district or vocational school district shall deduct from the part of his salary so payable, in so far as the same is sufficient therefor, all moneys paid by it into the retirement fund on account of the employe's contributions.

Section 9 of the act provides that its provisions are severable, and section 6 of the act repeals, in so far as it applies to employes of school districts and vocational school districts, the Act of June 7, 1917, P. L. 600, relating to the payment to dependent wives and children of public employes in the armed forces of the United States of one-half of the salary of such employes.

Your question whether the opinion of the Supreme Court in the Kurtz case, *supra*, invalidates the provisions of the Act of August 1, 1941, P. L. 744, *supra*, relating to the payment of retirement contributions by the school districts, raises no doubt in our minds.

In that case the Supreme Court held as follows, at page 386 of 346 Pa.:

The Act of June 7, 1917, P. L. 600, as amended by the Act of June 25, 1941, P. L. 207 and by the Act of April 21, 1942, P. L. 50 and the Act of May 6, 1942, P. L. 106 so far as this original act and these later amendatory acts provide for the payment to dependent wives and children of public employes in the armed services of the United States, of one half of the salary of such employes, not to exceed \$2000 per year, and the payments to parents of such sums as the employes had heretofore been accustomed to contribute to their dependent parents, are adjudged to be unconstitutional and void, and the City of Pittsburgh and each and all of its officers are enjoined from expending or causing to be expended any public funds under the provisions of these just cited acts and amendatory acts. (Italics ours.)

A cursory examination of the opinion of Chief Justice Maxey readily discloses that the attack against the constitutionality of the Act of June 7, 1917, P. L. 600, as amended, *supra*, was based upon unconstitutional payments to dependents of State employes, and not to payments to State employes themselves.

The court also said, at pages 373 and 374 of 346 Pa.:

The State Employes' Retirement System and the Teachers' Tenure Act * * * bear no legal resemblance to the instant Act. *The payments made to State employes and to teachers * * * are not gratuities made to the dependents of some employes * * ** (Italics ours.)

In the minority opinion of Justice Linn, in the Kurtz case, *supra*, it was stated as follows, at pages 397 and 398 of 346 Pa.:

* * * Dependency is a fact which must be shown and we understand that proof of it is required in the administration of the Act: * * *

In the majority opinion of the court, Chief Justice Maxey stated, at page 376 of 346 Pa.:

* * * The gratuities given by this Act to the kindred of employes is certainly *not* compensation for the service these employes are rendering the *state* and its *political subdivisions*. * * *

The benefit of retirement payments granted by the act of 1941, *supra*, is analogous to the allowances of "sick leaves" in reference to which Chief Justice Maxey, in the Kurtz case, *supra*, stated, at pages 376 and 377 of 346 Pa.:

It has also been suggested that what the State as an employer attempts to do here is analogous to its granting "sick leaves" with pay to its employes. The answer to that is that if such reasonable leaves are granted by the State or a municipality to *all* of its employes there is no ground for attacking the statute under which the grant is made as special legislation. As nearly every individual is subject to occasional illness, sick leaves become an inevitable incident to all employment. If the State as an employer chooses to grant such leave with pay, for limited periods (such laws are usually for ten days or two weeks annually) this action does not involve an unconstitutional misuse of public funds. When a person enters into the service of the State at a weekly or annual salary he contracts to give his employer all the service required of him during working days, subject only to occasional interruptions by the illnesses common to man. Vacations and sick leaves reasonable in length of time, without deduction of pay, are now generally recognized as implied in contracts of public employment. * * *

A careful study of the opinion reveals that it is not decisive of the question herein involved, and a prolonged discussion of the opinion would serve no useful purpose. Suffice it to quote therefrom the following, at pages 373 and 374 of 346 Pa.:

The State Employees' Retirement System and the Teachers' Tenure Act are cited in the Commonwealth's brief as examples of constitutional laws providing for gratuities and pensions. These Acts bear no legal resemblance to the instant Act. The payments made to State employes and to teachers are made out of funds to which the beneficiaries have made large contributions and are commensurate with the length of service of the recipients, and they are not gratuities made to the dependents of some employes. In *Retirement Board of Allegheny County v. McGovern et al.*, Commissioners, Appellants, 316 Pa. 161, 174 A. 400, the Court reiterated (p. 168) what was said in *Busser v. Snyder*, 282 Pa. 440, 454 "That the basis of the retirement pay is neither charitable nor benevolent but is for the faithful, valuable service actually rendered over a long period of years." We also said (p. 169) that "a pension is a bounty or a gratuity given for services that were rendered in the past" and that "retirement pay is defined as 'adjusted compensation' presently earned, which, with contributions from employes is payable in the future . . . When the conditions are satisfied . . . retirement pay becomes a vested right. * * *"

In passing upon the validity of the provisions of the retirement acts, it is necessary to keep in mind the character and purpose of such acts and the resulting liberality with which they must be construed.

In the cases of *Dom v. State Employees' Retirement Board*, and *Demming v. State Employees' Retirement Board*, 345 Pa. 489 (1942), the court said, at page 494:

* * * Employment contracts containing *provisions for retirement pay are liberally construed* to effectuate the declared intention of the parties to pay additional compensation for services rendered in the past. (Italics ours.)

As was stated by Judge Wickersham in the case of *Johnston v. State Employees' Retirement Board*, 39 Dauphin County Reports 231, at 242:

* * * *The retirement system is intended to be a highly beneficial one for faithful and superannuated State employes; to seize upon mere technicalities to defeat the applications of those otherwise entitled, and those who have contributed to the fund for many years would be defeating the very purpose for which the fund was established. For this reason the statutes should be liberally and beneficially construed.* (Italics ours.)

This doctrine has been universally carried out in a number of cases, which have construed retirement laws in Pennsylvania and other jurisdictions.

From the foregoing statements, it is clear that the opinion in the Kurtz case, *supra*, does not invalidate the provisions of the act of 1941, *supra*, relating to the payment of retirement contributions by the school districts.

The sole question raised by your inquiry is whether or not the opinion in the Kurtz case, which declares unconstitutional the provisions of the act of 1917 relating to payments to dependent wives and children of public employes in the armed forces of the United States, can be extended to cover the act of 1941, so as to declare invalid the provisions of that act which guarantee the payment by the school districts of retirement contributions on behalf of public school employes inducted into military or naval service.

We think not.

Were there any doubts, they would be dispelled by the concluding paragraph of the majority opinion of the court in the Kurtz case, *supra*, which is, in part, as follows:

The Act of June 7, 1917, P. L. 600, as amended * * * so far as this original act and these later amendatory acts provide for the payment to dependent wives and children of public employes in the armed services of the United States, * * * are adjudged to be unconstitutional and void, * * *

In view of the foregoing, it is considered unnecessary to answer *seriatim* the four questions contained in your request for advice.

We are of the opinion, therefore, that the opinion of the Supreme Court in the case of *Kurtz v. City of Pittsburgh et al.*, 346 Pa. 362 (1943), does not invalidate the provisions of the Act of August 1, 1941, P. L. 744, 24 P. S. § 2371.1 et seq., which requires that the school districts or vocational school districts shall pay into the School Employes' Retirement Fund on behalf of all public school employes who have been granted leaves of absence and have been inducted into the military or naval service in time of war or national emergency, in addition to the contributions required by law to be made by it, the full amount of the contribution required by law to be paid by the employe, so that such employe's retirement rights shall, in no way be affected by such leave of absence.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 466

Osteopaths—Revocation of license—Unethical conduct not connected with advertising—Act of March 19, 1909, section 14, as amended June 5, 1937.

"Unethical conduct," under section 14 of the Act of March 19, 1909, P. L. 46, as last amended by the Act of June 5, 1937, P. L. 1649, is of itself a separate ground for the suspension or revocation of a license by the State Board of Osteopathic Examiners in its discretion, and does not necessarily have to be connected with misleading or fraudulent advertising.

Harrisburg, Pa., July 29, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: We have your request for advice as to whether the term "unethical conduct" as used in the provisions of section 14 of the Act of March 19, 1909, P. L. 46, as last amended by the Act of June 5, 1937, P. L. 1649, 63 P. S. § 271, is a ground for the revocation of an osteopathic license.

Your inquiry is occasioned by the fact that the State Board of Osteopathic Examiners wishes to be apprised of its authority to revoke the license of a practicing osteopath who pleaded guilty to charges of violating the Narcotic Act.

It is not necessary for us to go into the merits of the case in question since the discretion to be exercised in this matter is imposed upon the State Board of Osteopathic Examiners in that it may or may not suspend or revoke the license depending upon, whether in its judgment, the circumstances warrant such action. It is sufficient for the purpose of this opinion to note that the licensee was arrested and paid a fine for a technical violation of the Narcotic Act by sending certain drugs through the United States mail.

The particular question presented by you is whether or not "unethical conduct" must be associated with misleading or fraudulent advertising in the practice of osteopathy as determined by the State Board of Osteopathic Examiners, or if it is of itself a ground for the revocation of a license separate from misleading or fraudulent advertising in the practice.

The pertinent part of section 14 of the above cited act relating to this problem is as follows:

* * * The State Board of Osteopathic Examiners may refuse, revoke, or suspend the right to practice osteopathy in this State upon 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 which impairs intellection and

judgment, to such an extent as to incapacitate the performance of professional duties; the violation of the practice of the principles of the system of osteopathy as defined in this act; misrepresentation; *unethical conduct, or misleading or fraudulent advertising in the practice*, as determined by the board. * * * (Italics ours.)

It would seem quite clear that "unethical conduct" is a separate ground for the revocation of an osteopathic license. However, in ascertaining the real meaning of these particular words, it is necessary in construing them to effectuate the intention of the General Assembly in passing such legislation as it relates to osteopathic physicians and surgeons, as a whole.

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature: *Wiesheier et al. v. Kessler*, 311 Pa. 380 (1933); *Hammerle et al. v. Kessler*, 311 Pa. 386 (1933); Statutory Constitution Act of May 28, 1937, P. L. 1019, Article IV, Section 51, 46 P. S. § 551. Where words are not explicit the intention of the legislature must be ascertained by considering among other things the object to be obtained in the legislation: *Orlosky v. Haskell*, 304 Pa. 57 (1931). Such language must be read in a sense which harmonizes with the subject matter in its general purpose and object: *Pocono Manor Association v. Allen et al.*, 337 Pa. 442 (1940).

In reading the entire act it is easy to conclude that it was undoubtedly the purpose of the legislature in passing the osteopathic legislation to set up standards or requirements to be met by the practitioners in this particular field, which would give such licensees a professional status in its most restricted sense, comparable to that of medical doctors and lawyers, whereby an individual must not only have special knowledge and learning in his particular field, but also must possess other qualities of good character and conduct befitting such status. In order to achieve this status of professional responsibility, separate and distinct from ordinary business practices and the restraints imposed only by general law, certain requirements were imposed upon such individuals restricting their normal freedom to carry on their profession, and restraining them over and above the ordinary business man in order to insure their continued integrity, good character and unselfish and honorable devotion to their chosen work. A man may be most skillful and learned in the field of osteopathic treatment and yet be denied the right to enter upon that practice due to some deficiency in character or conduct. A fortiori, it follows that a licensed practitioner may forfeit his right to continue to practice because of some prohibited misconduct. The purpose of such requirements, however, is not to defeat skillful prac-

tioners, but to demand of them certain qualities of character and conduct which will be of mutual benefit to the practitioners and the general public.

While the various recognized professions have different standards of "unethical conduct," yet any "unethical conduct" in each situation must be interpreted in connection with the standard of conduct required of the particular profession. It is obvious that a licensed osteopath in the practice of his profession enjoys a position of special trust and confidence that enables him easily to violate the narcotic law, and at the same time apprehension for violation is made more difficult because of the special privilege placed in him by the legislature. This being true the reason is apparent why the legislature has seen fit to place a high standard of conduct on a licensed osteopath by providing that "unethical conduct" may be a reason for refusing, suspending or revoking his license. Hence, one who is in such a high position of trust and confidence and takes advantage of it to violate the narcotic law, may be determined to be guilty of "unethical conduct" in the practice of osteopathy by the Osteopathic Examining Board.

The legislature must have been fully cognizant of this, and, therefore, its purpose in including "unethical conduct" in section 14, *supra*, becomes obvious. It is clear that "unethical conduct," if limited solely to misleading or fraudulent advertising, would greatly restrict the legislative purpose intended by this act, and most certainly it would result in making the construction not only extremely forced, but would achieve a result not compatible with an intention expressed in this section and by the entire act.

The clear meaning of this phrase is that "unethical conduct" is of itself a category separate and distinct from "misleading or fraudulent advertising in the practice as determined by the board."

We are of the opinion, therefore, that "unethical conduct" as used in Section 14 of the Act of March 19, 1909, P. L. 46, as last amended by the Act of June 5, 1937, P. L. 1649, 63 P. S. § 271, is of itself a separate ground for the suspension or revocation of a license by the State Board of Osteopathic Examiners in its discretion and it does not necessarily have to be connected with misleading or fraudulent advertising in the practice.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 467

Physicians and surgeons—Temporary licensure—Act of April 22, 1943—Emergency conditions.

Under the Act of April 22, 1943 (No. 45), the State Board of Medical Education and Licensure has authority to issue temporary permits to licensed medical practitioners of other states entitling them to practice in this Commonwealth during the present war and six months after the cessation of hostilities for the purpose of serving as resident physicians or assistant surgeons in hospitals of this Commonwealth, if their services are necessary due to a shortage of such services in the communities in which the hospitals are located.

Harrisburg, Pa., July 29, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You have requested our advice as to whether or not the State Board of Medical Education and Licensure has authority to issue temporary permits under the provisions of the Act of April 22, 1943, P. L. 71, for resident physicians or assistant surgeons to serve in hospitals in this Commonwealth.

Your inquiry is occasioned by reason of applications which have been made to the board by licensed medical practitioners of other states who desire to serve as resident physicians or assistant surgeons in some of the larger hospitals in this Commonwealth. Section 1 of the act provide, inter alia, as follows:

The State Board of Medical Education and Licensure of Pennsylvania may issue temporary certificates authorizing doctors of medicine, legally licensed in other states, to practice medicine and surgery in Pennsylvania during the present war between the United States and any foreign country and six months after the cessation of hostilities. * * *.

The provisions of this act are intended to supply medical services in communities where, because of the drain of war needs on such services that are normally available, there exists a need for medical services that may become a threat to public health. * * *.

The language of the legislature is unambiguous. It is apparent that the intention of the legislature was to permit doctors of medicine, legally licensed in other states, who practice medicine and surgery in other states, to practice in this Commonwealth for the period hereinbefore stated if they are of good moral character and possess the other required qualifications set forth in the act, and there is a need for medical services in the communities where hospitals are located which may result in a threat to the public health

We are of the opinion, therefore, that under the provisions of the Act of April 22, 1943, P. L. 71, the State Board of Medical Education and Licensure has the authority to issue temporary permits to doctors of medicine, properly qualified as aforesaid, entitling them to practice medicine and surgery in this Commonwealth during the present war and six months after the cessation of hostilities for the purpose of serving as resident physicians or assistant surgeons in hospitals in this Commonwealth, if the doctors applying for such permits possess the requisite qualifications and their services are necessary due to the fact that the shortage of such medical services in the communities in which the hospitals are located, may become a threat to public health.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 468

Real estate brokers—Licensure—Real Estate Brokers License Act of 1937, section 6—Timely filing of application for licensure under "grandfather" clause—Refusal—Right to reconsider application.

Where an applicant for a real estate broker's license made timely application for licensure under the "grandfather" clause of section 6 of the amendatory Real Estate Brokers' Act of July 2, 1937, P. L. 2811, and the application was refused, although the applicant was qualified, but no hearing was held on the application and no appeal was taken from the refusal thereof, the Board of Professional Licensing of the Department of Public Instruction may in its discretion, on the basis of additional facts presented to it, register the applicant summarily as a real estate broker, if it would have granted a license at the time of the application, or grant him a hearing on his application.

Harrisburg, Pa., July 29, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You have requested our advice as to what authority your department has to reconsider the applications of an individual for licensure as a real estate broker under the following statement of facts:

Applications were filed for licensure as a real estate broker by a secretary-treasurer of two building corporations, under the amendatory provisions of section 6 of the Real Estate Brokers' License Act of July 2, 1937, P. L. 2811, 63 P. S. § 431, within the required 90 days

of the effective date of this act. Thereafter certain additional information was furnished by him to your department at the request of the Professional Licensing Bureau. Finally, he was informed by letter of March 30, 1938, from your department that his applications were rejected on the ground that he did not qualify for licensure without examination on the basis of his experience, and that it would be necessary for him "to serve a two-year apprenticeship as a licensed real estate salesman in the employment of a licensed real estate broker and submit to an examination as required by law."

At the time that the applicant filed his applications he had been actively engaged as a managing engineer of real estate for a period of at least 12 years. His experience consisted of managing three large office buildings and two hotels.

The questions herein involved are as follows: (1) Did the applicant have a right to a license under section 6 at the time of the application? (2) Does the board presently have jurisdiction to reconsider the application? (3) Are notice and hearing necessary before refusal?

Some time ago, we had occasion to advise your department, informally, on this matter, but it now develops that at that time we did not have the full facts before us. We were merely informed that it was an application for a real estate broker's license which your department was requested to consider on a *nunc pro tunc* basis because it originally had been filed within the time limit. We then informed you that the application could not be honored in view of our ruling in Informal Opinion No. 1101. A careful study of the file in this matter, which now contains all of the facts, reveals that this is a situation where the application was made in time, but the license not having been granted, was again submitted for reconsideration by the board. Hence, Informal Opinion No. 1101 does not apply.

Your problem presents a fundamental issue in the expanding field of administrative law concerning the continuing power of an administrative agency to review, modify or rescind its own decision on an application on which it has held no hearing.

The existence and extent of continuing jurisdiction in an administrative agency is primarily a problem in statutory construction. The Real Estate Brokers' License Act was placed in force in Pennsylvania by the Act of May 1, 1929, P. L. 1216, 63 P. S. § 431 et seq. The term "real estate broker" as defined in section 2 of this act was extended by the Act of July 2, 1937, P. L. 2811, 63 P. S. § 432, to include "all managers of office buildings, apartment buildings, and other buildings, and persons employed by banking institutions and

trust companies for the foregoing purposes." Section 6 of the amendatory Act of 1937, P. L. 2811, 63 P. S. § 432 note, provided as follows:

Any person who has, for a period of two years immediately preceding the effective date of this act, engaged in any business or occupation not heretofore required to be licensed as a real estate broker, and who is under the provisions of these amendments required to be so licensed, shall be issued a real estate broker's license by the Department of Public Instruction, without requiring him or her to submit to an examination as required by the act to which this is an amendment and its amendments: *Provided, That such person makes application for such license within ninety days after the effective date of this act and pays the fee prescribed by law for such license.* (Italics ours.)

The amendatory act of 1937 became effective on July 2, 1937. The Real Estate Brokers' License Act, as amended, contains no restrictions upon the continuing power of control inherent in the present situation entrusted to the Department of Public Instruction. Section 10 of the act, 63 P. S. § 440, specifies a procedure as to notice and "ample opportunity to be heard thereon in person or by counsel before refusing, suspending or revoking any license." Section 10 (c) of the same act provides:

The refusal of the department to issue any license, after application properly made, and compliance by the applicant with the requirements of this act, shall be subject to review by the court of common pleas of Dauphin County, upon petition for writ of mandamus, or other appropriate remedy, with the right of appeal to the applicant as in other and similar cases.

There are numerous analogous statutes, in which the rapid expansion of governmental regulatory authority is qualified by grandfather clauses. In similar legislation in this Commonwealth, as well as in numerous Federal statutes, there is likewise imposed a time limit within which an application must be filed in order to receive the protection of such grandfather clauses. Such clauses, exempting previously unregulated persons or businesses from the strict requirements of these new regulatory acts, if not required in most cases by constitutional safeguards, at least reflect a legislative recognition of fairness and justice. Thus in the case of one who has for years held a very responsible position managing buildings, it is quite impossible to comply with the newly conceived regulatory requirement of an apprenticeship of several years in the office of a licensed real estate broker. The legislature, very properly, if not necessarily, tempered the imposition of governmental regulatory authority in this field in

order to work no hardship upon such experienced persons by depriving them of their means of livelihood.

The Superior Court of Pennsylvania in *Puhl et al. v. Pa. P. U. C.*, 139 Pa. Super. 152, 160 (1940), had before it Section 804 of the Public Utility Law of May 28, 1937, P. L. 1953, 66 P. S. § 1304, extending the jurisdiction of an administrative agency so as to include previously unregulated contract carriers. A clause in section 804 exempted from the necessity of proving public convenience, bona-fide contract carriers by motor vehicle rendering service upon the effective date of that act provided that application was made to the Commission within one hundred twenty days after the effective date of that act. In an opinion by Parker, J., the Superior Court recognizes at page 160 that:

* * * It was the intent and purpose of the proviso in Section 804 to recognize and continue in force service bona fide performed by contract motor carriers on the effective date of the act as a matter of right, * * *.

In its decision reversing an order wherein the Commission had refused to recognize such grandfather rights, the Superior Court interpreted the exemption in favor of existing operators, with liberality.

In the case of *Whinney v. Public Service Commission*, 116 Pa. Super. 472 (1935), the Superior Court upheld the action of the Public Service Commission in permitting continued service by a motor carrier, who had taken no steps until 1923 to secure the benefit of the grandfather clause contained in the Public Service Company Law effective January 1, 1914.

In the case of *Bickley v. Pa. P. U. C.*, 135 Pa. Super. 490, 495 (1939), the Commission and the Superior Court disposed on its merits of an application for registration as a common carrier filed as late as February of 1936 by a trucker who claimed to have served an extensive territory prior to January 1, 1914, the effective date of the grandfather clause of the Public Service Company Law.

In dealing with a grandfather application, therefore, an administrative agency is not confronted with a situation restricting its inherent power to modify, amend or revoke any previous orders. It is the general rule that administrative determinations are subject to reconsideration and change where they have not passed beyond the control of the administrative authorities or where the powers and jurisdiction of the administrative authorities are continuing in nature. Since no rights vest by reason of the refusal of a grandfather application, even in public utility cases where other carriers would be seri-

ously affected economically by the presence of a competing carrier, administrative authorities very clearly have power to reconsider their determinations in grandfather applications.

The legislative intent in this situation was not to exclude continuing jurisdiction in the administrative agency regulating real estate brokers. Under the enabling statute, it is possible for the Department of Public Instruction, through its Bureau of Professional Licensing to act on inadequate information, as in fact happened in this case. In *Gage v. Gunther et al.*, 68 Pac. 710, 713 (1902), Mr. Justice Harrison of the Supreme Court of California recognized such continuing administrative jurisdiction and stated:

* * * There is no statutory inhibition against his granting a rehearing or a review, or the number of times a motion therefor may be made, or any provision relating to the time within which a rehearing may be granted, or within which the former decision may be set aside. * * *

In the case of *Pittsburgh & L. E. R. Co. et al. v. Public Utilities Commission*, 128 Ohio St. 388, 191 N. E. 467, 470 (1934), the Supreme Court of Ohio held that the "continuing jurisdiction" of an administrative agency overrode a requirement that an application for rehearing be filed within thirty days. In the field of the continuing jurisdiction of an administrative agency, as aptly stated by District Judge Underwood in the case of *Froeber-Norfleet, Inc. v. Southern Ry. Co. et al.*, 9 F. Supp. 408, 411 (1934), it was held that:

There is no common-law statute of limitations.

In *Equitable Trust Co. of New York v. Hamilton*, 226 N. Y. 241, 123 N. E. 380 (1919), Cardozo, J., found the continuing jurisdiction of an administrative agency was "consistent with" the scheme and purpose of the regulatory statute and found that this conclusion was "reinforced by compelling public policy and long continued practice." In the course of his opinion this eminent judge stated that:

* * * In such circumstances, action once taken it is said, is final, no matter how inconsiderate or hasty. We think that precedent and policy demand another ruling. * * * The board may disallow to-day, and on further consideration allow to-morrow. * * *

* * * The very question to be determined is when action becomes final. That is in every case a question dependent for its answer upon the scheme of the statute by which power is conferred. * * *

As pointed out further in this decision, boards

* * * must often act hastily and on inadequate information. They ought to have some opportunity to undo and correct an error apparent to themselves. * * *

The continuing jurisdiction of the Bureau of Professional Licensing of the Department of Public Instruction is, therefore, sustained by the almost unanimous decisions of courts and administrative agencies, and by the intention of the legislature in enacting the Real Estate Brokers' Act.

If it be assumed that applicant, by virtue of Section 10 of the Act of May 1, 1929, P. L. 1216, as amended, 63 P. S. § 440 (b) and (c), was entitled to a hearing on his application, it would appear that by his letter of March 23, 1938, he was willing to consider the matter closed upon receipt of notification of the board's refusal to grant a license upon the basis of his submitted qualifications. Under subsection (c) applicant was then entitled to proceed by mandamus or other appropriate remedy to review the board's refusal to issue the license. This he failed to do. On this basis the board may now properly refuse to reconsider its action.

On the other hand the board may now in the exercise of its discretion on the ground of newly discovered evidence (42 Am. Jur. Public Adm. Law, 537, 538), reconsider its determination. On this basis it should be made plain that a hearing is now being granted as a matter of grace and not of right. It should also be understood that in the event, following a hearing, the applicant should be refused a license, he may then exercise his right under subsection (c) to review the board's refusal before the Court of Common Pleas of Dauphin County. Hence, in determining whether to grant applicant a hearing, the board should consider whether, if all the averred facts as to his qualifications were true, the board would then grant him a license under section 6. If the board has no reason to doubt the applicant's qualifications as explained in his communications following his formal application, then it should hesitate to deprive him of the privilege of being licensed under the grandfather clause simply because of his lack of diligence in appealing from a refusal by the board to issue a license, based on the absence of clear expression of his qualifications as contained in his original application which was made in time under section 6. In other words, if applicant, on the basis of the facts he now presents to the board, would then have been granted a license, the board now has discretion to grant him a hearing, or summarily to have him registered as a real estate broker.

We are of the opinion, therefore, that where an applicant for a real estate broker's license made timely application under the provisions of section 6 of the amendatory Real Estate Brokers' Act of July 2, 1937, P. L. 2811, 63 P. S. § 432, and the application was refused, although the applicant was qualified, but no hearing was held on the application and no appeal was taken from the refusal of the applica-

tion, the Board of Professional Licensing of the Department of Public Instruction now has authority, on the basis of the additional facts presented to it, if it would have granted a license at the time of the application, to register the applicant summarily as a real estate broker, or to grant the applicant a hearing on his license application.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 469

Incompetents—Liability for costs of transportation and commitment—Amendment of May 27, 1943, to sections 307 and 501 of The Mental Health Act of 1923—Effective date—Statutory Construction Act of 1937, section 4, as amended June 3, 1941.

Since the Act of May 27, 1943 (No. 299), further amending sections 307 and 501 of The Mental Health Act of June 11, 1923, P. L. 998, by imposing upon institution districts certain costs of transportation and commitment and other expenses incurred necessary to mental patients, affects the budgets of political subdivisions, its effective date, under section 4 of the Statutory Construction Act of May 28, 1937, P. L. 1019, as amended by the Act of June 3, 1941, P. L. 82, is the beginning of the fiscal year of the political subdivision affected, following the date of the final enactment of the act.

Harrisburg, Pa., August 2, 1943.

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

Madam: We have your request for advice concerning the effective date of the Act of May 27, 1943, Act No. 299, P. L. 682.

This act further amends Sections 307 and 501 of the Mental Health Act of July 11, 1923, P. L. 998, 50 P. S. § 1, as last amended by the Act of October 11, 1938, P. L. 63, 50 P. S. § 21, by imposing upon the institution districts certain costs of transportation and commitment, and other necessary expenses incurred for mental patients.

Since the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 501, as amended, it is well settled that all laws, except laws making appropriations and laws affecting the budget of any political subdivision, shall be effective from and after the first day of September next following their final enactment, unless a different date is specified in the law itself.

Since no effective date is set forth in the act of 1943, *supra*, and since the act affects the budgets of political subdivisions, the effective date is determined by the provisions of the Statutory Construction Act.

Section 4 of said act, as amended by the Act of June 3, 1941, P. L. 82, Section 1, 46 P. S. § 504 is, in part, as follows:

Laws affecting the budget of any political subdivision, enacted finally at a regular session of the Legislature, shall be in full force and effect at the beginning of the fiscal year of the political subdivision affected following the date of the final enactment of such law unless a different date is specified in the law itself.

We are of the opinion, therefore, that the Act of May 27, 1943, P. L. 682, Act No. 299, amending Sections 307 and 501 of the Mental Health Act of July 11, 1923, P. L. 998, 50 P. S. § 1 as last amended by the Act of October 11, 1938, P. L. 63, 50 P. S. § 21, imposing upon the institution districts certain costs of transportation and commitment, and other necessary expenses incurred for mental patients, becomes effective at the beginning of the fiscal year of the political subdivision affected, following the date of the final enactment of the act, in accordance with the provisions of the Statutory Construction Act of May 28, 1937, P. L. 1019, Article I, Section 4, as amended by the Act of June 3, 1941, P. L. 82, Section 1, 46 P. S. § 504.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 470

Casualty Insurance—Workmen's Compensation Policies—Ohio—Corporations—Associations—Exchanges—Retaliatory Discrimination—Pennsylvania Department of Justice—Act of May 17, 1921, P. L. 789, as amended.

Ohio casualty insurance companies, even though admitted for other purposes, may not be authorized to write workmen's compensation insurance in the Commonwealth of Pennsylvania, since Pennsylvania companies are prohibited by an Ohio statute from writing workmen's compensation insurance in that state.

The fact that there is no prohibition in the Pennsylvania laws is immaterial. It happens that Pennsylvania companies are subjected to fees and other charges in certain states though under Pennsylvania law no similar fee or charge is imposed upon either a domestic or foreign company doing business in this State.

Harrisburg, Pa., August 3, 1943.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested this department to advise you whether a casualty insurance company, incorporated under the laws of the State of Ohio, may be permitted to write workmen's compensation insurance in Pennsylvania.

This question arises by reason of the fact that in the State of Ohio insurance companies do not write workmen's compensation insurance, all such insurance being written there as a virtual monopoly, by an agency similar to our State Workmen's Insurance Fund. It has been urged that if Pennsylvania casualty companies cannot write workmen's compensation insurance in Ohio, Ohio companies should not be permitted to issue policies of such insurance in Pennsylvania. In other words, it is suggested that this is a proper case for retaliation.

The retaliatory provision of our Pennsylvania law is set forth in Section 212 of the Insurance Department Act, the Act of May 17, 1921, P. L. 789, as amended by the Act of June 22, 1931, P. L. 616, and by the Act of May 24, 1933, P. L. 988, 40 P. S. § 50. This section provides as follows:

If, by the laws of any other state, any taxes, fines, penalties, licenses, fees, or other obligations or prohibitions, additional to or in excess of those imposed by the laws of this Commonwealth upon insurance agents, brokers, public adjusters, public adjusters' solicitors, or insurance companies, associations, exchanges of other states, are imposed on insurance agents, brokers, or public adjusters or public adjusters' solicitors, or insurance companies, associations, and exchanges of this Commonwealth doing business in such state, like obligations and prohibitions shall be imposed upon all insurance agents, brokers, public adjusters, public adjusters' solicitors, and insurance companies, associations, and exchanges of such state doing business in this Commonwealth, so long as such laws remain in force. (Italics ours.)

This section has apparently not been the subject of litigation in Pennsylvania.

The section provides for retaliation in the case of taxes, fines, penalties, license fees, or other obligations or prohibitions, but in this case we are interested only in prohibitions. Likewise, the section deals with insurance companies, association and exchanges, agents, brokers, public adjusters and public adjusters' solicitors, but here only insurance companies are involved.

So simplified, the question might be stated briefly as follows: Is the law which prevents private insurance companies from writing workmen's compensation insurance in the State of Ohio a basis for invoking retaliation on the grounds that it is a prohibition on Pennsylvania companies, additional to or in excess of any prohibition imposed by the State upon Ohio companies doing business in the State of Pennsylvania?

We feel that there is such a prohibition and that this is a case for retaliation.

Section 212, supra, provides that if by the laws of any other state a prohibition is placed upon Pennsylvania companies additional to or in excess of any prohibition which is placed thereon by Pennsylvania law a like prohibition is to be put upon companies of such other state doing business in this State. While there is no prohibition against any qualified casualty company writing workmen's compensation insurance in Pennsylvania, under the Ohio law there is a prohibition against Pennsylvania companies writing such insurance in Ohio, and this is additional to or in excess of any prohibition applicable in Pennsylvania.

Section 1465-101 of the Ohio General Code provides as follows:

All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages when the injury, disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employes, or when the same is occasioned by the wilful act of the employer on any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority in this state. Provided that any corporation organized under the laws of this state to transact liability insurance as defined in paragraph 2 of section 9607-2 or as defined in paragraph 2 of section 9510 of the General Code may by amendment of its articles of incorporation or by original articles of incorporation, provide therein for the authority and purpose to make insurance in states, territories, districts and countries, other than the state of Ohio indemnifying employers against loss or liability for payment of compensation to workmen and employes and their dependents for death, injury or occupational disease occasioned in the course of the employment and to insure and indemnify em-

ployers against loss, expense and liability by risk of bodily injury or death by accident, disability, sickness or disease suffered by workmen and employes for which the employer may be liable or has assumed liability. (*Italics ours.*)

The above quoted section is in the form of a direct prohibition against any insurance company writing workmen's compensation insurance in the State of Ohio and constitutes a prohibition against Pennsylvania casualty insurance companies. In contrast with that part of the above quoted provision which thus prohibits both Ohio companies and the companies in Pennsylvania or any other state from writing such insurance, the section above quoted expressly provides also that Ohio insurance companies may obtain authority to write workmen's compensation insurance in any state except Ohio.

The fact that there is no prohibition in the Pennsylvania law is immaterial. It happens that Pennsylvania companies are subjected to fees and other charges in certain states though under Pennsylvania law no similar fee or charge is imposed upon either a domestic or foreign company doing business in this state. You inform us, however, that in such cases the companies of such state imposing such fee or charge are compelled by your department to pay a similar fee or charge when admitted to do business in this State. We view the situation as to the prohibition created by the Ohio law to be the same as the situation above described. If Pennsylvania has no prohibition which is applied initially here, nevertheless the effect of the Ohio law being to prohibit our companies from writing workmen's compensation insurance in that state, your department should prohibit Ohio companies from writing workmen's compensation insurance business in this State.

It is our opinion that Ohio casualty insurance companies, even though admitted for other purposes, may not be authorized to write workmen's compensation insurance in the Commonwealth of Pennsylvania, since Pennsylvania companies are prohibited by an Ohio statute from writing workmen's compensation insurance in that state.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 471

Criminal procedure—Commutation of sentences—Prisoners serving consecutive sentences—Constitution, Article IV, section 9—Act of April 9, 1929—Good Time Law of 1901.

1. Where a prisoner was sentenced after June 25, 1937, by one court at the same time to two or more consecutive sentences, for purposes of commutation under Article IV, section 9, of the Constitution, and the Act of April 9, 1929, P. L. 177, those sentences must be treated by the Board of Pardons as one sentence, the minimum of which will be the total of all the minimum sentences and the maximum of which will be the total of all the maximum limits of such sentences: unless, however, each one of these elements, that is, the date of the sentences and the imposition thereof by one court at the same time, is present, then in acting upon the application for commutation by a prisoner undergoing two or more sentences imposed to run consecutively, the Board of Pardons must consider the terms of each sentence separately.

2. Under the Act of May 11, 1901, P. L. 166, commonly known as the "Good Time Law," authorizing commutations limited to a specific number of months off for each year of service for good behavior, several terms of imprisonment are to be lumped for the purposes of estimating the amount of commutation.

Harrisburg, Pa., August 9, 1943.

Honorable John C. Bell, Lieutenant Governor of the Commonwealth of Pennsylvania, Chairman of the Board of Pardons, Harrisburg, Pennsylvania.

Sir: This department is in receipt of a communication from the Board of Pardons requesting our opinion on the following question:

When an applicant for commutation is serving consecutive sentences and the Board of Pardons has determined upon favorable consideration, may it lump the sentences for commutation or must each individual sentence be commuted?

To answer your query requires but an amplification of President Judge Keller's opinion in *Commonwealth ex rel. Lycett v. Ashe*, Warden, 145 Pa. Super. Ct. 26 (1941), which construes the Act of Assembly of June 25, 1937, P. L. 2093, 19 P. S. § 897, section 1 of which reads as follows:

Whenever, after the effective date of this act, two or more sentences to run consecutively are imposed by any court of this Commonwealth upon any person convicted of crime therein, there shall be deemed to be imposed upon such person a sentence the minimum of which shall be the total of the minimum limits of the several sentences so imposed, and the maximum of which shall be the total of the maximum limits of such sentences.

In the *Lycett* case, *supra*, this act was held not to be retroactive. It was also held to be limited in its application to consecutive sen-

tences imposed at the same time by the same court. We quote from page 31, *Commonwealth ex rel. Lycett v. Ashe*, *supra*:

* * * As we read the act it applies only to two or more consecutive sentences imposed at the same time by one court. The Act reads "imposed by any court," not "by any courts." It matters not whether it is acting as a court of quarter sessions or of oyer and terminer, it applies to any court which imposes "two or more sentences to run consecutively . . . upon any person convicted of crime therein." A subsequent single sentence imposed by another court for prison escape, or for crime committed while the convict is on parole, does not fall within its terms, viz., "whenever, after the effective date of this act, two or more sentences to run consecutively are imposed by any court of this Commonwealth upon any person convicted of crime therein," that is, convicted in the court that imposed the consecutive sentences.

Prior to the act of 1937 it was well established that consecutive sentences of imprisonment could not be lumped for parole: *Commonwealth ex rel. Lynch v. Ashe*, 320 Pa. 341 (1936). And the only right to lump sentences is that given by the act of 1937. Consequently, from and including June 26, 1937 (the date upon which section 1 of the act of 1937 became operative in accordance with the ruling of this department in Informal Opinion No. 1200), two or more consecutive sentences imposed at the same time by one court must be treated as a single sentence for the purposes of parol. But unless both of the foregoing elements are present consecutive sentences may not be so lumped.

Commutation by the Board of Pardons, in so far as it has to do with the treatment of consecutive sentences, is analogous to parole in the same circumstances (see Formal Opinion No. 458). Obviously the law enunciated by the appellate courts pertaining to the right of parole is equally applicable to the right to commute. If the Board of Parole must treat consecutive sentences as separate and distinct sentences in certain cases, then so must the Board of Pardons when it is commuting those sentences.

We must distinguish here a commutation of sentence under the authority of the Act of April 9, 1929, P. L. 177, 71 P. S. § 299, and Article IV, Section 9 of the Constitution of 1874, from a commutation of sentence under the Act of May 11, 1901, P. L. 166, 61 P. S. § 271 et seq., generally known as the Good Time Law.

A commutation under the Constitution and the act of 1929, vesting authority in the Pardon Board to commute sentences, has no limitations. And it is only with the class of cases falling under this constitutional and statutory authority that this opinion is concerned.

On the other hand, a commutation under the Good Time Law of 1901, is limited by that act to a specified number of months off for each year of service for good behavior. Under this law it is specifically provided that for purposes of estimating the amount of commutation, several terms of imprisonment shall be lumped.

We are of the opinion, therefore, that where a prisoner was sentenced after June 25, 1937, by one court at the same time to two or more consecutive sentences for purposes of commutation under Article IV, Section 9 of the Constitution of Pennsylvania and the Act of April 9, 1929, P. L. 177, 71 P. S. § 299, those sentences must be treated by the Board of Pardons as one sentence, the minimum of which will be the total of all the minimum sentences and the maximum of which will be the total of all the maximum limits of such sentences. Unless, however, each one of these elements, that is, the date of the sentences and the imposition of the sentences by one court at the same time, is present, then, in acting upon the application for commutation as aforesaid by a prisoner undergoing two or more sentences, imposed to run consecutively, the Board of Pardons must consider the terms of each sentence separately.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 472

Schools—Employes on military leave—Payments to dependents—Act of August 1, 1941, section 3(c)—Effect of ruling of unconstitutionality—Right to make payments accruing to date of ruling—Recovery of payments made before ruling—Preservation of benefits of position—Employment of substitutes.

1. Only those provisions of the Act of August 1, 1941, P. L. 744, contained in section 3(c) thereof, providing for payments to dependents of State employes on leave in military service, are unconstitutional and void.

2. The preservation by the Act of August 1, 1941, P. L. 744, of all benefits of the position of any employe of a school or vocational school district is valid and effective where such an employe has been granted military leave of absence.

3. The provisions of the Act of August 1, 1941, P. L. 744, which authorize the employment of a substitute where such services are necessary, are valid and effective.

4. Benefits not paid dependents of school or vocational school district employes on military leave prior to final adjudication of the constitutional invalidity of the statutory provision therefor cannot thereafter be paid up to the date of that adjudication, even though application for such payment had theretofore been filed.

5. Whether any effort should be made now or when the school or vocational school district employe returns to his employment, to recover monetary benefits paid prior to the final adjudication of the illegality of such payments is a purely administrative matter which is the prerogative of the Chief Executive of this Commonwealth insofar as State employes are concerned, and of the various school boards of the school or vocational school districts which have granted military leave to their employes.

Harrisburg, Pa., August 10, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This is a companion opinion to our Formal Opinion No. 465, which concerns itself with a request for advice relating to the effect of the decision of the Supreme Court of Pennsylvania in the case of *Kurtz v. City of Pittsburgh et al.*, 346 Pa. 362 (1943), upon the validity of the Act of August 1, 1941, P. L. 744, relating to the rights and privileges of public school employes who have been granted leaves of absence for military or naval service in time of war or national emergency.

In Formal Opinion No. 465, we considered the questions relating to the retirement benefits of school or vocational school employes as affected by reason of the decision of the Supreme Court in the *Kurtz* case, *supra*. In this opinion we shall direct our attention to a series of other questions propounded by you because of this same decision. We shall state and answer these questions seriatim:

1. Does the Act of August 1, 1941, P. L. 744, fall with the Act of June 2, 1917, P. L. 600?

The Act of August 1, 1941, P. L. 744, 24 P. S. § 2371.1 et seq., reserves all rights and privileges of public school employes who are granted military or naval leaves in time of war or during a state of national emergency. The title to the act provides as follows:

AN ACT

Requiring school boards in all school districts, and boards of directors of all vocational school districts, to grant leaves of absence to all school employes who shall volunteer or be called for military or naval service in time of war or during a state of national emergency; preserving certain contracts, salaries, increments, retirement rights, seniority, State contributions and grants to local school boards, eligibility lists, reemployment; authorizing school boards and boards of directors of vocational schools to employ substitutes in place of such employes; requiring school

districts and vocational school districts to make additional payments into the School Employees' Retirement Fund; reserving all rights and privileges of employes granted leaves of absence under the provisions herein, and superseding or repealing all contrary laws.

The contents of this title amply demonstrate the wide scope covered by the legislature. A study of this title and the various provisions of the act readily indicates that the subject matter concerns itself with much more than just the subject matter of the provisions of the act of 1917, *supra*. As a matter of fact, section 6 of the 1941 act, *supra*, repeals the provisions of the act of 1917 in so far as they are applicable to the employes of school and vocational school districts and all other inconsistent parts of the act. However, the underlying principle of the 1917 act was reenacted in the 1941 law in so far as school and vocational school employes are concerned. In section 3 (c), 24 P. S. § 2371.1, we have the following:

(c) During the leave of absence under the aforesaid conditions the school board or board of directors of vocational schools shall be required to pay to the dependent wife, dependent child or children or dependent parent or parents of the employe the difference between his regular salary and the salary paid to any substitute employe temporarily engaged because of such absence, but in no event more than half of the employe's regular salary from the school district or vocational school districts: Provided, That no school district or vocational school district shall pay to the dependent or dependents of any employe in military or naval service a total of more than two thousand dollars (\$2000) per annum.

No school district or vocational school district shall pay to the dependent or dependents of any employe more than the difference between the military or naval pay, including commutation and allowance of said employe, and the regular salary that said employe would have received if he were actually performing the duties of his regular position as an employe of the school district or vocational school district.

No allowance shall be paid under the provisions of this act to the dependent or dependents of any employe, if his military or naval pay, including commutation and allowance, exceeds the regular salary that said employe would have received if he were actually performing the duties of his regular position.

In Formal Opinion No. 465, we had occasion to quote from the majority decision in *Kurtz v. City of Pittsburgh et al.*, 346 Pa. 362, 386 (1943), as follows:

The Act of June 7, 1917, P. L. 600, as amended by the Act of June 25, 1941, P. L. 207 and by the Act of April 21, 1942, P. L. 50 and the Act of May 6, 1942, P. L. 106 so far as this original act and these later amendatory acts provide for the payment to dependent wives and children of public employes

in the armed services of the United States; of one half of the salary of such employees, not to exceed \$2000 per year, and the payments to parents of such sums as the employees had heretofore been accustomed to contribute to their dependent parents, are adjudged to be unconstitutional and void, and the City of Pittsburgh and each and all of its officers are enjoined from expending or causing to be expended any public funds under the provisions of these just cited acts and amendatory acts.

A cursory examination of the opinion of Chief Justice Maxey, discloses that the attack against the constitutionality of the Act of June 7, 1917, P. L. 600, as amended, *supra*, was based upon unconstitutional payments to dependents of State employees, and not to payments to State employees themselves. The court held on pages 373 and 374 as follows:

The State Employees' Retirement System and the Teachers' Tenure Act * * * bear no legal resemblance to the instant Act. The payments made to State employees and to teachers * * * are not gratuities made to the dependents of some employees * * *.

Section 9 of the 1941 act, 24 P. S. § 2371.8 provides the following:

The provisions of this act are severable; if any provision shall be construed or deemed to be in violation of the Constitution of the Commonwealth or of the United States, or otherwise invalid, then the other provisions herein shall not be effected thereby, but shall be enforced.

It is apparent from the decision in the Kurtz case that the Supreme Court only declared as unconstitutional that feature of the 1917 act which provided for the payment of monetary benefits to dependent or dependents of an employee. This being true, and when we consider the provisions of section 9 of the 1941 act, *supra*, it is apparent that as a result of the Kurtz decision, only the provisions of section 3 (c) of the 1941 act would be directly affected and invalidated as a consequence thereof. Therefore, all other provisions of the 1941 act remain unaffected and in full legal force.

2. Do the benefits of preservation of position through the granting of a military leave of absence continue to be valid and effective?

Section 1 of the 1941 act contains a statement of the legislative purpose in connection therewith and provides as follows:

The Congress of the United States of America has enacted and the President of the United States has approved a statute, entitled, "An act to provide for the common defense by increasing the personnel of the armed forces of the United States and providing for its training", in which it is provided that certain male citizens of the United States shall be liable for

training and service in the land or naval forces of the United States under a system of compulsory selective induction into such forces.

Under said statute and subsequent statutes of the United States of America and under the laws of the United States concerning the National Guard and the land and naval reserve forces, employes of school districts and vocational school districts in the Commonwealth of Pennsylvania may volunteer or be selected and assigned to military or naval service in defense of this nation.

It is hereby declared to be the intention of this act that such employes so affected shall retain all of the rights and privileges they shall have acquired prior to assignment to service under said Federal statutes, or any such rights and privileges they would have acquired or received, if they had not been assigned to such service; it is intended that such employes assigned to such service shall be considered in all respects to be continuing in the service of the school board or board of directors of vocational schools for which they were last working prior to such assignment to military or naval service. (Italics ours.)

The nature of the legislation is such that it calls for liberal interpretation. Even if this were not so, however, it is evident that the answer to your question presents no difficulty as reference to the provisions of the act which are not affected by the Kurtz decision clearly demonstrate that the legislature has preserved for any school or vocational school district employe, who is in military service of his country, his contract rights with the school district, as well as the right to return to his or her position, the rights to increments, seniority rights, retirement rights, credit for sababtical leave and protection on the eligibility list of any school or vocational school district. See Section 3 (a), (b), (d), (e) and (f), 24 P. S. § 2371.3 and Section 5 (a) and (b), 24 P. S. § 2371.5 of the Act of August 1, 1941, P. L. 744. Therefore, your second question is answered in the affirmative.

3. Do the provisions of the act authorizing employment of substitutes in all cases in which the services of a substitute are necessary for performing the duties of the position remain unaffected by the Supreme Court decision?

In view of the discussion previously contained in this opinion and also by virtue of our ruling in Formal Opinion No. 465, it is apparent that the answer to your third question is in the affirmative.

4. In those cases in which the application for military leave was filed and approved before the decision of the Supreme Court was handed down but no benefits had yet been paid, may all the benefits to which the applicant would have been entitled had the act stood

the test of constitutionality be paid up to the date on which the opinion was rendered, or must such benefits not paid prior to the date of the decision remain unpaid?

As we have previously pointed out herein the effect of the ruling of the Supreme Court in the Kurtz case, *supra*, was to render unconstitutional the provisions of section 3 (c) of the 1941 act which specifically provided for the payment of monetary benefits to dependent or dependents of any school or vocational school district employee. Its effect was to prohibit further payments of any monetary benefits. Our opinion in this respect concurs with the ruling contained in Form Letter No. 10 addressed to the heads of all departments, commissions, bureaus and officers of the Commonwealth issued by the Board of Review under date of March 24, 1943, wherein it was ruled that:

Benefits not already increased, restored, or paid, in compliance with our Form Letter #9, dated 3 March, 1943, will not be increased, restored or paid.

5. Should an effort be made, either now or when the employee returns to his employment, to recover benefit overpayments resulting from retroactive "change in status" of the applicant?

The answer to your last question does not entail any legal interpretation but rather concerns itself with a matter purely administrative in character which is the prerogative of the Chief Executive of this Commonwealth in so far as State employees are concerned. In cases involving school and vocational school employees it is an administrative matter for their school board members.

Reference again to Form Letter No. 10 of the Board of Review hereinbefore cited indicates the following:

Until and unless you are hereafter notified otherwise, no action or attempt shall be taken or made to recover any of the aforesaid benefits paid up to and including Sunday, 21 March 1943.

This ruling still applies in so far as State employees are concerned and nothing has occurred which necessitates any change of this particular ruling.

In view of the foregoing, it is our opinion:

1. That only the provisions of sections 3 (c) of the Act of August 1, 1941, P. L. 744, 24 P. S. § 2371.3, became null and void as a result of the decision of the Supreme Court of this Commonwealth in the case of *Kurtz v. City of Pittsburgh et al.*, 346 Pa. 362 (1943).

2. The preservation of all benefits of a position of any employee of a school or vocational school district continues to be valid and effective.

tive where such an employe has been granted military leave of absence under the provisions of the Act of August 1, 1941, P. L. 744, *supra*, despite the ruling in the Kurtz case, *supra*.

3. The provisions of the Act of August 1, 1941, P. L. 744, *supra*, which authorize the employment of a substitute where such services are necessary remain unaffected by the decision in the Kurtz case, *supra*.

4. In those cases where applications for military leave for any school or vocational school district employe were filed and approved before the decision of the Supreme Court in the Kurtz case was rendered, but no benefits had yet been paid, such benefits cannot be paid.

5. Whether any effort should be made now or when the school or vocational school district employe returns to his employment, to recover monetary benefits paid previous to the effective ruling in the Kurtz case, *supra*, is a purely administrative matter which is the prerogative of the Chief Executive of this Commonwealth in so far as State employes are concerned, and of the various school boards of the school or vocational school districts which have granted military leave to their employes.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 473

Schools—Salary increases—Act of May 28, 1943—Scope—Substitute teachers—Teachers receiving less than \$1,000 a year—Computation of increases—Cost of living increases—Mandated salary increases—New employes—Effect of prior employment in different district—Application of salary above minimum against increases.

1. The term "members of the teaching and supervisory staffs of each school district" as used in the Act of May 28, 1943 (No. 329), comprehends substitute teachers and the act is therefore applicable to them.

2. The cost of living increases set forth in the schedule contained in the Act of May 28, 1943 (No. 329), are to be added to the 1941-1942 salary received by a member of the teaching or supervisory staff and to this there is to be added any mandated salary increases which have accrued under the law.

