

Commonwealth of Pennsylvania

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**OFFICIAL OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**  
**OF**  
**Pennsylvania**

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**FOR THE YEARS**  
**1945 and 1946**

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**JAMES H. DUFF, Attorney General**

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Compiled by  
**FREDERIC E. RAY**  
Department of Justice  
Harrisburg

## **MEMORANDUM AND DIRECTIVE**

### **(Supplement to Memorandum issued October 24, 1944)**

**From:** The ATTORNEY GENERAL.  
**To:** All administrative departments, boards and commissions.  
**Subject:** Administrative procedure.

This memorandum and directive is issued to all administrative departments, boards and commissions, as a supplement to "Memorandum to all administrative departments, boards, commissions, etc.," issued by me October 24, 1944, on the subject of general procedure to be followed in hearings, where such procedure has not been specifically set forth by statute and where an appeal from the decision of any department, board or commission, lies only by way of mandamus or injunction.

It has been called to my attention that in some instances certain administrative departments, boards and commissions have ignored counsel appearing or practicing before them. For example, some of these agencies received inquiries from lawyers in behalf of the latter's clients, but sent the information requested directly to such clients instead of to their lawyers.

Sometimes, when applications or registrations are transmitted in behalf of clients by counsel to such agencies, the agencies seek additional information from, or send certificates of registration to, the client, rather than to his counsel.

Again, it has happened that after an individual, partnership or corporation has been represented by counsel at a hearing before such agencies, the decisions or determinations of the agencies have been sent directly to the party represented instead of to the party's lawyer.

Whenever a member of the bar represents himself as authorized to speak for, or as speaking in behalf of, a client, or enters his appearance in litigation before any court, he is presumed to be acting properly, to speak for and to represent such client. As an officer of the court, a lawyer is answerable to the court for misrepresentation in such instances; and those represented to be clients, who in fact are not, are likewise protected by the court. For similar misconduct on the part of a lawyer before an administrative agency, he would also be accountable to the courts because his professional conduct is subject to the supervision of the courts. The same code of professional ethics and the same responsibility to the courts govern a lawyer whether he practices before a court or an administrative agency.

Therefore, hereafter, whenever any member of the bar appears or practices before any administrative department, board or commission, or makes inquiries of or applications to such agencies, in behalf of a client, whether such client be an individual, partnership or corporation or other legal entity, communication from such agency to such client shall be made by the agency through the lawyer representing the client, and not from the agency to the client direct. The decision or determination of any agency in such a case shall be transmitted to the attorney representing the client involved, and not to the client direct unless also to the attorney.

If, for protection, or where reasonable doubt exists, an agency may require appearances by attorneys to be in writing; or where technical appearances are not appropriate, a written statement that a lawyer represents a client may be insisted upon.

Dated: January 25, 1945.

## OFFICIAL OPINIONS

1945 - 1946

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### OPINION No. 520

*Pennsylvania Institution for Defective Delinquents—Delinquents 15 years of age or over—Admission of those committed by Municipal Court—Acts of June 11, 1923, P. L. 998; April 9, 1929, P. L. 177; May 25, 1937, P. L. 808; June 21, 1937, P. L. 1865; June 21, 1937, P. L. 1944.*

Under section 3 of the Act of May 25, 1937, P. L. 808, the age for admission to the Pennsylvania Institution for Defective Delinquents is fixed at "over the age of 15 years." Therefore, unless the State institution at Huntingdon is now filled to capacity with defective delinquents committed thereto since immediately subsequent to May 1, 1941, or those committed under the Mental Health Act, it may not refuse admission to the four male defective delinquents committed by Judge Jones regardless of their ages, since they are each over the age of 15 years. If taking these men into the institution will be detrimental to those now in the institution, the problem is clearly legislative and not an administrative one. We are advised that the Huntingdon institution has a number of cases which should be transferred to White Hill and still lacks approximately one hundred inmates to capacity. The four persons committed to the Pennsylvania Institution for Delinquent Defectives at Huntingdon, must be accepted to that institution in accordance with the terms of their commitments.

Harrisburg, Pa., January 25, 1945.

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

Madam: You have submitted to this department the opinion of the Honorable John Robert Jones, Judge of the Municipal Court of Philadelphia, dated January 19, 1945, in the matter of Commonwealth ex rel. George Lomax et al. v. Superintendent of Philadelphia County Prison, July Term, 1944, Nos. 24 and 43 and June Term, 1944, Nos. 726 and 684. And you have inquired as to your duties with regard to the State Institution at Huntingdon, Pennsylvania, which is under the management of a board of trustees but subject to the supervision of the Department of Welfare.

It appears that four men having been convicted or having pleaded guilty, were committed by Judge Jones to the Pennsylvania Institution for Defective Delinquents as male defective delinquents, but when these defendants were delivered by the Sheriff of Philadelphia County to the State institution at Huntingdon, Pennsylvania, they were refused admittance and returned to the Philadelphia County Prison. They then petitioned the court for relief on the ground that the Pennsylvania Institution for Defective Delinquents at Huntingdon, Pennsylvania, did not exist.

After taking testimony, the court dismissed the petitions, remanded the petitioners to custody and directed their delivery in accordance with the orders of commitment, at the same time enjoining the district attorney to present the facts as disclosed in the hearings which had been conducted, to the Attorney General and to petition him to enforce the orders of commitment.

The principal reason for refusing to accept these prisoners at the State institution at Huntingdon, was given as the inadequacy of facilities for the care of defective delinquents over the age of 25 years. It was pointed out that under subsection (b) of section 2311 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended by the Act of June 21, 1937, P. L. 1865, 71 P. S. § 601 (b), the Department of Welfare had the power and duty "To formulate and put into operation plans for the classification of State penal or correctional institutions, and also to formulate and put into operation a program for the classification of inmates so that the inmates may be grouped in those institutions which have the proper facilities."

It was then argued, not without persuasion from a penological point of view, that it would be impossible to segregate in the institution, depraved and perverted old men from juvenile delinquents to such an extent as to avoid the latter being subjected to a type of corruption to which their youth and mental conditions might make them easily susceptible.

The information which we have before us indicates that the average age of inmates at the Huntingdon institution is at present about 17 years; that of the four male defective delinquents involved in the proceedings before Judge Jones, one was 37 and another 68 years old; that the institution originally constructed as a penitentiary and later converted into an industrial school for boys, has been maintained and equipped since 1881 as a place for incarceration for youths between the ages of 15 and 25 years.

We can appreciate the hesitancy of those charged with the care of defective delinquent children and young men to permit them to be subjected to the influences of human derelicts, many years their senior; yet if under the law the State institution at Huntingdon is bound to receive defective male delinquents, so long as they are 15 years of age and over, then if facilities will not permit segregation, their admission is to be determined not from the standpoint of penological expediency but from the positive direction of