3. The term "who were not employed by a school district until after the end of the school term 1941-1942" as used in the Act of May 28, 1943 (No. 329), refers

to members of a teaching or supervisory staff who were not employed by the particular school district prior to and during the school term 1941-1942, even though they may have been employed as teachers elsewhere.

4. Under the Act of May 28, 1943 (No. 329), any amount of permanent salary above the amount of such minimum salary paid by a school district to a new member of a teaching staff may at the discretion of the board of school directors be deducted from the amount of increases provided in the said act, provided that such deductions are made uniformly among all such members.

5. Teachers holding substandard certificates, who have, under section 1210 of the School Code, been receiving less than \$1,000 a year as salary from a school district, are not within the terms of the Act of May 28, 1943 (No. 329), and are therefore not entitled to any salary increases provided thereunder.

Harrisburg, Pa., August 11, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You have requested our advice on certain matters relating to the administration of the Act of May 28, 1943, P. L. 786, Act No. 329.

In interpreting laws, the legislative intent controls. Section 51 of Article IV of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 551 provides as follows:

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; * * *

With these principles in mind we shall consider your various questions which we shall state and answer seriatim.

1. The act provides salary increases for members of the teaching and supervisory staffs of each school district.

Does the term "members of the teaching and supervisory staffs" include substitutes employed by school districts?

The question you ask has unusual importance by reason of the war, since many substitutes who are taking the place of those absent in

military service, while replacements in designation, are in effect regulars, due to the lengthy period they will be required to serve as a result of the war.

The purpose of the legislature in enacting this law is expressed in the first portion of section 1 which reads as follows:

In order to provide for the maintenance and support of a thorough and efficient public school system and to meet the increased cost of living during the present emergency and to enable the teachers of this Commonwealth who are paid in the lower salary brackets to maintain for themselves and their families a decent standard of living the salaries of the following members of the teaching and supervisory staffs of each school district are hereby increased by the following amounts * * *

The provisions of the Act of April 6, 1937, P. L. 213, as amended, commonly known as the Teachers' Tenure Act, amended section 1201 of the Act of May 18, 1911, P. L. 309, 24 P. S. § 1121, known as The School Code, and this section was further amended by the Act of May 21, 1943, P. L. 273, Act No. 127, to read as follows:

The board of school directors in every school district in this Commonwealth shall employ the necessary qualified *professional employes, substitutes, and temporary professional employes* to keep the public schools open in their respective districts in compliance with the provisions of this act.

The term "professional employe" as used in this act, shall include teachers, supervisors, supervising principals, principals, directors of vocational education, dental hygienists, visiting teachers, school secretaries the selection of whom is on the basis of merit, as determined by eligibility lists, school nurses who are certified as teachers and any regular full-time employe of a school district who is duly certified as a teacher.

The term "substitute" shall mean any individual who has been employed to perform the duties of a regular professional employe during such period of time as the said regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe who is absent or who has been employed with the approval of the district or county superintendent and of the Superintendent of Public Instruction during the present war-time emergency and for a period not longer than one year beyond the cessation of hostilities to fill a vacancy until an acceptable qualified teacher can be obtained.

The term "temporary professional employe" shall mean any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular

professional employe whose services have been terminated by death, resignation, suspension or removal.

* * * * *

Temporary employes shall for all purposes, except tenure status, be viewed in law as full-time employes, and shall enjoy all the rights and privileges of regular full-time employes, and the Commonwealth shall pay to the school district for each temporary employe the same per centum or share of salary, provided by law, as in the case of professional employes; and in cases of temporary employes of approved local or joint vocational industrial, vocational home economics, and vocational agricultural schools or departments, the school district shall be reimbursed, as provided by law, for each of their full-time salaries, just as though they were professional employes. Such reimbursement from the Commonwealth shall not be made for substitutes except in cases of sabbatical leave. (Italics ours.)

The phrase, "members of the teaching and supervisory staff", is not defined in The School Code or any other act of the General Assembly. The phrase appears to have been used for the first time in the Act of April 28, 1921, P. L. 328, amending the Act of May 18, 1911, P. L. 309, known as The School Code, 24 P. S. § 1 et seq. Section 1210 of The School Code, Clause 19 (a), 24 P. S. § 1180, reads as follows:

Of the salaries herein provided for full-time teachers, supervisors, principals and all other full-time members of the *teaching and supervisory staff* in the public schools of the Commonwealth, the Commonwealth shall pay * * *. (Italics ours.)

In section 1210, clause 20, 24 P. S. § 1181, the following appears:

On or before the first day of November of each year, each school district of the first and second class, and each school district of the third class having a district superintendent, shall file a certificate with the Superintendent of Public Instruction, in such form as he may prescribe and on blanks to be furnished by him, showing the number of full-time teachers, supervisors, principals, and other full-time members of the *teaching and supervisory staffs*, the number thereof employed in elementary schools and the number employed, respectively, in three and four year junior high schools, the certificates held by each, and the compensation paid each for the current school year, and showing further the number of part-time teachers, supervisors, and principals employed in extension schools and classes established as herein provided, the certificates held by each, and the compensation paid each during the preceding school year. * * * (Italics ours.)

The phrase is also used in clause 25 of section 1210 of The School Code, as well as in clause (k) of section 1216. There is nothing in the act of May 28, 1943, supra, which indicates that the substitute teacher

is to be excluded from the benefits of its provisions. The substitute teacher is as much affected by the increased cost of living as the professional employe. It is as important for substitute teachers to maintain for themselves and their families a decent standard of living as it is for other members of the teaching profession. The school districts will be seriously handicapped in obtaining and retaining substitute teachers if these are to be paid less than the regular teachers.

The School Code has defined "substitute", "temporary professional employe" and "professional employe", and it would seem that if only certain of these employes were to come within the terms of Act No. 329, the General Assembly would have used one or more of these definite terms. However, the General Assembly used none of these terms but did use the more general term "member of the teaching and supervisory staff", which is a very broad term and which, in our opinion, is all inclusive, unless there is something in the act which narrows its construction. The only exceptions that we can find in the act do not include substitute teachers.

For instance, Act No. 329, *supra*, reads in part as follows:

* * * Members of the teaching and supervisory staffs of a school district who are not employed by the district for the whole of either of the school terms for which an increase in salary is provided for hereby shall receive only the proportionate amounts payable for the payroll periods during which he or she has been employed by the district.

This provides for a situation where a teacher enters upon his or her duties at some time other than the beginning of a term.

The act increases the salaries for each member of the teaching and supervisory staff who, at the end of the school term 1941-1942, received salaries at the rate of \$1,000 and more, up to and including those who received \$3,499. This schedule by its very terms excludes both those who were receiving less than the minimum and those who were receiving more than the maximum. Having made these exceptions, it would seem that if the substitute teacher was to be excluded, the General Assembly would have so provided, and in the absence of any condition, proviso or other exception, we cannot read such exception into the act.

The term "substitute" is also used in the Act of August 1, 1941, P. L. 744, which is entitled:

An act requiring school boards in all school districts, and boards of directors of all vocational school districts, to grant leaves of absence to all school employes who shall volunteer or be called for military or naval service in time of war or

during a state of national emergency; preserving certain contracts, salaries, increments, retirement rights, seniority, State contributions and grants to local school boards, eligibility lists, reemployment; authorizing school boards and boards of directors of vocational schools to employ substitutes in place of such employes; requiring school districts and vocational school districts to make additional payments into the School Employes' Retirement Fund; reserving all rights and privileges of employes granted leaves of absence under the provisions herein, and superseding or repealing all contrary laws.

This act has been the subject of Formal Opinions Nos. 465 and 472. Section 4 of said act reads:

During the period of said leave of absence, if a qualified substitute is employed, the Commonwealth shall pay the school board or board of directors of vocational schools the full amount of State contribution or grant as if the said employe were performing his regular school duties for the said school board or board of directors of vocational schools.

This act shows a definite intention upon the part of the General Assembly to see to it that the school districts will not suffer financial loss by reason of school teachers entering the military services. Many substitutes are engaged to replace men in the military services.

It is well to keep in mind that the General Assembly made an appropriation in The General Appropriation Act of June 4, 1943, Act No. 77-A, of a definite amount to take care of these increases, and that if the appropriation is insufficient to pay the specifically scheduled increases, reductions shall be made on a uniform percentage basis. The Appropriation Act of June 4, 1943, *supra*, reads in part:

For reimbursing school districts upon the increases in salaries of school teachers as provided in legislation enacted by the General Assembly session of one thousand nine hundred and forty-three the sum of twenty-four million three hundred thousand dollars (\$24,300,000).

There is nothing in this act which would exclude substitute school teachers.

Therefore, we see no intent by the General Assembly to exclude the substitute teacher. We do see, however, an effort to adjust on a proportional basis the salary of a teacher employed for a part of the school term with that of a teacher who serves for the full term. The mention of these exceptions excludes any not mentioned. Accordingly, we conclude that substitute teachers are members of the teaching and supervisory staff and are therefore within the provisions of the act under discussion.

2. The act provides that certain salaries for the school terms 1943-1944 and 1944-1945 are to be increased by specific amounts which are determined by the amounts of such salaries at the close of the 1941-1942 school term. The act also provides that the required increases shall be in addition to any increments which may accrue under the law. In determining the salary required for any particular individual for the school terms 1943-1944 and 1944-1945, do we add the indicated cost of living increase to the 1941-1942 salary and then add any increments which have accrued under the law, or do we add the cost of living increase to the salary being paid the individual for the school year 1942-1943 and then add any mandated increments which have accrued?

Section 1, inter alia, reads as follows:

* * * the salaries of the following members of the teaching and supervisory staffs of each school district are hereby increased by the following amounts: For each of the two school terms of one thousand nine hundred forty-three, one thousand nine hundred forty-four (1943-1944), and one thousand nine hundred forty-four, one thousand nine hundred forty-five (1944-1945); To members of the teaching and supervisory staffs who at the end of the school term one thousand nine hundred forty-one, one thousand nine hundred forty-two, (1941-1942), received salaries * * *

The legislature provided that the temporary increases in salary were to be made in accordance with the provided schedule. The increases set forth in detail in section 1 of the act are in addition to the salaries received by members of the teaching or supervisory staff for the school year 1941-1942, if employed by a school district during that year. To this amount are to be added any increments which any member of the teaching or supervisory staff may become entitled to under existing laws as reference to section 1 indicates that the legislature, among other things, provided that:

* * * The additional amounts of salary provided for hereby shall not include any increments any such member of the teaching or supervisory staffs may become entitled to under existing law during the period covered by the provisions of this act but they shall also be entitled to the full amount of such increments.

Therefore, the increased cost of living percentage is to be added to the 1941-1942 salary, to which also is to be added any mandate salary increases which have accrued under the law.

3. The act refers to members of the teaching and supervisory staff who were not employed by a school district until after the end of the school term 1941-1942, and provides that the additional amounts

for such persons shall be paid on the basis of the minimum salary prescribed by section 1210 of the school laws. Does the expression "who were not employed by a school district" mean not employed by the school district in which the teacher is employed for the school terms 1943-1944 and 1944-1945, or does it mean not employed in any school district?

In referring once more to section 1 we find in addition to its other provisions the following:

In the case of members of the teaching or supervisory staffs who were not employed by a school district until after the end of the school term one thousand nine hundred forty-one, one thousand nine hundred forty-two (1941-1942), the additional amounts hereinbefore provided for shall be paid on the basis of the minimum salary prescribed by section one thousand two hundred ten of the Public School Code of May eighteenth one thousand nine hundred eleven (Pamphlet Laws 309), and its amendments, for the position held in the district and any part of any amount of permanent salary above the amount of such minimum salaries that is paid by any school district may at the discretion of the board of school directors (or board of public education) be deducted from the amount of the increase provided for hereby. All deductions so made shall apply uniformly to all members of the teaching and supervisory staffs in the district. * * *

Our concern in this inquiry is the intention of the legislature in using the words "who were not employed by a school district until after the end of the school term * * * 1941-1942." In referring to section 1210, *supra*, of the School Code, the legislature was referring to what is commonly known as the Edmonds Act, which provides the minimum schedule of salaries payable to the employes of the teaching and supervisory staff of the various school districts in this Commonwealth. In doing this the legislature must have intended to mean, and was referring to, members of the teaching and supervisory staff who were not employed by the school district in question during the school term 1941-1942, because the Edmonds Act provides the minimum schedule of salaries only in those cases where members of the teaching or supervisory staff are employed by a new school district. Such a conclusion is in perfect keeping with the purpose of the legislature, not only to provide against the increased cost of living, but also to keep members of the teaching and supervisory staff in their positions with their respective school districts and to prevent the law of supply and demand from controlling the situation.

Accordingly, we must interpret these words to mean members of the teaching and supervisory staff who were not employed by the particular district.

4. In the case of members of the teaching or supervisory staff who were not employed by a school district until after the end of the 1941-1942 school term, the act states that any amount of permanent salary above the amount of such minimum salary that is paid by a school district may, at the discretion of the board of school directors, be deducted from the amount of the increase provided for in Act No. 329. However, the further statement is made that all deductions so made shall apply uniformly to all members of the teaching and supervisory staff in the district. We raise a question as to whether we should interpret this literally, or if we should interpret it to mean that all deductions so made shall apply uniformly to all members of the teaching and supervisory staff who were not employed in the district until after the end of the 1941-1942 school term?

This question concerns itself with an interpretation of section 1 which was quoted under your third inquiry. It is our opinion that the legislature intended to refer only to such employees of the teaching and supervisory staff who were not employed by a school district until after the end of the 1941-1942 school term. This conclusion is strengthened by the fact that the legislature, in so far as these "new" members of the teaching or supervisory staff are concerned, provided that "any amount of permanent salary above the amount of such minimum salary that is paid by any school district may, at the discretion of the board of school directors (or board of public education), be deducted from the amount of the increases provided for hereby."

The fact that there exist contract rights of the members of the teaching or supervisory staff of school districts which are protected by the Teachers' Tenure Act makes it obvious that the legislature could be referring only to new members of the teaching or supervisory staff hired by a school district after the end of the school term 1941-1942. It is also to be noted that if such deductions are made by a school district, they must be made uniformly. This means "uniformly among all new members of the teaching or supervisory staff" because our situation in this respect is not controlled by the same uniformity rule as that which obtains in tax matters. See *Smith v. Phila. School District et al.*, 334 Pa. 197 (1939).

5. Our records indicate that there were a few teachers employed in school districts in Pennsylvania during the school year 1941-1942 who were receiving salaries less than \$1,000. This is because subsection 13 of section 1210 of The School Code provides that teachers with substandard certificates receive \$75.00 or \$85.00 per month according to the type of substandard certificate held. If such teachers are employed during the school terms 1943-1944 or 1944-1945, are the salaries which the respective districts are required to pay them during these school terms affected by the provisions of the act?

The legislature made no mention in the act which we are considering of teachers whose salaries are less than \$1,000 a year. The temporary salary increases are granted to those teachers mentioned in the schedules set forth in the act.

Interpretation of laws is governed by well recognized principles of statutory construction; and no principle is more clearly established in our jurisprudence in ascertaining legislative intent than the maxim "Expressio unius est exclusio alterius", which in 31 C. J. 396, Note 95, is defined as meaning, "The inclusion of one is the exclusion of another."

It is, therefore, our opinion that:

1. The term "members of the teaching and supervisory staffs of each school district" as used by the legislature in the provisions of the Act of May 28, 1943, P. L. 786, Act No. 329, includes "substitute teachers."

2. The cost of living increases set forth in the schedule contained in the act are to be added to the 1941-1942 salary received by a member of the teaching or supervisory staff, and to this added any mandated salary increases which have accrued under the law.

3. The term "who were not employed by a school district until after the end of the school term * * * 1941-1942", as used in the act, refers to members of a teaching or supervisory staff who were not employed by the particular school district prior to and during the school term 1941-1942.

4. The legislature by providing that any amount of permanent salary above the amount of such minimum salary paid by a school district may, at the discretion of the board of school directors, be deducted from the amount of increase provided for in said act, intended that such deductions must be made "uniformly" among all new members of a teaching or supervisory staff.

5. Teachers who have been receiving less than \$1,000 a year as salary from a school district are not within the terms of the Act of May 28, 1943, P. L. 786, Act No. 329, and therefore not entitled to any salary increases thereunder.

Very truly yours,

DEPARTMENT OF JUSTICE, •

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 474

Taxation—Inheritance taxes—Collection by Registers of Wills and certain other employes—Surety bonds—Premiums—How payable—Employes of Secretary of Revenue—Salaries—How payable—Acts of April 8, 1919, P. L. 781; July 8, 1919, P. L. 782; June 20, 1919, P. L. 52; April 9, 1929, P. L. 343, section 1201(f); April 8, 1937, P. L. 286; June 21, 1937, P. L. 1865; April 9, 1929, P. L. 177, sections 509, 709, 2404(a); May 21, 1943, P. L. 369; May 21, 1943, P. L. 380; April 23, 1941, P. L. 71.

1. Before May 21, 1943, the premiums on surety bonds of Registers of Wills as agents for the collection of inheritance taxes had to be paid by the Registers of Wills, and might not be paid from inheritance tax collections; but after May 21, 1943, such premiums may be paid from inheritance tax collections.

2. Premiums on the surety bonds of employes assisting the Registers of Wills in the collection of inheritance taxes in counties having less than 1,500,000 population should not be paid from inheritance tax collections; such bonds should be secured through the Department of Property and Supplies, if they are deemed necessary by the Executive Board. The same rule applies to employes in counties having more than 1,500,000 population after May 21, 1943. The premiums for surety bonds of such employes in counties having a population of over 1,500,000, prior to May 21, 1943 might be paid from inheritance tax collections only in those instances where your department is satisfied that the procurement of such bonds constitutes "a reasonable expense" incurred in the collection of the inheritance tax by the Registers of Wills.

3. Subject to the supervisory powers of the Secretary of Revenue, the salaries of employes of the Auditor General who assisted the Registers of Wills and the Department of Revenue in the collection of inheritance taxes should be paid from inheritance tax collections. Similarly the salaries of employes now appointed by the Secretary of Revenue to assist the Registers of Wills in the collection of inheritance taxes should be paid from inheritance tax collections.

Harrisburg, Pa., August 18, 1943.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have the request of the Department of Revenue to be advised concerning certain questions which have arisen in connection with the collection of inheritance taxes by Registers of Wills and certain other employes. We shall discuss the questions in the order submitted.

Your first inquiry is as follows:

1. Should premiums on the surety bonds of Registers of Wills, as agents for the collection of Inheritance Tax, be paid from Inheritance Tax collections or by the Registers of Wills?

This question has been answered by section 1 of the Act of July 8, 1919, P. L. 782, as last amended by the Act of May 21, 1943, P. L. 369, Act No. 171, 72 P. S. § 2482, which now reads as follows (italics denote additions, brackets denote deletions):

* * * all clerks *appraisers investigators* and others persons [other than appraisers] required to assist any register of wills in [any county of this Commonwealth having a population of less than one million five hundred thousand inhabitants] *any county of the Commonwealth* in collecting and paying over inheritance taxes shall be appointed and their compensation fixed by the [Auditor General] *Secretary of Revenue* and upon his approval and order shall be paid out of the said taxes in the hands of the registers together with other necessary expenses incident to the collection of such taxes *including the payment of the cost of registers' bonds to the Commonwealth.*

This act, as above amended, now expressly provides that the cost of registers' bonds is to be paid out of inheritance tax collections in the hands of the registers. The amendment became effective on May 21, 1943.

However, the registers had no authority to pay the cost of their bonds out of inheritance tax collections prior to May 21, 1943. This conclusion was reached under the Act of June 20, 1919, P. L. 521, as amended, 72 P. S. § 2301 et seq., in an Informal Opinion dated April 14, 1924, by William A. Schnader, then Special Deputy Attorney General, to Samuel S. Lewis, then Auditor General, as follows:

Nowhere in the Act of 1919 nor elsewhere in the statutes is any provision made for the payment by the Commonwealth of premiums on bonds required to qualify Registers of Wills as above set forth. It is true that the Auditor General is authorized by Article II, Section 15 of the Act of 1919 to allow to the Register of Wills "*costs of advertising and other reasonable fees and expenses incurred in the collection of the tax.*" Premiums on the bonds necessary to qualify Registers of Wills to collect the tax are not, however, expenses incurred in the collection of the tax. Until they have qualified by filing the necessary bond, Registers are not the agents of the Commonwealth, and obviously have no power to incur any expenses.

There being no statutory authority for the payment of premiums on those bonds out of funds of the Commonwealth you are advised that it would be unlawful for you to allow them to be so paid. (Italics ours.)

The foregoing Informal Opinion was controlling until May 21, 1943, because there had been no change in the provisions of section 15 of the said act of 1919, 72 P. S. § 2351. Moreover, the language of that section was repeated in section 1201 (f) of The Fiscal Code, the Act of April 9, 1929, P. L. 343, 72 P. S. § 1201 (f), wherein the Department of Revenue was given the following power in connection with the collection of transfer inheritance taxes:

(f) In settling the accounts of registers, or of any county treasurer who has acted prior to the qualification of the register of wills of his county, to credit the accounting officer and deduct from the settlement all commissions due such officer for collecting transfer inheritance taxes, the compensation and expenses paid with the approval of the Auditor General to investigators, appraisers, and expert appraisers, *the costs of advertising, and all other reasonable fees and expenses incurred in the collection of the tax;* (Italics ours.)

A similar conclusion was reached in Formal Opinion No. 64 of this department, dated September 21, 1932, 1931-1932, Op. Atty. Gen. 236, as follows:

* * * registers of wills are required by the Act of June 7, 1917, P. L. 415, Section 1, subsection 2, to file statutory bonds with the Secretary of the Commonwealth. These bonds are given to secure the payment of taxes or commissions which these respective acts direct these officers to collect and transmit to the Commonwealth. See also Sections 611 and 613 of The Fiscal Code (Act of April 7, 1929, P. L. 343).

* * * * *

The premium to be paid for any bond which is required to be given to the Commonwealth and filed with the Secretary of the Commonwealth must be paid by the officer tendering the bond in the absence of statutory authority for payment from public funds. There is no authority for payment by the Commonwealth of the premium on bonds required by the Act of April 6, 1830, P. L. 272, or the Act of June 7, 1917, P. L. 415, Section 1.

Accordingly, we are of the opinion that the premiums on the surety bonds of Registers of Wills as agents for the collection of inheritance tax had to be paid by the Registers of Wills prior to May 21, 1943, and could not be paid from inheritance tax collections until after that date.

Your second inquiry is as follows:

2. Should premiums on the surety bonds of employes collecting Inheritance Tax for and on behalf of the Registers of Wills, be paid from Inheritance Tax collections or by the Registers of Wills?

Prior to the amendatory Act No. 171, approved May 21, 1943, cited above, section 1 of the Act of July 8, 1919, P. L. 782, 72 P. S. § 2482, distinguished between the manner of appointment of employes assisting the Registers of Wills in collecting inheritance taxes in counties having less than 1,500,000 inhabitants, and in those counties having a population in excess of that number.

Prior to the amendment, that section read as follows:

All clerks and other persons, other than appraisers, required to assist any register of wills, in any county of this Commonwealth having a population of less than one million five hundred thousand inhabitants, in collecting and paying over inheritance taxes shall be appointed and their compensation fixed by the Auditor General, and, upon his approval and order, shall be paid out of the said taxes in the hands of the registers, together with other necessary expenses incident to the collection of such taxes.

In the Informal Opinion of April 14, 1924, cited *supra*, we find the following ruling with respect to the said section:

In counties having a population of more than one million five hundred thousand (1,500,000) inhabitants the clerks who assist the Register of Wills in the collection of inheritance taxes are not State employes. There is no authority for their appointment by the Auditor General nor is he authorized to fix their compensation. * * *

The Fiscal Code continued the pre-existing powers of the Auditor General regarding the appointment of clerks required to assist the Registers of Wills in the collection of inheritance taxes. As originally enacted, section 407 of The Fiscal Code provided (72 P. S. § 407):

The Auditor General shall continue to appoint, or approve the appointment, fix the compensation, and approve or disapprove the expense accounts, of such clerks, investigators, appraisers, expert appraisers, permanent appraisers, and other employes, as may be necessary to enable the registers of wills of the several counties to collect transfer inheritance taxes upon estates of resident decedents as now provided by law.

This section has also been amended by the Act of May 21, 1943, P. L. 380, Act No. 178, so as to vest in the Secretary of Revenue the power to appoint such clerks, investigators, appraisers, etc.

We conclude from the foregoing statutes that the Auditor General did not acquire the power under The Fiscal Code to appoint clerks to assist the Register of Wills in the collection of inheritance taxes in counties having a population of more than 1,500,000. Thus, we find that, prior to May 21, 1943, such clerks were not State employes, although the clerks performing a similar function in the remaining counties of the Commonwealth were State employes.

In view of the 1943 amendment to section 1 of the Act of July 8, 1919, P. L. 782, quoted *supra*, all clerks, appraisers, investigators and other persons required to assist the Register of Wills in the collection of inheritance taxes are to be appointed and the compensation fixed

by the Secretary of Revenue. Therefore, all of such persons are State employes.

The bonding of State employes is governed by section 2404 (a) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as last amended by the Acts of April 8, 1937, P. L. 286, and June 21, 1937, P. L. 1865, 71 P. S. § 634- (a), which authorizes the Department of Property and Supplies to procure surety bonds for the faithful performance of the official duties of State officers and employes, and to pay for such bonds out of moneys appropriated to it. Section 509 of The Administrative Code of 1929, 71 P. S. § 189, prohibits other administrative departments, boards or commissions from purchasing bonds except through the Department of Property and Supplies as purchasing agency (with certain exceptions not material here). Under section 709 (g) of The Administrative Code of 1929, as last amended by the Act of April 23, 1941, P. L. 21, 71 P. S. § 249 (g), the Executive Board is given authority to approve recommendations for the bonding of State employes and to fix the amount of such bonds as may be required.

In view of the foregoing provisions of The Administrative Code of 1929, any bonds covering clerks, investigators, appraisers, or other employes appointed either by the Auditor General or by the Secretary of Revenue must be purchased through the Department of Property and Supplies after a ruling by the Executive Board requiring such bonds and fixing the amount thereof. Consequently, there is no authority for the payment of the premiums for such bonds from inheritance tax collections. Such was also the ruling in the Informal Opinion of April 14, 1924, *supra*.

As to the clerks in counties having a population of more than 1,500,000, who, as pointed out *supra*, were not State employes prior to May 21, 1943, it must be determined whether the expense of the premiums for their surety bonds are deductible as "reasonable fees and expenses incurred in the collection of the tax." Informal Opinion of April 14, 1924, rules on that point as follows:

* * * Under this section you have the right to approve for payment out of taxes collected by the Registers the compensation of clerical assistants if you regard them so reasonably necessary for the collection of the tax. The clerks employed by the Registers in such cases are, however, his employes and not the employes of the Commonwealth. If you feel that it is necessary for the protection of the Commonwealth that these employes be bonded, premiums on their bonds would appear to be expenses reasonably incurred in the collection of the tax. We desire to point out, however, that the Register of Wills himself must be bonded to protect the Commonwealth and as the clerks employed by him are not State em-

ployes it would not be unreasonable to require him to attend to the bonding of these clerks for his own protection and without expense to the Commonwealth.

We are of the opinion that the foregoing ruling is sound. Therefore, whether or not the premiums on the surety bonds of such non-State employes may be paid from inheritance tax collections in counties having a population of over 1,500,000, must be determined by your department on the basis of whether such premiums are reasonable expenses incurred in the collection of the tax. However, in other counties, there is no authority for paying such premiums out of inheritance tax collections, and such employes should be bonded, if at all, under the provisions of The Administrative Code of 1929, *supra*.

Your final question is:

3. Should the salaries of employes of the Auditor General [now the Secretary of Revenue] who assist the Registers of Wills in the collection of Inheritance Tax, be paid from Inheritance Tax collections or by the Registers of Wills?

Prior to the 1943 amendment, the Act of July 8, 1919, P. L. 781, *supra*, specifically provided that the compensation for clerks appointed by the Auditor General to assist any Register of Wills in a county having less than 1,500,000 inhabitants "shall be paid out of the said taxes in the hands of the Registers." Of course, the returns of the Registers of Wills in making such compensation are subject to the supervisory power of the Department of Revenue, and this opinion is not intended to construe the relative jurisdictions of the Auditor General and the Secretary of Revenue regarding such employes prior to the 1943 amendments.

Since the employes assisting the Register of Wills in a county having more than 1,500,000 inhabitants prior to May 21, 1943, were not employes of the Auditor General, they do not fall within the scope of your third question. Moreover, as pointed out in the Informal Opinion of April 14, 1924, the salaries of such employes could be deducted as necessary expenses by the Register of Wills.

The Act of May 21, 1943, P. L. 369, Act No. 171, quoted *supra*, amending the said act of 1919, specifically provides that the compensation for such clerks, appraisers, investigators, and other persons required to assist any Register of Wills, as approved by the Secretary of Revenue, "shall be paid out of the said taxes in the hands of the registers."

To summarize, you are advised as follows:

1. Before May 21, 1943, the premiums on surety bonds of Registers of Wills as agents for the collection of inheritance taxes had to be

paid by the Registers of Wills, and might not be paid from inheritance tax collections; but after May 21, 1943, such premiums may be paid from inheritance tax collections.

2. Premiums on the surety bonds of employes assisting the Registers of Wills in the collection of inheritance taxes in counties having less than 1,500,000 population should not be paid from inheritance tax collections; such bonds should be secured through the Department of Property and Supplies, if they are deemed necessary by the Executive Board. The same rule applies to employes in counties having more than 1,500,000 population after May 21, 1943. The premiums for surety bonds of such employes in counties having a population of over 1,500,000, prior to May 21, 1943 might be paid from inheritance tax collections only in those instances where your department is satisfied that the procurement of such bonds constitutes "a reasonable expense" incurred in the collection of the inheritance tax by the Registers of Wills.

3. Subject to the supervisory powers of the Secretary of Revenue, the salaries of employes of the Auditor General who assisted the Registers of Wills and the Department of Revenue in the collection of inheritance taxes should be paid from inheritance tax collections. Similarly, the salaries of employes now appointed by the Secretary of Revenue to assist the Registers of Wills in the collection of inheritance taxes should be paid from inheritance tax collections.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

GEORGE W. KEITEL,
Deputy Attorney General.

OPINION No. 475

State Board of Vocational Education—School Districts—Expenditures—Reimbursement—Discretionary Powers—Department of Public Instruction.

The approval of the State Board for Vocational Education, as provided for in the statutes dealing with vocational education is not merely ministerial, but involves the use of discretion.

School districts cannot be reimbursed by the Commonwealth for expenditures made in furtherance of vocational education, unless such activity had been approved by the State Board for Vocational Education.

Reimbursement to school districts for vocational education cannot be in excess of funds appropriated by the legislature for such purpose, or otherwise available.

Harrisburg, Pa., August 20, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion concerning the financing of vocational educational programs and the authority of the Department of Public Instruction with reference thereto.

An examination of the statutes concerning vocational education reveals that section 401 of the Act of May 18, 1911, P. L. 309, as amended, 24 P. S. § 331, known as the School Code, provides:

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, * * * and may establish, equip, furnish, and maintain the following additional schools or departments for the education and recreation of persons residing in said district * * *:

* * * * *

Vocational schools.

Section 1303 of the Act of April 9, 1929, P. L. 177, known as The Administrative Code of 1929, 71 P. S. § 353, provides:

The Department of Public Instruction shall have the power, and its duty shall be:

(a) To administer the laws of this Commonwealth relating to vocational education, industrial education * * * as defined in said laws;

(b) To investigate the need for and aid in the establishment of, supervise, inspect, and *approve, for the purpose of reimbursement on the part of the State,* schools, departments, and *courses,* for agricultural, industrial, commercial, and home economics, mining, and other vocational and practical education, as well as continuation schools, when maintained as a part of the public school system of the Commonwealth; (*Italics ours.*)

The Act of May 31, 1913, P. L. 138, as amended, 24 P. S. § 1651, provides for the establishment and regulation of vocational schools by school districts. Section 2 of said act, 24 P. S. § 1652, reads:

The State Board for Vocational Education is hereby authorized and directed to investigate and to aid in the introduction of vocational industrial, vocational agricultural, vocational homemaking, and vocational distributive occupational education; to assist in the establishment of schools and departments for the aforesaid forms of education, and to inspect and *approve such schools* or departments, as are hereinafter provided. * * * (*Italics ours.*)

Section 8 of said act, 24 P. S. § 1659, provides:

Vocational industrial * * * schools or departments shall, *so long as they are approved* by the State Board for Vocational Education as to organization, control, location, equipment, courses of study, qualifications of teachers, methods of instruction, conditions of admission, employment of pupils, and expenditures of money, *constitute approved local or joint vocational schools. School districts maintaining such approved local or joint vocational schools or departments shall receive reimbursement, as hereinafter provided.* (Italics ours.)

Section 9 of said act, as amended, 72 P. S. § 4281, provides:

The Commonwealth, in order to aid in the maintenance of *approved* local or joint vocational industrial * * * schools, * * * shall, as provided in this act, pay annually from the treasury to school districts and unions of school districts, maintaining such schools or departments, by order on the State Treasurer, signed by the Superintendent of Public Instruction, as the executive officer of the State Board for Vocational Education, *from funds appropriated*, by the Legislature for that purpose or otherwise available, and in addition to the amounts * * * computed in accordance with the following schedules: * * * (Italics ours.)

Section 10 of said act, 72 P. S. § 4282, reads as follows:

On or before the first Wednesday of January of any year in which the regular session of the Legislature is held, the State Board for Vocational Education shall present to the Legislature an estimate of the amount of money necessary to meet the expenditures to be incurred in the administration of this act for the two school years beginning with the first day of the ensuing June; and the amount necessary to meet the claims of school districts and unions of school districts maintaining *approved vocational schools* or departments, under the provisions of this act for the two school years beginning with the first day of the preceding July. On the basis of such a statement, the Legislature shall make an appropriation of such amounts as may be necessary to meet the expense of carrying this act into effect, and of reimbursing such school districts and unions of school districts for such school years as herein provided. (Italics ours.)

Section 11 of said act, 72 P. S. § 4283, reads as follows:

On or before the tenth day of July of each year the school authorities of each district shall present to the State Superintendent of Public Instruction a statement of the amount expended during the school year, previous to such first day of July, for instruction in *approved local or joint vocational industrial*, vocational home economics, vocational distributive occupational, or vocational agricultural schools or departments, as herein provided. On the basis of such a statement,

the State Superintendent of Public Instruction, as the executive officer of the State Board for Vocational Education, shall, by requisition upon the State Treasurer, pay such school district and joint school districts such reimbursement for the previous school year as is provided for in this act. (*Italics ours.*)

The Act of July 1, 1937, P. L. 2603, creates a vocational school district, when authorized by the electors, in each school district of the Commonwealth, and section 5 of the act, 24 P. S. § 1669, reads as follows:

The powers and duties of vocational school districts shall be limited to the establishment, maintenance, conducting, and operation of vocational industrial, vocational agricultural, vocational homemaking, and vocational distributive occupational schools, departments, and classes when, *and only when, the same have been authorized by the electors of the district as hereinafter provided.* In carrying out these functions (except as otherwise expressly provided by law) all vocational school districts, all boards of directors of vocational schools, and all vocational, public schools, departments and classes established under the provisions of this act, shall be subject to all the provisions of the public school laws of this Commonwealth which apply generally to school districts of the particular class, to boards of directors thereof, and to public secondary schools and vocational schools and the teaching and supervisory staffs thereof. (*Italics ours.*)

The second paragraph of section 6 of the above act, as amended, 24 P. S. § 1670, reads as follows:

The Commonwealth shall reimburse the vocational school districts herein established in the same manner and to the same extent as is provided by existing law for salaries of teachers, transportation and tuition of pupils, and any other reimbursement to which school districts are now or shall hereafter be entitled: Provided, That any vocational school district, consisting of all the school districts that are under the jurisdiction of the county superintendent, shall be reimbursed to an amount which, when added to all other items of reimbursement from the Commonwealth as provided by law, shall total eighty per centum (80%) of the sum expended for approved salaries and travel of the teaching, supervisory and administrative staffs, for the transportation and tuition of pupils, during the previous year, and any other reimbursements to which school districts are now or shall hereafter be entitled.

Section 14 of the above act, 24 P. S. § 1677, reads as follows:

The provisions of this act do not repeal or in anywise affect any of the provisions of the existing laws of this Commonwealth providing for the establishment, maintenance,

conduct or operation of vocational schools, departments or classes by school districts or unions of school districts.

From the foregoing provisions, it is apparent that the legislature has given the Department of Public Instruction considerable control over the expenditure of public moneys for vocational education. This control is accomplished through the department's participation in the establishment, supervision, the approval for reimbursement, and the submission of biennial estimates. This involves the exercise of discretion by the Department of Public Instruction. The frequent use of the words "approve", "approved" and "approval" is significant.

In the case of *Fuller v. Board of University and School Lands of State of North Dakota*, 21 N. D. 212, 129 N. W. 1029, it was said:

The very act of "approval" imports the act of passing judgment, the use of discretion, and the determination as a deduction therefrom unless limited by the context of the statute.

In the case of *Leroy v. Worcester St. Ry. Co.*, 287 Mass. 1, 191 N. E. 39, the court said:

The word "approval" implies exercise of sound judgment,
* * *

In the case of *Brown v. City of Newburyport*, 209 Mass. 259, 95 N. E. 504, the court held that:

Where a city council authorized the city treasurer to borrow money "from time to time with the approval of the committee on finance", the word "approval", as so used, contemplated the exercise of discretion by the committee as a whole, investigating and sanctioning according to their own independent judgment each separate loan made under its order; and hence it could not legally delegate such duty to the mayor as chairman of the committee.

In the case of *Garr v. Fuls*, 286 Pa. 137, 133 A. 150, the court held:

"Approval" as used in 36 P. S. § 411, giving county commissioners authority to make application for approval of improvement and maintenance of public highway directly to state highway department, as construed by highway department comprehends supervision and sanction of all various steps leading up to contract, including contract itself and its performance, * * *

If, notwithstanding these safeguards over expenditures, the funds appropriated are presumably exhausted, the school districts, as was said in Formal Opinion No. 98, dated October 3, 1933 (1933-1934 Op. Atty. Gen. 67), "will have to do without."

You call our attention to the Act of July 28, 1941, P. L. 513, 24 P. S. § 1664.4, by a reference to section 3409-A of the School Law. Section 5 of this act reads as follows:

Section 5. This act shall become effective immediately upon final enactment and shall remain in force until May 31st one thousand nine hundred forty-three.

This act having expired, the authority granted by it has also expired, and while Act No. 77-A, approved June 4, 1943, The General Appropriation Act, contains the following provision:

For the payment of salaries and expenses of the department in carrying out the provisions of the Act of July 28 one thousand nine hundred forty-one (Pamphlet Laws 513) in conducting special classes in vocational education the sum of forty thousand dollars (\$40,000).

the appropriation of \$40,000 is not available because there are no provisions in the Act of July 28, 1941, P. L. 513, to be carried out, as the act, by its own terms, is no longer in force.

We are therefore of the opinion that the approval of the State Board for Vocational Education, as provided for in the above cited statutes dealing with vocational education is not merely ministerial, but involves the use of discretion; and school districts cannot be reimbursed by the Commonwealth for expenditures made in furtherance of vocational education unless such activity had been approved by the State Board for Vocational Education. Furthermore, reimbursement to school districts for vocational education cannot be in excess of funds appropriated by the legislature for such purpose, or otherwise available.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 476

Marriage—License—Disposition of duplicate—Filing with issuing officer—Recording—Forwarding to Department of Health—Fees—Act of June 23, 1885—Uniform Vital Statistics Act.

1. Section 30 of the Uniform Vital Statistics Act of May 21, 1943 (No. 192), requiring a person who performs a marriage ceremony to file a duplicate marriage certificate within ten days after the ceremony, supersedes the provision of the Act of June 23, 1885, P. L. 146, as amended, that such duplicate certificates be filed within 30 days.

2. Under section 30 of the Uniform Vital Statistics Act, the duplicate marriage certificates filed with officers issuing marriage licenses must be forwarded by them to the State Department of Health on or before the fifteenth day of the month following that in which such certificates were filed.

3. Under the Uniform Vital Statistics Act the total fee to be charged by officers issuing marriage licenses is \$3, of which \$2.50 is for the use of the clerk of the Orphans' Court of the county wherein the license is issued and 50 cents for the use of the Commonwealth.

4. Officers issuing marriage licenses must record the duplicates filed with them in the marriage dockets before forwarding them to the State Department of Health.

Harrisburg, Pa., September 8, 1943.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to answer certain questions concerning the Uniform Vital Statistics Act of May 21, 1943, P. L. 414, Act No. 192. Your questions are as follows:

(1) Does Section 30 of said act require a person who performs a marriage ceremony to file a duplicate marriage certificate within ten days after the ceremony, or within thirty days thereafter?

(2) Does Section 30 of said act require the officer issuing a marriage license to forward a duplicate marriage certificate filed with him to the Department of Health on or before the fifteenth day of the month following that in which such certificate was filed?

(3) What is the fee which the officer issuing a marriage license may charge and collect therefor?

We shall answer the foregoing questions seriatim.

Section 1 of the Act of June 23, 1885, P. L. 146, as amended May 6, 1909, P. L. 446, 48 P. S. § 1, provides that from and after October 1, 1885, no person shall be married within this Commonwealth until first obtaining a license for such purpose from the clerk of the orphans' court in the county where the marriage is performed, and sets forth the form of such license. Said section also provides that the license shall have appended to it two certificates, one marked original and one marked duplicate, to be filled in by the person performing the ceremony, certifying that the ceremony was performed by such person. The original certificate shall be given to the persons married, and the duplicate certificate shall be returned to the clerk of the orphans' court who issued the marriage license.

Section 2 of said act, 48 P. S. § 4, provides that the clerks of orphans' courts shall keep a marriage license docket for a complete record of the issuance of marriage licenses.

Section 4 of said act, 48 P. S. § 7, provides that the duplicate marriage certificate shall be returned by the person who performs the marriage ceremony to the clerk of the orphans' court who issued the marriage license within thirty days after the performance of the ceremony; and said clerk shall thereupon enter in the marriage docket such duplicate certificate.

Section 1 of the Act of May 2, 1925, P. L. 494, 48 P. S. § 18, sets forth the fee which is to be charged by clerks of orphans' courts for issuing a marriage license. This fee is \$2.50,—\$2.00 for the use of the clerk of the orphans' court and 50 cents for the use of the Commonwealth.

We are informed that it has been the consistent practice of the clerks of orphans' courts to retain those marriage certificates filed with them, and that no record thereof has heretofore been transmitted to or maintained by the Department of Health.

Section 30 of the Uniform Vital Statistics Act, *supra*, provides as follows:

Registration of Marriages; Marriage Certificates Filed.—Every person who performs a marriage ceremony shall prepare and sign a certificate of marriage in duplicate, one of which shall be given to the parties and the other filed by him, within ten days after the ceremony, with the officer who issued the marriage license. Every officer who issues a marriage license shall forward to the department, on or before the 15th day of each calendar month, the certificates of marriage which were filed with him during the preceding calendar month.

It is obvious that section 30 of the Uniform Vital Statistics Act conflicts with the before mentioned provisions of the act of 1885. One or the other must prevail unless both, being in *pari materia*, can be construed together, if possible, as one law. Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Section 62, 46 P. S. § 562. If the provisions of these two statutes are irreconcilable, those of the Uniform Vital Statistics Act, being the latest in date of final enactment, will prevail. Statutory Construction Act, Section 66, 46 P. S. § 566.

The requirement in the act of 1885 that the person performing the marriage ceremony must return the duplicate marriage certificate to the officer issuing the marriage license within thirty days after the performance of a marriage ceremony cannot, of course, be reconciled

with the provision in section 30 of the Uniform Vital Statistics Act that the return of such duplicate marriage certificate must be made within ten days after the ceremony. Therefore, the requirement of section 30 of the Uniform Vital Statistics Act prevails over the inconsistent provision of the act of 1885, and to that extent repeals such provision. This answers your first question.

It matters not what the present practice of the clerks of orphans' court is with relation to the retention of duplicate marriage certificates filed with them, in view of the provisions of section 30 of the Uniform Vital Statistics Act above cited and quoted. This section expressly requires the officer issuing a marriage license to forward to the Department of Health all duplicate certificates of marriage filed with him. All such certificates filed in any calendar month must be forwarded by such officers to the department on or before the fifteenth day of the succeeding calendar month. Prior to the Uniform Vital Statistics Act there was no such requirement, which explains why the clerks of orphans' courts formerly retained these certificates. This satisfies your second inquiry.

As hereinbefore set forth, the act of 1925 stipulates a fee of \$2.50 for the issuance of a marriage license—\$2.00 for the use of the clerk of the orphans' court and 50 cents for the Commonwealth. Under said act, although \$2.00 of this fee was for the use of such clerk, it was not stipulated that this portion of the fee was in payment of any particular act performed by the clerk of the orphans' court in issuing marriage licenses. Apparently the \$2.00 was to cover all acts required by the clerk of the orphans' court, in connection with the issuance of marriage licenses.

Section 31 of the Uniform Vital Statistics Act is as follows:

Marriage License Fees.—Every officer authorized to issue marriage licenses shall be paid a recording fee of fifty cents for each marriage certificate filed with him, and forwarded by him to the department. The recording fee shall be paid by the applicant for the license and be collected, together with the fee, for the license.

It is quite clear from the foregoing that a new and additional amount is added to the fee heretofore required of applicants for marriage licenses, namely, 50 cents. This 50 cents is to compensate the officer issuing a marriage license and recording the marriage certificate filed with him, and by him forwarded to the Department of Health. From and after September 1, 1943, the effective date of the Uniform Vital Statistics Act, the total fee for the issuance of a marriage license will be \$3.00—\$2.50 for the use of the clerk of the orphans' court and 50 cents for the use of the Commonwealth.

Section 35 of the act, provides as follows:

Clerk of Court to be Paid Statistical Recording Fee.—The clerk of the court shall be paid fifty cents for each certificate prepared and forwarded by him to the department as above provided.

This section, however, does not add to the total fee already stipulated, namely, \$3.00, an additional 50 cents. The 50 cents mentioned in section 33 is in payment to the clerk of the orphans' court, for his preparation of certificates of decrees of divorce, annulment of marriage, adoption, or annulment of adoption, and his forwarding of the same to the department, as required by section 32 of the act.

Although not specifically asked by you, there is an incidental question in the premises concerning which inquiries have been made, which question we shall answer. This relates to the recording of the duplicate marriage certificates filed with the officers issuing marriage licenses. Although the Uniform Vital Statistics Act nowhere expressly requires the recording of duplicate marriage certificates by the officers with whom they are filed, the implication is clear that such officers must record such certificates before forwarding them to the Department of Health. The language of section 31 cited and quoted above clearly indicates this. The 50 cents additional fee is a "recording fee." It is twice called this in such section. Furthermore, section 4 of the act of 1885, supra, 48 P. S. § 7, provides that upon the filing of a duplicate marriage certificate with a clerk of the orphans' court, he "shall immediately enter the same on the docket, where the marriage license of said person is recorded; * * *" It is so clear that the legislature intended these certificates to be recorded that we make no further comment.

It is our opinion, therefore, that:

1. Duplicate marriage certificates must be filed by the persons performing a marriage ceremony within ten days after such ceremony, such filing to be with the officers who issue the marriage licenses.

2. Duplicate marriage certificates filed with officers issuing marriage licenses must be forwarded by officers with whom they are filed to the Department of Health, on or before the fifteenth day of the month following that in which such certificates were filed.

3. The total fee to be charged by officers issuing marriage licenses shall be \$3.00—\$2.50 for the use of the clerk of the orphans' court of the county wherein the license is issued, and 50 cents for the use of the Commonwealth.

It is our further opinion that duplicate marriage certificates filed with officers issuing marriage licenses must be recorded by such officers

in the marriage dockets kept by them prior to their being forwarded to the Department of Health, and we so advise you.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 477

Real Estate—Purchased at Judicial Sales—Taxes—Public Assistance—Redemption—Duty of State Officials—Act of May 29, 1931, P. L. 214.

Where real estate is purchased by the Commonwealth through the Department of Justice at judicial sales, including county treasurers' sales, to protect the Commonwealth's liens, such property is not subject to county or municipal taxes assessed for the period subsequent to the date of the Commonwealth's deed.

Under the Act of May 29, 1931, P. L. 280, owners and other interested parties are given a right to redeem property sold by county treasurers within a two-year period. If the property is not so redeemed, the title of the Commonwealth dates back to the date of the deed. The Commonwealth would not be liable for county or municipal taxes from the date of its deed. The duty of the State officials is to dispose of property purchased at judicial sales, as soon as possible, and the presumption is that this duty will be performed.

Harrisburg, Pa., September 23, 1943.

Honorable Samuel Y. Ramage, III, Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Dear Mr. Ramage: This department is in receipt of your communication of August 17, 1943, requesting advice as to whether real property purchased at a judicial sale by the Commonwealth under authority of the Act of May 29, 1931, P. L. 214, 72 P. S. § 1412 et seq., is subject to county or municipal taxes assessed for the period subsequent to the date that the Commonwealth acquires title. Additionally, you wish advice on the question: If the property so purchased by the Commonwealth is not subject to such taxation, would the same rule obtain as to properties purchased at a County Treasurer's sale where the Commonwealth immediately obtains title but subject to divestiture if the property is redeemed within the two-year redemption period.

In the case of Commonwealth of Pennsylvania, State Employees' Retirement System v. Dauphin County et al., 335 Pa. 177 (1939), to which you refer, the court held that real estate owned by the Commonwealth or one of its departments or boards may not be subjected

to taxation by one of its municipal subdivisions without express statutory authority. As to the Act of May 22, 1933, P. L. 853, 72 P. S. § 5020, the court held as to section 201 thereof, as follows:

It is not to be presumed that the general provisions of Section 201, delegating a portion of the power to tax real estate to municipal subdivisions, was meant to include property owned by the Commonwealth. The legislators did not intend to upset the orderly processes of government by allowing the sovereign power to be burdened by being subjected to municipal taxes. Legislative enactments presumptively affect only private rights and do not embrace the rights of a sovereign unless the sovereign is explicitly designated or clearly intended. See *Baker et al. v. Kirschnek et al.*, 317 Pa. 225, 231-232. From this general principle, the rule arises that a municipality cannot successfully tax state owned property unless it points to a statute clearly authorizing it to do so. See *County of Erie v. City of Erie*, 113 Pa. 360, 366; *Heron v. Pittsburgh*, 57 Pa. Superior Ct. 648, 649. * * *

The court further pointed out that the fact that revenue is derived from the property or that it is leased for private use does not preclude the existence of a public use by the Commonwealth. Moreover, the court stated that consideration must be given to the predominant public purpose for which the fund derived is to be used.

There is no doubt that the Department of Public Assistance in the administration of the Public Assistance program is performing a governmental function and thus a public purpose. Commonwealth ex rel, *Schnader v. Liveright*, 308, Pa. 35 (1932).

The debt which makes it necessary for the Commonwealth to purchase the real estate to which you refer arises from the grant of public assistance to needy recipients having the necessary eligibility requirements under the provisions of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, 62 P. S. § 2501 et seq. Under the provisions of the Support Law, the Act of June 24, 1937, P. L. 2045, 62 P. S. § 1971 et seq., the duty and responsibility is placed on the Department of Public Assistance to obtain reimbursement where recipients are the owners of certain real or personal property. If and when the debt due the Commonwealth is reduced to judgment, the Commonwealth, acting through the Department of Justice under the Act of May 29, 1931, P. L. 214, supra, is authorized and empowered to bid in the property at a judicial sale, if necessary to protect the Commonwealth's interests. When this is done, and title is taken in its name, the sovereign Commonwealth is not liable for county or municipal taxes since all funds obtained from the property will be used for the public purpose of administering public assistance and thus caring for needy residents of the Commonwealth. See section 12(b) of the Public

Assistance Law, *supra*, which provides that reimbursements are credited to the current appropriation of the Department of Public Assistance. The duty of the State officials is to dispose of property purchased at judicial sales, as above recited, as soon as possible, and the presumption is that this duty will be performed. Hence, under the case of *Commonwealth of Pennsylvania, State Employees' Retirement System v. Dauphin County et al.*, *supra*, the Commonwealth is not obliged to pay county or municipal taxes for the period subsequent to the date when the Commonwealth acquires title.

Under Section 9 of the Act of May 29, 1931, P. L. 280, 72 P. S. § 5971-i, owners and other interested parties are given a right to redeem property sold by County Treasurers within a two-year period. If the property is not so redeemed, the title of the Commonwealth dates back to the date of the deed and the rule enunciated in *Commonwealth of Pennsylvania, State Employees' Retirement System v. Dauphin County et al.*, *supra*, obtains. The Commonwealth would not be liable for county or municipal taxes from the date of its deed.

In view of the foregoing, we are of the opinion that if property is purchased by the Commonwealth through the Department of Justice at judicial sales, including County Treasurers' sales, to protect the Commonwealth's liens, such property is not subject to county or municipal taxes assessed for the period subsequent to the date of the Commonwealth's deed.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 478

Intoxicating Liquors—Beverages—Military and Naval Reservations—Air Depots—Importations—Pennsylvania Control Board—Foreign Dealers—Sale and Delivery—Brewers—Credit—Cash Payments—Resales.

The Pennsylvania Liquor Control Act and the Beverage License Law do not apply in the territory embraced by the United States at the Navy Yard at Philadelphia, Middletown Air Depot and the Carlisle Barracks Military Reservation, but do apply in the area included within Indiantown Gap Military Reservation.

Importers of liquor, licensed under the Pennsylvania Liquor Control Act, and out-of-state dealers, may sell and deliver liquor as defined in said act, direct to the first three of said four territories, but not to the last thereof.

Breweries, importing distributors and distributors, licensed under the Beverage License Law, as well as out-of-state dealers, may sell malt or brewed beverages, as defined in said law, on credit or without requiring the cash deposits stipulated in the law, to and within the first three of said four territories, but not to the last thereof, if such beverages are to be resold or consumed within such territories.

Harrisburg, Pa., October 6, 1943.

Honorable Frederick T. Gelder, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: On November 9, 1940, the Pennsylvania Liquor Control Board requested us to advise it (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.

The military or naval reservations you inquired about were (1) the United States Navy Yard at Philadelphia, (2) the Middletown Air Depot, (3) United States Medical School at Carlisle and (4) the Indiantown Gap Military Reservation.

As a result of the inquiry mentioned above we advised you in Formal Opinion No. 378, 1939-40 Op. Atty. Gen. 495, as follows:

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 reservation.

You have recently requested us to reconsider the advice given you in Formal Opinion No. 378, above cited and partially quoted.

The United States Navy Yard at Philadelphia is owned by the United States of America. By the Act of March 29, 1827, P. L. 153, the Commonwealth of Pennsylvania ceded jurisdiction over that territory to the government of the United States. Other statutes consenting to the acquisition of, and ceding jurisdiction over, the Navy Yard and its component parts, are the Acts of February 10, 1863, P. L. 24; August 24, 1864, P. L. 1017; and April 4, 1866, P. L. 96.

Jurisdiction over Middletown Air Depot was ceded by the Commonwealth to the Federal Government by the Act of April 25, 1929, P. L. 755, 2 P. S. §§ 1451-1453. The area embraced by the depot is owned by the United States.

The Act of July 1, 1937, P. L. 2656, 74 P. S. §§ 85-87, contains a cession by the Commonwealth to the United States of jurisdiction over all lands within the boundaries of the Carlisle Barracks Military Reservation, also known as the United States Medical School at Carlisle, excepting roads abutting thereon and the portion of the Carlisle-Harrisburg turnpike located therein. This area is owned by the Federal Government.

The Indiantown Gap Military Reservation is owned by the Commonwealth of Pennsylvania. Section 2402 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as last amended by the Act of July 21, 1941, P. L. 429, 71 P. S. § 632, authorized the Commonwealth to lease all or any part of this reservation to the government of the United States. This has been done by lease of October 1, 1941. The area is still occupied by the United States pursuant to the terms of such lease. No jurisdiction over the area has been ceded by the Commonwealth to the United States.

The 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 P. S. § 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 said act, as reenacted and amended, 47 P. S. §§ 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 ours.)

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 P. S. § 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 P. S. § 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 ours.)

In *R. E. Collins, et al. v. Yosemite Park & Curry Company*, 304 U. S. 518, 58 S. Ct. 1009, L. ed. 1502 (1938), the matter of the regulation of the sale of liquor in territory owned by the United States, within a state, was exhaustively treated. In that case suit was brought to enjoin the State Board of Equalization and the State Attorney General from enforcing the Alcoholic Beverage Control Act of the State of California within the limits of Yosemite National Park. It was asserted by the state that the Alcoholic Beverage Control Act applied within the park and that a permit for importation and sale must be applied for and obtained before liquor could be sold in the park, and that the fees and taxes imposed by the act apply to such sales.

California by statute granted exclusive jurisdiction of the lands composing Yosemite National Park to the United States, reserving to the state the right to serve civil or criminal process with the limits thereof, and further reserving to the state the right to tax persons and corporations, and franchises and property on the lands included in the park.

Mr. Justice Reed, speaking for the court, said:

* * * 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 equalized by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect.

* * * "Clause 17 [of Section 8 of Article I of the Federal Constitution] contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. * * *" The clause is not the sole authority for the acquisition of jurisdiction. There is no question about the power of the United States to exercise jurisdiction secured by cession, though this is not provided for by Clause 17. And it has been held that such a cession may be qualified. It has never been necessary, heretofore, for this court to determine whether or not the United States has the constitutional right to exercise jurisdiction over territory, within the geographical limits of a State, acquired for purposes other than those specified in Clause 17. * * *

On account of the regulatory phases of the Alcoholic Beverage Control Act of California, it is necessary to determine that question here. The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17. * * * As the National Government may * * * acquire lands within the borders of states by eminent domain and without their consent, the respective sovereignties should be in a position to adjust their jurisdiction. There is no constitutional objection to such an adjustment of rights. It follows that jurisdiction less than exclusive may be granted the United States. The jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California, e. g., right to tax, * * *. As there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the Act under consideration are unenforceable in the Park.

* * * we are of the opinion that this language [the right to tax persons and corporations, their franchises and prop-

erty] is sufficiently broad to cover excises on sales, but not the license fees provided for by this Act. [Alcoholic Beverage Control Act.]

* * * The provisions requiring licenses for the importation or sale of alcoholic beverages in the Park are invalid.

* * * The State makes the point that § 2 of the Twenty-first Amendment gives it the right to regulate the importation of intoxicating liquors. * * * The argument for this claim is bottomed upon our decision in *State Bd. of Equalization v. Young's Market Co.*, 299 U. S. 59, 81 L. ed. 38, 57 S. Ct. 77, where we held that a statute imposing a \$500 license fee for importing and a \$750 license fee for brewing beer did not violate the commerce clause or the equal protection clause, because the words of the Twenty-first Amendment "are apt to confer upon the State the power to forbid all importations" and "the State may adopt a lesser degree of regulation than total prohibition" * * *. The lower court was of the opinion that though the Amendment may have increased "the State's power to deal with the problem . . . , it did not increase its jurisdiction." With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the Twenty-first Amendment. There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate, alcoholic beverages, the Twenty-first Amendment is not applicable.

From the foregoing it is clear that importation of liquor from outside Pennsylvania directly to any of the territories hereinbefore mentioned, with the exception of Indiantown Gap Military Reservation, would not be "importation of liquor into Pennsylvania" within the meaning of the Pennsylvania Liquor Control Act. It is also clear that importers of liquor, licensed under said act, may sell and deliver liquor as defined therein, direct to the aforesaid territories with the exception of Indiantown Gap Military Reservation. See *Pacific Coast Dairy, Inc. v. Department of Agriculture of California et al.*, 317 U. S. —, 63 S. Ct. 628, 87 L. ed., Adv. Op., 560 (1943).

Inasmuch as the Commonwealth is the owner of the Indiantown Gap Military Reservation, and the United States occupies it as lessee, the Commonwealth still retains full jurisdiction over the lands embraced within the reservation. In the case of *Crook v. Old Point Comfort Hotel Co.*, 54 F. 604 (C. C. E. D. Va. 1893), it was held that the word "purchase," as used in Article I, Section 8, of the Federal Constitution, has not the general technical meaning belonging to it at common law of any acquisition of lands other than by descent or

inheritance, but has only the meaning of an acquisition of land by actual purchase.

It follows from this that since the United States neither owns Indiantown Gap Military Reservation nor has received from the Commonwealth any cession of jurisdiction over said reservation, the United States occupies the land as a mere lessee and the full jurisdiction of the Commonwealth is retained by the latter. The Pennsylvania Liquor Control Act and the Beverage License Law are, therefore, both fully effective within the limits of the reservation.

Importations of liquor or malt and brewed beverages, as defined in the Pennsylvania Liquor Control Act and the Beverage License Law hereinbefore cited, into Indiantown Gap Military Reservation from Pennsylvania importers would be fully subject to the said acts. See *Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania*, — U. S. —, 63 S. Ct. 617, — L. ed. — (1943). It is also true that such importations from outside Pennsylvania to Indiantown Gap Military Reservation would be fully subject to the Pennsylvania Liquor Control Act and the Beverage License Law. See *R. E. Collins, et al. v. Yosemite Park & Curry Company*, *supra*. See generally, *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 5 S. Ct. 995, 29 L. ed. 264 (1885); *Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455, 74 L. ed. 1091 (1930) and *Silas Mason Company, Inc., v. Tax Commission of the State of Washington*, 302 U. S. 186, 58 S. Ct. 233, 82 L. ed. 187 (1937).

It follows, therefore, that the Pennsylvania Liquor Control Act and the Beverage License Law do not apply in the territory embraced by the United States at the Navy Yard at Philadelphia, Middletown Air Depot and the Carlisle Barracks Military Reservation, but do apply in the area included within Indiantown Gap Military Reservation; that importers of liquor, licensed under the Pennsylvania Liquor Control Act, and out-of-State dealers, may sell and deliver liquor as defined in said act, direct to the first three of said four territories, but not to the last thereof; and that breweries, importing distributors and distributors, licensed under the Beverage License Law, as well as out-of-State dealers, may sell malt or brewed beverages, as defined in said law, on credit or without requiring the cash deposits stipulated in the law, to and within the first three of said four territories, but not to the last thereof; if such beverages are to be resold or consumed within such territories.

To the extent that the views herein expressed conflict with Formal Opinion No. 378, *supra*, the latter is overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 479

Schools—Reimbursement from Commonwealth for teachers' pay—Substitute teachers—Teachers on sabbatical or military leave—Holder of wartime emergency certificate—Minimum salary requirement—School Code of 1911, section 1201, as amended—Acts of May 21 and May 28, 1943.

The Act of May 21, 1943 (No. 127), does not authorize the Commonwealth to allow reimbursement where a school district employs a substitute to fill a bona fide vacancy, except where the substitute is serving for a teacher on sabbatical or military leave, in which case reimbursement is authorized by section 1201 of the School Code of 1911, as amended by the Act of June 20, 1939, P. L. 482, or where at the request of the responsible local district or county superintendent of schools the Superintendent of Public Instruction has issued to a teacher temporarily employed a special wartime emergency certificate to teach in the subject or field for the wartime or emergency conditions making it necessary, in accordance with the Act of May 28, 1943 (No. 329), and such teacher is paid at least the minimum salary.

Harrisburg, Pa., October 7, 1943.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an interpretation of the Act of May 21, 1943, P. L. 273, Act No. 127, and of the Act of May 28, 1943, P. L. 784, Act No. 328. More specifically, you ask:

1. If a school district employs a substitute to fill a bona fide vacancy until an acceptable qualified teacher can be obtained, in accordance with the provisions of Act No. 127, may reimbursement be allowed by the Commonwealth on account of the services of such a substitute teacher, notwithstanding the provision of the last sentence of Section 1201 of the School Code?

The Act of May 21, 1943, *supra*, further amends Section 1201 of the Act of May 18, 1911, P. L. 309, known as the "School Code," 24 P. S. § 1121, but makes no reference to reimbursement by the Commonwealth to school districts. It authorizes a board of school directors

to employ a substitute under certain conditions to fill a bona fide vacancy. It also broadens the definition of a "substitute," by the addition of the following underlined phrase:

The term "substitute" shall mean any individual who has been employed to perform the duties of a regular professional employe during such period of time as the said regular professional employe is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employe who is absent *or who has been employed with the approval of the district or county superintendent and of the Superintendent of Public Instruction during the present war-time emergency and for a period not longer than one year beyond the cessation of hostilities to fill a vacancy until an acceptable qualified teacher can be obtained.* (Italics ours.)

The final paragraph of section 1201 of the Act of 1911, *supra*, 24 P. S. § 1121, reads as follows:

Temporary employes shall for all purposes, except tenure status, be viewed in law as full-time employes, and shall enjoy all the rights and privileges of regular full-time employes, and the Commonwealth shall pay to the school district for each temporary employe the same per centum or share of salary, provided by law, as in the case of professional employes; and in cases of temporary employes of approved local or joint vocational industrial, vocational home economics, and vocational agricultural schools or departments, the school district shall be reimbursed, as provided by law, for each of their full-time salaries, just as though they were professional employes. *Such reimbursement from the Commonwealth shall not be made for substitutes except in cases of sabbatical leave.* (Italics ours.)

The law is clear and free from all ambiguity. Reimbursement may be made for substitutes only in cases of sabbatical leave. You call our attention to your request for an opinion and a letter in reply from this department, under date of November 8, 1939, in which the conclusion was reached that the Commonwealth may reimburse the school districts for substitutes. We do not agree with the conclusions expressed in this letter, wherein much stress is laid upon the intent of the legislature. There was no occasion to discuss intent. The Supreme Court of Pennsylvania in the case of *Commonwealth v. Chester County Light and Power Co.*, 339 Pa. 97 (1940), said at page 99:

* * * It is only when the words of the law "are not explicit" that the intention of the legislature may be ascertained by considering other means of construction: * * *

Section 51 of the Act of May 28, 1937, P. L. 1019, known as the "Statutory Construction Act," 46 P. S. § 551, reads in part 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.

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. (Italics ours.)

Furthermore, the legislature has affirmatively stated that the Commonwealth shall reimburse the school district for each member of the teaching and supervisory staff thereof who is on sabbatical leave of absence. This was accomplished by the Act of July 1, 1937, P. L. 2579, which added section 1216 to the Act of May 18, 1911, P. L. 309, and as now amended, 24 P. S. § 1211, reads in part as follows:

(k) A member of the teaching or supervisory staff, while on sabbatical leave of absence, shall, for all purposes, be viewed in law as full-time teacher, supervisor, principal or other full-time member of the teaching and supervisory staff, as the case may be, and while on sabbatical leave, he or she shall enjoy all the rights and privileges of an employe in regular full-time daily attendance in the position from which sabbatical leave of absence was granted, and during the period of said leave, the *Commonwealth shall pay to the school district for each member of the teaching and supervisory staff thereof, who is on sabbatical leave of absence, the same per centum or share of salary provided for by law, as if the employe was in regular daily full-time attendance in the position from which the sabbatical leave of absence was taken, and in cases of employes of approved local or joint vocational, industrial vocational, home economics, and vocational agricultural schools or departments who are on sabbatical leave, the school district shall be reimbursed, as provided by law, for each of their full-time salaries just as though such employes were in daily attendance upon their respective duties. (Italics ours.)*

It should be noted that the Act of August 1, 1941, P. L. 444, 24 P. S. § 2371.1 et seq., relating to public school employes who have been granted leaves of absence for military or naval service, contains in section 4 thereof, a further exception to the prohibition against reimbursement. See Formal Opinions No. 465 and No. 472.

The answer to your first question is as follows: No reimbursement may be allowed where a school district employs a substitute to fill a bona fide vacancy, except where a substitute is serving for a teacher

on sabbatical or military leave, or under conditions hereinafter considered which further limit the application of the restrictive clause relating to reimbursement.

Your second question reads:

2. In case the answer to the foregoing question should be negative, may reimbursement be allowed by the Commonwealth in case the Superintendent of Public Instruction has issued a Special Wartime Emergency Certificate to such a teacher in accordance with the provisions of subsection (i) of Section 2 of Act No. 328?

The act of May 28, 1943, supra, is entitled:

An act prescribing temporary emergency war provisions with respect to the administration of certain provisions of the school laws of this Commonwealth relating to days for school to be in session, closing schools and suspending classes, temporary assignment and reassignment of teachers, extension of transportation facilities, payment of tuition in lieu of transportation and granting temporary farm and conservation employment certificates for certain pupils under certain conditions *providing for full state subsidies when employing teachers holding Special Wartime certificates* authorizing boards of school directors (or boards of public education) subject to the approval of the district or county superintendent to put such provisions into operation. (Italics ours.)

Paragraph (i) of section 2 of said act authorizes any board of school directors to:

(i) *Obtain the full State subsidy provided for fully and regularly certificated teachers* when at the request of the responsible local district or county superintendent of schools the Superintendent of Public Instruction has issued to a teacher temporarily employed a Special Emergency Wartime Certificate to teach in the subject or field for which wartime emergency conditions make it necessary to employ such teacher. (Italics ours.)

This provision requires no explanation and the answer to your second question, assuming the conditions of the act have been complied with, is in the affirmative.

Your third question reads:

3. In the case of teachers holding wartime emergency certificates issued under the provisions of Act No. 328, and on account of whose services the districts are to receive full reimbursement under its provisions, what salary must be paid to the teacher in order that the district may be entitled to full reimbursement?

The only reference in Act No. 328 to teachers' salaries is found in paragraph (d) of section 2, which authorizes any board of school directors or board of public education to:

(d) Adjust the assignment and reassignment of teachers in such field subjects schedules and semesters or other periods of work and in such schools as their preparation experience and certification may qualify them. No such temporary emergency assignment or reassignment shall reduce the annual compensation any teacher now receives nor shall the emergency assignment, reassignment or the return to the original type of assignment when the emergency has ended be deemed to be a demotion under the tenure provisions of the school laws of this Commonwealth.

This, of course, does not answer your question.

We, therefore, turn to Section 1210 of the Act of May 18, 1911, P. L. 309, 24 P. S. § 1164, et seq., known as the School Code. Clause 1 of said section reads as follows:

The minimum salaries of all teachers, supervisors, principals, and superintendents in the public schools of the Commonwealth, except as otherwise hereinafter provided, shall be paid by the several classes of districts in which such persons are employed, in accordance with the following schedules:

Clauses 2, 5, 6 and 7 of said section set forth salary schedules for school districts of the first, second, third and fourth classes respectively.

Clause 9 of the same section, as amended, 24 P. S. § 1172, reads:

The foregoing schedules prescribe a minimum salary in each instance, and where increment is prescribed it is also a minimum. It is within the power of the boards of education, boards of public school directors, or county conventions of school directors, as the case may be, to increase, for any person or group of persons included in this schedule, the initial salary or the amount of an increment or the number of increments or the minimum qualifications set forth in this act. Teachers shall be entitled to the increments provided for in said schedules who have complied with such requirements as may be prescribed by the State Board of Education, except where additional qualifications are required by the local board of public education or board of school directors.

Nothing in this act contained shall be construed to interfere with or discontinue any salary schedule now in force in any school district so long as such schedule shall meet the requirements of this section, nor to prevent the adoption of any salary schedule in conformity with the provisions of this act.

Clause 12 of the same section, as amended, 24 P. S. § 1175, reads:

Only those persons holding one of the following certificates shall be qualified to teach in the public schools of this Com-

monwealth: College permanent certificate, college provisional certificate, normal school diploma, normal school certificate, special permanent certificate, special temporary certificate, permanent State certificate, certificates which are permanent licenses to teach by virtue of the provisions of section one thousand three hundred eight of this act as amended, or such other kinds of certificates as are issued under the rules and regulations of the State Board of Education or State Council of Education. The State Board of Education shall also provide for the issuance of certificates by county or district superintendents, to meet such emergencies or shortage of teachers as may occur. (Italics ours.)

Clause 13 of the same section, as amended, 24 P. S. § 1176, reads: .

The holders of any of the foregoing certificates shall be entitled to the benefits of the salary schedule where the qualifications required for such certificates include not less than graduation from a State normal school of this Commonwealth or equivalent training, but all holders of certificates which are permanent licenses to teach in the public schools of the Commonwealth shall be entitled to the benefits of this salary schedule, and nothing in this act, nor any regulations of the State Board of Education, shall invalidate any permanent certificate, except as hereinafter provided on account of incompetence, cruelty, negligence, immorality, or intemperance. Teachers not entitled to the benefits of the salary schedule herein provided shall become entitled to such benefits by meeting the qualifications prescribed in this act, and such teachers, until so qualified, shall receive at least seventy-five dollars (\$75) per month: Provided, That a teacher holding a professional certificate, or a certificate of equivalent value as determined by the State Board of Education, shall receive a minimum monthly salary of eighty-five dollars (\$85) upon meeting such qualifications as shall be required under the rules of the State Board of Education. (Italics ours.)

Clause 23 of the same section, as amended, 24 P. S. § 1184, reads in part as follows:

* * * Provided, however, that the Superintendent of Public Instruction may refuse to authorize the payment of any amount payable to any school district for the school year commencing the first day of July, one thousand nine hundred and thirty-seven, or any school year thereafter, which school district shall, at any time hereafter, fail or refuse to pay to the members of its teaching and supervisory staffs the full amount of the minimum salaries and increments required by this section. He may continue to withhold such requisitions until provision has been made by the school district for the payment of such minimum salaries and increments.

Therefore, to summarize, it may be said that prior to the passage of Act No. 328 supra, in order that a school district may obtain the full State subsidy, it was necessary for school teachers to possess certain certificates and to be paid certain minimum salaries. Act No. 328 and Act No. 127, supra, change the first requirement and provide for special wartime emergency certificates, and authorize the payment of the full State subsidy provided for fully and regularly certificated teachers under certain conditions, but neither of these acts changes the requirement of the law that minimum salaries must be paid by the school districts if they are to receive full reimbursement.

Furthermore, we do not believe it to be the intent of the legislature that the State would pay the full subsidy to the school district based on the minimum salary and the school district pay less than the minimum salary to the school teacher, thus making a profit at the expense of the school teacher.

It is therefore our opinion that school teachers holding Special Wartime Emergency Certificates are entitled to the minimum salaries referred to in the above mentioned schedules, and upon failure of the school districts to pay such salaries, the Superintendent of Public Instruction may exercise the authority conferred upon him in clause 23 supra. If a school district pays the school teachers in accordance with the schedules mentioned, the school district is entitled to the full State subsidy.

Temporary salary increases as set forth in the Act of May 28, 1943, P. L. 786, Act No. 329, are discussed in Formal Opinion No. 473.

We are, therefore, of the opinion that:

(1) No reimbursement may be allowed by the Commonwealth where a school district employs a substitute to fill a bona fide vacancy, except where a substitute is serving for a teacher on sabbatical or military leave, or under other conditions hereinafter set forth.

(2) Reimbursement may be allowed, when at the request of the responsible local district or county superintendent of schools, the Superintendent of Public Instruction has issued to a teacher, temporarily employed, a Special Wartime Emergency Certificate to teach in the subject or field for which wartime emergency conditions make it necessary, in accordance with the Act of May 28, 1943, P. L. 784, Act No. 328.

(3) Minimum salaries must be paid to school teachers holding Special Wartime Emergency Certificates under the provisions of the

Act of May 28, 1943, supra, in order to entitle school district to receive full reimbursement from the State as therein provided.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 480

Minors—Hours of employment—Child Labor Law of 1915—Applicability to employees of interstate railroad.

1. In the absence of Federal legislation upon the subject of hours of labor of persons engaged in interstate commerce, the State may enact such legislation in the exercise of its police power, but when Congress legislates on the subject the power of the State to regulate such hours is subordinate to the Federal power, and if there is a conflict the Federal legislation must prevail.

2. Neither the Hours of Service Act of March 4, 1907, 34 Stat. at L. 1415, the Railway Labor Act of May 20, 1926, 44 Stat. at L. 577, as amended, nor the Fair Labor Standards Act of June 25, 1938, 52 Stat. at L. 1060, regulating the hours and conditions of labor of persons engaged in employment upon interstate railroads generally, evidences any intention on the part of the Federal Government to exercise control specifically over the hours of minors.

3. The Pennsylvania Child Labor Law of May 13, 1915, P. L. 286, as amended, is applicable to minors between the ages of 16 and 18 employed by interstate railroads.

Harrisburg, Pa., October 28, 1943.

Honorable William H. Chesnut, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting advice as to whether the Pennsylvania Child Labor Law is applicable to minors between the ages of 16 and 18 years of age who may be employed by interstate railroads.

The Child Labor Law, the Act of May 13, 1915, P. L. 286, as amended, 43 P. S. § 41, et seq., provides for the health, safety and welfare of minors by forbidding their employment or work in certain establishments and occupations, and under certain specified ages, and by restricting their hours of labor and regulating the conditions of their employment.

Section 4 of the Pennsylvania Child Labor Law, as amended, provides for the following restrictions on hours of labor of minors under 18 years of age:

No minor under eighteen years of age shall be employed or permitted to work in, about, or in connection with any establishment, or in any occupation, for more than six consecutive days in any one week, or more than forty-four hours in any one week, or more than eight hours in any one day: Provided, That during the present existing state of war between the United States and certain foreign countries and six months thereafter, upon application of an employer to the Secretary of Labor and Industry, with the approval of the Industrial Board, minors between the ages of sixteen and eighteen years shall be permitted to work forty-eight hours in any one week, but not to exceed ten hours in any one day nor more than six consecutive days in any one week, provided such employment is directly or indirectly in furtherance of the war effort: And provided further, That messenger boys employed by telegraph companies at offices where only one such minor is employed as a messenger in which case such minor shall not be employed for more than six consecutive days in any one week, or more than fifty-one hours in any one week, or more than nine hours in any one day.

* * * * *

No minor under eighteen years of age shall be employed or permitted to work for more than five hours continuously in, about, or in connection with, any establishment without an interval of at least thirty minutes for a lunch period and no period of less than thirty minutes shall be deemed to interrupt a continuous period of work.

Section 5 of said Child Labor Law prohibits certain types of employment to minors under 18 years of age as follows:

No minor under eighteen years of age shall be employed or permitted to work in the operation or management of hoisting machines, in oiling or cleaning machinery, in motion; in the operation or use of any polishing- or buffing-wheel; at switch-tending, at gate-tending, at track-repairing; as a brakeman, fireman, engineer, or motorman or conductor, upon a railroad or railway; as a pilot, fireman, or engineer upon any boat or vessel; in the manufacture of paints, colors or white lead in any capacity; in preparing compositions in which dangerous leads or acids are used; in the manufacture or use of dangerous or poisonous dyes; in any dangerous occupation in or about any mine; nor in or about any establishment wherein gunpowder, nitroglycerine, dynamite, or other high or dangerous explosive, is manufactured or compounded.

No minor under eighteen years of age shall be employed or permitted to work in, about, or in connection with, any establishment where alcoholic liquors are distilled, rectified,

compounded, brewed, manufactured, bottled, sold, or dispensed; nor in a public bowling alley; nor in a pool or billiard room.

No minor shall be employed or permitted to serve or handle alcoholic liquor in any establishment where alcoholic liquors are sold or dispensed; nor be employed or permitted to work in violation of the laws relating to the operation of motor vehicles by minors.

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

The State, under its police power, has the unquestioned authority to impose restrictions and regulations as to hours and working conditions designed for the care and protection of its minors. The authority of the State in the absence of Federal legislation to enact laws in the exercise of its police power for the purpose of establishing such reasonable regulations as are appropriate for the protection of the health and safety of its citizens is no longer open to question even though such legislation may affect interstate commerce. See *New York, New Haven & Hartford Railroad v. New York*, 165 U. S. 628 (1897).

However, if and when Congress enacts legislation upon the subject of hours of labor of employes of railroads engaged in interstate commerce, the power of the State to regulate such hours is subordinated to the Federal power, and if there is a conflict between the State and Federal legislation, the former must yield to the latter. See *Erie Railroad v. New York*, 233 U. S. 671, 34 S. Ct. 756, 58 L. Ed. 1149 (1914), where the court said:

We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, *the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.* (Italics ours.)

It is necessary, therefore, to consider whether Congress has enacted such legislation as to manifest a definite purpose to exercise its constitutional authority and regulate the hours and working conditions of minors employed by interstate carriers.

Though Congress has enacted no legislation expressly regulating the hours and working conditions of minors employed by interstate carriers, it is suggested that Congress has acted in this respect. Reference is made to the Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U.S.C.A. Sections 61 to 64, known as the Hours of Service Act; to the Railway Labor Act, the Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, and the Act of June 25, 1936, c. 804, 49 Stat. 1921, 45 U.S.C.A. Sections 151-163, et seq., and to the Fair Labor Standards Act of 1938, the Act of June 25, 1938, c. 676 52 Stat. 1060, 29 U.S.C.A. Sections 201 to 219.

The said Act of March 4, 1907, *supra*, referred to as the Hours of Service Act, prescribes the hours of employment upon interstate railroads as follows:

It shall be unlawful for any common carrier, its officers, or agents, subject to sections 61-64 of this title to require or permit any employes subject to sections 61-64 of this title to be or remain on duty for a longer period than sixteen consecutive hours, * * *.

The only employes included within this statute are those "actually engaged in, or connected with the movement of any train." See *San Pedro, L. A. & S. L. R. Co. v. United States*, 213 Fed. 326 (1914). See also opinion of Attorney General Francis Shunk Brown of Pennsylvania, 1917-1918 Op. Atty. Gen. 482.

The Hours of Service Act, *supra*, evidences no intention by the Federal Government to exercise control specifically over the hours of minors, nor over the hours of any employe not actually engaged in the movement of any train. However, even assuming that said minors did perform services within the coverage of the Hours of Service Act, this would not invalidate or make inapplicable the provisions of the State Child Labor Law relating to the working hours of such minors. The Federal law was enacted to promote safety in operating trains by preventing excessive mental and physical strain which usually result from remaining too long in an exacting task. See *Chicago & Alton R. R. Co. v. United States*, 247 U. S. 197, 199 (1918). See also *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612 (1910); *Atchison Topeka & Santa Fe Ry. Co. v. United States*, 269 U. S. 266 (1925). It would be vain to deny that to some extent the Federal enactment and the State laws under discussion are related in some of their purposes inasmuch as the State, in the interest of safeguarding the health and well-being of its minors, has placed limitations upon the nature and hours of their work. It is noteworthy, however, that although the State law prescribes a specific maximum number of hours of work for minors, namely, forty-four hours in any one week, or eight hours in any one day, the Federal

law merely limits hours to sixteen consecutive hours for employes actually engaged in or connected with the movement of trains with a proviso of nine hours with respect to telegraph and telephone dispatchers, etc., who have duties relating to train movements. It is evident that the standards prescribed in the Federal Hours of Service Act were determined primarily in relation to the safety of the public and the movement of trains. The standards prescribed in the State legislation, however, bear a relation, primarily, to the health and well-being of minors.

The disparate purposes of the State and Federal legislation would appear to justify a conclusion that the State law would be operative even as to those minors performing functions within the general coverage of the Federal law. As stated above, it is established and settled that a State, through the exercise of its police power, may regulate the nature and hours of labor of minors even though such regulation may affect interstate commerce. It has also been said that "in the application of this principle of supremacy of an act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot v. Davenport*, 22 How. 227 (1859).

The purpose of a Federal law to displace a local law in a field in which the congressional enactment would be supreme, must be definitely and clearly expressed, and will not be implied. *Mintz v. Baldwin*, 289 U. S. 346, 350 (1932). This rule was forcibly expressed in *Illinois Central R. R. Co. v. Public Utilities Comm.*, 245 U. S. 493, 510 (1918), in the following language:

In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. * * *

The rule was quoted by the Supreme Court in *Welch v. New Hampshire*, 306 U. S. 79, 85 (1939), with the remark that the court had frequently applied that principle. See also *Reid v. Colorado*, 187 U. S. 137, 148 (1902); *Missouri Pac. Ry. Co. v. Larabee Mills Co.*, 211 U. S. 612, 621 et seq. (1908); *Missouri K. & T. Ry. Co. v. Harris*, 234 U. S. 412, 418-419 (1914); *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, 139 (1930); *Northwestern Bell Tel. Co. v. Nebraska Ry. Comm.*, 297 U. S. 471, 478 (1936); *Kelly v. Washington*, 302 U. S. 1, 10 et seq. (1937); *Missouri K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 623, 624 (1898); *Crossman v. Lurman*, 192 U. S. 189, 199, 200 (1903); *Asbell v. Kansas*, 209 U. S. 251, 257, 258 (1907); *Savage v. Jones*, 225

U. S. 501, 533 (1911); *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294 (1913); *Carey v. South Dakota*, 250 U. S. 118, 122 (1918); *Gilvary v. Cuyshoga Valley Ry. Co.*, 292 U. S. 57, 60, 61 (1933).

From the above, it is readily seen that there is no repugnance between the State Child Labor Act, prescribing a limitation of forty-four hours per week and eight hours a day on employment of minors, and the Federal Act, limiting hours to sixteen consecutive hours for employes actually engaged in or connected with the movement of trains, with a proviso of nine hours with respect to telegraph and telephone dispatchers who have duties relating to train movements, but making no provision relative to the employment of minors as such. The Pennsylvania Child Labor Law, *supra*, is not in conflict with but rather supplements the Federal Hours of Service Act, *supra*, by making definite provisions limiting hours of employment of minors and prohibiting the employment of said minors in certain occupations.

The Railway Labor Act, *supra*, was enacted to establish a complete and satisfactory system for the fixing of rates of pay, rules and working conditions of railroad employes, and the settlement of labor disputes that arise on interstate carriers. The purposes of the said Railway Labor Act are stated, *inter alia*, to be:

(4) To provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions;

(5) To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions.

The Railway Labor Act thus provides a method of fixing wages of employes by free contract or adjustment of labor disputes. See *Long Island Railroad Company v. Department of Labor of State of New York*, 256 N. Y. 498, 177 N. E. 17 (1931). It is not a regulatory act and there is no limitation on hours of employment as such. The question to determine is whether the Railway Labor Act of 1926, *supra*, actually does supersede the State law.

That there is not a preemption of the field of regulation of hours and working conditions by the Federal Railway Labor Act of 1926, *supra*, see the recent case of *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, 63 S. Ct. 420, 423, 87 L. Ed. Adv. Ops. 369 (1943), where the court, addressing itself to the claim that a State regulation requiring cabooses on interstate trains is invalid, said:

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages,

hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers. Cf. *Pennsylvania R. Co. v. United States R. Labor Board*, 261 U. S. 72, 84, 43 S. Ct. 278, 279, 67 L. Ed. 536.

State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection and innumerable others. Any of these matters might, we suppose, be the subject of a demand by workmen for better protection and upon refusal might be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. But we would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, and safety provisions for industry and transportation. We suppose employees might consider that state or municipal requirements of fire escapes, fire doors, and fire protection were inadequate and make them the subject of a dispute, at least some phases of which would be of federal concern. But it cannot be that the minimum requirements laid down by state authority are all set aside. *We hold that the enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves and did not preclude the State of Illinois from making the order in question.* (Italics ours.)

See also *Missouri Pacific Railroad Company v. Norwood*, 283 U. S. 249, 258, 75 L. Ed. 1010 (1931), where on a bill for injunction against the enforcement of a State statute regulating freight train and switching crews, the court held that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed on such crews.

Furthermore, the court held that the State act, prescribing the number of men for freight train and switching crews, was not in conflict with the Railway Labor Act of 1926, as follows:

No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration.

The Fair Labor Standards Act of 1938, *supra*, provides for minimum wages of employes engaged in commerce or in the production of goods for commerce; for maximum hours of employes engaged in the production of goods for commerce, but exempts employes engaged in transportation; and for certain prohibitions against oppressive child labor.

The case of *United States of America v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941), sustained the constitutionality of the Fair Labor Standards Act of 1938, *supra*. It is interesting to note that the court in its opinion expressly overruled the case of *Hammer v. Dagenhart*, 247 U. S. 281, 38 S. Ct. 529, 62 L. Ed. 1101 (1918), which had held that the regulation of child labor was exclusively within the jurisdiction of the State, and this is said to have eliminated the necessity for a constitutional amendment.

Under Section 13(b) railroads are exempted from the provisions of the Fair Labor Standards Act of 1938 relating to maximum hours. They are not exempted from section 12 prohibiting oppressive child labor. The only exceptions in this respect are found in section 13(c) as follows:

The provisions of section 212 of this title relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

However, section 18 of the Fair Labor Standards Act of 1938 provides that if State standards are higher than Federal standards, then these higher State standards shall be enforced as follows:

No provision of sections 201-219 of this title or of any other thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under such sections or a maximum workweek lower than the maximum workweek established under such sections, and no provision of sections 201-219 of this title 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 such sections. * * *

As there is no irreconcilability between the Federal Fair Labor Standards Act of 1938 and the Pennsylvania Child Labor Law, but rather a declaration in the Federal Act for the enforcement of the more stringent State regulations, the State regulations are enforceable.

From the foregoing examination of relevant Federal legislation, it appears that the Federal Railway Labor Act, *supra*, does not preempt the field of the regulation of hours; that the Fair Labor Standards Act of 1938, *supra*, excepts from its regulatory provisions, relating to maximum hours, employes engaged in transportation; and that the Federal Hours of Service Act does not supersede the State's regulation of the hours of minors. Furthermore, none of the Federal acts except the Fair Labor Standards Act, *supra*, governs the employment of minors in hazardous occupations. While the Fair Labor Standards Act, *supra*, alone prohibits oppressive child labor, it expressly gives effect to more stringent State regulations. Hence, the Pennsylvania Child Labor Act is not repugnant to the Federal legislation and is not an interference with interstate commerce but is rather in aid of and for the protection of minors engaged in such commerce, as well as in intrastate commerce and industries within the State.

It is our opinion, therefore, that the Pennsylvania Child Labor Law, the Act of May 13, 1915, P. L. 286, as amended, 43 P. S. § 41 et seq., is applicable to minors between the ages of 16 and 18 years of age who may be employed by interstate railroads.

In Formal Opinion No. 388, 1941-1942 Op. Atty. Gen. 27 (1941), we held, and so advised your predecessor, that when interstate carriers and their employes, pursuant to the Railway Labor Act, *supra*, enter into collective bargaining agreements, said act and agreement supersede the Women's Labor Law, the Act of July 25, 1913, P. L. 1024, as amended, 43 P. S. § 101 et seq. Inasmuch as our conclusions herein conflict with those in Formal Opinion No. 388, *supra*, the latter, in so far as inconsistent, are overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 481

Taxation—Federal income tax—Attachment for delinquency—Commonwealth as garnishee—Internal Revenue Code of 1939, sections 3670 and 3671.

Sections 3670 and 3671 of the Internal Revenue Code of 1939, providing for the issuance of attachments for delinquent income tax payments, do not authorize the issuance of such attachments against the sovereign Commonwealth of Pennsylvania, either for wages due its employes or for sums due vendors or others.

Harrisburg, Pa., November 18, 1943.

Honorable G. Harold Wagner, State Treasurer, Harrisburg, Pennsylvania.

Sir: By communication of November 10, 1943, you inform us that you have been served with "Notice of Levy" and "Notice of Tax Lien under Internal Revenue Laws" by the Collector of Internal Revenue of the United States located at Philadelphia, with respect to a Commonwealth employe. The papers referred to recite that the Government of the United States has a claim against this employe for unpaid Federal income tax; and purport to impose a levy from any monies due the employe from the Commonwealth, in favor of the United States.

Section 3670 of the Internal Revenue Code, 26 U. S. C. A. Section 3670 reads as follows:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 3671 of said code, 26 U. S. C. A., Section 3671, is as follows:

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

You desire us to advise you:

(1) What effect is the State Treasurer required to give to the aforesaid notices served upon him where the delinquent taxpayer involved is a Commonwealth employe? Should the State Treasurer withhold the salary check due said employe?

(2) What effect should the State Treasurer give to the aforesaid notices where the delinquent taxpayer is not an employe of the Commonwealth, but is a vendor or other person to whom the Commonwealth is indebted?

The Commonwealth of Pennsylvania is a sovereign State of the United States of America. As such it cannot be sued unless it consent thereto, except pursuant to the provisions of its own Constitution and that of the United States; and the Commonwealth cannot have imposed upon it, or be subjected to, except under like circumstances. any burdens or obligations.

It is axiomatic that the Commonwealth cannot be garnished. This is what the aforesaid levy purports to do. The fact that the claimant is the Government of the United States is immaterial. The Commonwealth of Pennsylvania cannot be made a garnishee by any person, corporation, State or by the Federal Government, unless it consent thereto.

We consider it unnecessary to enter into a discussion of whether any property of the delinquent taxpayer is in the hands of the Commonwealth, or whether such taxpayer might have a claim which could be legally asserted against the Commonwealth, or whether all funds of the Commonwealth remain its property until delivered to a payee. Such a discussion would serve no useful purpose because your questions are governed by the principles hereinbefore enunciated.

It is our opinion, therefore, that no effect whatever need be given by you to notice of levy and of tax served upon you in favor of the Government of the United States against a delinquent taxpayer of the Federal Government for or on account of monies owing to such taxpayer by the Commonwealth, whether such taxpayer be an employe of the Commonwealth or whether he be some one to whom the Commonwealth owes money for other reasons.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 482

Railroads—Crossings—Federal or State regulation—Exercise of Federal power—Retention of State jurisdiction—Public Utility Law of 1937, section 409, as amended—Public Utility Commission—Exclusive jurisdiction.

1. In the absence of any exercise by Congress of the constitutional power vested in it, in its control over interstate commerce, to curtail the regulatory power of the State over the construction, alteration and abolition of railroad crossings, such power still rests in the State.

2. Under section 409 of the Public Utility Law of May 28, 1937, P. L. 1053, as amended by the Act of September 28, 1938, P. L. 44, the Public Utility Commission has exclusive jurisdiction over abolition of crossings located on an existing line of railroad, which is a part of an interstate system or which is owned by an interstate system, after the Interstate Commerce Commission has approved abandonment of the line, if the State commission has not already consented unconditionally to such abandonment.

Harrisburg, Pa., December 3, 1943.

Honorable John Siggins, Jr., Chairman, Pennsylvania Public Utility Commission, Harrisburg, Pennsylvania.

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

Under the provision of Section 409 of the Public Utility Law, does the Public Utility Commission have jurisdiction over the abolition of crossings located on a line of railroad which is a part of an interstate system, or which is owned by an interstate system, where the Interstate Commerce Commission has approved the abandonment of said line?

Your request states that in those cases where a railroad company operating within the Commonwealth of Pennsylvania desires to abandon the whole or a portion of a line which is a part of an interstate system, application for approval of the abandonment is filed with the Interstate Commerce Commission, and that body forwards a copy of such application to the Governor, who then refers it to the Public Utility Commission. When your commission receives such an application it ascertains whether there are any highway crossings located on the line proposed to be abandoned, and if such be the fact, the commission institutes a formal investigation directed to the railroad company involved, requiring it to show cause why it should not make application to the commission for permission to abolish such highway crossings. In those cases where this course has been followed the railroads have filed motions to dismiss, and the basis of such motions is a contention that the Pennsylvania Public Utility Commission lacks jurisdiction because of a construction placed on section 409 of the Public Utility Law by the Superior Court in *Jennings, Trustee, v. P. U. C.*, 140 Pa. Super. 569 (1940):

Section 409 of the Public Utility Law (66 P. S. § 1179) contains five subsections. The following are pertinent to the present question:

(a) No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels, and no highway, without like order, shall be so constructed across the facilities of any such public utility and, *without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated or abolished.*

(b) The commission is hereby vested with *exclusive* power to appropriate property for any such crossing, and to determine and prescribe by regulation or order, the points at which, and the manner in which, such crossing may be constructed, altered, relocated or abolished, and the manner and condi-

tions in or under which such crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public.

(c) Upon its own motion or upon complaint, the commission shall have *exclusive* power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be abolished upon such reasonable terms and conditions as shall be prescribed by the commission. In determining the plans and specifications for any such crossing, the commission may lay out, establish, and open such new highways as, in its opinion, may be necessary to connect such crossing with any existing highway, or make such crossing more available to public use; and may abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any of such crossings. The commission may order the work of construction, relocation, alteration, protection, or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth. (Italics ours.)

Subsection (a) above quoted provides that no public utility shall abolish a crossing without the prior order of the commission; subsection (b) vests the commission with *exclusive* power to determine and prescribe the points at which, and the manner in which, crossings may be abolished, and subsection (c) vests the commission with *exclusive* power to order the abolition of crossings and the terms by which abolition shall be effected. The latter provision includes, in the *exclusive* power of the commission, the power to lay out, establish, and open such new highways as may be necessary for public use. This latter provision becomes very pertinent in those cases where the abolition of crossings creates cul-de-sacs for the traveling public or deprives property owners of access.

The quotations from section 409 of the Public Utility Law are included herein to stress the fact that the Public Utility Commission is the proper forum in which matters pertinent to the abolition of utility crossings should be adjudicated. The comment concerning the authority of the commission to lay out, establish and open highways is to stress the fact that conditions often arise where both public and private interests are vitally concerned with conditions as they may exist after a crossing has been abolished.

Your letter asking for the advice herein given contains the following pertinent paragraph which might be cited as an additional reason why your commission should exercise jurisdiction in these matters:

In connection with the crossing above or below grade, the highway in many instances is carried across or under the tracks of the railroad by bridges of considerable height, and unless the bridges are properly maintained they become unsafe and dangerous to the traveling public. If, under the Jennings decision, the Commission has no jurisdiction over such crossings after the line has been abandoned, the order of the Commission with respect to the maintenance thereof is of no force or effect; therefore no party is charged with that duty. Under these circumstances the maintenance of said bridges will be neglected and as a result thereof they will become unsafe and dangerous to the public.

That your commission has jurisdiction over the abolition of crossings in Pennsylvania on railroads actively engaged in interstate commerce hardly needs comment. The remaining question to be considered then is:

What is the jurisdiction of the commission with respect to crossings on an interstate railroad where such railroad has applied for abandonment to the Interstate Commerce Commission?

In view of the exclusive jurisdiction granted to the commission in the manner hereinbefore set forth, we are of the opinion that the Public Utility Commission should exercise jurisdiction in these matters. The decision in *Jennings, Trustee, v. P. U. C.*, supra, does not alter our view, which is supported by the case of *Palmer v. Massachusetts*, 308 U. S. 79, the effect of which was avoided by the writer of the opinion in the Jennings case as follows:

* * * The case is not applicable here, for our state authority gave its unconditional assent to the absolute abandonment of these fifty-four miles of railroad.

Hence, it would follow that if the Pennsylvania Public Utility Commission has not consented to the abandonment of a line, it could still exercise jurisdiction over crossings thereon. It shall further be noted that the Superior Court spoke of "unconditional consent", which would seemingly imply that your commission could say "Our consent to abandonment is given providing you do thus and thus to the following crossings on said line:"

In the subject "Railroads", 55 Federal Digest, Section 99, will be found a lengthy list of decisions of the United States Supreme Court which hold that contracts by a railroad are subject to the possible exercise of the state's sovereign right to require the abolition of dangerous grade crossings as well as for the further proposition that:

The state, from which railroads derive their right to occupy land within the state, has a constitutional right to insist that highway crossings shall not be made dangerous to the public,

whatever may be the cost to the railroad companies; and, if it reasonably can be said that safety requires the abolition of grade crossings, neither prospective bankruptcy of the company nor its enagement in interstate commerce can take away this fundamental right of the state as sovereign of the soil.

Thus, it will be seen that certain inherent rights are vested in the states to control highway crossings of utility companies whether they be conducting interstate business or not. It does not seem reasonable that such rights can be lost because a railroad has made application to the Interstate Commerce Commission for abandonment, and, unless and until the Public Utility Commission has consented to such abandonment, it is our opinion that crossings on such a railroad line are live crossings subject to the jurisdiction of the Public Utility Commission.

You state in your request that proceedings against crossings have been instituted against railroads immediately after they had made application for abandonment to the Interstate Commerce Commission. Jurisdiction thereupon attached for the commission to prescribe the terms and conditions of abandonment for such crossings and it would not be swept aside by a subsequent order of the Interstate Commerce Commission for abandonment of the line; in fact, an order of abandonment in such event would be coupled with an implication that the line could be abandoned if the company complied with the order of your commission respecting abolition of crossings.

When the Pennsylvania Legislature vested the Public Utility Commission with exclusive authority over the abandonment of crossings, what else could it have had in mind but that crossings to be abandoned were "dead crossings", on tracks where service was to be or had been abandoned? To prevent the growth of dangerous conditions which might arise through neglected, abandoned crossings and to further prevent inconveniences to the traveling public, the legislature of Pennsylvania vested your commission with exclusive power to prescribe conditions for abandonment. This was a valid exercise of the police power as conditions at crossings are a matter of important local concern, and action by the State is no denial of Federal control over the abandonment of interstate railroads.

The only opposite view which could be urged is that the Interstate Commerce Commission has exclusive control over the abandonment of interstate railroads and, therefore, the state or its agencies are powerless to act. If this be true, no relief could be had either before the Public Utility Commission or in the State courts of Pennsylvania. In this regard the Interstate Commerce Commission advised you by

letter dated June 27, 1939: "we are of the opinion that this is a matter which does not affect the question of public convenience and necessity but which should be adjusted between the Commonwealth and the appellant". Both of these propositions cannot be correct, and leave the Commonwealth powerless in the matter. Present trends in constitutional construction forbid such a hopeless result and we should not assign ourselves such a position when there is possibility of achieving a better answer. See the recent case of *Maurer v. Hamilton*, 309 U. S. 598, 60 Sup. Ct. 726 (1940).

The Supreme Court of the United States held in the case of *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 58 S. Ct. 510, that the power of Congress to regulate interstate traffic does not force the states to conform to regulations which Congress might have made, but has not adopted, and does not curtail the power of the states to take measures to insure the safety and conservation of their highways. The court further said in this case:

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial, function, to be performed in the light of the congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause, Const. art. 1, § 8, cl. 3, as well as the Fourteenth Amendment, stops with the inquiry whether the state Legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles v. Binford*, supra; *Stephenson v. Binford*, 287 U. S. 251, 272, 53 S. Ct. 181, 187, 77 L. Ed. 288, 87 A. L. R. 721.

We find nothing in the Interstate Commerce Act, 49 U. S. C. A. 1, (18), (19), (20), which reserves to the Federal Government the right to control the conditions for the abandonment of crossings on interstate railroads where applications are made for a certificate of the Interstate Commerce Commission for abandonment. Therefore, such matter would be subject to State regulation and it is presumed that the Interstate Commerce Commission, in the proceedings before it for abandonment, would take into consideration the outlay required to removal of crossings. See *Transit Commission of State of New York v. U. S.*, 284 U. S. 260, 52 S. Ct. 157. Congress, having failed to deal

with the subject of the removal of crossings on railroad lines for which the Interstate Commerce Commission has issued a certificate for abandonment, such power still rests with the State and the Public Utility Commission could exercise jurisdiction over the abandonment of crossings thereon if it has not unconditionally consented to such abandonment. *Jennings, Trustee, v. P. U. C. supra*, can be so construed.

We are of the opinion, therefore, that under the provisions of section 409 of the Public Utility Law, the Public Utility Commission has jurisdiction over the abolition of crossings located on a line of railroad which is a part of interstate system or which is owned by an interstate system, where the Interstate Commerce Commission has approved the abandonment of said line, if the Public Utility Commission has not consented unconditionally to such abandonment.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

PHIL H. LEWIS,
Deputy Attorney General.

OPINION No. 483

Transfer Inheritance Taxes—Collection—Registers of Wills—Expenses—Appraisers—Clerks and Employes—Payment—Secretary of Revenue—Constitutionality of Act of May 23, 1943 (Act No. 171).

The Act of May 21, 1943 (Act No. 171), which amends the Act of July 8, 1919, P. L. 782, the Act of May 21, 1943 (Act No. 172), which amends the Act of May 4, 1927, P. L. 727, and the Act of May 21, 1943 (Act No. 178), which amends the Fiscal Code, are constitutional in all respects.

Registers of Wills of the several counties are legally bound to pay from transfer inheritance taxes of resident decedents collected by them, the salaries and proper expenses of investigators, appraisers, clerks and other employes appointed by the Secretary of Revenue to assist the Registers in the collection of such taxes.

Registers cannot be surcharged because of the payment of such salaries, even though the legislation in question should subsequently be declared unconstitutional. As agents of the Commonwealth they would be merely obeying the clear mandate of the legislation, and, in any event, would be protected.

It is not ordinarily the duty or function of the Department of Justice to pass upon the constitutionality of acts of assembly. It is the department's duty and function to defend and support the constitutionality of all acts of assembly whenever and wherever attacked. In view of the grave public interests at stake in the present situation, and of the resultant jeopardizing of the revenues of the Com-

monwealth, it is advisable to depart from our usual policy and express our opinion on the constitutional issues involved, even though the same have not yet been passed upon by the courts.

Harrisburg, Pa., January 12, 1944.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether the following acts are constitutional: the Act of May 21, 1943, P. L. 369, Act No. 171, which amends the Act of July 8, 1919, P. L. 782; the Act of May 21, 1943, P. L. 370, Act No. 172, which amends the Act of May 4, 1927, P. L. 727; and the Act of May 21, 1943, P. L. 380, Act No. 178, which amends The Fiscal Code. Acts Nos. 171 and 172 became effective immediately upon final enactment, namely, May 21, 1943. Act No. 178 became effective May 31, 1943. These acts, in brief, provide that the Secretary of Revenue, rather than the Auditor General, shall have complete supervision over the appraisements of the estates of resident decedents of the Commonwealth and shall appoint and fix the compensation of all clerks, appraisers, investigators and other persons required to assist the several registers of wills in the collection of inheritance taxes on the estates of resident decedents.

It is not ordinarily the duty or function of the Department of Justice to pass upon the constitutionality of Acts of Assembly. On the contrary, it is the department's duty and function to defend and support the constitutionality of all Acts of Assembly whenever and wherever attacked. However, in view of the grave public interests at stake in the present situation, and of the resultant jeopardizing of the revenues of the Commonwealth, we deem it advisable to depart from our usual policy and express our opinion on the constitutional issues involved even though the same have not yet been passed upon by the courts.

You inform us that the Auditor General has on several occasions notified the various registers of wills that the constitutionality of the foregoing acts is doubtful and that if investigators, appraisers and clerks appointed by the Secretary of Revenue to assist the registers in the collection of resident inheritance tax are paid by the registers, they may be surcharged. These communications, it appears, have influenced a number of registers of wills to the extent that they have failed and refused to pay employees of the classes designated.

That every Act of Assembly is presumptively valid and constitutional until declared otherwise by a court of competent jurisdiction is a proposition so axiomatic as to require or necessitate no citation of authorities. We do not bottom our conclusions on the foregoing proposition alone, however, for it is our considered opinion that the

amendatory statutes under discussion are constitutional and valid in all respects. Under the subject legislation the power of appointment of the employes designated now rests entirely in the hands of the Secretary of Revenue, and the salaries of such employes are to be paid out of inheritance tax receipts by the registers of wills whom such employes assist. Nor can registers be surcharged because of the payment of such salaries, even though the legislation in question should subsequently be declared unconstitutional, for, as agents of the Commonwealth they would be merely obeying the clear mandate of the legislation, and, in any event, would be protected in following this opinion, as they are bound to do. Commonwealth ex rel. v. Lewis, Auditor General, 282 Pa. 306 (1925). See also, Section 512 of The Administrative Code of 1929, which provides in part as follows:

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.

To extend this opinion further would be to labor a matter when no occasion exists for so doing. It is our opinion, therefore, and you are accordingly advised that the Act of May 21, 1943, P. L. 369, Act No. 171, which amends the Act of July 8, 1919, P. L. 782, the Act of May 21, 1943, P. L. 370, Act No. 172, which amends the Act of May 4, 1927, P. L. 727, and the Act of May 21, 1943, P. L. 380, Act No. 178, which amends The Fiscal Code, are constitutional in all respects; and that pursuant to the terms of said legislation the registers of wills of the several counties are legally bound to pay from transfer inheritance taxes of resident decedents collected by them, the salaries and proper expenses of investigators, appraisers, clerks and other employes appointed by the Secretary of Revenue to assist the registers in the collection of such taxes.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 484

Pennsylvania Turnpike Commission—Right of member of Commission to hold office of secretary and treasurer—Bonds required.

Harrisburg, Pa., January 12, 1944.

Honorable Edward Martin, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have referred to us a request for advice sent to you by letter of January 10, 1944, by the Honorable Thomas J. Evans, Chairman of the Pennsylvania Turnpike Commission.

Mr. Evans desires to be advised whether the office of Secretary and Treasurer of the Pennsylvania Turnpike Commission is a single office which may be filled by one person, or must one individual be secretary and another treasurer. Mr. Evans also wishes to be advised whether a member of the Commission can hold the office of secretary and treasurer, if it is a single office; and whether members of the Commission may hold the offices of secretary and treasurer in the event they are separate offices.

There is no doubt whatever in our minds that the office of secretary and treasurer of the Pennsylvania Turnpike Commission is a single office, to be filled by one person. The Act of May 21, 1937, P. L. 774, which creates the Pennsylvania Turnpike Commission, provides, among other things, in section 4, as follows:

* * * The commission shall elect one of the appointed members as chairman of the commission, and shall also elect a secretary and treasurer who may not be a member of the commission.* * *

The ordinary meaning of that portion of the statute above quoted, clearly indicates that one individual is to fill the office of secretary and treasurer, and that in one office are combined the functions of secretary and treasurer. If the meaning were otherwise, the foregoing language should read "** * * shall also elect a secretary and treasurer who may not be members of the commission.*" Furthermore, the Trust Indenture of August 1, 1938, entered into between the Commission and Fidelity-Philadelphia Trust Company, relating to the Turnpike's 3¾ revenue bonds, throughout its context, wherever the term "Secretary and Treasurer" is used, contemplates such term to mean and designate a single office. A random example of such use of the term in the Indenture will be found in Article III, Section 6 (f), on page 30 thereof, wherein it is stated "** * * a written statement by the Secretary and Treasurer of the Commission that the court has approved, or in his opinion will approve, such bond or bonds.*" It is manifest that if the office of secretary and treasurer were not a single office the foregoing would read "*in their opinion.*"

Also, we have no difficulty in concluding that a member of the Commission may hold the office of secretary and treasurer. That portion of section 4 of the statute creating the Commission hereinbefore quoted, in using the words "* * * shall also elect a secretary and treasurer who *may* not be a member of the commission," means "who *need* not be a member of the commission." Webster's New International Dictionary, Second Edition, on page 1517, defines the word *may* to mean liberty, opportunity, permission, possibility; as; he may go; you may be right. The same authority also says:

Where the sense, purpose, or policy of a statute requires it *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force.

There is nothing in the statute cited, in its sense, purpose or policy, which requires that the word *may* in the case under discussion should be construed as *must* or *shall*. Nor can we discover anything in the Trust Indenture which would indicate that the use of *may* had any meaning other than its ordinary permissive and discretionary meaning.

We might add, however, with relation to section 4 of the act, where it requires that "* * * each appointed member of the commission shall execute a bond in the penalty of \$25,000, and the secretary and treasurer shall execute a bond in the penalty of \$50,000 each * * *," that if a member of the Commission is elected as secretary and treasurer he should execute and file a bond in the sum of \$25,000 as a member, and an additional bond of \$50,000 as secretary and treasurer, of the Commission.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 485

State Government—Department of Health—Records of vital statistics—Illegitimate births—Restrictions on disclosure—Uniform Vital Statistics Act of 1943—Repeal of earlier legislation—Delayed birth records—Fee for filing or amendment—Sufficiency of proof—Certificate of adoption—Purposes of Uniform Act—Guides in interpretation.

1. The Uniform Vital Statistics Act of May 21, 1943, P. L. 414, being a general revision of the laws relating to vital statistics, insofar as section 20 (2) governs disclosure of records of illegitimate births, it supersedes and repeals section 21 of the Act of June 7, 1915, P. L. 900, as last amended by the Act of April 22, 1937, P. L. 399.

2. Under section 20 of the Uniform Vital Statistics Act of 1943, the Department of Health may disclose illegitimacy of birth or information from which that fact may be ascertained, by permitting inspection of its records or by issuing certified copies of such birth certificates, only to the mother of the illegitimate child or to the child itself, or upon order of a court in instances where such information is necessary for the determination of personal or property rights and then only for that purpose.

3. The provisions of sections 17 to 19 of the Uniform Vital Statistics Act of 1943, relating to delayed or altered certificates of birth and providing for the filing and alteration thereof without fee, repeal the Act of July 16, 1941, P. L. 383, which required payment of a fee for the filing of a delayed birth record.

4. Under section 17 of the Uniform Vital Statistics Act of 1943, the Department of Health may file or amend a birth record on the basis of data contained in a certificate of adoption filed with it by a clerk of court pursuant to section 32 of the act, if it is satisfied with the proof offered, whether or not such adoption preceded the effective date of the statute.

5. The purpose of the Uniform Vital Statistics Act of 1943 is to establish an all-inclusive system for the recordation and preservation of data relating to such statistics and to make uniform the laws of the several States enacting the legislation, and it is to be construed with those purposes in mind.

Harrisburg, Pa., February 8, 1944.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you concerning certain provisions of the Uniform Vital Statistics Act, the Act of May 21, 1943, P. L. 414, 35 P. S. 505.1 et seq. Your questions are as follows:

1. Does Section 20 (2) of said act, in view of Section 21 of the Act of June 7, 1915, P. L. 900, as last amended April 22, 1937, P. L. 399, 35 P. S. § 471, prohibit the department from supplying a certified copy of a record of an illegitimate birth to any one except upon order of court?

2. Does said act repeal that portion of Section 2 of the Act of July 16, 1941, P. L. 383, 35 P. S. § 482, which provides that a fee of \$2.50 shall be paid to the Bureau of Vital Statistics for the filing of a delayed birth certificate?

3. May the Department of Health accept as satisfactory proof for the filing of a delayed birth certificate information contained in a certificate of adoption filed by a clerk of court with the department, as required by Section 32 of the Uniform Vital Statistics Act? In the

event our answer to this question is in the affirmative you desire to be advised whether the department may accept certificates of adoption which occurred prior to September 1, 1943, for the same purpose, September 1, 1943, being the effective date of the Uniform Vital Statistics Act.

We will answer the foregoing questions under their respective numbers.

1. Section 21 of the Act of June 7, 1915, P. L. 900, as amended, supra, provides, among other things:

* * * 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. * * *

Section 20 (2) of the Uniform Vital Statistics Act is as follows:

Disclosure of illegitimacy of birth or of information from which is can be ascertained may be made only upon order of a court, in a case where such information is necessary for the determination of personal or property rights, and then only for such purpose.

The ostensible purpose of the Uniform Vital Statistics Act is to establish an all-inclusive system for the recordation and preservation of data relating to vital statistics, as defined in the act. The avowed purpose of all uniform legislation, such as this act, is to make uniform the laws of the several states enacting such legislation. The Uniform Vital Statistics Act was approved by the National Conference of Commissioners on Uniform State Laws in 1942. It is a revision of the Model Vital Statistics Act promulgated in 1940, which was redesignated a Uniform Act and tentatively approved by the Commissioners in 1941. As of 1941 the act had been adopted in three other states. We emphasize the twofold purpose of the act, namely, to supply in one piece of legislation the machinery to deal completely with vital statistics; and secondly, as rapidly as possible, to enact such legislation uniformly in all states. In construing the provisions of the act, or their possible conflict with those of other and prior statutes, or in comparing the provisions of the act with those of similar acts passed in other states, the aforesaid desiderata of uniformity and completeness should be kept in mind.

For our specific guidance in construing statutes, and in particular the inconsistent statutory provisions hereinbefore quoted and cited, we look to the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 501 et seq. Section 57 of said act, 46 P. S. § 557, is as follows:

Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them.

While it is true that laws or parts of laws are in *pari materia* when they relate to the same persons or things or to the same class of persons or things, and are to be construed together, if possible, Statutory Construction Act, Section 62, 46 P. S. § 562, the treatment accorded such statutes in so far as revisions and codifications of laws upon a particular subject are concerned, is somewhat different. Section 91 of the Statutory Construction Act, 46 P. S. § 591, is as follows:

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.

Whenever a general law purports to establish a uniform and mandatory system covering a class of subjects, such law shall be construed to repeal pre-existing local or special laws on the same class of subjects.

In all other cases, a later law shall not be construed to repeal an earlier law unless the two laws be irreconcilable.

The Uniform Vital Statistics Act purports to be a revision of the laws on the subject it deals with, sets up a general and exclusive system covering this subject, is intended to be a substitute for prior legislation relating thereto, and should, therefore, be construed to repeal former laws upon the same subject, especially if the former are inconsistent with the act.

It would be easy to conclude that Section 20 (2) of the Uniform Vital Statistics Act is in *pari materia* with that portion hereinbefore quoted of Section 21 of the Act of June 7, 1915, as indeed it is, and that the two should be construed together, *were it not for the fact that the uniform act is a general revision of the laws relating to vital statistics*. It is therefore our conclusion that Section 20 (2) of the Uniform Vital Statistics Act repeals and supersedes that portion of the Act of 1915 referred to.

It follows that the department may disclose illegitimacy of birth, or information thereof, only in accordance with Section 20 (2) of the Uniform Vital Statistics Act.

2. The Act of July 16, 1941, P. L. 383, 35 P. S. § 481 et seq., provided for the filing of data with the Department of Health for the recordation of births of persons born in this Commonwealth, records of whose births were not already recorded. By popular usage such records have come to be called delayed birth records, and certificates

thereof issued by the department delayed birth certificates. The entire act is devoted to this subject. A fee of \$2.50 is required by the act to be paid for such registration.

The Uniform Vital Statistics Act also provides for delayed or altered certificates of birth, in sections 17 to 19, inclusive. No fee is required to file such delayed or altered certificates under the Uniform Act, just as no fee is required to file an ordinary record of birth. For the reasons hereinbefore advanced, a fee may not be charged after September 1, 1943, for filing a record of a birth not theretofore recorded, or for filing data for the purpose of altering a birth already recorded, any more than for filing the material necessary to establish an ordinary birth record. We think the Uniform Vital Statistics Act repealed the Act of July 16, 1941, P. L. 383.

3. According to Section 17 of the Uniform Vital Statistics Act a person born in this State may file or amend a certificate after the time prescribed by the act upon submitting such proof as shall be required by the department. You inquire whether the department may file or amend a certificate by accepting as proof of the data required, the information contained in a certificate of adoption filed with the department by a clerk of court, which filing is required by section 32 of the act. First of all, the amount and nature of the proof of such data are prescribed by the department itself. Whether the data contained in a certificate of adoption would fulfill the requirements set up by the department, is, of course, a matter for the department to decide. We see no reason why, if the department is satisfied with the proof offered by way of a certificate of adoption, it cannot file or amend a birth record.

Since we have answered this question in the affirmative, as qualified above, you desire to know whether you may accept the data from certificates of adoption which occurred prior to September 1, 1943, for the purpose of filing or amending records of birth, September 1, 1943, being the effective date of the Uniform Vital Statistics Act. We see no reason why you should not. To do so would not be to make the uniform act retroactive; see Statutory Act, Section 56, 46 P. S. § 556; and what you would be doing would be pursuant to the provisions of the uniform act, and after its effective date. You would simply be recording events which occurred prior to the time the act became effective, but doing so in accord with the act.

It is our opinion, therefore: 1. That the Department of Health may disclose illegitimacy of birth, or information from which illegitimacy of birth can be ascertained, only in accordance with the provisions of section 20 of the Uniform Vital Statistics Act. 2. No fee may be charged by the Department of Health for the filing of a de-

layed birth certificate after September 1, 1943. 3. The Department of Health may accept as satisfactory proof for the filing of a delayed birth certificate information contained in a certificate of adoption filed by a clerk of court pursuant to section 32 of the Uniform Vital Statistics Act in the event the department is of opinion that such proof meets its requirements, and this regardless of whether the adoptions which are certified to by clerks of courts occurred before or after September 1, 1943.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 486

War—Civilian defense—State Council of Defense Act of 1941, as amended—Rules and regulations—Refusal of obedience—Local council of defense—Air Raid Precautions Act of 1942, as amended—Remedies—Mandamus—Dismissal of local council—Right of private citizen to sue—Air Raid Protection Regulations No. 1—Violation—Applicability of Federal law.

1. Under the provisions of the Air Raid Precautions Act of April 13, 1942, P. L. 37, as amended by the Act of May 6, 1943, P. L. 170, and the State Council of Defense Act of March 19, 1941, P. L. 6, as amended by the Act of May 21, 1943, P. L. 394, a local council of defense is under a ministerial duty to enforce rules and regulations promulgated by the State Council of Defense, which may compel compliance with its rules by a writ of mandamus or may request the executive authority of the political subdivision to dismiss those responsible for refusing so to comply.

2. Refusal by a local council of defense to comply with orders promulgated by the State Council of Defense constitutes a violation of the Air Raid Protection Regulations No. 1 promulgated by the Third Service Command of the United States Army, which are identical with the regulations of the State Council of Defense, and subjects the local council to the penalties provided by appropriate Federal law.

3. Any citizen may bring an action before a magistrate, justice of the peace, or alderman for violation of the Air Raid Precautions Act of 1942, as amended.

Harrisburg, Pa., February 8, 1944.

Honorable Ralph C. Hutchison, Executive Director, State Council of Defense, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion regarding the authority of the State Council of Defense in a situation where a local council of defense announces its determination not to

participate in mobilization tests, and not to blow sirens when the army calls an air raid drill or blackout. You set forth three questions. We shall discuss the first and second questions together, as they are so closely related. These questions are:

1. What authority does the State Council of Defense have under the Act of 1941, to require a Local Council of Defense to comply with the Act and Regulations and Rules promulgated thereunder?

2. What recourse has the State Council of Defense where a Local Council orders its people not to obey practice tests when sounded by sirens or when ordered by the Army?

The Act of March 19, 1941, P. L. 6, as amended by the Act of May 21, 1943, P. L. 394, Act No. 185, 71 P. S. § 1681, known as the "State Council of Defense Act," authorizes the Governor in time of emergency or public need to create, by proclamation, a State Council of Defense for the general purpose of assisting in coordination of state and local activities related to State and National defense. Pursuant to such authority the State Council of Defense was established on April 7, 1941, by proclamation of former Governor James.

Section 4 of said act, which sets forth the powers and duties of the State Council of Defense, reads in part as follows:

Section 4. Powers and Duties.—The council shall have the following powers and duties:

* * * * *

(g) To require and direct the cooperation and assistance of State and local governmental agencies and officials.

* * * * *

(k). To cooperate with agencies established by or pursuant to laws of the United States, and of the several states, to promote civilian protection and the war effort, and to cooperate with and coordinate the work and activities of all local councils of the State * * *.

* * * * *

(m) To adopt, promulgate and enforce rules and orders not inconsistent with rules or orders of the United States Army or Navy, or of the Federal Office of Civilian Defense, with respect to the organization, recruiting, training, maintenance and operation of aircraft warning services, observation and listening posts, information and control centers, and such other services and facilities as may be necessary for the prompt reception and transmission of air raid warnings and signals.

Section 6 of said act provides for the establishment of local councils of defense and reads:

Section 6. Local Councils of Defense.—Each political subdivision of the Commonwealth may establish a local council of defense by the proclamation of the executive officers or governing body thereof. Local councils of defense, if and when established, shall cooperate with and assist the council and shall perform such services as may be requested by it.
* * *

It shall be the duty of every local council of defense to execute and enforce such rules and orders as the State Council of Defense shall adopt and promulgate under the authority of this act. Each local council of defense shall have available for inspection at its office all rules and orders adopted by the State Council of Defense. (Italics ours.)

Section 8 of the act provides for penalties, and reads as follows:

Section 8. Penalties.—Any person violating any of the rules and orders adopted and promulgated under section four by the State Council of Defense, shall upon conviction thereof in a summary proceeding, be sentenced to pay a fine not exceeding fifty (\$50) dollars or imprisonment not exceeding thirty (30) days or both for the first offense, and a fine not exceeding two hundred (\$200) dollars or imprisonment not exceeding (90) days or both for each subsequent offense.

The Act of April 13, 1942, P. L. 37, as amended by the Act of May 6, 1943, P. L. 170, Act No. 85, 35 P. S. § 2001, is known as the "Air Raid Precautions Act," and section 3 of this act reads in part as follows:

Section 3. (a) The State Council of Defense shall during the continuance of the existing state of war between the United States and any foreign country have the power and its duty shall be to take such precautionary measures as may be necessary for the safety, defense and protection of the civilian population of the Commonwealth and property within the Commonwealth with respect to air raids. In furtherance of this power and duty the State Council of Defense shall have power to adopt, promulgate and enforce rules, regulations and orders for this purpose. The State Council of Defense shall cause such rules, regulations and orders to be published and disseminated in the Commonwealth in such manner and to such extent as it shall deem necessary and advisable. Such rules, regulations and orders adopted by the State Council of Defense shall have the same force as if they formed a part of this act. Subject to the provisions of this act, and without limiting the general power conferred above, the State Council of Defense shall have the power and its duty shall be to make rules, regulations and orders regarding:

(1) The organization, recruiting, training, maintenance and operation of aircraft warning services; observation and listening posts, information and control centers, including the location thereof, and such other services and facilities as may be necessary for the prompt reception and transmission of air raid warnings and drills;

(2) The formulation and execution of plans for the carrying out of practice blackouts, air raid drills and warnings and of all precautionary measures under actual conditions of hostile air raids or enemy attack;

(3) The organization, recruiting, training, conduct and duties and powers of volunteer agencies;

* * * * *

Section 4 of the act reads in part as follows:

Section 4. *It shall be the duty of every local and district council of defense to execute and enforce such plans, rules, regulations and orders as the State Council of Defense shall adopt and promulgate.* * * * (Italics ours.)

Section 9 of the act provides for penalties for violation of the act and rules promulgated thereunder, and reads as follows:

Section 9. Any person violating any of the provisions of this act or any of the rules, regulations and orders adopted and promulgated under this act by the State Council of Defense or any local or district Council of Defense, or who shall fail to comply with any instructions lawfully given by any member of a municipal or volunteer agency or any person who shall without authority wear or display any official insignia authorized by the State Council of Defense or a local or District Council of Defense for use by members of any municipal or volunteer agency shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of not exceeding two hundred dollars (\$200), or imprisonment not exceeding ninety (90) days, or both.

All fines recovered under the provisions of this section shall be paid to the treasurer of the municipality or township in which the offense was committed for the use of such municipality or township.

Pursuant to the authority set forth in the Air Raid Precautions Act, rules and regulations for the safety, defense and protection of the civilian population and property with respect to air raids have been adopted and duly promulgated. These rules and regulations place certain duties and responsibilities upon local councils of defense. It is these duties and responsibilities which a local council of defense has advised you it will refuse to discharge in the future. As this local council of defense was created by a political subdivision, your first effort should be a request to the executive authority of the political subdivision either to prevail upon the local council of defense

to comply with the rules and regulations or to dismiss those responsible for the refusal and appoint others who will comply with said rules and regulations.

The duty of enforcing the rules and regulations of the State Council of Defense is ministerial and not discretionary, and you have the right to ask for a writ of mandamus to compel the members of the local council of defense, who refuse to cooperate, to comply with the rules and regulations of the State Council of Defense.

Under date of January 27, 1943, Milton A. Reckord, Major General of the United States Army, Commanding the Third Service Command, promulgated Air Raid Protection Regulations No. 1, and served notice to the people within the States of Pennsylvania, Maryland and Virginia that said Air Raid Protection Regulations No. 1 were pursuant to an order of Lieutenant General Hugh A. Drum, Commanding General, Eastern Defense Command and First Army, and that enforcement of said regulations was under his direction and control. These Air Raid Protection Regulations No. 1 are identical with the rules and regulations issued by the State Council of Defense. In fact, they were issued by the State Council of Defense upon the request of Major General Reckord, who desired that the enforcement of such rules and regulations should be undertaken by the several states, rather than through his office.

However, this does not mean that the Army relinquished its right to enforce the rules and regulations; and the Army may, under Section 11 of said Air Raid Protection Regulations No. 1, enforce such rules and regulations. We are quoting below paragraphs 47 and 48 of said section:

47. Any person who violates any regulation contained herein is subject to the penalties provided by Title 18, Section 97A, United States Code, and to immediate exclusion from the Eastern Military Area by the Commanding General, Eastern Defense Command and First Army. In addition, if two or more persons conspire to violate said section 97A, United States Code, and one or more persons do any act to effect the object of such conspiracy, each of said parties will be subject to the penalties provided by Title 18, Section 88, United States Code. In the case of an alien enemy, such person will, in addition, be subject to immediate apprehension and internment.

48. The Third Regional Office of the Office of Civilian Defense and civilian defense authorities within the States of Pennsylvania, Maryland and Virginia, with their consent, are designated as the principal agencies to assist in the enforcement of these regulations.

It is obvious, therefore, that the local council of defense in failing to comply with the orders of the State Council of Defense, is also violating the orders of the Third Service Command of the United States Army, and the violation is made greater by its directing others to disobey these orders. The local council is, by directing others to disobey the orders, placing all those who fail to comply with them in a position for prosecution by the State Council of Defense and the United States Army. You would therefore have, not only the remedies above outlined, but may also refer the matter to the Third Service Command of the United States Army for appropriate action under Federal law.

Your third question reads as follows:

3. May any citizen bring an action before a magistrate for violation of the Air Raid Precautions Act by orders of a Council and can its officers be prosecuted?

Under the sections of the respective acts above quoted, any citizen may bring an action before a justice of the peace, alderman or magistrate for violation of the Air Raid Precautions Act.

We are therefore of the opinion that: 1. Request should be made to the executive authority of the political subdivision appointing the local council of defense to dismiss those responsible for the refusal and appoint others who will comply with said rules and regulations. 2. You may ask the courts for a writ of mandamus to compel the members of the local council of defense to comply with the rules and regulations of the State Council of Defense; or you may refer the matter to the Third Service Command of the United States Army for appropriate action under the Federal law. 3. Any citizen may bring an action before a justice of the peace, alderman or magistrate for a violation of the Air Raid Precautions Act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 487

Pawnbrokers—Regulation of business—Pawnbrokers' License Act of 1937—Applicability to warehouseman lending money on goods stored—Sufficiency of title—Constitution, art. III, sec. 3.

1. The Pawnbrokers' License Act of April 6, 1937, P. L. 200, governs the business of any person who lends money upon the security of tangible personal property,

without regard to the fact that he may also be engaged in another business not within the purview of the act, and is applicable to a warehouseman who makes loans upon goods, wares, or merchandise pledged, stored, or deposited as collateral security.

2. The title of the Pawnbrokers' License Act of 1937 gives full and complete notice to all persons engaged in the business of lending money on the security of personal property that they are subject to the provisions of the act, and is not subject to objection under article III, section 3, of the Constitution of Pennsylvania.

Harrisburg, Pa., February 25, 1944.

Honorable William C. Freeman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have inquired whether a person who does business as a storage warehouseman and who also lends money upon goods, wares, or merchandise pledged, stored or deposited as collateral security is bound by the provisions of the Act of April 6, 1937, P. L. 200, 63 P. S. § 281.1, known as the "Pawnbrokers' License Act."

The warehouseman in question admits that his activities come within the definition above set forth but contends that the title to the act is defective as to him because reference in the title is only to "the business of pawnbrokers" while he is a warehouseman who only incidentally happens to be lending money upon the security of pledged personal property.

His contention is that the act is unconstitutional as to warehousemen because it violates Section 3 of Article III of the State Constitution, which provides:

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

The title of the Act of April 6, 1937, reads as follows :

An Act licensing and regulating the business of pawnbrokers; providing for the issuance of licenses by the Secretary of Banking; authorizing the Secretary of Banking to make examinations and issue regulations; limiting the interest and charges on loans; and prescribing penalties for the violation of this act.

Section 2 of the act, defining the word "pawnbroker," reads, in part, as follows:

"Pawnbroker" includes any person, who * * * (3) does business as a storage warehouseman and lends money upon goods, wares or merchandise pledged, stored or deposited as collateral security.

What the warehouseman in question fails to realize is that the act purports to regulate the business of persons who lend money upon the

security of certain personal property irrespective of what other incidental business they may be in. The thing regulated is the lending of money. The fact that the lender of money on the security of personal property also happens to be a warehouseman is entirely immaterial. Such a lender could be a second-hand junk dealer whose business is to buy and sell junk and used cars but who also, in fact, is a pawnbroker because he loaned money on the security of second-hand junk, automobiles, etc.

Webster defines a pawnbroker as "one who loans money on the security of personal property pledged in his keep."

That is precisely the kind of business the Act of April 6, 1937, seeks to regulate. The fact that a person loaning money on such security happens, at the same time, to be engaged in another enterprise, is entirely beside the point. The business regulated is the lending of money on the security of pledged personal property; all persons so engaged are subject to the provisions of the act, whatever other business they happen to be in.

The title gives full and complete notice to all engaged in the business of loaning money on the security of personal property that they are subject to the provisions of the act, and is clearly constitutional on that point.

It is our opinion: 1. That warehousemen who loan money upon goods, wares, or merchandise pledged, stored, or deposited as collateral with them are pawnbrokers with respect to such loan transactions and that the title to the "Pawnbrokers' License Act," the Act of April 6, 1937, P. L. 200, 63 P. S., § 281.1, is not defective as to all persons engaging in such activity. 2. It follows that any such warehouseman who so loans money must become licensed under the above mentioned act and subject himself otherwise to the regulations thereof.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ORVILLE BROWN,
Deputy Attorney General.

OPINION No. 488

Elections—Spring primary—Nomination petitions—Congressional districts—Acts of May 8, 1943, P. L. 256; February 25, 1942, P. L. 7; June 27, 1931, P. L. 1416; June 3, 1937, P. L. 1333.

The Act of May 8, 1943, P. L. 256, reapportioning the Commonwealth into congressional districts, governs nomination petitions for the spring primary to be held the fourth Tuesday of April, 1944, in accordance with section 603 of the Act of June 3, 1937, P. L. 1333, which provides for the holding of a spring primary preceding the general election, and for the nomination thereof of candidates for all offices to be filled at the ensuing general election.

Harrisburg, Pa., February 25, 1944.

Honorable C. M. Morrison, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We are in receipt of request for advice as to whether nomination petitions for the spring primary to be held on the fourth Tuesday of April, 1944, should refer to the number of the congressional districts as apportioned under the act of 1942 or the act of 1943.

You inform us that your request for advice arises as a result of inquiries you have received from a number of candidates for the office of Representative in Congress.

The Act of May 8, 1943, P. L. 256, 25 P. S. § 2197, reapportioning the Commonwealth of Pennsylvania into congressional districts, provides in section 2, in part, as follows:

The first election under this act shall be held at the general election in the year one thousand nine hundred forty-four.
(Italics ours.)

A similar provision is found in the former congressional apportionment Act of February 25, 1942, P. L. 7, 25 P. S. § 2197, which provides in section 3, inter alia, as follows:

* * * *the first election under this act shall be held at the general election in the year one thousand nine hundred and forty-two.* (Italics ours.)

A similar provision is also contained in section 8 of the congressional apportionment Act of June 27, 1931, P. L. 1416, 25 P. S. § 2196.

The Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333, section 2601, et seq., in section 601, 25 P. S. § 2751, provides for the holding of the general election on the Tuesday next following the first Monday of November in each even-numbered year and enumerate the officers to be elected at such general election, including Representatives in Congress, and is, in part, as follows:

The general election shall be held biennially on the Tuesday next following the first Monday of November in each even-numbered year. Electors of President and Vice-President of the United States, United States Senators, Representatives in Congress, the Governor, the Lieutenant-Governor, the Secretary of Internal Affairs, the Auditor General,

the State Treasurer and Senators and Representatives in the General Assembly *shall be elected at the general election.*
* * * (Italics ours.)

Section 603 of the Election Code supra, 25 P. S. § 2753, relating to the spring primary and the candidates to be nominated thereat, provides for a spring primary preceding each general election to be held on the third Tuesday of May in all even-numbered years, except in the year of the nomination of the President of the United States, in which year, the spring primary shall be held on the fourth Tuesday of April, and is as follows:

There shall be a *spring primary preceding each general election* which shall be held on the third Tuesday of May in all even-numbered years, except in the year of the nomination of a President of the United States, in which year the spring primary shall be held on the fourth Tuesday of April. *Candidates for all offices to be filled at the ensuing general election shall be nominated at the spring primary.* Delegates and alternate delegates to national party conventions, members of State committees and such other party committeemen and officers, including members of the national committee, as may be required by the rules of the several political parties to be elected by a vote of the party electors, shall be elected at the spring primary. The vote for candidates for the office of President of the United States, as provided for by this act, shall be cast at the spring primary. (Italics ours.)

It will be noticed that the foregoing sections of the Election Code refer to general elections, municipal elections and special elections, but in referring to the spring and fall primaries, the word "election" is not used in conjunction therewith, thereby possibly giving rise to the popular custom of referring to the "primaries," without the use of the word "elections," although the definition of "election," contained in section 102 of the Election Code supra, 25 P. S. 2602, includes "primary election."

From the foregoing, it is clear that the candidates nominated at the primary are entitled to stand for election in the general election, and, therefore must be the candidates nominated from the same congressional districts as those entitled to elect Representatives in Congress in the general election. Otherwise, the election scheme would be unworkable.

It must be obvious that where there is a new apportionment of the Commonwealth into congressional districts, with a provision in the apportionment act that the first election thereunder shall be held at the general election in a designated year, it must necessarily include also the preceding primary held in conjunction with such general election.

We are of the opinion therefore, that the Act of May 8, 1943, P. L. 256, 25 P. S. § 2197, reapportioning the Commonwealth of Pennsylvania into congressional districts, governs nomination petitions for the spring primary to be held on the fourth Tuesday of April, 1944, in accordance with section 603 of the Pennsylvania Election Code, the Act of June 3, 1937, P. L. 1333, section 2753, which provides for the holding of a spring primary preceding the general election, and for the nomination thereof of candidates for all offices to be filled at the ensuing general election.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 489

Brokers—Real estate broker—Licensure—Act of May 1, 1929, as amended—Exemption of attorney—Applicability to employe—Delegation of personal privilege—Necessity for broker's license.

An employe of an attorney at law may not lawfully conduct a real estate business without obtaining a broker's license under the Real Estate Brokers' License Act of May 1, 1929, P. L. 1216, as amended; the exemption accorded to an attorney by the act because of his training, experience, and accountability to the courts, permitting him to conduct a business otherwise unlawful, is a personal one, and he may not delegate to or clothe another with those privileges and immunities.

Harrisburg, Pa., March 2, 1944.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion as to whether an employe of an attorney-at-law, conducting a real estate business, must obtain a license under the Act of May 1, 1929, P. L. 1216, as amended, 63 P. S. § 431, known as the "Real Estate Brokers' License Act of 1929." The facts are:

An attorney-at-law maintains, in addition to his law office, an office where a real estate business is conducted under a fictitious name, which is duly registered by the attorney-at-law. This real estate

business is conducted by the attorney's employe, who is not licensed under the "Real Estate Brokers' License Act of 1929," and this employe is not an attorney-at-law.

You inquire whether the employe must be licensed as a real estate broker, notwithstanding the fact that his employer, as an attorney-at-law, is exempt from compliance with the act.

Section 2 of the Act of 1929, *supra*, 63 P. S. § 432, exempting attorneys-at-law, was upheld in the case of *Young v. Department of Public Instruction*, 105 Pa. Super. Ct. 153 (1932).

A study of the Real Estate Brokers' License Act of 1929 reveals no language expressly extending the exemption accorded attorneys-at-law to their employes. Paragraph (d) of section 7 of the act reads:

(d) Authority to transact business as a real estate broker, or real estate salesman, under any license issued by the department shall be restricted to the person named in such license, and shall not inure to the benefit of any other person or persons whatsoever. Where a real estate broker's license shall be issued to a corporation or association, authority to transact business thereunder shall be limited to one officer of such corporation or association, to be designated in the application and named in the license. Each other officer of such association or corporation, desiring to act as a real estate broker in connection with the business of the said association or corporation or otherwise, shall be required to make application for and take out a separate license in his or her own name individually. Where the licensee is a copartnership, the license issued to such copartnership shall confer authority to act as real estate broker upon one member of such copartnership only, who shall be designated in the application and named in the license; all the other members of such copartnership desiring to act as real estate brokers in connection with the business of the partnership, or otherwise, shall be required to apply for and take out individual licenses in their own names.

This indicates the intent of the General Assembly to limit the effect of the licenses granted by the act, and it would seem, in view of this limitation, that it would follow that the exemptions granted should not be extended unless clearly authorized. It should be observed that:

Those who seek shelter under an exemption law must present a clear case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public. * * *

(33 Am. Jur., Licenses, Section 38.)

It was held in *Young v. Department of Public Instruction*, *supra*, at page 159, that:

* * * 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.

This would not apply to an employe conducting a real estate business under circumstances such as you have presented to us. Attorneys-at-law are exempted because of their training, experience and accountability to the court.

Privileges and immunities extending to an attorney by virtue of his office are peculiarly personal. An attorney cannot delegate to or clothe another with those privileges and immunities which extend only to him as an attorney for the purpose of conducting a business otherwise unlawful. Therefore an employe acting in the capacity of a real estate broker, even though employed by an attorney for this purpose, is doing so unlawfully unless licensed as a real estate broker. The exemption would have no factual foundation if it were extended to include those who are not attorneys-at-law.

Having concluded that the exemption granted to attorneys-at-law does not include those employed by an attorney-at-law under the circumstances outlined by you, the question arises as to what kind of a license the employe should possess. This was, in effect, answered by Formal Opinion No. 349, dated June 17, 1940 (Opinions of the Attorney General, 1939-1940, page 338), wherein this department held that a salesman employed by a justice of the peace must take out a real estate broker's license. Justices of the peace, like attorneys, are exempted, under Section 2 of the act, from the necessity of procuring a license.

We are therefore of the opinion that a person employed by an attorney-at-law, under the circumstances you have outlined, is not exempted from the provisions of the Act of May 1, 1929, P. L. 1216.

as amended, 63 P. S. § 431, and must procure a real estate broker's license before engaging in or carrying on a real estate business, or acting in the capacity of a real estate broker.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 490

Waters—Pollution of streams—Sanitary Water Board—Authority and functions Administrative Code of 1929, section 2110(e), as amended—Act of June 22, 1937—Discharge of sewage and industrial wastes—Adoption of policy and regulations—Necessity for investigation and hearing.

The Sanitary Water Board has authority, under section 2110(e) of The Administrative Code of April 9, 1929, P. L. 177, as amended by the Act of June 21, 1937, P. L. 1865, and sections 201, 202, 203, and 302 of the Act of June 22, 1937, P. L. 1987, to adopt a general policy and appropriate regulations requiring the treatment of sewage and industrial wastes to a specified degree before permitting their discharge into the waters of the Commonwealth, and the degree or nature of such treatment may be varied reach by reach of each stream in accordance with existing conditions, if the variations are reasonable and practicable; but, at least so far as the discharge of sewage is concerned, the adoption of such a policy and regulations must follow investigation and a hearing at which all persons interested are afforded an opportunity to be heard.

Harrisburg, Pa., March 3, 1944.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you concerning the adoption by the Sanitary Water Board of a certain policy with respect to the discharge of sewage into the waters of the Commonwealth.

Under Section 2110 (e) of The Administrative Code of 1929, as amended June 21, 1937, P. L. 1865, 71 P. S. § 540, the Sanitary Water Board has the power to make rules and regulations for the effective administration and enforcement of the laws of this Commonwealth prohibiting the pollution of the waters thereof. The general statute relating to the preservation and improvement of the purity of the waters of the Commonwealth, and to the duties and powers of the board with relation thereto, is the Act of June 22, 1937, P. L. 1987, 35 P. S. § 691.1 et seq.

You inform us that the Sanitary Water Board intends to consider the adoption of a policy setting forth the requirements for the discharge of sewage and industrial wastes into the waters of the Commonwealth; and that under such a proposed policy the board would adopt a regulation requiring the treatment of such wastes to a specified degree before their discharge into the streams of the Commonwealth, and that these requirements would be varied reach by reach of any particular stream in accordance with the use and condition of any reach thereof.

Two reasons appear to motivate the board in proposing to adopt the policy under discussion. First, the board is of opinion that such a policy would provide a logical and effective way for the equitable improvement of the streams of the Commonwealth in accordance with the duties of the board, and would constitute an extension of policy already followed. Second, the board considers the present time particularly auspicious for the enunciation of such policy so that municipalities and industries now discharging wastes which can and should be treated, but which industries and municipalities may not be able to obtain the necessary labor and materials at this time, may be apprised of what will be expected of them in the post-war period, and that as a result in such cases appropriate plans can be made which can be carried out as post-war projects.

Section 201 of the Act of June 22, 1937, P. L. 1987, supra, 35 P. S. § 691.201, provides that no person or municipality shall discharge any sewage into any of the waters of the Commonwealth except as provided in said act. Section 202 of said act, 35 P. S. 691.202, provides that any municipality or person discharging sewage into waters of the Commonwealth so as to cause pollution thereof shall discontinue such discharge upon order of the Sanitary Water Board at such time as the board shall be of opinion that the discharge is or may become injurious to the public health. Section 203 of the act, 35 P. S. § 691.203, states further that an order of the board to a municipality to discontinue existing discharges of sewage shall be by notice in writing, after investigation and hearing and an opportunity for all persons interested to be heard. The same section of the act provides that an order of the board directed to a person to discontinue existing discharges of sewage shall be by notice in writing to such persons, but does not set forth any requirement of a prior hearing. Such orders, whether against a municipality or a person, shall set a time within which the offending discharge shall be discontinued, which in the case of municipalities shall not exceed two years and in that of persons one year.

Section 302 of the act, 35 P. S. § 691-302, relates to the discharge of industrial wastes, as differentiated from sewage, and stipulates that the board may order any person discharging industrial wastes into

Commonwealth waters to discontinue such discharge. Before making such an order the board is required to make "due investigation," but need not hold a hearing. The same section of the act further provides that any discharge of industrial wastes into waters of the Commonwealth that is inimical and injurious to the public health or to animal or aquatic life, or to the use of the waters for domestic, industrial or recreational purposes, shall be unlawful and a nuisance whether the board shall declare it to be so or not.

We are of the opinion that the board may adopt a policy, and regulations to effectuate it, which would require the treatment of sewage and industrial wastes to a specified degree before permitting their discharge into the waters of the Commonwealth, and that the degree or nature of treatment of such wastes may be varied reach by reach of the stream in accordance with existing conditions, so long as these variations are reasonable and practicable.

The board proposes to hold public hearings upon the requirements to be laid upon municipalities and industries discharging sewage and industrial wastes before adopting such requirements, and would like to carry out its policy by holding group hearings, stream by stream, for all industries and municipalities whose use of any particular stream would be affected.

As an alternative to the foregoing proposal, the board would like to know if it might enunciate a policy based upon its own findings without a hearing, and apply such policy and regulations to effectuate it to all municipalities and persons without discrimination, subject only to the requirement that the regulations be uniform for given sections of the stream under consideration. We do not believe the alternative method desirable or proper because it would ignore the statutory requirement, in so far as the discharge of sewage is concerned, that municipalities must be granted a hearing before orders against them to discontinue the discharge of sewage can be validly made.

It is our opinion, therefore, that the Sanitary Water Board may adopt a policy and regulations to effectuate the same, requiring the treatment of sewage and industrial wastes to a specified degree before permitting their discharge into the waters of the Commonwealth; that the board may vary such regulations to suit the diverse conditions of various reaches of streams; and that such policy may be put into effect

reach by reach of streams after investigation and hearing and an opportunity for all persons and municipalities interested therein to be heard.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 491

Vital statistics—Illegitimacy—Disclosure of information—Court orders—Review of Formal Opinion No. 485—Section 20 (3) of the Uniform Vital Statistics Act.

The Department of Health may, under the act, disclose illegitimacy of birth, or information from which it can be ascertained, either to the mother of an illegitimate child or to the child itself, but to no other person. If, however, an order of court is presented to the department entitling any person other than the illegitimate himself or his mother to obtain such information, then the department should comply with such order.

Harrisburg, Pa., March 8, 1944.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We have been requested to review our Formal Opinion No. 485 addressed to you February 8, 1944, with respect to our first conclusion therein. This conclusion was as follows:

1. That the Department of Health may disclose illegitimacy of birth, or information from which illegitimacy of birth can be ascertained, only in accordance with the provisions of Section 20 of the Uniform Vital Statistics Act.

Apparently you have construed our opinion to mean that the Department of Health may disclose illegitimacy of birth, or information from which such illegitimacy can be ascertained, only upon order of a court. We did not mean so to hold by what we said in our opinion. Section 20 (3) of the Uniform Vital Statistics Act provides that the department shall not permit inspection of records or issue certified copies of certificates unless it is satisfied that the applicant therefor has a direct interest in the matter recorded and that the information is necessary for the determination of personal or property rights. It is further provided that any decision on this subject by the department shall be reviewable by a court.

The same section of the act in subsection (2) provides that disclosure of illegitimacy of birth or information from which it can be ascertained may be made only upon order of a court in a case where such information is necessary for the determination of personal or property rights, and then only for such purpose.

It seems to us that the department has the authority to permit inspection of records relating to illegitimacy, and to issue certified copies of certificates thereof, as it has heretofore done, provided it is satisfied that the applicant has a direct interest in the matter recorded and that the information is necessary for the determination of personal or property rights. At once we come to the question of who might be considered to have a direct interest. We have no hesitation in concluding that such a person would be either the mother of the child or the child itself. Certainly no other individual could have a more direct or personal interest in the matter than the two mentioned. And, by "mother" we mean the natural mother of an illegitimate child. In cases of illegitimates having been legitimized by adoption or otherwise, the procedure would be the same as that for any other legitimate.

We believe that subsection (2) of section 20 of the act, relating to an order of court, was inserted by the legislature to cover all cases other than those wherein the applicant is the mother of the child or the child itself. We do not believe the word "case," used in subsection (2), means a case in the technical sense of a proceeding in a court between litigants.

We accordingly advise you that the Department of Health may, under the Uniform Vital Statistics Act, disclose illegitimacy of birth, or information from which it can be ascertained, either to the mother of an illegitimate child or to the child itself, but to no other person. If, however, an order of court is presented to the department entitling any person other than the illegitimate himself or his mother to obtain such information then, of course, the department should comply with such order.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 492

Public schools—Married teachers—Temporary increase in salaries—Resolution by Board—Power to cancel—Legislative authority.

A school district is not obliged to continue the payment of the \$100 salary increase, contrary to the terms of the agreement between the teacher and the school district, where the board granted the increase by resolution, with the proviso that it did not apply to teachers who are married or who shall marry and that the increase was only temporary and could be cancelled at any time.

Pennsylvania statutes have provided for minimum salaries for school teachers without specifying any limits as to maximum, have authorized salary increases and salary decreases where the school teacher consents to the decrease. The general assembly has legislated only to a limited extent regarding the contractual relationship between the school teacher and the school district in regard to the amount of salary to which the teacher is entitled. This increase was a matter which only concerned the school teacher and the board.

Harrisburg, Pa., March 14, 1944.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion interpreting the Act of May 28, 1943, P. L. 786, 24 P. S. § 1186d. The facts, as stated, are as follows:

On January 9, 1942, by formal resolution, a school board, taking note of the increased cost of living, adjusted the pay of teachers upward in the sum of \$100 per annum, with the proviso that the advance did not apply to female teachers "who are married or who shall marry." It was provided also that the increase was only temporary, that the right was reserved to cancel it at any time, and that any teacher who accepted the increase after notice would be bound by the terms of the resolution. It appears that two teachers of the district received notice and agreed that they were bound by the terms of the resolution. The increase was effective at once, and was paid during the balance of the 1941-1942 term.

At the end of the term, which time governs the application of the Act of May 28, 1943, *supra*, one of these teachers was receiving \$1,700 permanent salary, plus the \$100 bonus above provided for, and the second teacher was receiving \$1,400 permanent salary, plus the \$100 bonus. They were not married at that time.

In both cases the application of the Act of May 28, 1943, *supra*, would give them the State cost-of-living bonus in the sum of \$200.

However, one teacher married in November, 1942, and a second teacher married in the summer of 1943. Under the terms of the school board's resolution of January 9, 1942, they would lose the \$100 temporary award paid by the school district. As the school board inter-

prets Section 5 of the Act of May 28, 1943, *supra*, any temporary or emergency increase it may have granted before May 28, 1943, including this \$100 increase, may be discontinued in accordance with the provisions of the grant in this case, on the marriage of the teacher.

Your department believes that the \$100 bonus cannot be discontinued until the end of the school year 1944-1945.

The Act of May 28, 1943, *supra*, was the subject of our Formal Opinion No. 473. This act increases the salaries of each member of the teaching and supervisory staff, who at the end of the school term 1941-1942, received salaries at the rate of \$1,000 and more up to and including those who received \$3,499. These increases were temporary and were to be made in accordance with a certain schedule.

The title of the Act of May 28, 1943, *supra*, reads as follows:

An act providing temporary increases in the salaries of certain members of the teaching and supervisory staffs of school districts; authorizing additional appropriations and temporary loans therefor; requiring the Commonwealth to reimburse school districts for the full amount of such increases; authorizing the Superintendent of Public Instruction to withhold payments due from the Commonwealth, in certain cases; authorizing additional temporary increases; and validating such increases heretofore made.

Other pertinent provisions are:

Section 1. * * * the salaries of the following members of the teaching and supervisory staffs of each school district *are hereby increased* by the following amounts, for each of the two school terms, one thousand nine hundred forty-three, one thousand nine hundred forty-four (1943-1944) and one thousand nine hundred forty-five (1944-1945): To members of the teaching and supervisory staffs who, at the end of the school term one thousand nine hundred forty-one, one thousand nine hundred forty-two (1941-1942), *received salaries* at the rate of * * * one thousand five hundred dollars (\$1500) and more, but not in excess of one thousand nine hundred ninety-nine dollars (\$1999), the amount of the increase for each school term shall be two hundred dollars (\$200). * * *

* * * * *

Section 3. The full amount of all additional amounts of salary provided for by this act, or the proportionate amount thereof that can be paid out of appropriations made for that purpose for the fiscal biennium one thousand nine hundred forty-three, one thousand nine hundred forty-five (1943-1945), shall be paid by the Commonwealth to the school districts in the manner that other payments on account of salaries of members of the teaching and supervisory staffs are paid. * * *

The Superintendent of Public Instruction may refuse to authorize the payment of any moneys payable to any school district by the Commonwealth for any purpose, during the effective period of this act or any school year thereafter, if such school district shall at any time hereafter fail or refuse to pay to the members of its teaching and supervisory staffs the temporary increases in salaries required by this act. He may continue to hold such requisitions until provision has been made by the school district for the payment of such temporary increases in salaries.

* * * * *

Section 5. In addition to the increases required by this act, the board of directors (or board of public education) of each school district is hereby authorized to grant temporary or emergency increases in salaries to members of its teaching or supervisory staff for any period up to and including the thirtieth day of June, one thousand nine hundred forty-five, and to discontinue such increases at the end of the period for which the same were granted, any law to the contrary notwithstanding, and any temporary or emergency increases heretofore granted by any school district and the discontinuance thereof at the end of the period for which granted, are hereby ratified, confirmed and made valid, notwithstanding the fact that the same may have been done without previous authority of law. (*Italics ours.*)

We find no specific direction in the act to justify the Department of Public Instruction in taking the position that the school board must, until the end of the period 1944-1945, pay the teachers the \$100 which each has forfeited by the terms of her contract.

True it is that the act refers to increases of salary, and that these teachers will fail to get a full increase if they do not continue to get the \$100; and it is equally true that section 1 of the act states that "salaries of * * * teaching * * * staffs are hereby increased by the following amounts," and that the amount of the *increase* is determined by the salary schedule of the "received salaries" at the end of the 1941-1942 term.

It is also true that section 3 of the act authorizes the Superintendent of Public Instruction to refuse to authorize the payment of any moneys payable to any school district if such school district shall refuse to pay to the teaching staffs the temporary increases required by this act.

Likewise, section 5 authorizes discontinuance of such increases *at the end of the period* for which the same were granted.

Nevertheless, we are reluctant to conclude that the General Assembly intended to interfere with the contractual relationship between

the school board and the school teacher to the extent that neither would be bound by their contract.

Whether or not the school teachers remained single, they were entitled to the increase of \$200 as the receipt or non-receipt of \$100 had no effect in so far as the determination of the amount of the increase under the Act of May 28, 1943, *supra*, was concerned.

As to the provisions of section 5 of the act, we feel the contractual proviso of \$100 was not within the purview of this section as it was not made for any period, but was contingent upon the maintenance of the unmarried status.

It is our opinion that this \$100 contractual proviso is a matter which concerns the school teacher and the school board, unless the General Assembly has placed some duty or responsibility upon the Department of Public Instruction with regard to its payment. We therefore examine other statutes to see if such is the case.

The Act of May 18, 1911, P. L. 309, known as the "School Code," 24 P. S. § 1, et seq., contains several provisions regarding the salaries of school teachers.

Section 1210 of the above act, 24 P. S. § 1164, provides for the minimum salaries of school teachers in accordance with schedules thereafter set forth.

Clause 9 of said section, 24 P. S. § 1172, reads in part as follows:

The foregoing schedules prescribe a minimum salary in each instance, and where increment is prescribed it is also a minimum. It is within the power of the boards of education, boards of public school directors, or county conventions of school directors, as the case may be, to increase, for any person or group of persons included in this schedule, the initial salary or the amount of an increment or the number of increments. * * *

Nothing in this act contained shall be construed to interfere with or discontinue any salary schedule now in force in any school district so long as such schedule shall meet the requirements of this section, *nor to prevent the adoption of any salary schedule in conformity with the provisions of this act.* (Italics ours.)

Section 1205-A of the School Code, as amended by the Act of April 6, 1937, P. L. 213, 24 P. S. § 1161, reads in part as follows:

The salary of any district superintendent, assistant district superintendent or other professional employe as defined in this act in any of the school districts of the Commonwealth may be increased at any time during the term for which such person is employed, whenever the Board of School Directors (or Board of Public Education) of the district deems it

necessary or advisable to do so, but there shall be no demotion of any professional employe, either in salary or in type of position, without the consent of the said employe, or if such consent is not received, then such demotion shall be subject to the right to a hearing before the Board of School Directors (or Board of Public Education), and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employe.

The deduction did not come within the provisions of section 1205-A, as the school teachers had consented to the reductions in their contracts.

The deduction was certainly not in conflict with the provisions of clause 9 of section 1210; on the contrary it may be well argued that such a contractual provision was what the legislature had in mind when it said therein:

Nothing in this act contained shall be construed to interfere with or discontinue any salary schedule now in force in any school district so long as such schedule shall meet the requirements of this section, nor to prevent the adoption of any salary schedule in conformity with the provisions of this act.

To sum up, we may say that the statutes have provided for minimum salaries for school teachers without specifying any limits as to maximum, have authorized salary increases and salary decreases where the school teacher consents to the decrease. Where a salary of a school teacher is decreased without her consent, such school teacher is entitled to a hearing. In other words, the General Assembly has legislated only to a limited extent regarding the contractual relationship between the school teacher and the school district in regard to the amount of salary to which the teacher is entitled.

In view of the above, we are of the opinion, and you are accordingly advised that the school district is not obliged to continue the payment of the \$100 temporary salary increase, contrary to the terms of the agreement between the teacher and the school district.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 493

Waters—Drainage into streams—Sanitary Water Board—Extent of powers—Act of June 22, 1937—Partial suspension of exemption as to mine drainage—Existence of practicable method to eliminate solids—Lack of practicable method of neutralization—Processing coal deposits in streams—Applicability of act to waste water—Independent coal breaker—Status as mine or industrial establishment.

1. The Sanitary Water Board originally created by section 202 of The Administrative Code of June 7, 1923, P. L. 498, and continued under the corresponding section of The Administrative Code of April 9, 1929, P. L. 177, has the power to declare a limited suspension of the exemption, from the general prohibition of section 301 of the Act of June 22, 1937, P. L. 1987, against discharge of industrial wastes into the waters of the Commonwealth, of acid mine drainage and silt from coal mines under section 310 of the act, to the extent that it finds reasonable and practicable methods available for removal of the major portion of the solids, consisting of coal and rock particles, without requiring total elimination of the acid and mineral salts in such drainage, as to which it finds that there is at the present time no reasonable and practicable neutralization method of general applicability on a commercial scale.

2. It is within the authority of the Sanitary Water Board to determine that waste waters, resulting from the processing of coal deposits now in the streams of the Commonwealth, constitute an industrial waste within the meaning of the Act of June 22, 1937, P. L. 1987.

3. Coal breakers serving anyone who delivers coal to them for processing and not operated by a producer of coal or directly connected with and forming an integrated part of a mining operation are industrial establishments rather than coal mines, within the contemplation of the Act of June 22, 1937, P. L. 1987, and are therefore not entitled to the exemption given by the act with respect to acid mine drainage and silt from coal mines.

Harrisburg, Pa., March 15, 1944.

Honorable A. H. Stewart, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you concerning certain powers and duties of the Sanitary Water Board with relation to the prevention and control of stream pollution.

The Sanitary Water Board was created by Section 202 of the Act of June 7, 1923, P. L. 498, as amended April 13, 1927, P. L. 207, 71 P. S. § 12, known as The Administrative Code. The board was continued by Section 202 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 62. It consists of the Secretary of Health as chairman, the Secretary of Forests and Waters, the Fish Commissioner and three other members. Section 439 of The Administrative Code of 1929, 71 P. S. § 149. Certain powers and duties of the board are set forth in section 2110 of the same code, as amended June 21, 1937, P. L. 1865, 71 P. S. § 540. The Department of Health

has the power and duty of acting as the enforcement agent for the Sanitary Water Board. Section 2109 of The Administrative Code of 1929, 71 P. S. § 539. The general statute relating to the preservation and improvement of the purity of the waters of the Commonwealth, and to the duties and powers of the Sanitary Water Board with relation thereto, is the Act of June 22, 1937, P. L. 1987, 35 P. S. § 691.1 et seq.

Section 301 of the Act of June 22, 1937, P. L. 1987, supra, provides that no industrial wastes may be discharged into the waters of the Commonwealth except as provided in said act. Industrial wastes are defined by section 1 of said act as meaning any liquid, gaseous or solid substance, not sewage, resulting from any manufacturing or industry. Section 310 of said act provides that the aforesaid prohibition “* * * shall not apply to acid mine drainage and silt from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known.”

You inform us that the polluting properties of coal mine drainage consist principally of acid content which is in solution, certain mineral salts also largely in solution, and coal mine wastes solids which are relatively inert particles of coal and waste rock of varying sizes in suspension; that although the acid and mineral salts in such drainage can be chemically neutralized by well known methods, the board knows of no reasonable and practicable method of general applicability on a commercial scale for such neutralization, and believes that further study is necessary before the exemption against the discharge of such acid and mineral salts can be removed. You further state that the board is of opinion that reasonable and practicable methods for the elimination of the major portion of the solids, consisting of coal and rock particles, are available, and that such solids should be removed prior to the discharge of mining waste waters into the streams of the Commonwealth, and that such removal is one of degree and that any cessation of the exemption from the prohibition of the discharge of such mine solids should be properly qualified so as to require their removal only to the extent that reasonable and practicable methods are available.

The board desires to know, therefore, whether it can declare a limited suspension of the aforesaid exemption of mine drainage from the prohibition against the discharge of industrial wastes into streams, and specify the extent to which such removal of coal mine solids is practicable.

We have no hesitation in concluding that the board has such power and authority. To hold otherwise would be to say that because all mine pollution could not be successfully eliminated at one fell stroke, it should all be tolerated until that becomes possible. Even a casual reading of the legislation relating to this subject matter could not result in such a strained construction. To deny the board the power to do what it contemplates would be to impute to the legislature a state of mind which not only is not revealed in the pertinent legislation, but which the history and language of such legislation clearly indicate to be otherwise. The legislature has long struggled with the problem of stream pollution in its efforts to restore the streams of the Commonwealth as nearly as practicable to their pristine condition.

It seems that the pollution of streams by coal mine solids arises not only from discharges direct from operating collieries but also from erosion from existing culm and waste banks, and also from the operation of "washeries" which take coal deposits from stream beds, remove merchantable coal therefrom, and return the waste solids to the stream. You wish us to advise you whether the board is within its authority in determining that waste waters resulting from the processing of such deposits now in the streams of the Commonwealth constitute an industrial waste within the meaning of the Act of June 22, 1937, P. L. 1987, supra. We are of opinion that it is. It seems to us to make no difference where industrial waste waters or other polluting matter come from. The important thing is what is done with them. If they are discharged into the waters of the Commonwealth they constitute an illegal pollution thereof.

It further appears that coal breakers are in general of two types, that is, those operated by the producers of the coal as an apparent part of the entire mining operation, and those breakers which serve anyone delivering coal to them for processing but which are not directly connected with any mining operation as such. You wish us to advise you whether such nonproducing breakers are industrial establishments rather than "coal mines." The reason for this question seems to be because of the exemption from the prohibition of the act of acid mine drainage and silt "from coal mines," whereas industrial establishments generally are subject to the prohibition. It is quite clear to us that a nonproducing breaker such as you describe is an industrial establishment and not a coal mine. An independent breaker not an integrated part of a mining operation is, to our minds, just as much an industrial establishment as a jewelry manufactory which cuts and shapes diamonds which originally came from a diamond mine. To hold otherwise would be to carry the concept of processing to an

unwarranted conclusion. We are of the opinion that nonproducing breakers are industrial establishments within the meaning of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General,

OPINION No. 494

Legislature—House of Representatives—Members—Salary approval of member who is in active service in armed forces as a commissioned officer—Salary approval of member not a commissioned officer—See Official Opinions of the Attorney General, 1941-1942 at pages 180 and 224.

The Speaker of the House of Representatives may not legally approve payment of the salary of a member of the House of Representatives who is in active service of the armed forces of the United States as a commissioned officer, but may legally approve payment of the salary of a member who is in active service provided he is not a commissioned officer.

Harrisburg, Pa., March 16, 1944.

Honorable Ira T. Fiss, Speaker of House of Representatives, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether a member of the House of Representatives of the General Assembly of the Commonwealth of Pennsylvania who is in active service as a commissioned officer in the armed forces of the United States is entitled to receive his salary as a member of the General Assembly, and also whether a member of the House of Representatives who is in active service of the armed forces of the Nation, but is not a commissioned officer, is entitled to receive his salary as a member of the General Assembly. You inform us that the cases you inquire about do not involve members of the General Assembly who entered the armed forces of the United States as the result of being members of the Pennsylvania National Guard when that unit became part of the Army of the United States.

In *Commonwealth ex rel. Crow v. Smith*, 343 Pa. 446 (1942), the Supreme Court held that a commissioned officer in the Officers Reserve Corps of the United States, called into active service as a Major in

the United States Army, could not continue to hold office as mayor of a city. The Constitution of the Commonwealth of Pennsylvania in Article XII, Section 2, provides that:

No * * * 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. * * *

and acceptance of a commission as an officer in the Army was held to amount to an automatic vacation of the State office. Following the decision in *Commonwealth ex rel. Crow v. Smith*, supra, we advised the Auditor General in Formal Opinion No. 424, dated May 29, 1942, 1941-1942 Op. Atty. Gen. 180, that he could not legally approve a requisition for salary claimed to be due an additional law judge who had been ordered into active service of the United States Army as a Lieutenant Colonel.

The questions presented by your request are governed by Article II, Section 6 of the Constitution of the Commonwealth of Pennsylvania which provides that:

* * * no member of Congress or other person holding any office (except of attorney-at-law or in the militia) under the United States or this Commonwealth shall be a member of either House during his continuance in office.

The phrase "any office" contained in the foregoing provision being, if anything, of broader significance than the phrase, "any office or appointment of trust or profit" contained in article XII, section 2, it follows that if the holding of a commission in the Army of the United States is within the prohibition contained in that section of the Constitution, a fortiori, it is within the general prohibition of article II, section 6. Therefore, if article II, section 6, contained no exceptions, we would without hesitation say that the first question you present to us is ruled by *Commonwealth ex rel. Crow v. Smith*, supra, and would conclude that it would be unlawful for you to approve payment of salary to one elected to the House of Representatives who is now a commissioned officer in the Army.

There remains for consideration the question of whether the exception of an *office in the militia* changes this conclusion. This, in turn, depends on whether the word "militia" as used in article II, section 6 has a meaning broad enough to include service in the Army of the United States. Undoubtedly, this word is used in the foregoing section of our Constitution in the same sense as in that section on the Constitution entitled "Militia," namely, article XI, section 1, which reads as follows:

The freemen of this Commonwealth shall be armed, organized and disciplined for its defense when and in such manner as may be directed by law. The General Assembly shall provide for maintaining the militia by appropriations from the Treasury of the Commonwealth, and may exempt from military service persons having conscientious scruples against bearing arms.

It is apparent in this section that the word "militia" refers to *State* military forces.

Furthermore, at the time of the adoption of the Constitution of 1874 "militia" was very generally used with this meaning. In *Kneedler et al. v. Lane et al.*, 45 Pa. 238, 244 (1863), Chief Justice Lowrie said:

Now, the militia was a state institution before the adoption of the federal constitution, and it must continue so, except so far as that constitution changes it, that is, by subjecting it, under state officers, to organization and training according to one uniform federal law, and to be called forth to suppress insurrection and repel invasion, when the aid of the federal government is needed, and it needs this force. For this purpose it is a federal force; for all others it is a state force, and it is called in the constitution "the militia of the several states:" Art. 2, 2, 1. * * * *Neither the states nor the Union have any other militia than this.* (Italics ours.)

While the opinion of the Chief Justice here quoted, on rehearing became a minority opinion, it is clear from the opinions of all the judges in the foregoing case that "militia" was understood to mean the State armed forces as opposed to the word "army" of the United States.

Likewise, the Federal statutes in effect at the time of the adoption of the Pennsylvania Constitution of 1874 also recognized the militia as a purely State organization. For example, Rev. Stat., Section 1625 (1878) reads:

Every able-bodied male citizen of the *respective States*, resident therein, who is of the age of eighteen years, and under the age of forty-five years, shall be enrolled in the militia. (Italics ours.)

Rev. Stat., Section 1630 (1878) states that:

The militia of *each State* shall be arranged into divisions,
* * * (Italics ours.)

Throughout the Federal statutes in effect in 1874, the militia is recognized as meaning the State armed forces.

It is our conclusion, therefore, that the word "militia" as used in article II, section 6 of the Constitution of Pennsylvania refers to the State militia, and that the exception contained in that article of any office in the militia does not apply to exempt a member of the General Assembly who is serving in the army of the United States as a commissioned officer, from the principles set forth in Commonwealth ex rel. Crow v. Smith, supra.

You may not, therefore, in our opinion, legally approve payment of salary to a member of the House of Representatives who is on active duty as a commissioned officer in the armed forces of the United States.

On the other hand, we know of no reason why a member of the General Assembly may not remain such and at the same time be in active service in the armed forces of the nation so long as he is not a commissioned officer. This question was fully discussed by us in an opinion rendered August 25, 1942, to Governor James. 1941-1942 Op. Atty. Gen. 224.

It is our opinion, therefore, that you may not legally approve payment of the salary of a member of the House of Representatives who is in active service of the armed forces of the United States as a commissioned officer, but that you may legally approve payment of the salary of a member of the House who is in active service of the armed forces of the nation provided he is not a commissioned officer therein.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ROSS S. CAREY,
Deputy Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 495

School districts—Teachers of vocational education—Salaries—Reimbursement to school districts—Acts of May 1, 1913, P. L. 138; May 18, 1911, P. L. 309; May 28, 1943, P. L. 786; June 4, 1943, P. L. 59.

Reimbursement to school districts for moneys expended for salaries to teachers of vocational education is to be made by the Commonwealth by using the same

method of reimbursement as heretofore, and excluding the mandated increases in salaries as provided by the Act of May 28, 1943, P. L. 786 in making the calculations for said reimbursement. This figure shall include the permanent salary increases for increments provided in clause 7 of section 1210 as amended by the Act of August 5, 1941, P. L. 783.

Harrisburg, Pa., April 4, 1944.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice as to the lawful method of calculating the reimbursements to be paid school districts of moneys expended for salaries to teachers of vocational education.

The Act of May 1, 1913, P. L. 138, as amended, 24 P. S. § 1651, provides for the establishment and regulation of vocational school districts. Section 8 of said act, as amended, 24 P. S. § 1659, provides:

Vocational industrial, vocational agricultural, vocational home economics, and vocational distributive occupational schools or departments shall, so long as they are approved by the State Board for Vocational Education * * * constitute approved local or joint vocational schools. *School districts maintaining such approved local or joint vocational schools or departments shall receive reimbursement, as hereinafter provided. (Italics ours.)*

Section 9 of said act, as amended, 72 P. S. § 4281, provides:

The Commonwealth, in order to aid in the maintenance of approved local or joint vocational industrial, vocational homemaking and vocational agricultural schools, or departments, shall as *provided in this act, pay annually from the treasury to school districts * * * from funds appropriated, by the legislature for that purpose or otherwise available, and in addition to the amounts paid to such school districts under the provisions of section one thousand two hundred and ten of an act, approved the eighteenth day of May, one thousand nine hundred and eleven (Pamphlet Laws, three hundred nine), * * * amounts computed in accordance with the following schedules:*

Districts of the First Class. The Commonwealth shall *reimburse, as hereinafter provided*, districts of the first class to the extent of twenty-five per centum (25%) of the sum expended for salaries during the previous school year by such district * * *.

Districts of the Second, Third and Fourth Classes. *The Commonwealth shall reimburse, * * * districts of the second,*

third, and fourth classes * * * to the extent of forty per centum (40%) of the sum expended for salaries during the previous school year by such district * * * Provided, That districts of the fourth class shall be reimbursed to the extent of twenty per centum (20%) of the sum expended for salaries during the previous school year by such districts or unions of districts for approved instruction in academic subjects in approved rural community vocational schools: *Provided further, That no district shall receive a reimbursement of more than eighty per centum (80%) of any one teacher's salary from either Federal or State funds or from both.* (Italics ours.)

It will be noted that the above provisions are separate and distinct from the Act of May 18, 1911, P. L. 309, known as the "School Code," 24 P. S. § 1, et seq.

We examine the School Code and find that clause 19 of Section 1210 of the Act of May 18, 1911, P. L. 309, 24 P. S. § 1180, provides for reimbursement to school districts as follows:

(a) *Of the salaries herein provided* for full-time teachers, supervisors, principals and all other full-time members of the teaching and supervisory staff in the public schools of the Commonwealth, the Commonwealth shall pay * * * to such school districts * * * for the payment of the salaries * * * as follows: In school districts of the first class, for each member of the teaching and supervisory staff, twenty-five per centum (25%) of the *annual minimum salary prescribed herein* for elementary teachers in such districts; * * *

(b) * * * Provided, That the total amount paid to any school district on account of any such teacher, supervisor, or principal employed in special education shall not exceed eighty per centum (80%) of the salary actually paid to such person. (Italics ours.)

By Act of August 5, 1941, P. L. 783, 24 P. S. § 1170, clause 7 of the above section was amended so that school districts of the fourth class receive from the Commonwealth the full amount of the increases of minimum salaries and of the increments prescribed by the 1941 amendment.

Thus, the legislature has provided by independent acts two means of reimbursing school districts for moneys expended on vocational education.

Let us now examine the Act of May 28, 1943, P. L. 786, 24 P. S. § 1186d which provides for temporary increases of teachers' salaries to be paid by school districts in accordance with the schedule therein

set up, during the school terms 1943-44 and 1944-45, with provision for reimbursement by the Commonwealth to the respective school districts for the entire amount of these temporary salary increases.

The title of the Act of May 28, 1943, *supra*, read as follows:

Providing temporary increases in the salaries of certain members of the teaching and supervisory staffs of school districts; authorizing additional appropriations and temporary loans therefor; requiring the Commonwealth to reimburse school districts for the full amount of such increases; authorizing the Superintendent of Public Instruction to withhold payments due from the Commonwealth, in certain cases; authorizing additional temporary increases heretofore made.

Section 1 of the act reads as follows:

* * * the salaries of the following members of the teaching and supervisory staffs of each school district are hereby increased by the following amounts, * * *

Section 2 provides:

In order to pay the additional amount of salary hereby provided for, the board of school directors (or board of public education) of any school district may revise its budget by increasing its appropriation or appropriations for salaries of members of the teaching and supervisory staffs * * *.

Section 3 reads:

The full amount of all *additional amounts of salary* provided for by this act, or the proportionate amount thereof * * * shall be paid by the Commonwealth * * * on account of salaries of members of the teaching and supervisory staffs are paid. * * * (*Italics ours.*)

The Act of June 4, 1943, P. L. 59, the General Appropriation Act of 1943, reads on page 76 as follows:

For *reimbursing school districts upon the increases in salaries* of school teachers as provided in legislation enacted by the General Assembly, session of one thousand nine hundred and forty-three, the sum of twenty-four million three hundred thousand dollars (\$24,300,000). (*Italics ours.*)

You ask whether the temporary salary increases are to be added to the salaries of school teachers when calculating the amount of reimbursement made by the Commonwealth to the school districts under the School Code, *supra*, and the act of 1913, *supra*.

A study of said act, the above quoted sections of the General Appropriation Act, and the Legislative Journal convinces us that it was the intent of the legislature to do two things:

1. Increase the salaries of certain school teachers.
2. Place the cost of such increase upon the State Treasury.

Your inquiry raises the question: Did the legislature intend to change the amount of reimbursement to the school districts in any other way than as above indicated? Your inquiry is prompted by the fact that the legislature has in time past used teacher salaries as the yardstick upon which to measure reimbursement to school districts. Obviously, there is no specific language in the Act of May 28, 1943, *supra*, which would lead us to believe that the legislature intended to change the amount of reimbursement to the school districts beyond that above mentioned.

It is to be noted that there is no repealing or amending clause in said act, nor is there any language whatever to show an intent to have any effect upon the statutes already enacted dealing with the same subject.

If the legislature had intended to render additional financial aid to the school districts or to decrease the financial aid, it seems to us that it would have used more specific language in the act and would have increased or decreased the appropriation.

It is to be noted that on page 76 of the above mentioned General Appropriation Act the following provisions are made:

For aid to school districts that now maintain or shall cause to be established and maintained as part of the public school system, vocational schools or departments, schools for agricultural education, industrial training, home economics, distributive occupations, public service occupations, and other vocational and practical education; for the salaries, wages, and expenses of employes; for general expenses of vocational divisions, and the payment to the Department of Property and Supplies of mileage charges for the use of automobiles by traveling vocational education supervisors, and for the cost of training vocational teachers in such institutions as the State Council of Education may designate and under such regulations as the State Council of Education may prescribe, as provided by law, the sum of one million six hundred fifty thousand dollars (\$1,650,000).

This represents an apparent increase in the appropriation over the biennium 1941-43 of \$150,000, but this latter amount is, in fact, a

carry-over of a balance in the previous appropriation. Not only do we feel that the legislature would have been more specific in said act, but we feel that it would have been more specific in the General Appropriation Act, and would have substantially increased the appropriation.

When the legislature, by the Act of May 1, 1913, *supra*, provided an additional method of reimbursement, it specifically mentioned that fact in the Act of May 1, 1913, *supra*. The Act of May 28, 1943, *supra*, mentions only reimbursement for the salary increases.

The method of reimbursement provided by the Act of May 1, 1913, *supra*, and the School Code are independent of each other and the Act of May 28, 1943, *supra*, makes no reference to either the act or the code.

In view of the foregoing, it is our conclusion that reimbursement to the school districts for vocational education is to be made by the Commonwealth by using the same method of reimbursement as heretofore, and excluding the mandated increases in salaries, as provided by the Act of May 28, 1943, *supra*, in making the calculations for said reimbursement.

You also ask to be advised with regard to the inclusion in the total sum expended for salaries of the permanent salary increases for increments provided in clause 7 of Section 1210, as amended by the Act of August 5, 1941, P. L. 783, 24 P. S. § 1170. This act amended clause 7 of Section 1210 of the School Code, 24 P. S. § 1170, and thus in accordance with the Statutory Construction Act, the original law became a part thereof and should be read together and viewed as passed at the same time. These increments therefore become a part of the permanent salary. This conclusion follows the decision of the court in the case of *Bishop v. Bacon, et al.*, 130 Pa. Super. Ct. 240 (1938), where on page 246, the court said:

Although "salary" and "increment" are separate and may be properly considered distinct for certain purposes, they together constituted plaintiff's "salary schedule." When plaintiff became entitled to an increment of \$100 for the school year 1932-1933, which was added to his minimum salary of \$1,400 which he received for the year 1931-1932, \$1,500 became his basic compensation to which the provisions of the Act of 1933 might be made applicable. In effect, it became a new minimum (he having remained in the service of the same district) * * *.

We are therefore of the opinion that reimbursement to the school districts for moneys expended for salaries to teachers of vocational

education is to be made by the Commonwealth by using the same method of reimbursement as heretofore, and excluding the mandated increases in salaries as provided by the Act of May 28, 1943, P. L. 786, 24 P. S. § 1186d, in making the calculations for said reimbursement, and that this figure shall include the permanent salary increases for increments provided in clause 7 of section 1210 as amended by the Act of August 5, 1941, P. L. 783, 24 P. S. § 1170.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 496

Taxation—Erie Railroad Company—Annual bonus—Acts of March 26, 1846, P. L. 179; May 16, 1935, P. L. 184.

The Erie Railroad Company must pay to the Commonwealth \$10,000 annually under the provisions of the Act of March 26, 1846, and the company is also subject to a franchise tax as provided by the Act of 1935.

Harrisburg, Pa., April 18, 1944.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised with regard to certain questions in connection with the assessment of tax and the payment of an annual bonus by the Erie Railroad Company. The specific questions which you have asked are as follows, and we will answer them in order:

1. Is the Erie Railroad Company liable for the \$10,000 annual payment, as provided by section 5 of the Act of March 26, 1846?

2. Is the Erie Railroad Company now liable for a tax on its capital stock, as provided by section 6 of the Act of March 26, 1846, or is it liable for a capital stock or franchise tax, under the provisions of the Act of June 1, 1889, P. L. 420, and its amendments?

1. Background of the Erie Railroad Company.

The New York and Erie Railroad Company was created by the Legislature of New York State in 1832. This company was empowered

to construct a railroad from New York City to Lake Erie through the southern tier counties of New York State. After a survey of the proposed route was begun, the company found that in Broome County, New York, it was confronted by a mountain of such magnitude that tunneling would be required, or stationary power, at great cost, would be necessary to surmount the obstacle. If the railroad could follow the valley of the Susquehanna, a level and easy route would be available around the mountain, although this would mean that the railroad would have to pass through Pennsylvania an over-all distance of approximately fifteen miles. The result was that the Pennsylvania Legislature passed the Act of February 16, 1841, P. L. 28, which authorized the New York and Erie Railroad Company to construct the road through a portion of Susquehanna County. Various limitations and restrictions were placed upon the entry of the company into Pennsylvania, but these have no relation to the present problem.

After the act of 1841, *supra*, was passed, it was discovered that an easier route would be available to the railroad if it could enter Pennsylvania through Pike County and pass through a part of Susquehanna County, into New York State. The Act of March 26, 1846, P. L. 179, was passed by the Pennsylvania Legislature as a supplement to the act of 1841, *supra*, and allowed the railroad company to use the route through the two counties.

At various times special acts of the legislature were passed, giving to the railroad company additional rights in Pennsylvania, until the Act of March 22, 1860, P. L. 223, which provided that any purchaser of the railroad would succeed to the rights, powers and privileges possessed by the road, and would also be "subject to all the duties, penalties, taxes, restrictions, obligations and provisions of the laws of this state relating to and concerning said company; * * *."

The Erie Railway Company was incorporated in New York State on June 25, 1861.

The Act of March 26, 1867, P. L. 574, provided that the Erie Railway Company was to be recognized in Pennsylvania as having been legally incorporated in New York State; that the Erie Railway Company had become vested with all the rights, privileges, franchises, etc., which the New York and Erie Railroad Company had lately owned in Pennsylvania, and that the statute itself was conclusive evidence of this in all legal proceedings in Pennsylvania.

The New York, Lake Erie and Western Railroad Company was incorporated in New York State, April 27, 1878, and took over from

the purchasers at a sale pursuant to a judgment of foreclosure, all the property formerly of the Erie Railway Company.

The Erie Railroad Company, as it is now known, was incorporated November 13, 1895, in New York State, and acquired all of the property of the New York, Lake Erie and Western Railroad Company, included in which was that portion of the franchises and rights formerly owned by the New York and Lake Erie Railroad Company in Susquehanna and Pike Counties in Pennsylvania.

The Erie Railroad Company is a foreign corporation, having filed in the office of the Secretary of the Commonwealth on June 6, 1912, a power of attorney allowing service of suit to be made on the Secretary of the Commonwealth, in conformity with the Act of June 8, 1911, P. L. 710.

2. Is the Erie Railroad Company Liable to the Commonwealth for the \$10,000 Annual Payment, as Provided by Section 5 of the Act of March 26, 1846, P. L. 179?

The act of 1846, *supra*, under the provisions of which the New York and Erie Railroad Company was allowed to pass through Pike and Susquehanna Counties, placed a condition upon the privilege of entering Pennsylvania in the form of a \$10,000 annual payment to the Commonwealth. This condition is set out in section 5 of the act of 1846, *supra*, as follows:

That after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western end with any other improvement extending to Lake Erie, said company shall cause to be paid into the treasury of this state, annually, in the month of January, ten thousand dollars; and any neglect or refusal by said company to pay as aforesaid, shall work a forfeiture of the rights and privileges granted by this act.

In *New York, Lake Erie and Western Railroad Company v. Pennsylvania*, 153 U. S. 627, 38 L. Ed. 846 (1893), the question raised was whether the Commonwealth of Pennsylvania could impose upon the treasurer of the New York, Lake Erie and Western Railroad Company, with offices in New York City, the duty of deducting Pennsylvania loans tax from the interest paid to the holders of the company's indebtedness in Pennsylvania. In holding that this additional burden placed upon the company would result in an impairment of the obligation of the contract between the railroad and Pennsylvania, as disclosed by the acts of 1841 and 1846, the court said with regard to the two acts, at page 642:

* * * Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. * * * When the state, by the acts of 1841 and 1846, gave this assent the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those acts, was not overlooked; for, by the seventh section of the act of 1846, into which, by its second section, all the restrictions, prohibitions, privileges, and provisions contained in the act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved, "if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges (provisions) of this act * * *"

The court then stated that no question had been raised as to any violation by the railroad company of the terms and conditions upon which it entered Pennsylvania. On page 643, the court continued:

"* * * Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the state, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situate within its limits."

As a result of this decision we conclude that a contract between the railroad and Pennsylvania was established by the act of 1841 and the act of 1846 and, since neither of the parties has at this time abrogated the contract it still must be considered to be in effect. Since both parties are bound by the terms of the contract, the Erie Railroad Company, as successor in title, is liable to the Commonwealth for the annual payment of \$10,000.

3. Is the Erie Railroad Company now Liable to the Commonwealth for Franchise Tax Under the Provisions of the Act of June 1, 1889, and its Amendments?

The act of 1846, section 6, provided as follows:

Section 6. That the stock of said company to an amount equal to the cost of construction of that part of their road situate in Pennsylvania, shall be subject to taxation by this Commonwealth, in the same manner, at the same rate as other similar property is, or may be subject; and it shall be the duty of the said company to cause their treasurer to pay into the treasury of this state any tax to which said proportion of stock is liable; * * *

Does this section of the act limit the Commonwealth in taxing the capital stock of the Erie Railroad Company to a valuation equal to the cost of the construction of the part of the railroad in Pennsylvania, or must the railroad pay a franchise tax as other foreign corporations, under the Act of May 16, 1935, P. L. 184, 72 P. S. § 1871, et seq., based upon a valuation determined by a statutory formula which reflects the extent of the privilege enjoyed by the railroad in Pennsylvania?

In *Erie Railway Company v. The Commonwealth*, 66 Pa. 84 (1870), the question arose as to whether the Erie Railway Company could claim any special exemption from a tonnage tax, imposed by the Act of August 25, 1864, P. L. 988, by reason of the contract between the railroad and the Commonwealth, as contained in the Act of March 26, 1846, P. L. 179. The company's position was that the \$10,000 annual payment, as provided for in the fifth section of the act of 1846, and the tax on the capital stock, as provided for in the sixth section, precluded the Commonwealth from levying any further tax on the company. The court said at page 87:

* * * These are all the provisions which are relied on to show a special exemption from taxation. It is not pretended that there is any express release of legislative power; but it is contended that, as the company have agreed to pay, and the state to accept these sums, it is necessarily implied that no more shall ever be exacted. So it might well be argued if any special taxation was imposed upon this company; for that would be to require an additional price beyond the terms of the contract. But the question, whether they shall be subject to a general tax laid upon all railroad and transportation companies in the Commonwealth is an entirely different one. There is no principle better established, and it requires no long array of cases to prove it, than that no surrender of the general power of taxation by any legislative act can be implied. It must be express: *The Providence Bank v. Billings*, 4 Peters, 514; *Bank v. The Commonwealth*, 10 Barr, 442. In the case last cited, it was decided that a bank chartered under the Act of 1824, which prescribed the payment of a certain tax on dividends declared, was subject to a subsequent general law, which increased the rate of taxation. "To deduce from premises so insufficient," said Mr. Justice Bell, "a consequence of such magnitude would indeed be a gross violation of the wholesome principle that an abandonment of the power of taxation is only to be established by clearly showing this to have been the deliberate purpose of the state."

The court concluded that the Erie Railway Company was properly subject to the tonnage tax. This case was later appealed to the United States Supreme Court (*Erie Railway Company v. Pennsylvania*, 82 U. S. 282 (1872)) and the decision of the Pennsylvania Su-

preme Court was reversed, not upon the question, however, of whether the tonnage tax could be imposed upon the Erie Railway Company regardless of the act of 1846, but on the ground that the tonnage tax was an undue burden on interstate commerce. Thus, *Erie Railway Company v. The Commonwealth*, 66 Pa. 84, stands for the proposition that the payment for the charter rights by the New York and Lake Erie Railroad Company, under the act of 1846, does not imply a surrender of the power to tax the corporation by a general tax law.

In *Commonwealth v. Erie Railway Company*, 98 Pa. 127 (1881) the question was raised as to how the capital stock of the Erie Railway Company was to be taxed under the general Revenue Act of April 24, 1874, P. L. 68, § 4. This act provided that every railroad company in Pennsylvania should pay an annual tax at the rate of nine-tenths of one mill upon its capital stock for each one percent of dividend declared, and in case of no dividend being declared, then six mills upon the true valuation of the capital stock. The accounting officers were of the opinion that this act repealed the method of taxing the capital stock of the Erie Railway Company, as set out by the act of 1846, and rendered it liable to tax in the same manner as the stock of other railroad companies, or according to the ratio of the portion of the road in this State, to its entire length. The court said at page 132:

* * * the Act of 1874 does not impose a tax upon the entire stock of the Erie Railway Company; only upon a fair proportion with reference to so much of the road as is located in Pennsylvania. It is silent as to the mode of ascertaining this proportion. But the Act of 1846, special to this company, directs that the stock to an amount equal to the costs of construction of that part of the road situated in Pennsylvania, shall be subject to taxation in the same manner and at the same rate as other similar property. By the later statute a rate is fixed, if there be a dividend; if no dividend, then a rate upon a true valuation of the capital stock. The prior statute fixes the amount of that stock. One fixes the rate for all railroad companies, the other determines the assessment of the stock of this company. The alleged inconsistency is not clear. There is no difficulty in the way of both having effect. One does not repeal the other, unless there be a clear and strong inconsistency between them: *Street v. Commonwealth*, 6 W. & S., 209; *Kilgore v. Commonwealth*, 9 W. N. C. 184. Had it been the intention to place an undefined and arbitrary discretion in the public officers, to fix the proportion of the capital stock, the repeal of the sixth section of the Act of 1846 would be plainly expressed.

We think the learned judge of the Common Pleas was right in his conclusion that the Act of 1846 settles the method of ascertaining the amount of capital stock which shall be assessed, and that the Act of 1874 fixes the rate of taxation.

This case holds that the act of 1874 did not change the method of fixing the value of the capital stock of the Erie Railroad Company, as was especially provided by the act of 1846, but that the method of valuing the capital stock could be changed by a statute that showed a clear legislative intent to bring about such a result.

The Act of June 1, 1889, P. L. 420, Section 20, as amended, 72 P. S. § 1902, specifies the method for determining the valuation of the capital stock of all corporations. This section provides that the actual cash value of the capital stock is to be reported as the taxable value, but that this value is not to be less (1) than the average for which the stock sold during the year; (2) not less than the price indicated by net earnings and dividends; (3) not less than the actual value of the net assets. It has been held that, "all elements of value must be considered if the value found is to be sustained as actual value." *Commonwealth v. Provident Life & Trust Company of Philadelphia*, 12 Dauphin 104.

By the Act of May 16, 1935, P. L. 184, Section 1, as amended, *supra*, corporations were divided into two classifications. A capital stock tax was imposed, as previously, under the act of 1889, *supra*, on domestic corporations, and a so-called franchise tax on all foreign corporations. Under this act, a formula was set up for apportioning the value of the capital stock of foreign corporations which should be attributed to the business of each corporation carried on within this Commonwealth. This system of taxing foreign corporations was held constitutional in *Commonwealth v. Columbia Gas and Electric Corporation*, 336 Pa. 209, as imposing a franchise tax upon the privilege of doing business in Pennsylvania.

The Statutory Construction Act of May 28, 1937, P. L. 1019, Article 7, Section 19, 46 P. S., § 591, states in part as follows:

Whenever a general law purports to establish a uniform and mandatory system covering a class of subjects, such law shall be construed to repeal pre-existing local and special laws on the same class of subjects.

There can be no question but that the act of 1889, *supra*, as amended by the act of 1835, *supra*, establishes a uniform and mandatory system covering taxation of all corporations for capital stock and franchise tax purposes, with the result that the method of valuing the capital stock of the Erie Railroad Company, as set out in the act of 1846, was thereby repealed.

From the decision in *Erie Railway Company v. The Commonwealth*, 66 Pa. 84, where it was held that the sixth section of the act of 1846

did not preclude the Commonwealth from imposing additional tax upon the Erie Railway Company, from the decision in *Commonwealth v. Erie Railway Company*, 98 Pa. 127, in which it was held that the method of determining the valuation of the Erie Railway Company for capital stock tax purposes, as prescribed by the act of 1846, might be changed by a subsequent statute, and from the fact that a complete system has been established for the valuing of the capital stock and the apportioning of that part of the capital stock to be attributed to Pennsylvania in determining the value of the privilege exercised in this State, we have no difficulty in concluding that the Erie Railroad Company is subject to the payment of a franchise tax under the Act of June 1, 1889, as amended by the Act of May 16, 1935, for the privilege of doing business in this Commonwealth.

We are of the opinion, therefore that: The Erie Railroad Company must pay to the Commonwealth \$10,000 annually under the provisions of the Act of March 26, 1846, P. L. 179. The Erie Railroad Company is subject to a franchise tax as provided by the Act of May 16, 1935, P. L. 184, 72 P. S. § 1871 et seq.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,

Attorney General.

B. B. BASTIAN,

Deputy Attorney General.

OPINION No. 497

County Treasurers—Quarter Sessions Court—Bonds—Taxes—Reduction of Amount—State Funds—County Code of May 2, 1929, P. L. 1278—Act of May 7, 1943, P. L. 237.

The courts of quarter sessions of the various counties of our commonwealth have power, upon proper application and explanation of change of circumstances, to revise or cut down the penalties set out in the existing bonds filed with the Auditor General by county treasurers.

The plain reading of section 145 of the general county law of May 2, 1929, P. L. 1278, indicates that the legislature did not prescribe a specific form of bond. It directs the court of quarter sessions to approve the bond and fix the penalty. The act further directs that the court be guided in fixing the penalty by "amount of moneys received * * * for the use of the commonwealth."

The Act of May 7, 1943, P. L. 237, abolished the mercantile license tax system. This source of commonwealth revenue, formerly channeled through county treas-

urers, with the exception of delinquent collections, no longer exists. The chief purpose of the required bond is to protect state funds in the hands of the county treasurer.

One of the purposes which the courts had in mind in 1942 when they fixed the penalties in the bonds no longer exists. Since the court is to be guided by the amount of moneys received by the county treasurer for the use of the commonwealth, it would appear this item should be corrected at this date to meet the changed circumstances.

Harrisburg, Pa., April 19, 1944.

Honorable F. Clair Ross, Auditor General, Harrisburg, Pennsylvania.

Sir: By your letter of March 8, 1944, you inquire if the judges of the respective courts of quarter sessions in the counties of the Commonwealth have authority to change the penalty in bonds of county treasurers filed with the Auditor General. You state that since the recent legislature abolished certain State taxes, relieving county treasurers from making collections, many county treasurers who assumed office in January, 1942, desire to have the penalties in their bonds decreased. However, surety companies on these bonds oppose the reduction. No objections have been voiced to the filing of bonds in smaller penal amounts by county treasurers who assumed office on January 1, 1944.

The General County Law, the Act of May 2, 1929, P. L. 1278, Article III, Section 145, 16 P. S. § 145, requires the county treasurer to file a bond in favor of the Commonwealth as follows:

Each county treasurer shall also, before entering upon the duties of his office, give bond with sufficient security, to be approved of by, at least two of the judges, if there is more than one judge of the court of quarter sessions in the county, and in such penalty as the said judges shall deem sufficient, conditioned for the faithful discharge of all duties enjoined upon him by law in behalf of the Commonwealth, and for the payment according to law of *all moneys received by him for the use of the Commonwealth*, which bond shall be taken by and acknowledged before the recorder of deeds of the same county, and recorded in his office at the cost of the county treasurer, and the original bond shall be forthwith transmitted to the Auditor General. (Italics ours.)

The case of *Shunk v. Miller*, 5 Pa. 250 (1847), discusses the construction of statutes requiring the filing of bonds. In that case, it is stated at page 253:

* * * The leading principle on this subject, which runs through the cases, is, that when a statute only directs the

condition of the bond, and does not avoid it if it should not conform to the directions, and something more than the condition is added to it, the bond may be allowed to cover the authorized part of the condition; Gilpin's Rep. 179.

But it is otherwise where a statute authorizes a bond to be taken in a prescribed manner or for certain expressed purposes, and declares, if it be not so taken, the bond shall be void. There the bond must follow the words prescribed, and it is not good for any purpose, however lawful in itself, if it be not conformable to the statute; * * *

The plain reading of section 145 of The General County Law, *supra*, indicates that the legislature did not prescribe a specific form of bond. It directs the court of quarter sessions to approve the bond and fix the penalty. The act further directs that the court be guided in fixing the penalty by "amount of moneys received * * * for the use of the Commonwealth."

The Act of May 7, 1943, P. L. 237, abolished the mercantile license tax system. This source of Commonwealth revenue, formerly channeled through county treasurers, with the exception of delinquent collections, no longer exists.

It has been held that the chief purpose of the required bond is to protect State funds in the hands of the county treasurer. See *Hughes v. Commonwealth*, 48 Pa. 66 (1864).

Unless the interpretation of this act denies the power to the courts of quarter sessions to change the penalty once they have fixed same, it would be reasonable to infer that in the interest of economy county treasurers be permitted to request such courts to change the penalty in their bonds and thus save moneys that they are required to pay out for higher premiums.

One of the purposes which the courts had in mind in 1942 when they fixed the penalties in the bonds no longer exists. Since the court is to be guided by the amount of moneys received by the county treasurer for the use of the Commonwealth, it would appear this item should be corrected at this date to meet the changed circumstances.

We are of the opinion, therefore, that the courts of quarter sessions of the various counties of our Commonwealth have power, upon proper application and explanation of the change of circumstances, to re-

vise or cut down the penalties set out in the existing bonds filed with the Auditor General by county treasurers.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,

Attorney General,

H. ALBERT LEHRMAN,

Deputy Attorney General.

OPINION No. 498

Municipal Employes' Retirement Law, the Act of June 4, 1943, P. L. 886, construed.

Harrisburg, Pa., April 20, 1944.

Honorable C. M. Morrison, Chairman, State Employes' Retirement Board, Harrisburg, Pennsylvania.

Sir: We have your request for advice concerning the Municipal Employes' Retirement Law, the Act of June 4, 1943, P. L. 886, 53 P. S. § 371.1 et seq.

Specifically, you ask the following question:

Has the State Employes' Retirement Board the authority under the act to pay out of the special appropriations outlined in section 26 the cost of the services rendered by the actuary in furnishing estimated costs to a municipality on the basis of a preliminary study?

In response to your inquiry, you are referred to section 6 of the Retirement Law, *supra*, 53 P. S. § 371.6.

We are of the opinion that the question submitted in your request for advice is directly answered by the aforesaid section 6 of the Retirement Law, *supra*, which is, in part, as follows:

The cost and expenses incident to such circular of information, including the compensation of the actuary in making the preliminary actuarial investigation required by the pre-

ceding section to be fixed by the State Employes' Retirement Board, shall be paid from the appropriation made by this act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General,

H. J. WOODWARD,
Special Deputy Attorney General.

OPINION No. 499

Parole—Industrial Home for Women, Muncy—Inmates—Prostitution—Jurisdiction of Parole Board—Act of May 27, 1943, P. L. 767. See also Formal Opinion No. 454.

The Pennsylvania Board of Parole does not have jurisdiction over inmates who have been committed to the institution upon plea or conviction of the crime of prostitution, even though they may be kept there for periods equal to three years, for the reason that the maximum term of imprisonment for the crime of prostitution is one year.

Harrisburg, Pa., May 1, 1944.

Honorable Henry C. Hill, Chairman, Pennsylvania Board of Parole,
Harrisburg, Pennsylvania.

Sir: You ask our opinion concerning the jurisdiction of the Pennsylvania Board of Parole over certain inmates at the Pennsylvania Industrial Home for Women at Muncy, Pennsylvania. You advise that these inmates, convicted of the charge of prostitution, have been detained for periods in excess of two years.

In Formal Opinion No. 454 of April 8, 1943, it was held that the Board of Parole had jurisdiction in cases of persons sentenced to that institution, where the maximum term which the legislature has fixed as punishment for the crime of which the prisoner was guilty equals or exceeds two years. This conclusion in almost identical language was made unmistakably clear by its legislative adoption in the amendments of May 27, 1943, P. L. 767, to the Parole Act, the Act of August 6, 1941, P. L. 861, 61 P. S. § 331.31.

Prostitution is a misdemeanor punishable by a fine of \$500 and by imprisonment not exceeding one year under The Penal Code, the Act of June 24, 1939, P. L. 872, 18 P. S. § 4512.

The Act of July 25, 1913, P. L. 1311, as last amended June 22, 1931, P. L. 859, 61 P. S. § 566, provides as follows:

Any court of record in this Commonwealth, exercising criminal jurisdiction, may, in its discretion, sentence to the State Industrial Home for Women any female over sixteen years of age, upon conviction for, or upon pleading guilty of, the commission of any criminal offense punishable under the laws of this State. After due notice given to all courts of record exercising criminal jurisdiction in this Commonwealth by the board of trustees of said State Industrial Home for Women that the said home is prepared to receive all women so convicted or pleading guilty of an offense punishable by imprisonment *for more than a year* who shall be sentenced to imprisonment; such sentence in all cases shall be to confinement in said State Industrial Home for Women. *Every sentence imposed pursuant to this act shall be merely a general one* to the State Industrial Home for Women, and shall not fix or limit the duration thereof. *The duration of such imprisonment, including the time spent on parole, shall not exceed three years*, except where the maximum term specified by law for the crime for which the prisoner was sentenced shall exceed that period, in which event such maximum term, including the time spent on parole, shall be the limit of detention under the provisions of this act. (Italics ours:)

We thus have two alternative punishments for the crime of prostitution. Under section 512 of The Penal Code, *supra*, imprisonment for prostitution cannot exceed one year. Under the Act of July 25, 1913, as amended, *supra*, a court may, in its discretion, sentence to the institution at Muncy a female over sixteen years of age who has been convicted of or who has pleaded guilty of prostitution; and, once due notice has been given to a court by the trustees of the institution at Muncy, the court must sentence a female who has been convicted or who has pleaded guilty of any offense punishable by imprisonment for more than one year, to that institution. The act of 1913 further provides that every sentence imposed pursuant thereto shall be a general one, of no fixed limitation; provided, however, that the duration of such imprisonment at Muncy cannot exceed three years unless the crime for which the prisoner was sentenced carried a penalty of more than three years.

The first alternative punishment by imprisonment for the crime of prostitution would be for a period not exceeding one year in jail. The second would be commitment to the institution at Muncy of a female guilty of prostitution, provided she was over sixteen years of age, such commitment being entirely within the discretion of the sentencing court. When sentence of commitment to Muncy is made in such a case pursuant to the act of 1913, the sentence must be a gen-

eral one, with no fixed duration, with the exception hereinbefore already noted. Therefore, if the court sentences the guilty female to jail she may not be imprisoned there for more than a year, but if the court commits her to Muncy she may be kept there for three years.

The two foregoing statutory provisions are, of course, different, but they are not irreconcilable. Theoretically at least, imprisonment in jail is for the purpose of punishment, and it is usually the professional prostitutes who are sent there. On the other hand, confinement at Muncy is primarily for the purpose of rehabilitation, and the time required for rehabilitation cannot be known with any degree of certainty; and it is usually the so-called amateur prostitutes who are committed to Muncy.

Under that portion of the act of 1913, *supra*, relating to commitment to Muncy of females convicted or pleading guilty of offenses punishable by imprisonment for more than a year, the courts must commit to Muncy such persons. However, this part of the act of 1913 has nothing to do with females convicted of prostitution, because the penalty of imprisonment for the crime is one year only. Consequently, there is no mandatory commitment to Muncy of guilty prostitutes. The only commitment to Muncy of guilty prostitutes would be one made in the court's discretion. But, once such commitment is made, it must be by general sentence, as hereinbefore indicated.

However, the Pennsylvania Board of Parole does not have jurisdiction over inmates of the Pennsylvania Industrial Home for Women at Muncy who have been committed to that institution upon plea or conviction of the crime of prostitution, even though they may be kept there for periods equal to three years, for the reason that the maximum term of imprisonment set by the legislature for the crime of prostitution is one year. Therefore, in accordance with our Formal Opinion No. 454, *supra*, and section 31 of the Parole Act, *supra*, the Pennsylvania Board of Parole has no jurisdiction over such inmates.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General,

RALPH B. UMSTED,
Special Deputy Attorney General,

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 500

Cooperative agricultural associations—Capital stock—Escheat reports—Filing of reports required by the Act of June 25, 1937, P. L. 2063.

Cooperative agricultural associations, with or without capital stock, must file with the Department of Revenue, escheat reports in January of each year.

Harrisburg, Pa., May 22, 1944.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We are in receipt of your recent communication in which you inquire if there is a liability on the part of cooperative agricultural associations to file escheat reports with the Department of Revenue.

Section 3 of the Act of June 25, 1937, P. L. 2063, 27 P. S. § 436, provides that in the month of January of each year reports shall be made to the Department of Revenue as follows:

(1) Every company shall make a report of all dividends or profits declared by it to any stockholder or member and unclaimed for six or more successive years next preceding the first day of said month, where funds have been provided by the company for the payment of said dividends or profits, and of all debts and interest on debts due by it to any creditor, for the payment of which debts or interest thereon funds have been provided by the company, where said payments have been unclaimed for six or more successive years next preceding the first day of said month.

(2) Every company shall make a report of any and all customers, advances, tolls or deposits held by it, and under the terms of the deposit agreement due and owing to the person or company depositing the same and unclaimed by said person or company for six (6) or more successive years next preceding the first day of said month.

* * * * *

(4) (a) Every company shall make a report of any and all stock or certificates of beneficial interest, or whatsoever nature, issued by or authorized to be issued by such company, which have been demandable and have been and remain unclaimed by the person legally entitled thereto for six or more successive years next preceding the first day of said month.

Section 2 of the Act of June 25, 1937, P. L. 2063, as amended, 27 P. S. § 435 supplies the following definition for the word company:

The word company shall include limited partnerships and unincorporated associations, joint-stock associations, public utility corporations, insurance exchanges, associations or cor-

porations, and any company or corporation incorporated and doing business under the laws of this Commonwealth, except mutual savings fund societies and building and loan associations, and except banks, national banks, bank and trust companies, trust companies and other corporations, associations, partnerships, limited partnerships, and partnership associations, engaged in the business of receiving money on deposit or securities or other property for safekeeping.

The language of the report provision of the act of 1937, *supra*, is clear and unless there is something to the contrary in the enabling legislation under which cooperative agricultural associations come into existence, it must be construed to make them liable to file reports in January of each year. Cooperative agricultural associations with capital stock are clearly "joint-stock associations, companies or corporations doing business under the laws of the Commonwealth," within the meaning of the word "company," as above quoted. Cooperative agricultural associations not having capital stock are certainly covered by the word "associations."

An inspection of the Act of June 7, 1887, P. L. 365, 14 P. S. § 1 et seq.; the Act of June 12, 1919, P. L. 466 as amended by the Act of May 1, 1929, P. L. 1201, 14 P. S. § 41 et seq.; the Act of April 30, 1929, P. L. 885, 14 P. S. § 81 et seq.; the Act of May 22, 1933, P. L. 915, 14 P. S. § 107 et seq.; the Act of May 25, 1933, P. L. 1027, 14 P. S. § 114 et seq.; and the Act of June 30, 1923, P. L. 984, 14 P. S. § 191 et seq., fails to disclose any provision which would exempt associations created under their authority from filing escheat reports. Quite the contrary is indicated by Section 6 of the Act of April 30, 1929, P. L. 885, 14 P. S. § 86, which we quote as an example:

Any association may transact or do business with or for patron stockholders or patrons not stockholders, and may issue and sell its preferred stock to patrons or non-patrons of the associations; but common stock of the association shall be sold to patrons only; and the certificate of common stock shall contain a provision that the association shall have an option to redeem the stock at par value plus accrued dividends when the owner thereof has for a period of twelve months, done no business with the association, and shall contain a further provision that no sale of stock shall be valid without the written consent of the association, and, if the association withholds its consent to such sale, then the association shall redeem such stock at par value plus accrued dividends. Dividends on the common stock shall be paid only after dividends are paid on the preferred stock, and the required surplus fund set aside, and shall be not greater than six per centum per annum, except as hereinafter provided. Dividends on pre-

ferred stock shall be not greater than six per centum per annum and shall be cumulative.

After payment of the dividend on the preferred stock, and after making provision from its net earnings for the reserve fund, as hereinafter provided, the remainder of the net earnings of the association, not required for dividends on the common stock, may, in the discretion of the directors, be distributed as a patronage refund. Patron stockholders shall be entitled to patronage refunds at double the rate of patronage refunds to which non-stockholder patrons shall be entitled. Patronage refunds may be credited to the accounts of non-stockholders in the purchase of capital stock of the association.

It may be seen then that in so far as its stockholders are concerned, a cooperative agricultural association is not different from an ordinary business corporation with respect to the disposition of unclaimed dividends or unredeemed stock and, under the legislation of which section 6 of the act of 1929, *supra*, is an example, patronage refunds must fall in the same category as dividends. And an association without capital stock, in so far as its members are concerned, is dissimilar only in that one respect.

We are of the opinion that cooperative agricultural associations, with or without capital stock, must file with the Department of Revenue, escheat reports in January of each year in accordance with the provisions of the Act of June 25, 1937, P. L. 2063, 27 P. S. § 436.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 501

School districts—Public School Employes Retirement Fund—Allowance to employes on military leave—Cost of living increase.

School districts and boards of directors of vocational schools are required to include the increased cost of living allowance of employes on military leave of absence for the purpose of calculating and making contributions to the Retirement Fund.

Harrisburg, Pa., June 8, 1944.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You ask whether or not the amount school districts are required to pay into the School Employees' Retirement Fund on behalf of an employe in military service, under the Act of August 1, 1941, P. L. 744, is limited to the contributions deducted under his contract while an employe of such district, or must it include that which, by virtue of the cost of living increase under Act of May 28, 1943, P. L. 786, he would have received were he still an employe of the district.

Section 1 of the Act of August 1, 1941, P. L. 744, 24 P. S. § 2371.1, demonstrates the legislative intent that such employes in military or naval service "shall be considered in all respects to be continuing in the service of the school board or board of directors of vocational schools for which they were last working prior to such assignment to military or naval service."

Section 2 (c) of the same act, 24 P. S. § 2371.2, states that "* * * all rights and privileges shall be reserved to such employe as if he continued in the service of said school board or board of directors of vocational schools: * * *."

Section 3 (e) of the act, 24 P. S. § 2371.3, requires certain duties to be performed by the school district or vocational school district "so that such employes' retirement rights shall be in no way affected by such leave of absence."

The increased cost of living pay, provided for public school employes in the various categories under the Act of May 28, 1943, P. L. 786, 24 P. S. § 118 6d—h., while only a temporary increase, is part of the employes' salary.

These additional contributions materially affect the rights of the individual under various sections of the Retirement Act, such as section 14 of the Act of July 18, 1917, P. L. 1043, as amended, 24 P. S. § 2135, dealing with the calculation of the allowance on superannuation retirement, and section 1 (17) of the same act, as amended, 24 P. S. § 2081, in which "final salary" means the average annual salary, earnable by a contributor as an employe for the ten years of service immediately preceding retirement.

It is clear that the purpose of the various acts was to preserve all rights and privileges of the individual in military service in respect to

the Retirement System, as though he were still an employe of the school board or board of directors. It follows that in order to preserve such rights and privileges of those in military service on a par with their former associates who still remain school board employes, contribution by the school board or board of school directors should include the cost of living increase provided under the Act of May 28, 1943, P. L. 786, 24 P. S. § 2371.1 et seq.

We are of the opinion, therefore, that school districts and boards of directors of vocational schools are required to include the increased cost of living allowance of employes on military leave of absence for the purpose of calculating and making contributions to the Retirement Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

JOHN W. KEPHART, JR.,
Assistant Deputy Attorney General.

OPINION No. 502

Pennsylvania State Guard—New uniforms for officers—Act of May 5, 1943, P. L. 151 construed.

An allowance of \$130 each year is all that may be given to each officer if prescribed by the Governor and if found necessary for furnishing the officers of the Pennsylvania State Guard with uniforms, arms and equipment. The Department of Military Affairs cannot provide such officers uniforms under section 10 of the Pennsylvania State Guard Act of May 5, 1943, P. L. 151.

Harrisburg, Pa., June 19, 1944.

Honorable R. M. Vail, Adjutant General, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: By your recent communication you ask if the Department of Military Affairs may expend funds towards the purchase of new uniforms for officers of the Pennsylvania State Guard. You desire us to interpret certain sections of the Act of March 19, 1941, P. L. 3, as amended by the Act of May 3, 1943, P. L. 151, known as the Pennsylvania State Guard Act, 51 P. S. § 217 et seq.

Section 11 of said act reads as follows:

Every *commissioned officer* shall furnish his own arms, uniforms and equipment which shall be as prescribed by the Adjutant General. An allowance for this purpose of not to exceed one hundred dollars (\$100.00) for each *officer* may be prescribed by the Governor and in addition thereto, if found necessary, the Governor may prescribe a further allowance not to exceed thirty dollars (\$30.00) *in any one year* for each *officer*. (Italics ours.)

Section 12 reads as follows:

All Pennsylvania laws or sections of laws pertaining to the Pennsylvania National Guard shall be applicable and shall govern the Pennsylvania State Guard, except as modified or changed by the provisions of this act.

Under Section 9 of the Pennsylvania National Guard Act, the Act of May 17, 1921, P. L. 869, as last amended May 17, 1939, P. L. 165, 51 P. S. § 39, it is provided in part:

An equipment and clothing allowance for *officers* and warrant officers shall be made available as follows:—An initial allowance for *officers* and warrant officers of two hundred dollars (\$200) when originally appointed. *No more than one initial allowance shall be granted to any officer or warrant officer*, no additional allowance shall be made available to *officers* receiving the initial allowance for a *period of five years* from the date of initial credit. * * * (Italics ours.)

Since these sections of the two acts are inconsistent, it is clear that section 9 of the Pennsylvania National Guard Act, *supra*, is superseded. Section 11 of the Pennsylvania State Guard Act, *supra*, controls the allowance for officers' uniforms.

We feel the plain construction of section 11 of the Pennsylvania State Guard Act permits an allowance of \$130 to be made each year to each officer by the Governor. The words "in any one year" describe the period to which the amount of moneys \$100 and \$30 apply.

Unless section 10 of the Pennsylvania State Guard Act permits the Governor to provide additional moneys for officers' uniforms, we feel section 11 of the Pennsylvania State Guard Act controls the matter of officers' uniforms entirely. Section 10, 51 P. S. § 226, provides as follows:

The Governor shall have the authority and power to requisition from the War Department of the United States such arms and equipment as may be available for use of the Penn-

sylvania State Guard under the provisions of Public Resolution No. 874, the 76th Congress of the United States, approved October 21, 1940, and such other uniforms, arms and equipment as may hereafter be authorized by the Congress of the United States to be made available to the Pennsylvania State Guard. The Governor shall have further authority and power to make available for the use of the Pennsylvania State Guard such uniforms, arms and equipment as may be owned by the Commonwealth or as may be in possession of the Commonwealth for the purpose of such use. In the absence of any provision of uniforms, arms and equipment by the United States such uniforms, arms and equipment may be prescribed by the Governor and provided at the cost of the Commonwealth.

This section, we feel, applies to enlisted men's uniforms, arms and equipment. In construing statutes, there is a well-known doctrine that if there be conflict between two provisions of the same law that are irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provisions unless the general provision shall be enacted later. This is the law in Pennsylvania. See the Act of May 28, 1937, P. L. 1019, 46 P. S. § 563. It is obvious that section 10 of the Pennsylvania State Guard Act deals with the general subject of uniforms, arms and equipment, and is meant to apply to the enlisted men and not to the officers. Hence, section 11 is the only law now prevailing that deals with officers' uniforms.

It is our opinion, therefore, that an allowance of \$130 each year is all that may be given to each officer if prescribed by the Governor and if found necessary for furnishing the officers of the Pennsylvania State Guard with uniforms, arms and equipment. It is our opinion also, that the Department of Military Affairs cannot provide such officers uniforms under section 10 of the Pennsylvania State Guard Act of May 3, 1943, P. L. 151, 51 P. S. § 226.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General,

H. ALBERT LEHRMAN,
Deputy Attorney General.

OPINION No. 503

Bureau of Vital Statistics—Marriage licenses—Issuing Officer—Procedure—Official Opinion No. 476 reviewed and modified.

Suggestion has been made that the officers issuing marriage licenses retain the duplicate marriage certificate filed with them, as had been the practice hereto-

was in accord with section 30 of the Uniform Vital Statistics Act, which provided, among other things, as follows:

* * * Every officer who issues a marriage license shall forward to the department, on or before the 15th day of each calendar month, the certificates of marriage which were filed with him during the preceding calendar month.

It now develops that if our aforesaid conclusion is followed one of the primary and clear purposes of the legislature in passing the Uniform Vital Statistics Act will not be accomplished. The object of the legislation, and the intent of the legislature in enacting it, were to provide a uniform method and procedure for the collection and preservation of all vital statistics relating to inhabitants of the Commonwealth, and to centralize the collection of such data in the Department of Health. If the duplicate marriage certificate filed with the issuing officer is forwarded by him to the Department of Health, that department will be unable to obtain therefrom sufficient information to compile the statistics desired and required; and the officers issuing marriage licenses, unless they make copies of these duplicate certificates before forwarding them to the department, will be unable to maintain a complete record of marriages. Neither of these results is desirable, and we are sure the legislature did not intend them.

The suggestion has been made that the officers issuing marriage licenses retain the duplicate marriage certificates filed with them, as had been their practice heretofore, instead of forwarding them to the Department of Health. It has been further suggested that the officers with whom duplicate marriage licenses are filed, instead of forwarding such certificates to the department, send to the department the information required by it with relation to marriages, on Form HVS-20097, or on a form substantially similar, provided by the Department of Health. This form is entitled "Marriage Record." If this suggested procedure is followed, a complete record of every marriage will be maintained in the office of the officer issuing a marriage license, if the marriage is performed, and a complete record of such marriage will also be compiled and preserved by the Department of Health.

We think the suggested procedure above outlined is clearly within the intent and purpose of the Uniform Vital Statistics Act, and that if it is followed neither the spirit nor letter of the act will be violated.

Therefore, to the extent that Formal Opinion No. 476, dated September 8, 1943, addressed to you as Secretary of Health, is inconsis-

tent with the conclusions of this opinion it is hereby modified and overruled.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,

Attorney General.

WILLIAM M. RUTTER,

Deputy Attorney General.

OPINION No. 504

Corporations—Medical and hospital services—Legality—Practice of medicine—Nonprofit Medical Service Corporation Act of 1939—Nonprofit Corporation Law of 1933, sec. 219, as amended—Restriction to domestic corporations—Interpretation of act—Foreign nonprofit corporation—Right to certificate—Refusal of comity—Exemption as benevolent society.

1. Except as specifically authorized by the Nonprofit Medical Service Corporation Act of June 27, 1939, P. L. 1125, as amended, or by other legislation relating to workmen's compensation, hospitals, hospitalization insurance, and similar services, no corporation, nonprofit or otherwise, may secure, provide, or render medical services to individuals in this Commonwealth, since such service would constitute the practice of medicine contrary to law.

2. The Nonprofit Medical Service Corporation Act of 1939, as amended, is a regulatory statute intended to authorize qualified persons to provide adequate medical service for residents of Pennsylvania unable to provide such service for themselves, under the control of the Department of Health and the Department of Insurance.

3. The medical service authorized by the Nonprofit Medical Service Corporation Act of 1939, as amended, may be provided only by a nonprofit medical service corporation organized and operated under section 219 of the Nonprofit Corporation Law of May 5, 1933, P. L. 289, as last amended by the Act of May 21, 1943, P. L. 360, or by a beneficial, benevolent, fraternal, or fraternal benefit society.

4. Refusal of permission to foreign nonprofit medical service corporations to operate in Pennsylvania is within the police power of the State, the privilege of comity of consent not being extended to such foreign corporations.

5. The Secretary of the Commonwealth has no authority, under section 4 of the Nonprofit Medical Corporation Service Act of 1939, as amended, to grant a certificate of authority to a foreign nonprofit membership corporation offering to furnish medical and dental services and hospitalization, including drugs and nursing, for agricultural workers and their families in Pennsylvania, without cost beyond the purchase of a membership certificate, unless the corporation comes within the specific exemptions of the statute.

6. A foreign nonprofit corporation may not be accorded exemption from operation of the Nonprofit Medical Service Corporation Act of 1939, as amended, as a benevolent or fraternal society unless it has a lodge system and a representative form of government.

Harrisburg, Pa., July 18, 1944.

Honorable C. M. Morrison, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication asking whether you may grant a certificate of authority to a foreign non-profit membership corporation, incorporated to do business in this Commonwealth as an organization offering to furnish medical and dental services and hospitalization, including drugs and nursing, for agricultural workers and their families. Membership is obtained by the purchase of a certificate upon the payment of \$1.00 plus the approval of the board of directors. The corporation does not guarantee that such services will be furnished, but such services as are furnished are without cost to members.

It must be remembered that, except as to specific acts of the legislature relating to workmen's compensation, hospitals, hospitalization insurance and similar services, and within the limits therein prescribed, prior to the enactment of the Nonprofit Medical Service Corporation Act and related legislation, hereafter specifically referred to, no corporation whether nonprofit or otherwise could secure, provide, or render medical services, whether prepaid or otherwise, since the securing, providing or rendering of such services would constitute the practice of medicine by the corporation contrary to law. *Com. ex rel. Attorney-General v. Alba Dentist Company*, 13 Pa. Dist. 432 (1904); *The Thomas Diagnostic Clinic*, Opinion of the Attorney General, 30 Pa. Dist. 778 (1921); and *People of the State of California ex rel. State Board of Medical Examiners v. Pacific Health Corporation, Inc.*, 12 Cal. (2d) 156, 82 P. (2d) 429, 119 A.L.R. 1284, note 1290 (1938). See also decision cited in 103 A.L.R. 1240, note 1.

The Nonprofit Medical Service Corporation Act of June 27, 1939, P. L. 1125, as amended, 15 P. S. § 2851-1501 et seq., with which we are here primarily concerned, is a regulatory act.

The purpose and intent of the legislature set forth in section 19, as amended, 15 P. S. § 2851-1519, were "to authorize qualified persons to provide adequate medical service for residents of this State who are unable to provide such services for themselves" and "to maintain the standing and promote the progress of the science and art of medicine in this State."

Broad jurisdiction is given to the Department of Health under section 16, 15 P. S. § 2851-1516, and section 5, 15 P. S. § 2851-1505, and to the Department of Insurance, section 5, *supra*, section 6, 15 P. S.

§ 2851-1506, and sections 12, 13 and 14, 15 P. S. §§ 2851-1512, 1513 and 1514, in controlling such organizations. Section 7, 15 P. S. § 2851-1507, limits such medical service as authorized under this and related acts to persons domiciled in this Commonwealth, with the provision that such corporations operating near the boundary lines may with the permission of adjacent states go beyond our borders, subject, however, to the complete control of Pennsylvania authority.

Section 4, 15 P. S. § 2851-1504, sets forth what unauthorized non-profit medical service is forbidden and unlawful.

*It shall be unlawful for any person, copartnership, association, common law trust, or corporation, except when especially organized under the provisions of the Nonprofit Corporation Law, and its amendments, for the purpose, to establish, maintain, or operate a nonprofit medical service plan whereby medical services may be provided to persons of low income and over-income, as herein defined, for prepayment; periodical; or lump sum payments; * * * nor shall any provisions in this act be construed to apply to beneficial, benevolent, fraternal, and fraternal benefit societies, having a lodge system and a representative form of government. * * ** (Italics ours.)

Section 3, 15 P. S. § 2851-1503, defines a nonprofit medical service corporation as a corporation organized and operated under the provisions of the Nonprofit Corporation Laws, as follows:

“Nonprofit medical service corporation” means a corporation organized and operated under the provisions of the “Nonprofit Corporation Law,” approved the fifth day of May, one thousand nine hundred thirty-three (Pamphlet Laws, two hundred eighty-nine), and its amendments.

The Nonprofit Corporation Law of May 5, 1933, P. L. 289, section 219, as last amended May 21, 1943, P. L. 360, 15 P. S. § 2851-219, permits incorporation for the purpose of having a prepaid medical service plan, sets forth various requirements to be met and requires in addition that the articles of incorporation be approved by the Department of Health and the Insurance Department, and stipulates that the courts after receiving these approvals, “shall be guided solely by public necessity and public interest and welfare in approving or disapproving the articles of incorporation.”

The special procedure and special limitation set up by the legislature under the Nonprofit Corporation Law and the Nonprofit Medical Service Corporation Act, along with the purposes as expressed in these acts, demonstrate clearly that it was the intention of the legislature to limit such organizations to nonprofit corporations incorporated in

Pennsylvania. Such limitations come within the police power of a state. Therefore, comity of consent in this situation is a privilege which is not extended to foreign nonprofit corporations. See *Van Steuben v. The Central R. R. Co.*, 178 Pa. 367 (1896); *Nugent Funeral Home, Inc., v. Beamish*, 315 Pa. 345 (1934); *Rule et al. v. Price, et al.*, 323 Pa. 139 (1936); *Horowitz v. Beamish*, 323 Pa. 273 (1936); and *American and Foreign Christian Union v. Matilda Yount*, 101 U. S. 356 (1880).

There is no provision in our acts which would permit foreign nonprofit corporations to enter this State and conduct a prepaid medical service plan, and subject them to the same degree of supervision for the protection of the lives and health of our citizens as domestic nonprofit medical service corporations. For the department to grant such permission would nullify the public policy of this State and the purposes of the subject legislation, as enacted and expressed by our General Assembly. This the department has no right to do.

The only exception under which the applicant might be considered to be exempt from these acts is that relating to "benevolent societies." But it fails to come within this exception because it does not have a lodge system and a representative form of government, as required of such societies.

We are of the opinion: 1. That no corporation except where specifically authorized by statute, and within the limits therein prescribed, may secure, provide or render medical services to individuals in this Commonwealth, since such would constitute the practice of medicine contrary to law,

2. That where a foreign nonprofit corporation seeks to enter this State, having for its purpose a medical service plan which requires prepayment for the privilege of receiving such service, whether by lump sum or periodical payments, no matter how large or small, and where such corporation does not come within the specific exemptions of the Nonprofit Medical Service Corporation Act, such corporation is a medical service organization governed by and subject to the provisions of such act.

3. That where such foreign corporation has as its purpose the same as one organized under the provisions of the Nonprofit Medical Service Corporation Act, comity is not extended to such corporation, which therefore, may not operate or exercise in Pennsylvania the authority granted by its state of incorporation, and thus cannot be granted a certificate of authority to do business in this Commonwealth.

In view of this conclusion, it does not become necessary to discuss or decide the rights of this organization under dental, hospitalization, nursing or drug laws.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

JOHN W. KEPHART, JR.,
Assistant Deputy Attorney General.

OPINION No. 505

Vocational rehabilitation—Services enumerated in section 3(a) of the Federal Vocational Rehabilitation Act Amendments of 1943—Availability of State appropriation.

The Commonwealth through the State Board for Vocational Education of the Department of Public Instruction and the Bureau of Rehabilitation of the Department of Labor and Industry, may, in its plan for cooperation, accept all services provided for in section 3(a) of the Vocational Rehabilitation Act Amendments of 1943, the Act of Congress of July 6, 1943, c. 190, 57 Stat.—, 29 USCA section 33, and State funds appropriated for vocational rehabilitation are available for expenditures for the services enumerated in section 3(a) of the said Act of Congress.

Harrisburg, Pa., August 8, 1944.

Honorable William H. Chesnut, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sirs: This department is in receipt of your communication requesting advice as to whether the Pennsylvania rehabilitation acts include all the rehabilitation services for persons disabled in industry or otherwise, and their return to civil employment, as provided for in section 3(a) of the Federal Vocational Rehabilitation Act Amendments of 1943.

Specifically, you submit the following questions for interpretation:

1. May the State under the State rehabilitation acts provide all of the rehabilitation services enumerated in section 3(a) of the Federal Vocational Rehabilitation Act, Public Law 113?
2. Are State funds appropriated for vocational rehabilitation available for expenditure for all of these enumerated services?

3. If, under the State rehabilitation acts, all of the services enumerated in Public Law 113 may not be provided, what services may be provided?

4. If State funds appropriated for vocational rehabilitation are not available for expenditure for all of the services enumerated under Public Act 113, for which of these services may State funds be expended?

5. If State funds appropriated for vocational rehabilitation are not available for certain of the services enumerated under Public Law 113, may federal funds be received and expended for such services?

Section 3(a) of the Vocational Rehabilitation Act Amendments of 1943, the Act of Congress of June 2, 1920, c. 219, as amended July 6, 1943, c. 190, 57 Stat. —, 29 USCA section 33, provides:

(a) From the sums made available pursuant to section 2, the Secretary of the Treasury shall pay to each State which has an approved plan for vocational rehabilitation, for each quarter or other shorter payment period prescribed by the Administrator, the sum of amounts he determines to be—

* * * * *

(3) one-half of necessary expenditures under such plan in such period (exclusive of administrative expense) for rehabilitation services specified in subparagraphs (A), (B), (C), (D), and (E), to disabled individuals (not including war disabled civilians) found to require financial assistance with respect thereto, after full consideration of the eligibility of such individual for any similar benefit by way of pension, compensation, or insurance, such rehabilitation services being—

(A) corrective surgery or therapeutic treatment necessary to correct or substantially modify a physical condition which is static and constitutes a substantial handicap to employment, but is of such a nature that such correction or modification should eliminate or substantially reduce such handicap within a reasonable length of time;

(B) necessary hospitalization, in no case to exceed ninety days, in connection with surgery or treatment specified in subparagraph (A);

(C) transportation, occupational licenses and customary occupational tools and equipment not mentioned elsewhere in this subsection;

(D) such prosthetic devices as are essential to obtaining or retaining employment;

(E) maintenance not exceeding the estimated cost of subsistence during training, including the cost of any necessary books and other training material.

(4) expenditures in such period necessary for the proper and efficient administration of the plan, including necessary administrative costs in connection with providing the foregoing services to, and guidance and placement of, disabled individuals.

Section 5(d) of the Act of July 18, 1919, P. L. 1045, 43 P. S. § 675, expressly provides for the arrangement for therapeutic treatment, as follows:

The Chief of the Bureau of Rehabilitation shall have power with the approval of commissioner:

* * * * *

(d) To arrange for such therapeutic treatment as may be necessary for the rehabilitation of any physically handicapped persons who have registered with the chief of the bureau.

Section 5(e) provides for procuring and furnishing artificial appliances or prosthetic devices, as follows:

(e) To procure and furnish at cost to physically handicapped persons who have registered with the chief of the bureau limbs and other orthopedic and prosthetic appliances, to be paid for in easy instalments, when such appliances cannot be otherwise provided: Provided, however, That if it be shown that any physically handicapped person is unable to pay for such artificial limbs or other appliances, the chief of the bureau may direct, with the approval of the commissioner, that such limbs or appliances shall be supplied to such physically handicapped person and the cost thereof paid out of the funds appropriated for the rehabilitation activities of the bureau; such payments to be made by the State Treasurer on the warrant of the Auditor General or requisition of the Commissioner of Labor and Industry.

Sections 5(f) to (i) provide for training and maintenance, as follows:

(f) To arrange with the Superintendent of Public Instruction for training courses in the public schools in the Commonwealth in selected occupations for physically handicapped persons registered with the chief of the bureau.

(g) To arrange with any educational institution for training courses in selected occupations for physically handicapped persons registered with the chief of the bureau.

(h) To arrange with any public or private organization or commercial, industrial, or agricultural establishment, for training courses in selected occupations for physically handicapped persons registered with the chief of the bureau.

(i) To provide maintenance costs during the prescribed period of training for physically handicapped persons registered with the chief of the bureau: Providing, That when the pay-

ment of maintenance costs is authorized by the chief of the bureau, with the approval of the Governor, it shall not exceed fifteen dollars (\$15.00) per week, and the period during which it is paid shall not exceed twenty weeks, unless an extension of time is granted by the commissioner; said payments to be made by the State Treasurer on the warrant of the Auditor General on requisition of the Commissioner of Labor and Industry.

The Administrative Code, the Act of June 7, 1923, P. L. 498, 71 P. S. § 1 et seq., abolished all bureaus within departments and the functions of these bureaus were given to the Secretary or head of the departments. Section 2209 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 569, provides for rehabilitation, as follows:

The Department of Labor and Industry shall have the power:

(a) To render aid to persons injured in industrial pursuits, to arrange for medical treatment for such persons, and procure artificial limbs and appliances to enable them to engage in remunerative occupations;

(b) To make surveys to ascertain the number and condition of physically handicapped persons within the Commonwealth;

(c) To cooperate with the Department of Public Instruction in arranging for training courses in the public schools, or other educational institutions, for persons injured in industrial pursuits, and to arrange for such courses in industrial or agricultural establishments;

(d) To such extent as the department shall have funds available for the purpose, to provide maintenance for such injured persons during such training in such amounts as may be provided by law.

Additionally, by the Act of March 2, 1921, P. L. 12, 43 P. S. § 641 et seq., the Commonwealth of Pennsylvania accepted the provisions and benefits of the Act of Congress approved June 2, 1920, *supra*. Section 2 of this act, 43 P. S. § 642, expressly provides for the acceptance of the Act of Congress by Pennsylvania, as follows:

The Commonwealth of Pennsylvania does hereby accept the provision and benefits of the act of Congress, entitled "An act to provide for the promotion of vocational rehabilitation of persons *disabled in industry or otherwise* and their return to civil employment," approved June second, one thousand nine hundred and twenty, and will observe and comply with all requirements of such act. (*Italics ours.*)

Section 5, 43 P. S. § 644, provides for a plan for cooperation, as follows:

It shall be the duty of the State Board of Education and the Department of Labor and Industry of this Commonwealth to formulate a plan of cooperation, through the Bureau of Rehabilitation of the Department of Labor and Industry, in accordance with the provisions of this act and said act of Congress. *Such plan shall become effective when approved by the Governor of the Commonwealth.* (Italics ours.)

Under this Acceptance Act of 1921, and the plan for cooperation set up thereunder, the Commonwealth, through the proper agencies, is empowered to promote a program of vocational rehabilitation in accord with Federal legislation and to expend State funds matched by Federal funds therefor.

Moreover, The General Appropriation Act of 1943 (Act No. 77-A) provides an appropriation for rehabilitation of \$375,000 and authorizes expenditures for artificial appliances, the payment of maintenance costs and all other expenses necessary to carry out the provisions of the rehabilitation acts, as follows:

To the Department of Labor and Industry

* * * * *

For the payment of salaries, wages, or other compensation of employes engaged in administration of the laws relating to rehabilitation of persons injured in industry, and for the payment of general expenses, supplies, printing, and equipment necessary for the proper conduct of the work of the department with respect to rehabilitation, and for the purchase of artificial appliances for, and the payment of maintenance cost of, physically handicapped persons in training, *and all other expenses necessary to carry out the provisions of the Rehabilitation Acts*, the sum of three hundred seventy-five thousand dollars (\$375,000); and, in addition thereto, any contributions from the Federal Government or from any other source for rehabilitation shall be paid into the General Fund and credited to this appropriation. (Italics ours.)

* * * * *

Formal Opinion dated April 19, 1920, 1919-1920 Op. Atty. Gen. 318, referred to in your letter, no longer applies as it was written and released before the Pennsylvania Acceptance of the Act of Congress of June 2, 1920, *supra*, on March 2, 1921.

The specific services to be rendered disabled persons eligible for vocational rehabilitation are enumerated in the above quoted section 3(a) of the Vocational Rehabilitation Act Amendments of 1943. These 1943 amendments do not involve any vital or drastic change in the program enunciated in the original 1920 Vocational Rehabilitation

Act and merely sets forth a more detailed statement of the rehabilitation program. Thus, this program of rehabilitation is made available to the Commonwealth of Pennsylvania under sections 2 and 5 of the Pennsylvania Acceptance of the Act of Congress of June 2, 1920, supra. The plan for cooperation of the State Board for Vocational Education and the Department of Labor and Industry of the Commonwealth of Pennsylvania could include all the services enumerated in the above quoted section 3(a), or as many of such services as the said agencies of the Commonwealth consider essential to promote an adequate vocational rehabilitation program.

The answers, therefore, to your first two questions are in the affirmative and, therefore, it is unnecessary to answer the remaining three questions.

In view of the foregoing, we are of the opinion that the Commonwealth of Pennsylvania, through the State Board for Vocational Education of the Department of Public Instruction and the Bureau of Rehabilitation of the Department of Labor and Industry, may, in its plan for cooperation, accept all services provided for in section 3(a) of the Vocational Rehabilitation Act Amendments of 1943, the Act of Congress of July 6, 1943, c. 190, 57 Stat. —, 29 USCA Section 33, and State funds appropriated for vocational rehabilitation are available for expenditures for the services enumerated in section 3(a) of said Act of Congress.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General,

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 506

School districts—Employes—Completion of military or naval duties—Physical and mental examinations—Requests within 40 days after discharge—Public School Employes' Retirement System—Disability rights—50-day period—Act of August 1, 1941, P. L. 708 construed.

The provisions contained in section 13, clause 6 of the Act of August 1, 1941, P. L. 708, in respect to the 40-day limitation for making of a request for a physical and mental examination and the 50-day requirement for making an election in writing, are mandatory and cannot be changed or modified without legislative action.

Harrisburg, Pa., September 1, 1944.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: We have received your communication of April 12, 1944, in respect to school employes who have been absent from school employment duties by reason of having been in naval or military service and who have completed such military service but have failed to comply with the requirements of the Act of August 1, 1941, P. L. 708, 24 P. S. § 2132a.

You ask if the Public School Employes' Retirement Board has authority under such circumstances to consider and approve requests for physical and mental examinations received more than forty days, as required by section 13, paragraph (6) of the act of 1941, *supra*, after the applicant has completed active military service. You also inquire whether the Retirement Board has authority to accept written elections filed by school employes returning from military service later than fifty days, as required by section 13, paragraph (6), after the completion of such active military service.

Section 13, paragraph 6 of the Act of August 1, 1941, P. L. 708, adds Clause 6 to Section 13 of the Act of July 18, 1917, P. L. 1043, 24 P. S. § 2132a, as follows:

An employe, who shall have withdrawn from actual school employment or actual school service for active military service consisting of full time service in the armed forces of the United States under a requisition from, or by executive order of, the President of the United States, or in the armed forces organized for the defense of the Commonwealth of Pennsylvania by the authority of this Commonwealth, *may, after his or her return to actual school employment or actual school service, but not later than forty (40) days after the completion of such active military service, request the board for a physical and mental examination.* At a time and place within the Commonwealth and by an examiner or examiners to be designated by the board, the applicant shall appear for, and submit to, such examination. The form and content of the examination and the certificates made pursuant thereto shall be prescribed by the board, with the advice of the board's actuary and a physician or a psychiatrist to be employed by the board for that purpose. If the examiner or examiners shall find as a fact that such employe is free from physical or mental incapacity which renders him or is likely to render him incapable of performing the duties of his employment, the examiner or examiners shall so certify to the board, whereupon the board shall classify the applicant as a member free from active military service disability, and thereupon such

member shall become entitled to enjoy all the benefits of this act. *If the examiner or examiners shall find as a fact that such employe is physically or mentally incapacitated for the performance of the duties of the employment which he had when last in the actual employ and service of his or her employer, the examiner or examiners shall certify to the board the nature and degree of such physical or mental incapacity or disability, whereupon the board shall classify the applicant as a member with active military service disability, and thereupon such member may elect to accept the benefit of the provisions of section twelve of this act or the benefits of this act without disability rights, and shall be classified by the board as an employe without disability rights. Such election shall be in writing, in form prescribed by the board, and shall be filed with the board not later than fifty (50) days after the completion of such active military service.* All employes who shall have been engaged in active military service and who shall have returned to the employment or service of his or her employer without examination or certification shall be classified by the board as employes without disability rights. All persons classified as employes without disability rights shall enjoy all the rights incident to membership in the retirement system, except the right to retire for disability or upon disability and to receive a disability retirement allowance. Such member's salary deduction shall be reduced accordingly. The amount by which the salary deduction of an employe without disability rights to be paid into the fund shall be reduced shall be determined by the board in accordance with tables to be prepared and certified by the actuary. (Italics ours.)

From the foregoing, it is apparent that a public school employe, after his or her return to actual school employment or actual school service, *but not later than forty days* after the completion of such active military service, may request the Retirement Board for a physical and mental examination.

In respect to the right of an employe to make an election under this section, such election is to be made *not later than fifty days* after the completion of such active military service.

It should be clear that the words "but not later than" exclude all additional periods of time and are therefore mandatory. The phrase "not less than four weeks" has been held to be mandatory in *Commonwealth ex rel. v. Brown*, 210 Pa. 29 (1904). The general rule has been that where a statute fixes a definite period during which an act must be performed, action thereafter will be ineffective since the time limit is mandatory. *Harris v Mercer* (No. 1), 202 Pa. 313 (1902); *Fayette County Commissioners' Petition*, 289 Pa. 200 (1927); in re *East Lake Road and Payne Ave.*, 309 Pa. 327 (1933). The conclusion

above reached by the court and applicable to the present situation is that 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. Statutory Construction Act of May 29, 1937, P. L. 1019, Art. IV, Section 51, 46 P. S. § 551.

Under the above rulings of court and rules of interpretation as directed to be used in the interpretation of statutes by the legislature, it is impossible for this department to rule otherwise than that the time limits specified in the above clause of section 13 are mandatory even though in certain cases hardship may result. The remedy is one exclusively for the legislature.

We are of the opinion, therefore, that the provisions contained in Section 13, Clause 6 of the Act of August 1, 1941, P. L. 708, 24 P. S. § 2132a, in respect to the forty-day time limitation for the making of a request for a physical and mental examination, and the fifty-day requirement for making an election in writing, are mandatory and cannot be changed or modified without legislative action.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

OPINION No. 507

United States Armed Forces—Returning veterans—Reinstatement to positions formerly held—Commonwealth—Political subdivisions—Acts of June 7, 1917, P. L. 600; July 18, 1917, P. L. 1043; August 1, 1941, P. L. 708; August 1, 1941, P. L. 744; May 6, 1942 (Special Session) P. L. 106: Official Opinions of the Attorney General, 1917-1918, p. 738; 1939-1940, p. 486; 1943-1944, p. 113.

Employees of the Commonwealth and of its political subdivisions named in this opinion, including school districts and vocational school districts, who are serving or have served in the armed forces and who otherwise meet the qualifications imposed by the legislation under discussion, are entitled to resume their former employment upon honorable discharge if the right to return is exercised within the statutory limitations, if any, and if none, within a reasonable time as determined by a uniform administrative policy.

Harrisburg, Pa., September 27, 1944.

Honorable Edward Martin, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you what rights returning veterans of the United States armed forces have with relation to re-

instatement to positions formerly held by them under the Commonwealth of Pennsylvania or any of its political subdivisions.

The Act of June 7, 1917, P. L. 600, as last amended May 6, 1942, P. L. 106, Special Session, 65 P. S. § 111 et seq., provides that any appointive officer or employe regularly employed by the Commonwealth or by any county, municipality or township, who serves in the military or naval service of the United States, is not deemed to have resigned from or abandoned his office or employment, nor is he removable therefrom during his military service. If such officer or employe, at the time he enters military service, signifies in writing his intention of retaining his office or employment and resuming the duties thereof upon his release from military service, he has the right to return to his former position.

The Act of August 1, 1941, P. L. 744, 24 P. S. § 2371.1 et seq., provides that any employe of any school district or vocational school district within the Commonwealth who has been regularly employed for not less than one year prior to entry into the military service of the United States, shall be considered to be upon leave of absence during such military service, provided he gives notice of intention to return to his employment upon completion of military service and to resume such employment for a period of not less than one school year. This statute repealed the Act of June 7, 1917, P. L. 600, *supra*, in so far as it related to employes of school districts and vocational school districts.

This department in 1918 ruled that the reemployment provisions of the act of 1917 are mandatory. 1917-1918 Op. Atty. Gen. 738. We hold that the similar provisions of the act of August 1, 1941, *supra*, are likewise mandatory. We have recently affirmed the opinion we expressed in 1918, *supra*. 1939-1940 Op. Atty. Gen. 486. See also Formal Opinion No. 472, dated August 10, 1943, addressed to the Superintendent of Public Instruction.

The act of 1917 was considered by the Supreme Court of Pennsylvania in *Kurtz v. Pittsburgh et al.*, 346 Pa. 362 (1943). Although the constitutionality of the statute was under attack, and although the court concluded that certain provisions of the statute were unconstitutional, that portion thereof which relates to reemployment was not challenged and was not declared invalid.

It should be noted that the act of 1917 contained no provision relating to the time within which an employe must appear and claim reinstatement following his release from military service. The only requirement of this sort in the act is that which relates to the filing

with the head or chief of the department, bureau, commission or office in which he is employed, a statement in writing setting forth the fact of his entry into military service, and of his intention to retain his employment and to resume the duties thereof after the expiration of his military service. Therefore, if such a statement has been filed by an employe, it is sufficient notice of his desire to be reinstated after conclusion of military service. On the other hand, he would have to carry out such intention by appearing and claiming reinstatement. This he should do within a reasonable time. It is suggested that a uniform administrative policy be adopted to cover this statutory hiatus, in so far as the Commonwealth itself is concerned, so that every employe in military service will know within what time he must appear and claim his former job. In determining what is a reasonable time due consideration should be given to all the circumstances likely to exist at the time of demobilization.

The act of 1941, which relates to employes of school districts and vocational school districts, requires, as hereinbefore pointed out, that an employe of a school district or vocational school district must file a notice with the secretary of the school board or board of directors of a vocational school district where he is employed within thirty days of receipt of notice of induction into the military service, before being entitled to the benefits of the act. He must also agree in writing to return to his school employment for a period of not less than one school year. The act further provides in section 3(b), 24 P. S. § 2371.3, that upon termination of military service the school board or board of directors of a vocational school "shall immediately return said employe to the same position." Obviously there must be a lapse of time between termination of military service and the actual return of the employe to his former position. The two events could not take place simultaneously. Here again, a reasonable time should be allowed an employe between the time of his severance from military service and his being returned to his former position. It is quite possible that such an employe might be demobilized during the summer vacation. It would appear advisable for the Department of Public Instruction, in cooperation with school districts and vocational school districts, to work out a uniform administrative policy in this respect.

It should be noted, however, that the Act of August 1, 1941, P. L. 708, 24 P. S. § 2132a et seq., which adds a clause 6 to section 13 of the Act of July 18, 1917, P. L. 1043, the act establishing the Public School Employees' Retirement System, requires a school employe returning from military service to his former school position, and who desires to reenter such system, to request the Retirement Board for a physical and medical examination not later than forty days after

completion of military service. In this connection see Formal Opinion No. 506, dated September 1, 1944, addressed to the Superintendent of Public Instruction.

It is our opinion, therefore, that employes of the Commonwealth and of its political subdivisions hereinbefore named, including school districts and vocational school districts, who are serving or have served in the armed forces of the United States, and who otherwise meet the qualifications imposed by the legislation under discussion, are entitled to resume their former employment upon honorable discharge from military service if the right to return is exercised within the statutory limitations, if any, and if none, within a reasonable time as determined by a uniform administrative policy.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF.

Attorney General.

WILLIAM M. RUTTER,

Deputy Attorney General.

OPINION No. 508

Foreign corporations—Filing of escheat reports unnecessary—Act of June 25, 1937, P. L. 2063.

There is no legislative authority that would permit the Department of Revenue to demand escheat reports from foreign corporations even though those corporations are duly registered and doing business in Pennsylvania. Every corporation in this class heretofore notified to file such reports should now be notified that it is not necessary for it to do so.

Harrisburg, Pa., September 28, 1944.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: This office is in receipt of your request to be advised whether foreign corporations doing business in Pennsylvania must file escheat reports under the Act of June 25, 1937, P. L. 2063, P.S. §§ 434 et seq. You indicate that such corporations have been notified to furnish the Department of Revenue with annual escheat reports and that in some instances compliance has been refused.

Section 3 of the Act of 1937, supra, 27 P.S. § 436, provides that in the month of January of each year reports shall be made to the De-

partment of Revenue by "every company." Section 2 of that act, 27 P. S. § 435, defines company as follows:

The word company shall include limited partnerships and unincorporated associations, joint-stock associations, public utility corporations, insurance exchanges, associations or corporations, and any company or corporation *incorporated and doing business under the laws of this Commonwealth*, except mutual savings fund societies and building and loan associations, and except banks, national banks, bank and trust companies, trust companies and other corporations, associations, partnerships, limited partnerships, and partnership associations, engaged in the business of receiving money on deposit or securities or other property for safekeeping. (Italics ours.)

The words "incorporated and doing business under the laws of this Commonwealth," clearly modify the nouns immediately preceding them. Unless then, the conjunction "and" can be construed to mean "or," it is apparent that there is no authority under the law to require reports from corporations organized in states other than Pennsylvania even though they are doing business here.

The conjunction "and" as it is interposed between the words "incorporated" and "doing business," must be given the meaning which normal usage suggests. Thus, before the Department of Revenue can require an escheat report from a corporation that corporation must have met two conditions precedent. It must have been incorporated in Pennsylvania and it must have been doing business in Pennsylvania.

We are of the opinion that there is no legislative authority which would permit the Department of Revenue to demand escheat reports under the Act of June 25, 1937, P. L. 2063, from foreign corporations even though those corporations are duly registered and doing business in Pennsylvania. Every corporation in this class heretofore notified to file such reports should now be notified that it is not necessary for it to do so.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,

Attorney General.

RALPH B. UMSTED,

Special Deputy Attorney General.

OPINION No. 509

Banks and banking—Pledge of assets to secure deposit—Banking Code of 1933, sec. 1004, as amended—Public funds—Deposit by housing authority—Housing Authorities Law of 1937, as amended.

Funds of a public authority created under the Housing Authorities Law of May 28, 1937, P. L. 955, as amended by the Act of May 26, 1943, P. L. 658, are public funds within the meaning of section 1004 of the Banking Code of May 15, 1933, P. L. 624, as amended by the Act of June 21, 1935, P. L. 369, and a Pennsylvania bank or bank and trust company may therefore pledge or hypothecate its assets as security for such a deposit.

Harrisburg, Pa., October 13, 1944.

Honorable William C. Freeman, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You inquire whether a Pennsylvania bank or bank and trust company may pledge its assets to secure funds deposited by a Housing Authority. It may.

Section 1004 of the Banking Code, the Act of May 15, 1933, P. L. 624, as amended by the Act of June 21, 1935, P. L. 369, 7 P. S. § 819-1004, provides in part, as follows:

A bank or a bank and trust company shall not have the power to pledge or hypothecate any of its assets as security for deposits made with it, except for the following:

(1) Federal, State, municipal, school district, or other public funds.

The Housing Authorities Law, the Act of May 28, 1937, P. L. 955, as amended by the Act of May 26, 1943, P. L. 658, 35 P. S. § 1543, defines "Authority," or "Housing Authority" in the following terms:

A public body and a body corporate and politic created and organized, in accordance with the provisions of this act, for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

Section 10 of the above act, 35 P. S. § 1550, reads, in part, as follows:

An Authority shall constitute a public body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof. * * *

From the foregoing it is obvious that funds of a Housing Authority are public funds within the meaning of section 1004 of the Banking Code, *supra*.

We are of the opinion that a Pennsylvania bank or bank and trust company has the power to pledge or hypothecate assets as security for deposits made with it by any Pennsylvania Housing Authority.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 510

Parole—Acts of May 10, 1909, P. L. 495—Act of August 6, 1941, P. L. 861.

Sections 12, 13, 14 of the Act of May 10, 1909, are repealed by the Act of August 6, 1941, P. L. 861.

Harrisburg, Pa., October 23, 1944.

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

Madam: You inquire if the Parole Law of August 6, 1941, P. L. 861, as amended, 61 P. S. §§ 331.1 et seq., repeals by implication §§ 12, 13 and 14 of the Act of May 10, 1909, P. L. 495, 61 P. S. §§ 296, 297 and 298. It does.

The Parole Act creates a uniform and exclusive system for the administration of parole in the Commonwealth of Pennsylvania, and repeals all acts or parts of acts inconsistent therewith.

Sections 12, 13 and 14 of the Act of 1909, supra, treat with parole by officers of penal institutions and with declaring parolees delinquent. These matters now are wholly within the jurisdiction of the Pennsylvania Board of Parole.

Section 17 of the Parole Law, as amended, 61 P. S. § 331.17, reads in part as follows:

The board shall have exclusive power to parole and re-parole, commit and recommit for violations of parole, and to discharge from parole all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the

same be a state or county penitentiary, prison or penal institution, as hereinafter provided. * * *

Section 35 of the Parole Act provides:

* * * All acts and parts of acts inconsistent with this act are hereby repealed.

We are of the opinion that §§ 12, 13 and 14 of the Act of May 10, 1909, P. L. 495, 61 P. S. §§ 296, 297 and 298, are repealed by the Act of August 6, 1941, P. L. 861.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 511

(Revoked by Opinion No. 517)

Servicemen's Dependents' Allowance Act of 1942—Mental hospitals—To whom payable—Authority of mental hospitals to receive allowances from Federal Government—Power of Attorney.

State mental hospitals have the authority to receive checks from the Federal Government drawn to the order of the hospital in relation to the accounts of patients whose husbands are in military service. The most feasible and practical way to handle this is to get a power of attorney from the soldier to pay maintenance and hold the balance, if any, subject to the future disposition of the soldier.

Harrisburg, Pa., October 25, 1944.

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

Madam: We have your request for advice concerning the authority of a superintendent of a State mental hospital over checks received from the Federal Government drawn to the order of the hospital in relation to the accounts of patients whose husbands are in military service.

In support of your request, you state that there are several mental patients at the Harrisburg State Hospital whose husbands are in the military service and who are receiving checks from the Federal Government for \$50.00 per month; and that these checks are being drawn

to the order of the Harrisburg State Hospital, account of the patient, and are being placed in the patient's cash fund.

You request to be advised as follows:

1. Does the Superintendent have authority to determine the purposes for which this money is to be used and the priority of claimants?
2. If so, can the Superintendent pay the patient's maintenance to the Department of Revenue?
3. Must he have an order from the patient for each withdrawal?

The right of dependents of certain enlisted men to a monthly family allowance is governed by the Servicemen's Dependents' Allowance Act of 1942, the Act of June 23, 1942, c. 443, Title I, § 101, et seq., 56 Stat. 381, 37 U. S. C. A. § 201 et seq.

Section 101 of said act, 37 U. S. C. A. § 201, provides that the dependents of certain enlisted men shall be entitled to receive a monthly family allowance for any period during which such enlisted man is in the active military or naval service of the United States, on or after June 1, 1942, during the existence of any war declared by Congress and the six months immediately following the termination of such war.

Section 109 of said act, 37 U. S. C. A. § 209, provides for the payment of the family allowance, on behalf of the dependent, to a person designated by the enlisted man and is, in part, as follows:

Any family allowance to which any dependent or dependents of any enlisted man is entitled under the provisions of this chapter shall be paid on behalf of such dependent or dependents to any person who may be designated by such enlisted man * * *

From the foregoing provision of section 109 of the act, it is clear that payment of a family allowance may be made to the Harrisburg State Hospital, as designated by the enlisted man, on behalf of his dependent wife, a patient therein.

We are of the opinion, therefore, that a State mental hospital has the authority to receive checks from the Federal Government drawn to the order of the hospital in relation to the accounts of patients

whose husbands are in military service; and that the most feasible and practical way to handle this is to get a power of attorney from the soldier to pay maintenance and hold the balance, if any, subject to the future disposition of the soldier.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

MEMORANDUM TO ALL ADMINISTRATIVE DEPARTMENTS,
BOARDS, COMMISSIONS, ETC.

RE: General procedure to be followed in hearings, where such procedure has not been specifically set forth by the legislature, and where an appeal to the court lies only by way of mandamus or injunction.

FROM: The ATTORNEY GENERAL.

INTRODUCTION

Administrative agencies, both Federal and State, have for some time been the target of criticism aimed from many places. We are herein concerned with the criticism which is found in the opinions of the courts involving Commonwealth administrative agencies. This criticism, briefly stated, is that administrative agencies do not always observe due process of law in conducting their proceedings. The fundamental principles of due process, as applied to other fields of activity, are called fair play, sportsmanship, or giving the other fellow an even chance to present his side. It has been described in respect to administrative agencies by the Supreme Court of the United States in *Anderson National Bank v. Lockett*, 64 S. Ct. 599, 88 L. ed. 499. at 507:

* * * The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. * * *

In several recent opinions handed down by the courts, the administrative departments, boards and commissions of the Commonwealth have been criticised for failure to conduct proper hearings so that the defendant will be accorded such procedural due process of law. As a result, the following memorandum is submitted to the various agencies of the State government, in order to avoid future criticism and reversals, based upon procedure.

PART I.

PROCEDURE FOR REVOCATION OF LICENSE, PERMIT, ETC., FOR VIOLATIONS OF STATUTE, REGULATIONS, ETC.

When a complaint of a violation of some privilege, such as a license, permit, etc., granted by the Commonwealth, is received by an administrative agency, or a wrong is uncovered, the responsible agency should investigate such matter to find out whether the complaint can be substantiated by proper evidence.

It is a well recognized practice among administrative agencies that when a complaint is made or a violation occurs, of a minor character, an attempt is made by the agency to have the individual recognize and correct the infringement, rather than go to a hearing. Many such infringements are a matter of accident, or are due to lack of knowledge upon the part of individuals, and common sense dictates such action by administrators. Furthermore, the individual often would have a right to reinstatement of the privilege once the fault is remedied.

When, however, this fails or the infringement is of a serious character, and it becomes necessary to have a hearing in order to determine the facts and what action shall be taken by the particular department, board, bureau or commission, it is at this point that this memorandum becomes important in order that, as far as possible, due process of law or fair play in respect to procedure will be followed.

From the fact that the Commonwealth is initiating the proceeding, it follows that the burden is upon the particular agency to prove its case, which is more technically called the "burden of proof."

Certain rules, however, must be adhered to in order that neither the defendant nor the administrative agency can secure an unfair advantage. These various rules deal with notice, hearing, opportunity to present evidence, findings of fact, conclusions of law, and the deci-

sion of the administrative agency. Of course, all such recommendations are general and subject to any particular procedure which may be provided by statute for the individual agency and should be modified in accordance with the particular statute. Generally, however, substantially the following procedure should be observed and followed:

(1) NOTICE

After making an investigation of the complaint and finding it well founded, and that a hearing has become necessary, the proper administrative authority should notify *formally*, by registered mail, or service by the State Police, the party against whom the complaint is made, informing him of the nature of the charges, and setting a date and place for a hearing.

The notice should be specific and sufficiently clear and definite as to the nature of the charges, so as to give the alleged violator a reasonable appraisal of what those charges are; thus he may be reasonably able to prepare a defense.

In general, the notice should contain the following:

(1) **The nature of the acts committed indicating when, where, how and what was done.**

(2) **Reference should then be made to the statute, and the rules and regulations adopted hereunder, which have been violated.**

(3) **The notice should also set forth the sections of the statute which either authorize the hearing or which give discretionary power to the administrative office to cause such hearing, or which require such hearing.**

(4) **The notice should state the date of the hearing which, if not controlled by the legislation, should be set a reasonable length of time in advance to permit adequate preparation of the case by the interested parties.** In general, this should be not less than 10 days, and may be more, depending upon the circumstances.

(2) HEARING

This is a formal hearing before the responsible authorities at the time and place specified, at which testimony is taken and the individual against whom the charges are lodged is given an opportunity to answer or be heard.

A stenographic record should be made at the hearing for the purpose of establishing, in an orderly manner, a clear and complete picture of the controversy so that one unfamiliar with the controversy could properly come to a fair and reasonable conclusion upon reading the record. These notes of testimony should contain all the evidence, including a copy of the charges, specifications, exhibits, rules and regulations.

Under Section 517 of The Administrative Code of 1929, the witness may be required to give his testimony under oath, and under Section 520 of The Administrative Code of 1929, the departments have power to issue subpoenas to witnesses in order to obtain testimony, etc., from them.

While administrative agencies generally are not bound by the strict or technical rules of evidence in law or equity, the type of evidence submitted and received should be the best evidence available. Rules of evidence, however, are based upon common sense and judgment. They should not be disregarded except where the person conducting the hearing feels that justice requires it.

When objections are made to any testimony or evidence, such objections should be noted on the record. Such testimony should generally be admitted, subject to the objection, to be ruled on later by the agency, except where clearly immaterial or irrelevant and serving no useful purpose, in which event it should be excluded.

All parties should be given adequate opportunity to present their cases and such relevant testimony of witnesses as they deem requisite.

The following outline is merely a general method which may be used to develop a clear picture in the record:

- (1) Offer the notice into the record in evidence as an exhibit, first marking it as such.

- (2) Offer all relevant and material rules and regulations into the record as exhibits.

- (3) Swear the witnesses called to submit evidence and see that the correct names and addresses are recorded. Witnesses in support of the allegations contained in citation or notice shall be called first.

- (4) In direct examination, question each witness to establish his identity, to show his relationship to the proceedings, and to show that he is qualified.

(5) Using the notice as a guide, have the witness proceed with his testimony, either through questions from the representative in charge or counsel for the agency, or by his statements. If his testimony does not substantiate the allegations contained in the citation, ask questions so that the following will appear in the record:

(a) Identification of the subject matter (i. e., such as the product purchased).

(b) Date, approximate time, and place when, and where the acts occurred, and the circumstances under which the acts were performed. (For example, if an illegal sale—the date, approximate time and place when and where the purchases were made, and from whom made, and the circumstances surrounding the purchases.)

(c) Actions of investigator thereafter so that the cycle of events can be brought up to date in respect to his part in the case. (For example, the method of handling the product by the investigator so as to properly trace its custody to the hearing.)

(6) Allow the defendant or his counsel reasonable opportunity to cross-examine the witness.

(7) In the event an objection is interposed, grant an exception to counsel and allow the evidence to come in, unless it is clearly not pertinent or relevant to the allegations and would serve no useful purpose. Give counsel an opportunity to state his objections, and require the reasons therefor.

(8) Proceed with the other Commonwealth witnesses in much the same fashion, until a complete picture is presented.

(9) After all the evidence of the Commonwealth, including both testimony and exhibits, is introduced and submitted, the official in charge should then give the defendant or his counsel reasonable opportunity to present the defense.

(10) The official or officials in charge may at any stage of the proceedings ask questions of the witnesses to clarify any point which they do not understand, or on which they desire further explanation. They may also recall any witness to testify further on any point which they do not believe to be sufficiently covered to their satisfaction.

(11) The administrative agency may request or allow counsel or defendant to submit briefs within a reasonable length of time, for the purpose of aiding the agency in reaching a decision.

(3) DECISION OF ADMINISTRATIVE AGENCY

After the hearing, the administrative agency should study the record and then make findings of fact and conclusions of law. Cases should be determined **solely** upon the evidence adduced at the hearing.

The findings of fact should be prefaced by a discussion of the testimony. Findings of fact should not be based upon the number of witnesses from either side, but upon the weight of credible and competent evidence presented by all witnesses. All findings of fact should be based upon the substantial and credible evidence in the record.

The conclusions of law should be based upon the statute, the rules and regulations violated, plus any court decisions which might be pertinent.

The order should state by virtue of what legal authority the administrator takes the action which is then set forth.

A copy of the opinion and decision should be sent to the defendant or his counsel.

Dated: Nov. 1, 1944.

OPINION No. 512

Penal and mental institutions—Costs incident to the determination of mental status of certain persons committed.

Harrisburg, Pa., November 9, 1944.

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

Madam: We have your request for advice concerning the question of the liability of the Commonwealth or the county for certain costs incident to the determination of the mental status of certain persons committed to State penal and correctional institutions.

You inform us that the county commissioners of the various counties, from time to time, employ physicians to determine the mental status of certain residents committed to the Pennsylvania Industrial School at Huntingdon; and that the physicians present their bills to

the county for payment, and that all the counties, except Philadelphia and Allegheny, have been making payment; and that the Pennsylvania Industrial School at Huntingdon advises your department that these two counties are presenting the bills to that institution for payment.

You request to be advised whether Act No. 299 of 1943, placed the liability for these costs upon the Commonwealth or the county.

By your supplementary letter of June 16, 1944, you submit the following facts and questions:

AB is committed by a Court of Quarter Sessions or by a Juvenile Court to the Pennsylvania Industrial Schools at White Hill or Huntingdon, or the Pennsylvania Training School at Morgantown. While in custody of such institution it is deemed desirable by the management of the institution to have determined the question of mental illness.

Assuming that for the proper administration of the institution it becomes necessary for the Board of Trustees of the Institution acting through the Superintendent (Huntingdon), or the Department of Welfare acting through the Superintendent (White Hill) to petition the Court for an order of the commitment of such person to a hospital for mental diseases:

(1) Upon what agency of government is the cost of his transportation and commitment imposed?

(2) Upon what agency of government is imposed the cost of services of physicians?

(3) Does cost of transportation include, where necessary, ambulance or automobile, and attendants or nurses, necessary for his proper custody or restraint?

Act No. 299 of 1943 to which you refer, is the Act of May 27, 1943, P. L. 682, which further amends section 307 of the Mental Health Act of July 11, 1923, P. L. 998, 50 P. S. § 47 and also further amends section 501 of the Mental Health Act, *supra*, 50 P. S. § 141.

By the act of 1943, *supra*, section 307 of the Mental Health Act, *supra*, was further amended to provide that the cost of the transportation and commitment of a mentally ill person, committed to a mental institution, shall be paid by the person committed, by the applicant for his commitment, or by the proper institution district in which such person is resident.

Prior to the amendatory Act of 1943, *supra*, the liability for the cost of transportation and commitment, like the cost of the care and treatment of such mental patients, ultimately rested upon the Commonwealth.

Said Section 307 of the Mental Health Act, *supra*, as amended by said act of 1943, *supra*, is in part, as follows:

The superintendent or other person in charge of the institution to which the said person is committed shall, before the expiration of the period of commitment of the patient, make written report of said patient's mental condition to the court or judge making the commitment. Thereupon the court or judge, if satisfied that the patient is not mentally ill, shall order his discharge and that the cost of his care and treatment be paid by the person so committed, by the applicant for his commitment, or by the Commonwealth, and that *the cost of his transportation and commitment be paid by the person committed by the applicant for his commitment or by the proper institution district in which such person is resident, as the court or judge shall deem just and proper*, otherwise the court or judge shall make such order for the further disposition of the patient as may to him seem proper." (Italics ours.)

From the provisions of the foregoing section, it is clear that the cost of the care and treatment of a mental patient thus committed must be paid "by the person so committed, by the applicant for his commitment, or by the Commonwealth"; and that the cost of his transportation and commitment must be "paid by the person committed, by the applicant for his commitment, or by the proper institution district," within the discretion of the court.

Assuming, as stated in the request for advice, that for the proper administration of the State institutions named, it becomes necessary for the Commonwealth, acting through its officials in charge of such institution, to petition the court for an order for the commitment of a person to a hospital for mental diseases, it is clear that it was not the intent of the legislature, under the foregoing section, to make either the Commonwealth or its officials liable for the costs of transportation and commitment, within the meaning of the language of the act which makes these costs chargeable, in the alternative, against "the applicant for his commitment."

The Commonwealth is not within the purview of a statute, unless expressly mentioned. This rule of statutory construction is well established in Pennsylvania, and is particularly applicable in cases where to include the Commonwealth within the meaning of the statute would invest the State with some right or interest or impose a liability upon it.

The act of 1943, *supra*, also further amends section 501 of the Mental Health Act, *supra*, by providing, *inter alia*, that if the estate of the patient or the person liable for his support is unable to pay the costs of admission or commitment, the proper institution district in which such person is resident, shall be liable for such costs.

Said section 501 of the Mental Health Act, *supra*, as amended by said Act of 1943, *supra*, is as follows:

Whenever any patient who is mentally ill, mentally defective, epileptic, or inebriate is admitted to any mental hospital, whether by order of a court or judge, or in any other manner authorized by the provisions of this act, *the cost of such admission or commitment shall be deemed to include the expenses of removing such patient to the hospital, the fees of physicians or commissioners, and all other necessary expenses however incurred.* Such costs shall be chargeable to the estate of such patient, or to the person liable for his support: Provided, That if such estate or person is unable to pay the same, *the proper institution district in which such person is resident shall be liable for such costs.* (Italics ours.)

If the patient is committed by order of court, the court or judge shall determine, at the time of commitment, the liability for such costs, and shall assess the same as shall seem to him just and proper.

From the foregoing quoted section, it is clear that the cost of admission or commitment includes the expenses of removing such patient to the hospital, the fees of physicians or commissioners, and all other necessary expenses however incurred; and that the liability for these expenses enumerated, formerly an ultimate charge upon the Commonwealth, in the absence of payment from the estate of the patient, or the person liable for his support, now falls upon the proper institution district in which such person is resident, subject to the further provision of the act authorizing the court to determine the liability for such costs, if the patient is committed by order of court.

The foregoing section relates to any mentally ill person committed to a hospital for mental diseases, but has no application to the procedure involved in the case of a mentally defective person, detained in any penal or correctional institution, and subsequently committed to the Pennsylvania Institution for Defective Delinquents, which is governed by the Act of May 25, 1937, P. L. 808, 61 P. S. § 541, et seq., more fully hereinafter discussed.

The institution at Huntingdon is governed by the Act of May 25, 1937, P. L. 808, 61 P. S. § 541 et seq., creating the new institution known as the Pennsylvania Institution for Defective Delinquents.

With reference to the mental examination required, Section 3, 61 P. S. § 541-3 of said act provides, in part, as follows:

*When any person over the age of fifteen years is convicted of crime before any court, or is held as a juvenile delinquent by any juvenile court, or is detained in any prison, industrial school, * * * penitentiary or any other penal or correctional institution under sentence, and such person is, in the opinion of the court or the superintendent, jail physician, or warden of the institution where maintained, so mentally defective that he should be cared for and maintained in the Pennsylvania Institution for Defective Delinquents, such superintendent, physician or warden shall make application, upon a form prepared by the Department of Welfare, to the court having jurisdiction of the charge against such person, which court upon the presentation of such petition, * * * shall order an inquiry by two qualified physicians or by a psychiatrist as now provided by law, * * ** (Italics ours.)

The responsibility for all expenses in connection with the care and maintenance of persons detained in said institution is fixed by section 2 of said act, 61 P. S. § 541-2 which is, in part, as follows:

** * * The compensation of all officers and employes and all other expenses in connection with the care and maintenance of persons detained in said institution, shall be paid from appropriations made to the Department of Welfare for such purposes, but the Commonwealth shall be reimbursed for all such expenditures by the respective counties, from which such persons were committed, in the same manner and to the same extent as is now provided by law in the case of persons committed to the Pennsylvania Industrial School at Huntingdon. (Italics ours.)*

The expenses of examination, including physicians' fees and all costs incident to the commitment, and transfer to, and maintenance in, the institution are provided for in section 4 of said act, 61 P. S. § 541-4, which is as follows:

The expenses of examination, including the fees of the physicians and psychiatrists and all costs incident to the commitment, transfer to and maintenance of such person in the Pennsylvania Institution for Defective Delinquents, shall be borne by the county from which such person was committed. (Italics ours.)

From the foregoing section 4, it is clear that the expenses of examination, including physicians' fees and the costs of commitment, transfer and maintenance must be paid by the county.

The procedure in such cases would be the same as in other penal or correctional institutions, in which the liability for such costs is placed upon the county by virtue of section 308 of the Mental Health Act as amended, 50 P. S. § 48, which is, in part, as follows:

When any person detained in any prison, penitentiary, reformatory, or other penal or correctional institution, * * * shall, in the opinion of the superintendent, jail physician, warden, or other chief executive officer of the institution or other responsible person, be insane, or in such condition as to make it necessary that he be cared for in a hospital for mental diseases, the said superintendent, jail physician, warden, or other chief responsible officer of the institution, or other person, shall immediately make application, upon a form prescribed by the department, to a law judge of the court having jurisdiction of the charge against said person, or under whose order he is detained, for commitment of said person to a proper hospital for mental diseases. * * *

* * *

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

We are of the opinion, therefore, that: 1. The cost of the transportation and commitment of a person to a hospital for mental diseases must be paid by the person committed, by the applicant for his commitment, or by the proper institution district in which such person is resident, within the discretion of the court, by virtue of the amendment to section 307 of the Mental Health Act, the Act of July 11, 1923, P. L. 998, 50 P. S. § 1 et seq., embodied in the Act of May 27, 1943, P. L. 682, 50 P. S. § 47, except that neither the Commonwealth nor its official in charge of a State institution is included within the meaning of the term, "applicant for his commitment," and therefore neither is liable for such costs.

2. The cost of the admission or commitment of such patient to any mental hospital includes the expenses of removing such patient to the hospital, the fees of physicians or commissioners, and all othe

necessary expenses however incurred, in accordance with the provisions of section 501 of the Mental Health Act, supra, 50 P. S. § 141.

3. The expenses of examination, including the fees of the physicians and psychiatrists and all costs incident to the commitment, transfer to and maintenance of a mentally defective person detained in any penal or correctional institution, and subsequently committed to the Pennsylvania Institution for Defective Delinquents [Huntingdon], must be borne by the county from which such person was committed, in accordance with the provisions of the Act of May 25, 1937, P. L. 808, section 4, 61 P. S. § 541-4, the act creating the Pennsylvania Institution for Defective Delinquents.

4. The expense of examination, including the fees of physicians or commissioners, and all costs incident to the commitment and transfer to a hospital for mental diseases of any person detained in any prison, penitentiary, reformatory or other penal or correctional institution shall be paid by the county liable for the maintenance of the patient in the prison, penitentiary, reformatory or other penal or correctional institution from which he was transferred, without recourse against any poor district in accordance with the provisions of section 308 of the Mental Health Act, as amended, 50 P. S. § 48.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 513

*School districts—Financial difficulties—Teachers' salaries—Temporary increase—
Act of May 28, 1943, P. L. 786.*

A school district may, if it can bring itself within the terms or conditions of the case of *Smith v. Philadelphia School District*, 334 Pa. 197, reduce the salaries of its teachers, and thereafter take advantage of the Act of May 28, 1943, P. L. 786.

Harrisburg, Pa., November 9, 1944.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your inquiry regarding a certain school district of the third class which is in financial difficulties.

The district was formerly relatively wealthy, with a high salary schedule, but recently has been unable to employ teachers in accordance with such schedule. The district now contemplates reducing all salaries in its high schools to a maximum-minimum of \$1600 prescribed by law for such districts. After reducing the salaries of these school teachers to the maximum-minimum of \$1600, as prescribed by section 1210 of the School Law, the board of directors of the district proposes then to apply a temporary salary increase in the amount of \$200 for the year 1944-1945, in an attempt to comply with the requirements of the Act of May 28, 1943, P. L. 786, 24 P. S. § 1186(d) et seq. The question is raised as to what effect this action would have upon the payment of reimbursement by the Commonwealth to the district under the provisions of said act.

First, we shall consider the question whether the school district may reduce the salaries of its teachers. We assume that the district is in financial difficulties, and we also assume that any salary reduction will be uniform or general.

An examination of the Act of May 18, 1911, P. L. 309, known as the "School Code," 24 P. S. § 1, et seq., reveals the following provisions regarding the salaries of school teachers:

Section 1210, 24 P. S. § 1164, provides for the minimum salaries of school teachers, in accordance with schedules therein set forth.

Clause 9 of said section, 24 P. S. § 1172, reads in part as follows:

The foregoing schedules prescribe a minimum salary in each instance, and where increment is prescribed it is also a minimum. It is within the power of the boards of education, boards of public school directors, or county conventions of school directors, as the case may be, to increase, for any person or group of persons included in this schedule, the initial salary or the amount of an increment or the number of increments. * * *

Nothing in this act contained shall be construed to interfere with or discontinue any salary schedule now in force in any school district so long as such schedule shall meet the requirements of this section, *nor to prevent the adoption of any salary schedule in conformity with the provisions of this act.* (Italics ours.)

Section 1205-A of the School Code, as amended by the Act of April 6, 1937, P. L. 213, 24 P. S. § 1161, reads in part as follows:

The salary of any district superintendent, assistant district superintendent or other professional employe as defined

in this act in any of the school districts of the Commonwealth may be increased at any time during the term for which such person is employed, whenever the Board of School Directors (or Board of Public Education) of the district deems it necessary or advisable to do so, *but there shall be no demotion of any professional employe, either in salary or in type of position, without the consent of the said employe*, or if such consent is not received, then such demotion shall be subject to the right to a hearing before the Board of School Directors (or Board of Public Education), and an appeal in the same manner as hereinbefore provided in the case of the dismissal of a professional employe. (Italics ours.)

We direct our attention to the italicized portion of the above section. This clause was passed upon by the Supreme Court of Pennsylvania in the case of *Smith v. Philadelphia School District*, 334 Pa. 197 (1939), where the court said, on page 205:

* * * The word "demotion" as used therein means a reduction of particular teachers in salary or in type of position as compared with other teachers having the same status. But where there is a general adjustment of the salaries of all teachers with no consequent individual discrimination, the relative grade or rank of any particular teacher remains the same, and there has been no "demotion" of any particular teacher within the meaning of the word as there used.

On page 203, the court said:

* * * Because of the perilous financial situation of the School District, these reductions were of absolute necessity. Under existing financial and economic conditions, it was impossible to continue the higher salary rates, and had no modified salary schedule been adopted by the School District, it would have been necessary to close many schools and in various other ways curtail the educational program. The recent decision of this Court, in *Ehret v. School District of the Borough of Kulpmont*, 333 Pa. 518, clearly shows that a general reduction of salaries may be made where a school district cannot continue to pay existing salaries without disrupting its entire financial scheme and where to do so would threaten its ability to properly carry out its functions. In that case, Mr. Chief Justice Kephart, speaking for the Court, said: "As we have stated before, the purpose of the Tenure Act was to maintain an adequate and competent teaching staff, free from political and personal arbitrary interference, whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction, but it was not the intention of the legislature to confer any special privileges or immunities upon professional employees to retain permanently their position and pay regardless of

a place to work and pupils to be taught; nor was it the intention of the legislature to have the Tenure Act interfere with the control of school policy and the courses of study selected by the administrative bodies; nor was it the intention of the legislature to disrupt a school district's financial scheme, which must be operated upon a budget limited by the Code, that cannot be exceeded except in the manner provided by the legislature."

The Tenure Act is but an amendment to the School Code, and should be construed in conjunction with the other provisions of the Code to effectuate its purpose as a whole. By the provisions of the Code, a school district must operate on a strictly limited budget and changes can be made only in the manner provided by the legislature (School Code, Section 532, as amended.) Furthermore, if the School District were required to maintain forever its salary schedule, it must in some manner be accorded the right to secure the necessary funds. But its ability to levy taxes is strictly limited by statute (School Code, Section 524, as amended), and by the provisions of our Constitution: *Wilson v. Phila. School Dist.*, supra. It is obvious that the legislature did not intend that Sec. 3 of the Tenure Act should be construed to "freeze" salaries above the statutory minimum schedules where to do so would bind the school district to contracts for which it could not legally secure the required revenue.

Assuming, therefore, that the school district is in a serious financial condition and makes a general reduction in salaries in good faith and without discrimination, we see no legal objection to the proposed procedure.

We now proceed to your second question, which is: Assuming that the reduction is legal and has been made, may the school district then bring itself within the terms of the Act of May 28, 1943, P. L. 786, 24 P. S. Section 1186(d) ?

The title of this act reads:

An act providing temporary increases in the salaries of certain members of the teaching and supervisory staffs of school districts; authorizing additional appropriations and temporary loans therefor; requiring the Commonwealth to reimburse school districts for the full amount of such increases; authorizing the Superintendent of Public Instruction to withhold payments due from the Commonwealth, in certain cases; authorizing additional temporary increases; and validating such increases heretofore made.

The purpose of the legislature in enacting this law is expressed in the first portion, which reads:

In order to provide for the maintenance and support of a thorough and efficient public school system, and to meet the increased cost of living during the present emergency and to enable the teachers of this Commonwealth who are paid in the lower salary brackets to maintain for themselves and their families a decent standard of living, the salaries of the following members of the teaching and supervisory staffs of each school district are hereby increased by the following amounts, * * *.

The act provides that certain salaries for the school terms 1943-1944 and 1944-1945 are to be increased by specific amounts which are determined by the amounts of the salaries at the close of the 1941-1942 school term. The act also provides that the increases shall be in addition to any increments which shall accrue under the law. The act increases the salary of each member of the teaching and supervisory staff, who at the end of the school term 1941-1942 received a salary of \$1,000 up to and including \$3,499. The amount of the increases is to be paid by the Commonwealth.

The Superintendent of Public Instruction, under the act, is given authority to refuse to authorize the payment of any moneys payable to any school district and for any purpose, within the effective period of this act or any school year thereafter, if such school district shall at any time hereafter fail or refuse to pay to the members of its teaching and supervisory staffs the temporary salary increases required by this act. As the Commonwealth is financing these increases, this provision is justifiable.

We find no prohibition in the act preventing any district from taking advantage of it, after first reducing salaries under the circumstances set forth in the case of *Smith v. Philadelphia School District*, supra. It is presumed that the legislature had knowledge of the decision quoted and other decisions which followed, and if it was the desire of the legislature to prevent any school district from taking advantage of the Act of May 28, 1943, supra, we believe it would have expressly stated that desire or intent in the act. On the contrary, it appears that the legislature has continued its policy of providing a minimum salary that is to be paid by a school district, this minimum salary including the annual increment, to which the temporary increases provided by the act under consideration are to be added, but in all other respects the legislature has given the school districts

freedom of action to increase the salaries of school teachers, or decrease them under certain conditions.

We are, therefore, of the opinion, that a school district may, if it can bring itself within the terms or conditions of the case of *Smith v. Philadelphia School District*, 334 Pa. 197 (1939), reduce the salaries of its teachers; and thereafter take advantage of the Act of May 28, 1943, P. L. 786, 24 P. S. § 1186(d).

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 514

Board of Finance and Revenue—Rules and regulations—Qualifications of those who may appear and practice before the board—Acts of March 21, P. L. 558; April 8, 1869, P. L. 19; June 7, 1923, P. L. 498; April 9, 1929, P. L. 177, sec. 202; April 9, 1929, P. L. 343, sec. 501.

Rule 2 of the rules and regulations of the Board of Finance and Revenue as presently in force is invalid to the extent that (1) it permits an officer of a petitioner or applicant to argue or discuss legal questions before the board; and (2) to the extent that it prohibits an individual from appearing before the board in his own behalf. Any change or amendment to this rule should be made in conformity with this opinion.

Harrisburg, Pa., November 13, 1944.

Board of Finance and Revenue, Commonwealth of Pennsylvania,
Harrisburg, Pennsylvania.

Sirs: You have requested us to advise you who may practice before the Board of Finance and Revenue.

The administrative agency which is now the Board of Finance and Revenue was originally created by the Act of April 8, 1869, P. L. 19, 72 P. S. § 4142. It consisted of the Auditor General, the State Treasurer and the Attorney General, and was known as the Board of Public Accounts. By Section 202 of The Administrative Code, the Act of June 7, 1923, P. L. 498, 71 P. S. § 12, the foregoing board, together with the Board of Revenue, Commissioners, and Sinking

Fund Commission, were combined into one departmental administrative board known as the Board of Finance and Revenue. The Board of Finance and Revenue was continued by Section 202 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. § 62. Section 1102 of The Administrative Code of 1929, *supra*, 71 P. S. § 322, provided that the Board of Finance and Revenue should exercise, in so far as not inconsistent with the provisions of said code, the powers and duties set forth in The Fiscal Code, the Act of April 9, 1929, P. L. 343, 72 P. S. § 1 et seq. Section 501 of The Fiscal Code, *supra*, 72 P. S. Section 501, provided that subject to any inconsistent provisions in that code, the board should continue as the successor to the Board of Public Accounts created by the Act of 1869, *supra*. The general powers and duties of the Board of Finance and Revenue are set forth at length in The Fiscal Code in, among others, Sections 501 to 506, inclusive, 72 P. S. §§ 501-506; and Sections 1102 to 1107, 72 P. S. §§ 1102-1107.

Section 506 of The Administrative Code of 1929, *supra*, 71 P. S. Section 186, provides as follows:

Rules and Regulations.—The heads of all administrative departments, the several independent administrative boards and commissions, the several departmental administrative boards and commissions, are hereby empowered to prescribe rules and regulations, not inconsistent with law, for the government of their respective departments, boards, or commissions, the conduct of their employes and clerks, the distribution and performance of their business, and the custody, use, and preservation of the records, books, documents, and property pertaining thereto.

It is quite clear that under section 506 of The Administrative Code of 1929, above cited and quoted, the Board of Finance and Revenue has ample power to prescribe by rule and regulation the qualifications of those who may appear and practice before it, and by appearance we mean to include the filing of papers, pleadings and other documents with the board.

Rule No. 2 of the present rules and regulations of the Board of Finance and Revenue provides as follows:

Only an Attorney at Law who appears as the Attorney representing any petitioner before the Board, or an officer of the petitioner or applicant, shall be permitted to argue or discuss any legal question or questions raised in any petition or application before the Board at a hearing before said Board.

The foregoing rule restricts argument or discussion of legal questions before the board to attorneys at law and officers of parties.

Section 9 of the Act of March 21, 1806, P. L. 558, 17 P. S. § 1601, provides that in all civil suits or proceedings *in any court* within this Commonwealth, "every suitor and party concerned shall have a right to be heard by himself and counsel or either of them." The Board of Finance and Revenue is not a "court." It is precisely what The Administrative Code of 1929 designates it, namely, a departmental administrative board. See also *Shortz et al. v. Farrell*, 327 Pa. 81 (1937). Article I, section 9, of the Constitution of the Commonwealth, has no application to our problem inasmuch as it relates only to criminal prosecutions.

The foregoing act of 1806 does not expressly mention corporations, but it has been held that a corporation is included by the word "party." We would be inclined to say that a corporation would be included within the meaning of both these words; that is to say, we believe the words "suitor" and "party" mean a litigant, whether such litigant be an individual or a corporate entity. If this conclusion is sound there would appear to be no reason why the same rule should not apply to administrative agencies and tribunals. They are certainly of less dignity than are courts of record, even though in many instances they are quasi-judicial and maintain records of all their proceedings.

However, a corporation is in the eyes of the law a legal entity, a legal concept. The only way that it can act is through officers, agents, employees and servants; and these must necessarily be individuals. Therefore, if a corporation itself desired to appear as a litigant, either in a court or before an administrative agency such as the Board of Finance and Revenue, it would have to do so through an individual; and whenever such an appearance constituted the practice of law, the individual appearing for the corporation would have to be duly and regularly admitted to practice law in this Commonwealth. The Act of April 28, 1899, P. L. 117, as last amended April 23, 1933, P. L. 66, 17 P. S. § 1608, provides in part:

* * * it shall not be lawful for any person, partnership, association, or corporation, in any county in the State of Pennsylvania, to practice law, * * * without having first been duly and regularly admitted to practice law in a court of record of any county in this Commonwealth * * *

For decisions to the effect that when a corporation appears for itself in court it can do so only through individuals, and that such individuals must be duly admitted lawyers, see *New Jersey Photo Engraving Co. v. Carl Schonert & Sons, Inc.*, 95 N. J. Eq. 12, 122 Atl. 307 (1923); *Black & White Operating Co., Inc. v. Grosbart*, 7 N. J. Misc. 233, 151 Atl. 630 (1930); *Cary & Co. v. F. E. Satterlee & Co.*, 166 Minn. 507, 208 N. W. 408 (1926). See also *Blair, Jr. v. Service Bureau, Inc.*, 87 Pittsburgh Legal Journal 155 (1939); 40 Dickinson Law Review 225; and *Brand, Unauthorized Practice Decisions* (1937) 771.

We take it to be a generally held notion also that any party may appear before an administrative agency by an attorney at law. This notion would seem to be a natural outgrowth from the generally accepted conception of fundamental principles of Anglo-Saxon jurisprudence. The average man has no doubt in his mind that anyone who becomes involved in a legal proceeding is entitled to the advice and representation of counsel learned in the law. Nevertheless, we adhere and subscribe to the generally held belief and opinion that, as in the courts, a party may always appear before administrative tribunals in person in his own behalf, whether learned in the law or not. We would say, therefore, that no rule or regulation of the Board of Finance and Revenue should prohibit any party from appearing before it in person. If such a party is a corporation, we would see no reason why it could not *appear* by a duly authorized officer, employee or agent, since it could act only through its officers, employees or agents.

The distinction between merely appearing in behalf of a corporation, and functioning for a corporation in a manner which constitutes the practice of law, must be constantly borne in mind. When we say that a corporation may appear through a duly authorized individual, we do not mean to say that such an individual can do anything which amounts to the practice of law unless he is a lawyer.

No question has been raised relating to the right of an attorney at law to appear and practice before the board in behalf of a client who is a party. It is conceded that attorneys at law have such a right. It has been questioned, however, whether persons who are not parties, who are not attorneys at law, and who are not authorized officers or employees of corporate parties, may appear and practice before the board. The consideration of this question inevitably involves us in an examination of what appearance and practice before the board consist. To the extent that appearance and practice before the board constitute the practice of law the question is a closed one, except as to individual litigants themselves, as hereinbefore explained.

An excursion into the field of the rules and regulations of other administrative tribunals of the Commonwealth, of other States, or of the Federal Government, would not be especially helpful, for the law in this Commonwealth is well settled. It is interesting to note, however, that Rule No. 4 of the Rules of Practice of the Pennsylvania Public Utility Commission provides as follows:

4. Appearances, Attorneys.

All parties, except individuals appearing in their own behalf, shall be represented by attorneys at law in good standing.

All attorneys appearing before the Commission shall conform to the standards of ethical conduct required of practitioners before the Supreme Court of Pennsylvania, and failure so to conform will constitute ground for refusal of permission to appear before the Commission.

The foregoing rule of the Commission conforms to the conclusions expressed in this opinion.

Conceivably certain appearances before the Board of Finance and Revenue would not constitute the practice of law. For example, if an accountant or other lawman testifies on questions of valuation and the like before the board, that would not be the practice of law. Such individuals would be appearing as witnesses, and would be testifying merely as to facts. If such individuals deserted their roles as witnesses and attempted to present, discuss, or argue questions of law, they would cease to be witnesses and would be assuming and presuming to practice law. This they may not do.

An interesting discussion of the problem here presented may be found in Gellhorn, *Administrative Law* (1940) 587.

Where the line of demarcation lies in any particular proceeding before the board must be determined by the board. No general rule, other than that hereinbefore set forth, can be formulated for the board's guidance. We shall not attempt to define what the courts themselves have been unable or unwilling to define, namely, what constitutes the practice of law in all its ramifications. Each case must be decided on its own facts. For a general treatment of what con-

stitutes the practice of law, see our opinion in 1939-1940, Op. Atty. Gen. 412.

It is our opinion, therefore, that Rule No. 2 of the rules and regulations of the Board of Finance and Revenue as presently in force is invalid to the extent that (1) it permits an officer of a petitioner or applicant to argue or discuss legal questions before the board; and (2) to the extent that it prohibits an individual from appearing before the board in his own behalf. Any change or amendment of this rule should be made in conformity with this opinion.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 515

Foreign Fraternal Benefit Societies—Health and accident benefits—Coverage of non-member children—Act of July 17, 1935, P. L. 1092.

A foreign fraternal society may issue in this Commonwealth a certificate of health and accident benefits which it terms "non-cancellable." Direct coverage of non-member children for health and accident insurance by a fraternal benefit society is not authorized under the laws of the Commonwealth of Pennsylvania. The fact that health and accident insurance certificates are issued by a foreign benefit society in its home state unless financially hazardous from the point of view of Pennsylvania interests in the society, is not ground for discontinuance of its authority to do here the business authorized by our laws.

Harrisburg, Pa., December 14, 1944.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg,
Pennsylvania.

Sir: You have asked the advice of this department on the following questions:

1. Can non-cancellable health and accident benefits be approved for issuance by a fraternal [benefit] society?
2. Can the Insurance Department continue to grant authority to a society which issues such non-cancellable health and accident benefits in other states although refraining from such coverage in Pennsylvania?

3. Can the Insurance Department approve for issuance in Pennsylvania certificates of health and accident insurance containing dependent coverage, that is to say, direct coverage on dependents of members which dependents are not in fact members of the society?

4. Can the Insurance Department grant a certificate of authority to a fraternal [benefit] society, which society grants such dependent coverage in other states although refraining from doing so in Pennsylvania?

Your questions are answered seriatim.

1. We quote sections 6 and 7 of the Act of July 17, 1935, P. L. 1092, which pertain to fraternal benefit societies, 40 P. S. §§ 1056 and 1057, as follows:

Every such society, by its supreme governing or legislative body, shall have power to make, alter, and amend its constitution and laws for the government of the society, the management of its affairs, the admission and classification of its members, the control and regulation of the terms and conditions governing the issue of its benefit certificates and the character or kind of benefits or privileges payable or allowable thereunder, the fixing and adjustment of the rates of contribution, fees, or dues payable by its members, and the allotment of the same to the different funds of the society. Such constitution and laws, when made and altered and amended, shall be the law governing the society and its officers, board of directors, or managers, subordinate of constituent lodges, councils, or branches, and all members and beneficiaries in their relation thereto. * * *

The laws of every such society from the date of the passage of this act shall provide that, if the stated periodical contributions of the members are insufficient to pay all matured claims in full and to provide for the payment of its benefit fund obligations, valued upon a valuation by one of the standards authorized herein, and for the creation and maintenance of the funds required by its laws, additional or increased rates of contribution shall be collected from the members to meet such deficiency. Such laws may also provide that each certificate shall be charged with its proportion of any deficiency disclosed by the valuation herein specified, with lawful interest thereon.

If the term "non-cancellable" could be understood to imply that the rate of contribution fixed in a non-cancellable policy of insurance could not be changed after the making of the insurance contract, or that the constitution and laws for the government of a society could not be changed, then its use on the face of a policy of insurance could be decidedly misleading. But we think no such implication is to be drawn.

We know of no Pennsylvania decisions defining the word non-cancellable. However, we find in other jurisdictions the following cases: *Pacific Mut. Life Ins. Co. of California v. Strange*, 145 So. 425, 426, 226 Ala. 98 (1932) and *Dudgeon v. Mutual Ben. Health and Accident Assn.*, C. C. A. W. Va., 70 F 2d 49, 52 (1934).

These stand for the principle that the term non-cancellable, as used in a health and accident insurance policy, merely limits the rights of the insurer to cancel after an illness or accident, so long as the premium is paid, and it gives the insured material aid in continued protection against repeated illness and injuries and cancellation therefor.

After considering the provisions of the Fraternal Benefit Societies Act just quoted in the light of these decisions, we conclude the use of the expression "non-cancellable" in a fraternal benefit society health and accident policy in Pennsylvania, should be no cause for its rejection by the Insurance Department.

Your first question is answered in the affirmative.

2. Your second question becomes moot.

3. Under section 11 of the Fraternal Benefit Societies Act, 40 P. S. § 1061, it is provided:

Any person may be admitted to beneficial or general or social membership in any society in such manner and upon such showing of eligibility as the laws of the society may provide, and any beneficial member may direct any benefit to be paid to such person or persons, entity, or interest as may be permitted by the laws of the society. * * *

Under Section 1 of the above act, 40 P. S. § 1051, a fraternal benefit society is defined as follows:

That any corporation, society, order, or voluntary association, without capital stock, *organized and carried on solely for the mutual benefit of its members and their beneficiaries*, and not for profit, and having a lodge system and representative form of government, or which limits its membership to a secret fraternity having a lodge system and representative form of government, and which shall make provision for the payment of benefits in accordance with section nine hereof, is hereby declared to be a Fraternal Benefit Society. (Emphasis ours.)

Thus, it seems that initially the only persons who can benefit under a certificate issued by such a society are the members and those designated as beneficiaries. However, under section 40 of the act, 40 P. S. § 1090, it is provided:

Any fraternal benefit society authorized to do business in this State and subject to supervision, regulation, and examination by the Insurance Commissioner may provide in its laws, in addition to other benefits provided for therein, for insurance and/or annuities upon the lives of children at any age, upon the application of some adult person, as the laws of such society may provide. Any such society may, at its option, organize and operate branches for such children, and membership in local lodges and initiation therein shall not be required of such children, nor shall they have any voice in the management of the society.

Under this section it appears that beneficial societies upon application of some adult person, as the laws of the society may provide, are authorized to write insurance or annuity upon the lives of children of any age. It is susceptible of no other interpretation. And when read in conjunction with section 11, we are brought to the conclusion that health and accident certificates may only be issued by fraternal benefit societies to members but that insurance and annuities may be written upon the lives of children not members upon the application of some adult person—a member or non-member as the laws of the society may provide.

The answer to your third question is in the negative.

4. Section 25 of the act of 1935, supra, 40 P. S. § 1075, which prescribes the duties of the Insurance Commissioner with regard to foreign societies reads, in part, as follows:

When the Insurance Commissioner on investigation is satisfied that any foreign society transacting business under this act has exceeded its power or has failed to comply with any provisions of this act or is conducting business fraudulently, he shall notify the society of his findings in writing, the grounds of his dissatisfaction, and after reasonable notice require the society, on a date fixed, to show cause why its license should not be revoked.

Presuming that the method of operation of any foreign benefit society is lawfully conducted in so far as its home state is concerned and in so far as are concerned other states in which it is authorized to do business, it would seem that the Insurance Commissioner is only obliged to see to it that such society complies in Pennsylvania with Pennsylvania law. Of course, the Commissioner must also be concerned with any outside activities which might impair the financial structure of the society.

Briefly, so long as it does not impair the society's financial standing, the fact that a fraternal society issues in states other than Penn-

sylvania, health and accident insurance to non-member children should not in itself be a reason for refusing to certificate that society to do business in Pennsylvania.

The answer to your fourth question is in the affirmative.

It is our opinion that: 1. A foreign fraternal society may issue in this Commonwealth a certificate of health and accident benefits which it terms "non-cancellable."

2. Direct coverage of non-member children for health and accident insurance by a fraternal benefit society, is not authorized under the laws of the Commonwealth of Pennsylvania.

3. The fact that health and accident insurance certificates are issued by a foreign benefit society in its home state unless financially hazardous from the point of view of Pennsylvania interests in the society, is not ground for discontinuance of its authority to do here the business authorized by our law.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

OPINION No. 516

Taxation—Railroad companies—Gross receipts—Interstate transportation—Intra-state transportation part of which takes place in Pennsylvania—Acts of June 7, 1879, P. L. 112; June 1, 1889, P. L. 420.

Pennsylvania can, under appropriate legislation, tax that portion of the gross receipts arising from interstate transportation which originates and terminates in the State, and which relates to the segment of such transportation which occurs in Pennsylvania, using as the numerator of the fraction the mileage in Pennsylvania, and as the denominator thereof the mileage of the entire route. Pennsylvania cannot tax the entire gross receipts arising from transportation between points within Pennsylvania, but over a route lying partly outside the State. Nor can Pennsylvania tax the entire receipts from transportation between two points outside Pennsylvania, but over a route lying partly inside Pennsylvania. However, under the present legislation, Pennsylvania cannot tax any portion of gross receipts arising from interstate transportation, part of which takes place in Pennsylvania.

Harrisburg, Pa., December 18, 1944.

Honorable David W. Harris, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: The Department of Revenue has addressed an inquiry to us concerning the Act of June 7, 1879, P. L. 112, as supplemented by the Act of June 1, 1889, P. L. 420. These two acts are revenue measures.

Section 7 of the act of 1879, provided, among other things, that every railroad company doing business in Pennsylvania should pay a tax of eight-tenths of one per centum upon its gross receipts. This section was repealed by section 36 of the act of 1889. The act of 1889, by section 23, substantially reenacted section 7 of the act of 1879, with, however, some change in phraseology. The same rate of tax was imposed on gross receipts of railroad companies doing business in Pennsylvania, but the tax was restricted to gross receipts of such companies "received from passengers and freight traffic transported wholly within this State." The words "transported wholly within this State" did not appear in section 7 of the act of 1879.

You have asked us to advise you whether the tax imposed by the aforesaid legislation applies to gross receipts of railroads doing business in Pennsylvania arising from transportation originating within Pennsylvania and terminating therein, but which, en route, passes through another State; and also whether the tax applies to transportation originating outside Pennsylvania and terminating outside Pennsylvania, but which, en route, passes through Pennsylvania; in so far as the revenues from such transportation arise from those portions of the hauls which take place wholly within Pennsylvania. All of such shipments are, of course, interstate. The question is whether the portions thereof which occur wholly within the State can be taxed under the subject legislation.

It is quite clear that the language of section 7 of the act of 1879 was broad enough to cover receipts from interstate, as well as from intrastate, transportation. The problem presented is one of statutory construction, not of constitutional power, and involves the decision of whether the language of section 23 of the act of 1889 is broad enough to tax both interstate (to the permitted constitutional degree) and intrastate transportation.

Under the act of 1879, a tax was assessed upon the gross receipts of a company received from foreign and interstate transportation. The

tax was sustained by the Supreme Court of Pennsylvania in Philadelphia and Southern Mail Steamship Company *v.* Commonwealth, 104 Pa. 109 (1883). The Supreme Court of the United States reversed this decision on appeal in Philadelphia and Southern Steamship Company *v.* Pennsylvania, 122 U. S. 326 (1887), on the ground that the tax was a burden upon interstate commerce, and that its imposition by the Commonwealth conflicted with the power of Congress to regulate interstate commerce. The Supreme Court of Pennsylvania also sustained the tax under the act of 1879 upon the gross receipts of a telegraph company received from interstate messages. Western Union Telegraph Company *v.* Commonwealth, 110 Pa. 405 (1885). This case was also reversed by the Supreme Court of the United States. Western Union Telegraph Company *v.* Pennsylvania, 128 U. S. 39 (1888). In this case the Supreme Court of the United States said that the Commonwealth was not entitled to recover for the taxes in question "excepting in respect to the messages transmitted *wholly within the State.*" (Italics supplied.)

It would appear that section 23 of the act of 1889 was passed by the General Assembly to overcome the aforesaid decisions of the Supreme Court of the United States, both from an historical viewpoint and because the tax was thereby restricted to transportation "wholly within this State", the very words used by the Supreme Court of the United States in the Western Union Telegraph case.

In Lehigh Valley Railroad Co. *v.* Commonwealth, 22 W. N. 525 (1888); the Supreme Court of Pennsylvania affirmed an assessment of a gross receipts tax under the act of 1879 on revenues derived from transportation from a point in Pennsylvania to a destination in Pennsylvania, but which, en route, passed through an adjoining State. The transportation was interstate. The tax was determined by apportioning the total receipts received from the interstate shipment, on a basis of mileage, between that part of the transportation which occurred outside Pennsylvania and the part which occurred inside Pennsylvania. This case was affirmed by the Supreme Court of the United States in Lehigh Valley Railroad Company *v.* Pennsylvania, 145 U. S. 192 (1892). A similar case was Commonwealth *v.* Lehigh Valley Railroad Company, 129 Pa. 308 (1889), affirmed in Lehigh Valley Railroad Company *v.* Pennsylvania, 145 U. S. 205 (1892).

It will be seen that in the foregoing cases arising under the act of 1879 the Supreme Court of the United States sanctioned the imposition of a tax upon the proportion or fraction of the gross receipts arising from an interstate shipment which took place in Pennsylvania;

that is, a proportion determined by taking the mileage in Pennsylvania as the numerator and the mileage of the entire route as the denominator of the fraction. There are other decisions to the same effect: *United States Express Company v. Minnesota*, 223 U. S. 335 (1912); *Ewing v. City of Leavenworth*, 226 U. S. 464 (1913); *Cornell Steamboat Company v. Sohmer*, 235 U. S. 549 (1915); and *Wilmington Transportation Company v. Railroad Commission of the State of California*, 236 U. S. 151 (1915).

It is clear, therefore, as we have already hereinbefore said that our problem is not one of whether the Commonwealth *can* tax part of the gross receipts arising from interstate shipments passing through Pennsylvania, but is one of whether the Commonwealth *has* imposed such a tax.

It is our conclusion that although the Commonwealth could have taxed, and did tax, under the act of 1879, the gross receipts of a railroad company arising from transportation over those segments of an interstate route lying within Pennsylvania, where the points of origin and destination were both within the State, the General Assembly has precluded the Commonwealth from imposing such a tax by the repeal of section 7 of the act of 1879 and the substitution therefor of section 23 of the act of 1889. By the latter legislation the Commonwealth is restricted in the imposition of the subject tax to gross receipts arising from transportation "wholly within this State"; and these words mean precisely what they say. Transportation wholly within this State is not transportation originating and terminating outside Pennsylvania, although passing through Pennsylvania; nor is it transportation originating and terminating in Pennsylvania, but passing through another State en route. It is transportation originating and terminating in Pennsylvania, and which takes place entirely in Pennsylvania.

We are further fortified in our conclusion by two additional reasons. The first is that provisions of statutes imposing taxes are strictly construed. See section 58 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 558, and the cases and Source Notes in the annotations thereto. Secondly, in considering the intention of the legislature in interpreting a statute, among other things which may be properly considered, are the administrative interpretations of the statute under examination. See section 51 of the Statutory Construction Act, supra, 46 P. S. § 551, and the cases and

Source Notes in the annotations thereto. We are informed that from the time the subject act of 1879 was supplemented in 1889, it has been consistently interpreted by revenue officials of the Commonwealth as confining the imposition of the tax under discussion to purely intrastate gross receipts of railroads, up until the latter part of 1939. In short, for half a century no attempt had been made by officials of the Commonwealth charged with the administration of the subject legislation to impose any tax on gross receipts of railroads, any portion of which was derived from interstate transportation. This settled policy was, of course, known to the legislature, and if the legislature disapproved such a policy it had ample opportunities to change it. This it has not done. For us at this time to attempt to uproot such a firmly established doctrine would be, to say the least, indifferent to what appear to be the desires of the General Assembly, and would not be conducive to stability and continuity of executive and administrative determinations and practice.

We recapitulate. Pennsylvania can, under appropriate legislation, tax that portion of the gross receipts arising from interstate transportation which originates and terminates in the State, and which relates to the segment of such transportation which occurs in Pennsylvania, using as the numerator of the fraction the mileage in Pennsylvania, and as the denominator thereof the mileage of the entire route. Pennsylvania cannot tax the entire gross receipts arising from transportation between points within Pennsylvania, but over a route lying partly outside the State. Nor can Pennsylvania tax the entire receipts from transportation between two points outside Pennsylvania, but over a route lying partly inside Pennsylvania. However, under the present legislation, Pennsylvania cannot tax any portion of gross receipts arising from interstate transportation, part of which takes place in Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 517

Revocation of Formal Opinion No. 511.

Harrisburg, Pa., December 27, 1944.

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

Madam: Formal Opinion No. 511 of the Department of Justice dated October 25, 1944, addressed to you, concerning the authority of a superintendent of a State mental hospital over checks received from the Federal Government drawn to the order of the hospital in relation to the accounts of patients whose husbands are in military service, is hereby revoked.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 518

Mental hospitals—Accounts of patients whose husbands are in military service—Authority vested in the superintendent—Servicemen's Dependents. Allowance Act of 1942.

The superintendent of a State mental hospital has no authority over checks received from the Federal Government drawn to the order of the hospital in relation to the accounts of patients whose husbands are in military service to determine the purposes for which such checks are to be used and the priority of claimants. The interests of all parties are best conserved by following the usual procedure provided by the Act of May 28, 1907, P. L. 292, relating to guardians for the estates of feeble-minded persons.

Harrisburg, Pa., December 27, 1944.

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

Madam: We have your request for advice concerning the authority of a superintendent of a State mental hospital over checks received from the Federal Government drawn to the order of the hospital in relation to the accounts of patients whose husbands are in military service.

In support of your request, you state that there are several mental patients at the Harrisburg State Hospital whose husbands are in the military service and who are receiving checks from the Federal Government for \$50.00 per month; and that these checks are being drawn to the order of the Harrisburg State Hospital, account of the patient, and are being placed in the patient's cash fund.

You request to be advised as follows:

1. Does the Superintendent have authority to determine the purpose for which this money is to be used and the priority of claimants?
2. If so, can the Superintendent pay the patient's maintenance to the Department of Revenue?
3. Must he have an order from the patient for each withdrawal?

The right of dependents of certain enlisted men to a monthly family allowance is governed by the Servicemen's Dependents Allowance Act of 1942, the Act of June 23, 1942 c. 443, Title I, Section 101, et seq., 56 Stat. 381, 37 U. S. C. A. Section 201 et seq.

Section 101 of said act, 37 U. S. C. A. Section 201, provides that the dependents of certain enlisted men shall be entitled to receive a monthly family allowance for any period during which such enlisted man is in the active military or naval service of the United States, on or after June 1, 1942, during the existence of any war declared by Congress and the six months immediately following the termination of any such war.

Section 102 of said act, 37 U. S. C. A. Section 202, provides that the monthly family allowance payable to the dependents of any such enlisted man shall consist of the Government's contribution to such allowance and the reduction in or charge to the pay of such enlisted man.

Section 109 of said act, 37 U. S. C. A. Section 209, provides for the payment of the family allowance, on behalf of the dependent, to a person designated by the enlisted man and is, in part, as follows:

Any family allowance to which any dependent or dependents of any enlisted man is entitled under the provisions of this chapter shall be paid on behalf of such dependent or dependents to any person who may be designated by such enlisted man * * *

From the foregoing provision of section 109 of the act, it is clear that the payment which is permitted to be made to a person designated by the enlisted man is paid on behalf of the dependent, without vesting any authority in the person designated to exercise any ownership or control over, or make any disbursement whatever, of the fund.

The words, "on behalf of", do not indicate agency. *Schimmel v. Mallory*, S. S. Co. (D. C. N. Y.) 30 F. (2d) 735, 736.

Nor can the patient, in view of her incapacity, by any act of her own, constitute the hospital as her agent for the disbursement of the fund.

The commitment of a patient to a hospital for mental diseases is no adjudication of her lunacy. *Hyman's Case*, 139 Pa. Super. Ct. 212 (1940).

Nevertheless, the mere fact that she has been found by physicians and the court to be mentally ill, or in such condition as to be benefited by or need such care as is required by a person mentally ill, and therefore, committed to a hospital for mental diseases, at least raises the presumption that she is incapable of using her customary self-control, judgment and discretion in the conduct of her affairs.

Neither does section 109, *supra*, constitute the superintendent of the hospital a collection agency for such institution, a duty imposed upon the Department of Revenue by Section 509 of the Mental Health Act, the Act of July 11, 1923, P. L. 998, as amended, 50 P. S. § 150, which is, in part, as follows:

All moneys whatsoever due from the estate of a mental patient, or the persons liable under existing laws for such patient's support, for the care and maintenance, including clothing, of such patient in a mental hospital owned and operated by the Commonwealth, shall be collected by the Department of Revenue, as collection agency for such institution, and shall be promptly transmitted by the Department of Revenue to the State Treasurer. * * *

Section 115 of the act, 37 U. S. C. A. Section 215, provides against the assignability of family allowances and against liability to creditors, attachment, levy, or seizure, and is as follows:

The monthly family allowances payable under the provisions of this chapter shall not be assignable; shall not be subject to the claims of creditors of any person to whom or on behalf of whom they are paid; and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever.

The foregoing provisions obviously preclude the application by the hospital of the family allowance to the liquidation of the claim of the hospital, as a creditor for the care and maintenance of the patient.

Section 119 of the act, 37 U. S. C. A. Section 219, contains a prohibition against payment of any part of the family allowance to agents or attorneys and is, in part, as follows:

No part of any amount paid pursuant to the provisions of this chapter shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with any family allowance payable under this chapter, and the same shall be unlawful, any contract to the contrary notwithstanding. * * *

We believe that the interests of all parties are best conserved by recourse to the provisions of the Act of May 28, 1907, P. L. 292, relating to guardians for the estates of feeble-minded persons, Section 1 of which, 50 P. S. § 941, is as follows:

Whenever hereafter any person, being a resident of this State, shall become insane or feeble-minded or epileptic, or so mentally defective that he or she is unable to take care of his or her property, and in consequence thereof is liable to dissipate or lose the same, and to become the victim of designing persons, it shall be lawful for either the mother, father, brother, sister, husband, wife, child, next of kin, creditor, debtor, or, in the absence of such person or persons, or their inability, any other person, to present to the court of common pleas of the county in which said person to be cared for resides, his or her petition, under oath, setting forth the facts, praying the court to adjudge such person to be unable to take care of his or her property, and to appoint a guardian for the estate of such person.

This view is corroborated by the Office of Dependency Benefits of the War Department which by letter dated June 23, 1943, advised the revenue agent of the hospital, inter alia, as follows:

Funds received in payment of family allowances under the Service-men's Dependents Allowance Act of 1942 are subject to two statutory restrictions under sections 115 and 119 of that act. The former provides for nonassignability and ex-

emption from attachment and the latter prohibits payments therefrom of a fee to an agent or attorney for services rendered in connection with a payment of family allowance. Other than this, *the answer to your question appears to be determinable by the law of Pennsylvania controlling the handling of assets of non-sui juris persons under supervision of a court of competent jurisdiction.* (Italics ours.)

We are of the opinion, therefore, that: 1. The superintendent of a State mental hospital has no authority over checks received from the Federal Government drawn to the order of the hospital in relation to the accounts of patients whose husbands are in military service to determine the purposes for which such checks are to be used and the priority of claimants. 2. The interests of all parties are best conserved by following the usual procedure provided by the Act of May 28, 1907, P. L. 292, 50 P. S. § 941, relating to guardians for the estates of feeble-minded persons.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 519

Pennsylvania Industrial School at White Hill—Sentences—Commutation—Payment of fine and costs—Release—Discretionary power of Board of Parole—Case of LeRoy Spence—Acts of April 28, 1887, P. L. 63; June 21, 1937, P. L. 1944; June 24, 1939, P. L. 872; August 6, 1941, P. L. 861.

LeRoy Spence should be immediately discharged from the Pennsylvania Industrial School at White Hill, upon the production of satisfactory evidence of the payment of a fine of 6¼ cents and costs of prosecution imposed upon him by the sentence of the Court of Oyer and Terminer of Allegheny County, to Nos. 98, 99, 100, 101 and 106 of January 1944.

Harrisburg, Pa., December 27, 1944.

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

Madam: Under date of November 29, 1944, you requested our opinion concerning the effect to be given the action of the Board of

Pardons in the case of LeRoy Spence by the Department of Welfare, and more specifically the Pennsylvania Industrial School at White Hill.

On February 3, 1944, Leroy Spence was sentenced by the Court of Oyer and Terminer of Allegheny County to pay a fine of 6¼ cents and costs of prosecution to the Commonwealth of Pennsylvania, and to be imprisoned in the Pennsylvania Industrial School at White Hill for an indeterminate term. This is technically known as a general sentence. The defendant had been convicted of burglary under Section 901 of the Act of June 24, 1939, P. L. 872, 18 P. S. § 4901, the maximum period of confinement for which is fixed at twenty years.

Twenty years, therefore, was the maximum time this prisoner could be detained at the institution on the general sentence under the provisions of Section 6 of the Act of April 28, 1887, P. L. 63, 61 P. S. § 485, and the pertinent provisions of the Act of June 21, 1937, P. L. 1944, 61 P. S. §§ 545-1 et seq.

On November 10, 1944, the Board of Pardons commuted the general sentence of imprisonment of Leroy Spence to nine months and twenty days, expiring November 23, 1944, but took no action with regard to that portion of the sentence treating with the fine and costs of prosecution.

In these circumstances, we must hold that the Industrial School at White Hill is obliged to release the prisoner upon satisfactory evidence of payment of the fine and costs of prosecution. The general sentence of imprisonment has been served. However, the prisoner cannot be released unless he either pays the fine and costs of prosecution or serves three months additional imprisonment which will enable him to take advantage of insolvent laws: *Commonwealth ex rel. Myers v. Shearer, et al.*, 7 D. & C. 150 (1925).

Under section 6 of the act of 1887, *supra*, it is provided that every sentence to a reformatory, shall be a general sentence to imprisonment and that the courts of the Commonwealth imposing such a sentence, shall not fix or limit the duration thereof; that the term shall be as fixed by the trustees but shall not be greater than the maximum provided by law, for the crime for which the prisoner was convicted and sentenced. This law is made applicable to the Industrial School at White Hill under the act of 1937, *supra*. But the discretionary power to release before the maximum term, as above defined, in cases where that maximum is two years or more, is in the Pennsylvania Board

of Parole by virtue of the Act of August 6, 1941, P. L. 861, 61 P. S. §§ 331.1 et seq.

Since in this case there is no minimum fixed by the sentence of the court, it cannot be said that the Board of Pardons commuted the minimum sentence of the prisoner and, therefore, made him eligible, at the expiration of the commuted term, to parole. Furthermore, any thought that such was the intention is negatived by the fact that under the Parole Law of 1941, *supra*, the prisoner could have been paroled the day after his incarceration as we have heretofore said in Formal Opinion No. 449, dated February 26, 1943, to the Honorable Louis N. Robinson, then Chairman of the Board of Parole.

It follows then, that the commutation by the Board of Pardons must be considered a commutation of the maximum sentence and, therefore, a reduction of the period of twenty years for which the prisoner might have been held, to nine months and twenty days. At the expiration of that period of time on November 23, 1944, the prisoner's general sentence must be deemed to have been served in full. However, his release from incarceration is not indicated until he has satisfied the institution authorities that the fine and costs of prosecution which were imposed, have been paid.

It is our opinion that Leroy Spence should be immediately discharged from the Pennsylvania Industrial School at White Hill, upon the production of satisfactory evidence of the payment of a fine of 6¼ cents and costs of prosecution imposed upon him by the sentence of the Court of Oyer and Terminer of Allegheny County, to Nos. 98, 99, 100, 101 and 106 of January 1944.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

RALPH B. UMSTED,
Special Deputy Attorney General.

STATUTES CITED

<i>Acts of Assembly</i>	<i>Opinion</i>	<i>Page</i>
1806, March 21, P. L. 558	514	281
1827, March 29, P. L. 153	478	147
1841, February 16, P. L. 28	496	221
1843, April 14, P. L. 333	458	62
1846, March 26, P. L. 179	496	221
1860, March 22, P. L. 223	496	221
1863, February 10, P. L. 24	478	147
1864, August 24, P. L. 1017	478	147
1866, April 2, P. L. 96	478	147
1867, March 26, P. L. 574	496	221
1869, April 8, P. L. 19	514	281
1874, April 24, P. L. 68	496	221
1874, May 15, P. L. 186	446	8
1879, June 7, P. L. 112	516	290
1885, June 23, P. L. 146	476	140
1885, June 23, P. L. 146	503	241
1887, April 28, P. L. 63	449	21
1887, April 28, P. L. 63	454	40
1887, April 28, P. L. 63	519	299
1887, June 7, P. L. 365	461	74
1887, June 7, P. L. 365	500	235
1889, June 1, P. L. 420	516	290
1889, June 1, P. L. 429	461	74
1889, June 1, P. L. 420	496	221
1895, June 28, P. L. 408	450	32
1899, April 28, P. L. 117	514	281
1901, May 11, P. L. 166	471	111
1907, May 28, P. L. 292	518	285
1909, March 19, P. L. 46	466	96
1909, May 6, P. L. 446	476	140
1909, May 6, P. L. 447	503	241
1909, May 10, P. L. 495	449	21
1909, August 6, P. L. 861	510	262
1911, May 18, P. L. 309	456	56
1911, May 18, P. L. 309	513	276
1911, May 18, P. L. 309	473	119
1911, May 18, P. L. 309	478	147
1911, May 18, P. L. 309	492	204
1911, May 18, P. L. 309	495	215
1911, June 3, P. L. 639	456	56
1911, June 8, P. L. 710	496	221
1911, June 19, P. L. 1055	449	21
1911, June 19, P. L. 1059	449	21
1913, May 1, P. L. 138	495	215
1913, May 1, P. L. 138	475	135
1913, July 24, P. L. 965	452	37
1913, July 24, P. L. 1024	480	161
1913, July 25, P. L. 1311	454	40
1913, July 25, P. L. 1311	449	21
1913, July 25, P. L. 1327	449	21
1915, May 13, P. L. 286	480	161
1915, June 3, P. L. 788	449	21
1915, June 7, P. L. 900	485	180
1917, June 7, P. L. 600	465	90
1917, June 7, P. L. 600	472	113
1917, June 7, P. L. 600	507	256
1917, July 18, P. L. 1043	445	3
1917, July 18, P. L. 1043	462	82
1917, July 18, P. L. 1043	464	87
1917, July 18, P. L. 1043	501	237
1917, July 18, P. L. 1043	506	253
1917, July 18, P. L. 1043	507	256

<i>Acts of Assembly</i>	<i>Opinion</i>	<i>Page</i>
1919, June 12, P. L. 466	461	74
1919, June 12, P. L. 466	500	235
1919, July 8, P. L. 782	474	129
1919, July 8, P. L. 782	483	177
1919, July 8, P. L. 1044	459	65
1921, March 2, P. L. 12	505	248
1921, May 5, P. L. 379	449	21
1921, May 17, P. L. 789	470	107
1921, May 17, P. L. 869	502	239
1923, May 11, P. L. 204	449	21
1923, May 31, P. L. 468	448	14
1923, June 7, P. L. 498	493	209
1923, June 7, P. L. 498	505	248
1923, June 7, P. L. 498	514	281
1923, June 28, P. L. 975	449	21
1923, June 30, P. L. 984	500	235
1923, July 11, P. L. 998	447	11
1923, July 11, P. L. 998	469	106
1923, July 11, P. L. 998	512	270
1923, July 11, P. L. 998	518	295
1925, April 7, P. L. 162	464	87
1925, May 2, P. L. 494	476	140
1925, May 14, P. L. 697	449	21
1927, April 13, P. L. 207	493	209
1927, May 4, P. L. 727	483	177
1927, May 6, P. L. 848	449	21
1929, April 9, P. L. 177	471	111
1929, April 9, P. L. 177, sec. 202	493	209
1929, April 9, P. L. 177, sec. 452	444	1
1929, April 9, P. L. 177, sec. 509	474	129
1929, April 9, P. L. 177, sec. 512	483	177
1929, April 9, P. L. 177, sec. 1303	475	135
1929, April 9, P. L. 177, sec. 2109	493	209
1929, April 9, P. L. 177, sec. 2209	505	248
1929, April 9, P. L. 177, sec. 2402	478	147
1929, April 9, P. L. 177, sec. 2404	474	129
1929, April 9, P. L. 177, sec. 202	514	281
1929, April 9, P. L. 343	460	71
1929, April 9, P. L. 343, sec. 206	449	21
1929, April 9, P. L. 343, sec. 407	474	129
1929, April 9, P. L. 343, sec. 501	514	281
1929, April 9, P. L. 343, sec. 1201 f	474	129
1929, April 23, P. L. 638	464	87
1929, April 25, P. L. 668	461	74
1929, April 25, P. L. 755	478	147
1929, April 30, P. L. 885	461	74
1929, April 30, P. L. 885	500	235
1929, May 1, P. L. 1183	449	21
1929, May 1, P. L. 1201	461	74
1929, May 1, P. L. 1201	500	235
1929, May 1, P. L. 1216	468	100
1929, May 2, P. L. 1278	496	221
1929, May 2, P. L. 1278	497	228
1931, May 11, P. L. 109	449	21
1931, May 29, P. L. 214	477	145
1931, May 29, P. L. 280	477	145
1931, June 1, P. L. 318	460	71
1931, June 22, P. L. 616	470	107
1931, June 22, P. L. 859	449	21
1931, June 22, P. L. 859	499	232
1931, June 27, P. L. 1416	488	193
1933, April 23, P. L. 66	514	281
1933, May 3, P. L. 252	478	147
1933, May 5, P. L. 287	504	244
1933, May 15, P. L. 565	461	74

<i>Acts of Assembly</i>	<i>Opinion</i>	<i>Page</i>
1933, May 15, P. L. 624	448	14
1933, May 15, P. L. 624	509	261
1933, May 15, P. L. 796	451	34
1933, May 22, P. L. 853	477	145
1933, May 22, P. L. 915	500	235
1933, May 24, P. L. 988	470	107
1933, May 25, P. L. 1027	461	74
1933, May 25, P. L. 1027	500	235
1933, May 26, P. L. 1076	461	74
1933, June 2, P. L. 1433	454	40
1933, November 29, P. L. 15	478	147
1935, April 30, P. L. 122	450	32
1935, May 16, P. L. 208	461	74
1935, May 16, P. L. 184	496	221
1935, June 21, P. L. 369	509	261
1935, July 17, P. L. 1092	515	286
1936, December 5, P. L. (1937) 2897	444	1
1937, April 6, P. L. 200	487	191
1937, April 6, P. L. 213	473	119
1937, April 6, P. L. 213	492	204
1937, April 6, P. L. 213	513	276
1937, April 8, P. L. 227	461	74
1937, April 8, P. L. 286	474	129
1937, April 22, P. L. 399	485	181
1937, May 18, P. L. 713	461	74
1937, May 21, P. L. 774	484	180
1937, May 25, P. L. 808	512	270
1937, May 28, P. L. 955	509	261
1937, May 28, P. L. 1007	452	37
1937, May 28, P. L. 1019	448	14
1937, May 28, P. L. 1019	466	96
1937, May 28, P. L. 1019	476	140
1937, May 28, P. L. 1019	473	119
1937, May 28, P. L. 1019	469	106
1937, May 28, P. L. 1019	449	21
1937, May 28, P. L. 1019	456	56
1937, May 28, P. L. 1019	458	62
1937, May 28, P. L. 1019	479	154
1937, May 28, P. L. 1019	496	221
1937, May 28, P. L. 1019	506	253
1937, May 28, P. L. 1019	516	290
1937, May 28, P. L. 1053	468	100
1937, June 3, P. L. 1333	488	193
1937, June 5, P. L. 1649	466	96
1937, June 21, P. L. 1865	474	129
1937, June 21, P. L. 1865	490	199
1937, June 21, P. L. 1865	493	209
1937, June 21, P. L. 1944	454	40
1937, June 21, P. L. 1944	519	299
1937, June 21, P. L. 1969	461	74
1937, June 22, P. L. 1987	490	199
1937, June 22, P. L. 1987	493	209
1937, June 24, P. L. 2045	477	145
1937, June 24, P. L. 2051	477	145
1937, June 25, P. L. 2063	500	235
1937, June 25, P. L. 2093	458	62
1937, June 25, P. L. 2093	471	111
1937, June 25, P. L. 2093	508	259
1937, July 1, P. L. 2579	479	154
1937, July 1, P. L. 2603	475	135
1937, July 1, P. L. 2656	478	147
1937, July 2, P. L. 2811	468	100
1938, October 11, P. L. 63	469	106
1938, October 11, P. L. 63	447	11
1939, May 5, P. L. 64	461	74

<i>Acts of Assembly</i>	<i>Opinion</i>	<i>Page</i>
1939, May 12, P. L. 133	453	40
1939, May 17, P. L. 165	502	239
1939, June 15, P. L. 394	454	40
1939, June 24, P. L. 872	499	232
1939, June 24, P. L. 872	519	299
1939, June 26, P. L. 1080	449	21
1939, June 27, P. L. 1125	504	244
1941, March 19, P. L. 3	502	239
1941, March 19, P. L. 6	486	186
1941, April 23, P. L. 21	474	129
1941, May 29, P. L. 62	461	74
1941, June 3, P. L. 82	469	106
1941, July 16, P. L. 383	485	181
1941, July 21, P. L. 429	478	147
1941, July 28, P. L. 513	475	135
1941, August 1, P. L. 444	479	154
1941, August 1, P. L. 708	507	256
1941, August 1, P. L. 708	506	253
1941, August 1, P. L. 744	465	90
1941, August 1, P. L. 744	472	113
1941, August 1, P. L. 744	501	237
1941, August 1, P. L. 744	507	256
1941, August 5, P. L. 752	444	1
1941, August 5, P. L. 781	444	1
1941, August 5, P. L. 783	495	215
1941, August 6, P. L. 861	454	40
1941, August 6, P. L. 861	458	62
1941, August 6, P. L. 861	449	21
1941, August 6, P. L. 861	499	232
1941, August 6, P. L. 861	519	299
1941, August 6, P. L. 861	510	262
1941, August 6, P. L. 903	456	56
1941, Act No. 12A	447	11
1941, Act No. 73A	455	48
1941, Act No. 74A	447	11
1942, February 25, P. L. 7	488	193
1942, April 13, P. L. 37	486	186
1942, May 6, P. L. 106	507	256
1943, April 22, P. L. 71	467	99
1943, May 3, P. L. 151	502	239
1943, May 7, P. L. 237	497	228
1943, May 21, P. L. 273	479	154
1943, May 21, P. L. 369	474	129
1943, May 21, P. L. 369	483	177
1943, May 21, P. L. 370	483	177
1943, May 21, P. L. 372	483	177
1943, May 21, P. L. 380	474	129
1943, May 21, P. L. 414	476	140
1943, May 26, P. L. 653	509	261
1943, May 27, P. L. 682	469	106
1943, May 27, P. L. 682	512	270
1943, May 27, P. L. 767	499	232
1943, May 28, P. L. 784	479	154
1943, May 28, P. L. 786	513	276
1943, May 28, P. L. 786	473	119
1943, May 28, P. L. 786	492	204
1943, May 28, P. L. 786	405	215
1943, May 28, P. L. 786	501	237
1943, Act No. 77A	505	248

CASES CITED

	A	Opinion	Page
American and Foreign Christian Union <i>v.</i> Matilda Yount, 101 U. S. 356 (1880)	504		244
Anderson National Bank <i>v.</i> Lickett, 64 S. Ct. 599, 88 L. ed. 499		Memorandum	265
Asbell <i>v.</i> Kansas, 209 U. S. 251 (1907)	480		161
Atchison, Topeka & Santa Fe Ry. Co. <i>v.</i> United States, 269 U. S. 266 (1925)	480		161
Atlantic Coast Line <i>v.</i> Georgia, 234 U. S. 280 (1913)	480		161
B			
Baltimore & Ohio R. R. Co. <i>v.</i> Interstate Commerce Comm. 221 U. S. 612 (1910)	480		161
Becker, et al., <i>v.</i> School District of Upper Moreland Tp., et al., 50 Montg. County Law Reporter 244	456		56
Bickley <i>v.</i> Pennsylvania Utility Comm. 135 Pa. Super. Ct. 490 (1939)	468		100
Big Black Creek Imp. Co. <i>v.</i> Commonwealth, 94 Pa. 450 (1880)	459		65
Bishop <i>v.</i> Bacon, et al., 130 Pa. Super. Ct. 240 (1938)	495		215
Black & White Operating Co., Inc., <i>v.</i> Grosbart, 7 N. J. Misc. 233, 151, Atl. 630 (1930)	514		281
Blair Jr., <i>v.</i> Service Bureau, Inc., 87 Pitt. Leg. Jour. 155 (1939) ..	514		281
Brown <i>v.</i> City of Newburyport, 209 Mass. 259, 95 N. E. 504	475		135
C			
Carey <i>v.</i> South Dakota, 250 U. S. 118 (1918)	480		161
Carter's Estate, 254 Pa. 518 (1916)	458		62
Cary & Co., <i>v.</i> F. E. Satterlee & Co., 166 Minn. 507, 208 N. W. 408 (1926)	514		281
Chicago & Alton R. R. Co. <i>v.</i> United States, 247 U. S. 197 (1918) ..	480		161
Collins <i>v.</i> Kephart, et al., 271 Pa. 428 (1921)	455		48
Collins <i>v.</i> Martin, et al., 290 Pa. 388 (1927)	455		48
Commonwealth <i>v.</i> Chester County Light & Power Co., 339 Pa. 97 (1940)	479		154
Commonwealth <i>v.</i> Columbia Gas & Electric Corp. 336 Pa. 209	497		228
Commonwealth <i>v.</i> Cohen, 142 Pa. Super. Ct. 202 (1940)	456		56
Commonwealth <i>v.</i> Erie Railway Co., 98 Pa. 127 (1881)	497		228
Commonwealth <i>v.</i> Lehigh Valley Railroad Co., 129 Pa. 308 (1889) .	516		290
Commonwealth <i>v.</i> Long, 100 Pa. Super. Ct. 150 (1930)	456		56
Commonwealth <i>v.</i> Mollier, 122 Pa. Super. Ct. 373 (1936)	456		56
Commonwealth <i>v.</i> Provident Life & Trust Co. of Phila. 12 Dauph. 104	497		228
Commonwealth <i>v.</i> Ripka, 37 D. & C. 315 (1940)	449		21
Commonwealth <i>v.</i> Seibert, 262 Pa. 345 (1918)	456		56
Commonwealth <i>v.</i> Warner Bros. etc., 345 Pa. 270 (1942)	461		74
Commonwealth of Pa. State Employees Retirement System <i>v.</i> Dauphin County, et al., 335 Pa. 177 (1939)	477		145
Commonwealth ex rel. Attorney General <i>v.</i> Alba Dentist Co., 13 Pa. Dist. 432 (1904)	504		244
Commonwealth ex rel. Banks <i>v.</i> Cain, 345 Pa. 581 (1942)	449		21
Commonwealth ex rel. Banks <i>v.</i> Cain, 345 Pa. 581 (1942)	454		40
Commonwealth ex rel. <i>v.</i> Brown, 210 Pa. 29 (1904)	506		253
Commonwealth ex rel. Campbell <i>v.</i> Ashe, 141 Pa. Super. Ct. 408 (1940)	454		40
Commonwealth ex rel. Crow <i>v.</i> Smith, 343 Pa. 446 (1942)	494		212
Commonwealth ex rel. Johnson <i>v.</i> Halloway, 42 Pa. 446 (1862)	454		40
Commonwealth ex rel. Kent <i>v.</i> Smith, 323 Pa. 89 (1936)	449		21
Commonwealth ex rel. <i>v.</i> Lewis, 282 Pa. 306 (1925)	483		177
Commonwealth ex rel. Lycett <i>v.</i> Ashe, 145 Pa. Super. Ct. 26 (1941)	458		62
Commonwealth ex rel. Lycett <i>v.</i> Ashe, 145 Pa. Super. Ct. 26 (1941) .	471		111

	<i>Opinion</i>	<i>Page</i>
Commonwealth ex rel. Lynch v. Ashe, 320 Pa. 341 (1936)	458	62
Commonwealth ex rel. Lynch v. Ashe, 320 Pa. 341 (1936)	471	111
Commonwealth ex rel. McGinnis v. Ashe, 330 Pa. 289 (1938)	454	40
Commonwealth ex rel. Meinzer v. Smith, 118 Pa. Super. Ct. 250 (1935)	449	21
Commonwealth ex rel. Morgan v. Smith, 146 Pa. Super Ct. 352 (1941)	454	40
Commonwealth ex rel. Myers v. Shearer, et al., 7 D. & C. 150 (1925)	519	299
Commonwealth ex rel. Schnader v. Liveright, 508 Pa. 35 (1932) ..	477	145
Constitution Defense League v. Baldwin, 42 Dauph. 169 (1936) ..	455	48
Constitution Defense League v. Baldwin, 42 Dauph. 169 (1936)	457	59
Constitution Defense League v. Waters, et al., 34 Dauph. 237 (1931)	455	48
Constitution Defense League v. Waters, 308 Pa. 150 (1932)	455	48
Cornell Steamboat Company v. Sohmer, 235 U. S. 549 (1915)	516	290
Crook v. Old Comfort Hotel Co., 54 F. 604 (C.C.E.D.Va.) (1893) ..	478	147
Crossman v. Lurman, 192 U. S. 189 (1903)	480	161

D

Dom v. State Employes Retirement Board, 345 Pa. 489 (1942) ..	465	90
Dudgeon v. Mutual Benefit Health & Accident Assn. C.C.A.Va. 70 F. 2d 49 (1934)	515	286
Duquesne University of the Holy Ghost v. Lewis, 26 Dauph. 242 ..	455	48

E

Erie Railroad v. New York, 233 U. S. 671, 34 S. Ct. 756, 58 L. ed. 1149 (1914)	480	161
Erie Railway Company v. Commonwealth, 66 Pa. 84 (1870)	496	221
Erie Railroad Company v. Pennsylvania, 82 U. S. 282 (1872)	496	221
Ewing v. City of Leavenworth, 226 U. S. 464 (1913)	516	290

F

Fayette County Commissioners' Petition, 289 Pa. 200 (1927)	506	253
Finley v. McNair, 317 Pa. 278 (1935)	446	8
Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. ed. 264	478	147
Froeber-Norfleet, Inc. v. Southern Ry. Co. et al., 9 F. Supp. 409 (1934)	468	100
Fuller v. Board of University and School Lands of State of North Dakota, 21 N. D. 212, 129 N. W. 1029	475	135

G

Gage v. Gunther, et al., 68 Pac. 710 (1902)	468	100
Garr v. Fuls, 286 Pa. 137	475	135
Gilvery v. Guyshoga Valley Ry. Co., 292 U. S. 57 (1933)	480	161
Grime, et al., v. Dept. of Pub. Inst., et al., 324 Pa. 371 (1936)	459	65

H

Hammer v. Fagenhart, 247 U. S. 281, 38 S. Ct. 529, 62 L. ed. 1101 (1918)	480	161
Hammerle et al., v. Kessler, 311 Pa. 386 (1933)	466	96
Harris v. Mercur (No. 1) 202 Pa. 313 (1902)	506	253
Homan v. First National Bank, 315 Pa. 23 (1934)	448	14
Hughes v. Commonwealth, 48 Pa. 66 (1864)	497	228
Hyman's Case, 139 Pa. Super. Ct. 242 (1940)	518	295
Hysong et al., v. School District, et al., 164 Pa. 629 (1894)	455	48
Hysong et al., v. School District, et al., 164 Pa. 629 (1894)	457	59
Horowitz v. Beamish, 323 Pa. 273 (1936)	504	244

I

Opinion Page

Illinois Central R. R. Co. v. Public Utility Comm. 245 U. S. 493 (1918)	480	161
In re: East Lake Road and Payne Ave., 309 Pa. 327 (1933)	506	253

J

Jennings, Trustee v. P. U. C., 140 Pa. Super. Ct. 569 (1940)	482	171
Johnston v. State Employes Retirement Board, 39 Dauph. Co. Rep. 231	465	90

K

Kelly v. Washington, 302 U. S. 1 (1937)	480	161
Kneeder, et al., v. Lane, et al., 45 Pa. 238 (1863)	494	212
Kurtz v. City of Pittsburgh, et al., 346 Pa. 362 (1943)	472	113
Kurtz v. City of Pittsburgh, et al., 346 Pa. 362	465	90
Kurtz v. City of Pittsburgh, et al., 346 Pa. 362	507	256

L

Lehigh Valley Railroad Co. v. Commonwealth, 22 W. N. 525 (1888) ..	516	290
Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192 (1892) ..	516	290
Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 205 (1892) ..	516	290
LeRoy v. Worcester St. Ry. Co., 287 Mass 1, 191 N. E. 39	475	135
Long, et al., v. Metzger, et al., 301 Pa. 449 (1930)	456	56
Long Island Railroad Co. v. Department of Labor, State of New York, 256 N. Y. 498, 177 N. E. 17 (1931)	480	161

M

Magill v. Brown, Fed. Cas. No. 8952, Bright N. P. 346	455	48
Maurer v. Hamilton, 309 U. S. 598, 60 S. Ct. 726 (1940)	482	171
McCormick's Contested Election, 281 Pa. 281 (1924)	458	62
Mercy Hospital of Johnstown v. Lewis, et al., 27 Dauph. 346	455	48
Mintz v. Baldwin, 289 U. S. 346 (1932)	480	161
Missouri K. & T. Ry. Co. v. Haber, 169 U. S. 613 (1898)	480	161
Missouri K. & T. Ry. Co. v. Harris, 234 U. S. 412 (1914)	480	161
Missouri Pac. Ry. Co. v. Larabee Mills Co., 211 U. S. 612 (1909) ..	480	161
Missouri Pac. Ry. Co. v. Norwood, 283 U. S. 249 (1931)	480	161

N

National Transit Co. et al. v. Boardman, 328 Pa. 450 (1938)	461	74
New Jersey Photo Engraving Co. v. Carl Ashonert & Sons, Inc., 95 N. J. Eq. 12, 122 Atl. 307 (1923)	514	281
New York v. Hamilton, 226 N. Y. 241, 123 N. E. 380 (1919)	468	100
New York, Lake Erie & Western Railroad Co. v. Pennsylvania, 153 U. S. 627, 38 L. ed. 846	496	221
New York, New Haven & Hartford R. R. v. New York, 165 U. S. 628 (1897)	480	161
Northwestern Bell Tel. Co. v. Nebraska Ry. Comm. 297 U. S. 471 (1938)	480	161
Nugent Funeral Home Inc., v. Beamish, 315 Pa. 345 (1934)	504	244

O

Orlasky v. Haskell, 304 Pa. 57 (1931)	466	96
---	-----	----

P

Opinion Page

Pacific Coast Dairy, Inc., <i>v.</i> Dept. of Agriculture of California, et al., 317 U. S. — 63 S. Ct. 628, 87 L. ed. Adv. Op. 580 (1943) . . .	478	147
Pacific Mut. Life Ins. Co. of California <i>v.</i> Strange, 145 So. 425, 336 Ala. 98	515	286
Palmer <i>v.</i> Massachusetts, 308 U. S. 79	482	171
Penn Dairies Inc., <i>v.</i> Milk Control Comm. of Pennsylvania — U. S. — 63 S. Ct. 617	478	147
People of the State of California, ex rel. State Board of Medical Examiners <i>v.</i> Pacific Health Corp., Inc. 12 Cal. (2d) 156, 82 P. (2d) 429, 119 ALR 1284 note 1290 (1938)	504	244
Philadelphia & Southern Mail Steamship Co. <i>v.</i> Commonwealth, 104 Pa. 109 (1883)	516	290
Philadelphia & Southern Steamship Co. <i>v.</i> Pennsylvania, 122 U. S. 326 (1887)	516	290
Pittsburgh & L. E. R. Co. et al., <i>v.</i> P. U. C. 128 Ohio St. 388, 191 N. E. 467 (1934)	468	100
Pocomo Manor Assn. <i>v.</i> Allen, et al., 337 Pa. 442 (1940)	466	96
Pocomo Manor Assn. <i>v.</i> Allen, 337 Pa. 442 (1940)	473	119
Puhl, et al., <i>v.</i> Pa. P. U. C. 139 Pa. Super. Ct. 152 (1940)	468	100

R

R. E. Collins, et al., <i>v.</i> Yosemite Park & Curry Co., 304 U. S. 518, 58 S. Ct. 1009, L. ed. 1502 (1938)	478	147
Reid <i>v.</i> Colorado, 187 U. S. 137 (1902)	480	161
Riggs <i>v.</i> State, 84 Neb. 335, 121 N. W. 588	452	37
Rule, et al., <i>v.</i> Price, et al., 323 Pa. 139 (1936)	504	244

S

San Pedro, L. A. & S. L. R. Co., <i>v.</i> United States, 213 Fed. 326 (1914)	480	161
Savage <i>v.</i> Jones, 225 U. S. 501 (1911)	480	161
Schimmel <i>v.</i> Mallory S. S. Co. (D. C. N. Y.) 30 F. (2d) 735	518	295
Schoeppe <i>v.</i> The Commonwealth, 65 Pa. 51 (1870)	458	62
Shortz, et al., <i>v.</i> Farrell, 327 Pa. 81 (1937)	514	281
Shunk <i>v.</i> Miller, 5 Pa. 250 (1847)	497	228
Silas Mason Co., <i>v.</i> Tax Commission of the State of Washington, 302 U. S. 186, 58 S. Ct. 233, 82 L. ed. 187 (1937)	478	147
Sinnot <i>v.</i> Davenport, 22 How. 227 (1859)	480	161
Smith <i>v.</i> Illinois Bell Telephone Co., 282 U. S. 133 (1930)	480	161
Smith <i>v.</i> Phila. School District, et al., 334 Pa. 197 (1939)	473	119
Smith <i>v.</i> Phila. School District, et al., 334 Pa. 197 (1939)	513	276
South Carolina State Highway Dept. <i>v.</i> Barnwell Bros., 303 U. S. 177, 58 S. Ct. 510	482	171
Surplus-Trading Co. <i>v.</i> Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. ed. 1091 (1930)	478	147

T

Terminal Railroad Assn. of St. Louis <i>v.</i> Brotherhood of Railroad Trainmen, 318 U. S. 1, 63 S. Ct. 420, 87 L. ed. Adv. Op. 369 (1943)	480	161
The Thomas Diagnostic Clinic, 30 Pa. Dist. 778 (1921)	504	244
Transit Commission of State of New York <i>v.</i> U. S., 284 U. S. 260, 52 S. Ct. 157	482	171
Turbett Tp. <i>v.</i> Port Royal Borough Overseers of the Poor, 33 Pa. Super. Ct. 520 (1907)	459	65

U

United States Express Co. <i>v.</i> Minnesota, 223 U. S. 335 (1912)	516	290
United States of America <i>v.</i> Darby, 312 U. S. 100, 61 S. Ct. 451, 85 L. ed. 609 (1941)	480	161

V

Opinion Page

Van Steuben v. The Central R. R. Co., 178 Pa. 367 (1896)	504	244
--	-----	-----

W

Whinney v. Public Service Commission, 116 Pa. Super. Ct. 472 (1935)	468	100
Wilmington Transportation Company v. Railroad Commission of the State of California, 236 U. S. 151 (1915)	516	290

Y

Young v. Department of Public Instruction, 105 Pa. Super. Ct. 153 (1932)	489	196
--	-----	-----

INDEX

A

Agents and Brokers:	Opinion	Page
Agents, Bureau of Mines, United States Department of the Interior, administering of oaths	446	8
Real estate brokers, licenses, "Grandfather" clause	468	100
Agricultural Associations , taxation	461	74
Agricultural Credit Associations , taxation	461	74

ALL ADMINISTRATIVE DEPARTMENTS, BOARDS AND COMMISSIONS

General procedure to be followed in hearings, where such procedure has not been specifically set forth by the legislature and where an appeal to the court lies only by way of mandamus or injunction	Memorandum	265
---	------------	-----

Appropriations:

Department of Banking, Accumulated Fund, repayment into General Fund	451	34
Sectarian hospitals	455	48
Support of mentally defective persons, Polk State School ..	447	11
Vocational rehabilitation	505	248

AUDITOR GENERAL

Clerks of Quarter Sessions , transmission of fines and penalties, monthly report to Department of Revenue, settlement of accounts	460	71
County Treasurers , bonds, penalties, reduction in amount, Court of Quarter Sessions	497	228
Municipalities , Fire Department Relief Fund Associations, premiums of foreign fire insurance companies, payment of outside companies affording fire protection	450	32

B

BANKING, DEPARTMENT OF

Building and Loan Associations , cost of examination, appropriation of 1933, Accumulated Fund, repayment into General Fund, loan, gift	451	34
Housing Authorities , deposits pledged as security	509	261
Mortgages , interest, Sinking Fund, Commercial Department, security, pledge of bonds or other securities	448	14
Pawnbrokers , regulation of business, applicability of Pawnbrokers License Act of 1937 to warehousemen	487	191
Birth Certificates , illegitimate births, restrictions on disclosure, fee for filing, certificate of adoption	485	181

BOARD OF PARDONS	Opinion	Page
Commutation of sentences , prisoners serving consecutive sentences	471	111
Board of Finance and Revenue , see Revenue, Department of		
Board of Vocational Education , see Public Instruction, Department of		
Bonds , county treasurers, penalties, reduction in amount	497	228
Building and Loan Associations , see Banking, Department of		
Bureau of Mines , United States Department of the Interior, agents, oaths	446	8

C

Casualty Insurance , see Insurance Department		
Civil Service , see State Civil Service Commission		
Civilian Defense , rules and regulations	486	186
Corporations , see State Department		
County Officers:		
Registers of Wills, collection of inheritance tax, bond, premiums, how payable	474	129
Treasurers, bonds, penalties, reduction in amount	497	228
Courts:		
Clerks of quarter sessions, fines and penalties, monthly report to Department of Revenue	460	71
Quarter Sessions, authority to revise or cut down penalties set out in existing bonds filed with the Auditor General by county treasurers	497	228
Credit Unions , taxation	461	74

D

Dentists , sale of sulfanilamide	453	40
---	-----	----

E

Elections , see State Department		
Erie Railroad Company , bonus	496	221
Escheat Reports , filing of by cooperative agricultural associations	500	235

EXECUTIVE DEPARTMENT

Bureau of Mines , United States Department of the Interior, Federal Explosives Act, licensing of agents for the bureau, officials authorized to administer oaths	446	8
Pennsylvania Turnpike Commission , right of member to hold office of secretary and treasurer	484	180

F

Opinion Page

Federal Explosives Act, see Executive Department

Fines and Penalties, Clerks of Quarter Sessions, monthly reports
to Department of Revenue, settlement of accounts 460 71

Fire Department Relief Associations, funds received from tax
on premiums of foreign fire insurance companies 450 32

Foreign Fire Insurance Companies, tax on premiums 450 32

Foreign Fraternal Benefit Societies, see Insurance Department

G

Governor, see Executive Department

Gross receipts, see Taxation

H

HEALTH, DEPARTMENT OF

Marriage licenses, disposition of duplicates, filing with
issuing officer, Uniform Vital Statistics Act 476 140

Sanitary Water Board, extent of power, partial suspension
of exemption as to mine drainage, processing coal deposits
in streams, independent coal breaker, status as mine or in-
dustrial establishment 493 209

Sanitary Water Board, pollution of streams, adoption of
policy and regulations, investigation and hearing 490 199

Schools, medical inspectors, osteopathic physicians 456 56

Sulfanilamide, derivatives, sale of 453 40

Vital Statistics, records, illegitimate births, restrictions on
disclosures, delayed records, fee for filing, certificate of
adoption 485 181

Vital Statistics, illegitimacy, disclosure of information (Re-
view of Official Opinions No. 485, p. 181) 491 202

Vital Statistics, marriage licenses, issuing officer, procedure . 503 241

Hearings, procedure to be followed Memorandum 265

HOUSE OF REPRESENTATIVES

Members, active service in armed forces, commissioned offi-
cers, non-commissioned officers, approval for payment of
salaries 494 242

Housing Authorities, deposits, right of banks to pledge as secur-
ity 509 261

I

Illegitimate Births, see Birth Certificates

Incompetents, transportation and commitment, cost, liability .. 469 106

Industrial Home for Women, inmates, prostitution, jurisdiction
of Parole Board 499 232

Industrial Schools, minors, parole 454 40

INSURANCE DEPARTMENT**Opinion Page**

Casualty insurance, workmen's compensation policies, Ohio corporations, associations, exchanges, retaliatory discrimination 470 107

Foreign Fraternal Benefit Societies, health and accident benefits, coverage of non-member children, Act of July 17, 1935, P. L. 1092 515 286

INTERNAL AFFAIRS, DEPARTMENT OF

Weights and Measures, sale of vegetables in bunch form, meat and meat products by the piece 452 37

J

Jeans Hospital, appropriation 455 48

Judicial sales of real estate, taxes 477 145

L**LABOR AND INDUSTRY, DEPARTMENT OF**

Minors, hours of employment, Child Labor Law, employees of interstate railroads 480 161

Vocational Rehabilitation, Federal Vocational Rehabilitation Act, availability of State appropriation 505 248

Legislature, see House of Representatives

Licenses:

Marriage, disposition of duplicates 476 140

Marriage, issuing officer 503 241

Osteopaths, revocation of licenses 466 96

Physicians and surgeons, temporary licensure due to emergency conditions 467 99

Real estate brokers 468 100

Real estate brokers, exemption of attorney, Act of May 1, 1929, applicability to employees 489 196

Revocations, hearings, procedure Memorandum 286

Liquor, sale of, military and naval reservations 478 147

M

Marriage Licenses, see Licenses

Meats and Meat Products, sale by the piece 452 37

Mental Hospitals, see Welfare, Department of

Mentally Defective Persons, cost of support, Polk State School. 447 11

MILITARY AFFAIRS, DEPARTMENT OF

Pennsylvania State Guard, new uniforms for officers, Act of May 3, 1943, P. L. 151, construed 502 239

Military and Naval Reservations, sale of liquor 478 147

Minors, hours of employment, Child Labor Law, interstate railroads 480 161

	Opinion	Page
Minors, parole, industrial schools	454	40
Mortgages, see Banking Department		
Municipal Employes' Retirement Act construed	498	215

N

Nurses, State hospitals, training classes, American Red Cross ..	457	59
--	-----	----

O

Osteopathic Physicians, right to act as medical inspectors in school districts	456	56
Osteopathic Physicians, revocation of license, unethical conduct not connected with advertising	466	96

P

Parole, see Pennsylvania Board of Parole		
Penal and Mental Institutions, see Welfare, Department of		
Pawnbrokers, see Banking Department		

PENNSYLVANIA BOARD OF PAROLE

Parole, Industrial Home for Women at Muncy, inmates, prostitutes, jurisdiction of board	499	232
Parole, jurisdiction of board, reparole, indeterminate, flat and general sentences, second conviction for crime committed during parole, cost of returning parole violators	449	21
Parole, minors sentenced to industrial schools	454	40
Parole, prisoner serving multiple sentences imposed at different terms of court, aggregate maximum sentence exceeding two years, jurisdiction of board	458	62
Pennsylvania Industrial School at White Hill, see Welfare, Department of		

PENNSYLVANIA LIQUOR CONTROL BOARD

Intoxicating Liquors, beverages, military and naval reservations, sale and delivery, credit, cash payments, resales .	478	147
---	-----	-----

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Railroads, crossings, Federal and State regulations, exercise of Federal power, retention of State jurisdiction	482	171
Pennsylvania State Guard, see Military Affairs		
Pennsylvania Turnpike Commission, see Executive Department		
Pharmacists, sale of sulfanilamide	453	40
Physicians, sale of sulfanilamide, prescriptions	453	40
Physicians and Surgeons, temporary licensure, emergency conditions	467	99

	Opinion	Page
Polk State School , see Welfare, Department of		
Prisoners , consecutive sentences, commutation	471	111
Prisoners , multiple sentences imposed at different times, aggregate maximum exceeding two years, parole, jurisdiction of Board of Parole	458	62
Productive and Distributive Associations , taxation	461	74
PUBLIC ASSISTANCE, DEPARTMENT OF		
Real estate purchased at judicial sale, taxes	477	145
PUBLIC INSTRUCTION, DEPARTMENT OF		
Board of Vocational Education , school districts, expenditures, reimbursement, discretionary powers	475	135
Osteopaths , revocation of license, unethical conduct not connected with advertising	466	96
Physicians and Surgeons , temporary licensure, emergency conditions	467	99
Public School Employees' Retirement Fund , superannuation, cash refund, deductions	445	3
Public School Employees' Retirement Fund , refund of balance of accumulated deductions in annuity savings account	462	82
Public School Employees' Retirement Fund , veteran of World War I, failure to serve in Expeditionary Force, computation of length of service	464	87
Real Estate Brokers , application for license under "Grandfather" clause, refusal, right to reconsider application ...	468	100
Real Estate Brokers , licensure, exemption of attorney, applicability to employe, delegation of personal privilege ...	489	196
Scholarships , Wartime Emergency Educational Plan	459	65
Scholarships (supplementing Official Opinion No. 459) ...	463	86
School Districts:		
Employes on military leave, payments to retirement fund, constitutionality of Act of August 1, 1941	465	90
Employes on military leave, payments to dependents, employment of substitutes	472	113
Employes, completion of military or naval duties, physical and mental examination, requests within 40 days after discharge, Public School Employees' Retirement System, disability rights, 50-day period, Act of August 1, 1941, P. L. 708 construed	506	253
Financial difficulties, teachers' salaries, maximum-minimum, temporary increase, Act of May 28, 1943, P. L. 786	513	276
Married teachers, temporary increase in salaries, power to cancel, legislative authority	492	204

	Opinion	Page
Reimbursement from Commonwealth for teachers' pay, substitute teachers, teachers on sabbatical or military leave, holder of wartime emergency certificate, minimum salary requirement	479	154
Salary increases, substitute teachers, computation of increases	473	119
School Employees' Retirement Fund, allowance to employes on military leave, cost of living increase	501	237
Teachers of vocational education, salaries, reimbursement to school districts	495	215
Vocational Rehabilitation, Federal Vocational Rehabilitation Act Amendments, availability of State appropriation	505	248
Public School Employees' Retirement Board , see Public Instruction, Department of		

R

Railroads , crossings, Federal and State regulations	482	171
Railroads , tax on gross receipts	516	290
Real Estate , judicial sales, taxes	477	145
Real Estate Brokers , see Licenses		
Register of Wills , see County Officers		

REVENUE, DEPARTMENT OF

Board of Finance and Revenue , qualifications of those who may appear and practice before the board, rules and regulations	514	281
Fines and penalties , clerks of quarter sessions, monthly reports, settlement of accounts, transmission of same to State Treasurer	460	71
Taxation:		
Cooperative associations	461	74
Cooperative Agricultural Associations, escheat reports, filing of	500	235
Erie Railroad Company, annual bonus	496	221
Gross receipts, railroad companies, interstate and intrastate transportation	516	290
Inheritance taxes, collection, surety bonds, premiums, how payable, employes of Department of Revenue, salaries, how payable	474	129
Inheritance taxes, collection, registers of wills, expenses, appraisers, clerks and employes, payment	483	177
Rules and regulations , Civil Defense	486	186
Board of Finance and Revenue	514	281

S

	Opinion	Page
Sanitary Water Board , see Health, Department of		
Scholarships , Wartime Emergency Educational Plan	459	65
Scholarships (Supplementing Official Opinion No. 459, p. 65) ...	463	86
School Districts , see Public Instruction, Department of		
Schools , medical inspectors, osteopathic physicians	456	56
Secretary of the Commonwealth , see State Department		
Servicemen's Allowance Act of 1942 , see Welfare, Department of		

STATE CIVIL SERVICE COMMISSION

Civil service , examination, personnel records, merit system, expenses	444	1
--	-----	---

STATE COUNCIL OF DEFENSE

Civil Defense , rules and regulations, refusal of obedience, local council of defense, mandamus, dismissal of local council, right of private citizen to sue, violation of Air Raid Protection Regulations No. 1, applicability of Federal law	486	186
---	-----	-----

STATE, DEPARTMENT OF

Corporations , medical and hospital services, restriction to domestic corporations, interpretation of act, foreign non- profit corporation, right to certificate	504	244
Elections , spring primary, nomination petitions, congressional districts	488	193
Municipal Employees' Retirement Law construed	498	231
Parole , Act of 1909 repealed by Act of August 6, 1941, P. L. 861	510	262

STATE TREASURER

Taxation , Federal income tax, attachment for delinquency, Commonwealth as garnishee	481	169
Streams , pollution, regulations of Sanitary Water Board	490	199
Sulfanilamide , derivatives, sale, physicians, dentists, veterinarians, pharmacists, Act of May 12, 1933, P. L. 133 construed	453	40

T

Taxation:

Annual bonus , Erie Railroad Company	496	221
Cooperative associations	461	74
Federal income tax , attachment for delinquency	481	169
Foreign fire insurance companies , premiums	450	32
Gross receipts , railroad companies	516	290
Inheritance taxes , collection by registers of wills, bonds, premiums, how payable	474	129
Inheritance taxes , collection, registers of wills, expenses	483	177

Transfer inheritance tax, see Taxation

U

Opinion Page

United States Department of the Interior, Bureau of Mines, see
Executive Department

V

Vegetables , sale in bunch form	452	37
Veterinarians , sale of sulfanilamide	453	40
Vocational Education , see School Districts		

W

Weights and Measures, see Internal Affairs, Department of

WELFARE, DEPARTMENT OF

Incompetents , cost of transportation and commitment, liability	469	106
Mental hospitals , accounts of patients whose husbands are in military service, authority vested in the super- intendent, Servicemen's Dependents Allowance Act of 1942	518	295
Nurses , training, civilian defense, religious order, American Red Cross, sectarian institutions	457	59
Penal and Mental Institutions , costs incident to the de- termination of mental status of certain persons committed	512	270
Pennsylvania Industrial School at White Hill , prisoners, sentences, commutation, payment of fines and costs, re- lease, power of Board of Parole	519	299
Polk State School , mentally defective persons, cost of sup- port, appropriation, liability of Commonwealth	447	11
Sectarian Hospitals , State Funds, appropriations	455	48
Servicemen's Dependents Allowance Act of 1942 , mental hospitals, to whom allowances are payable, authority of hospitals to receive payments, disposition of funds, power of attorney	511	263

(This opinion revoked—see Opinion No. 518)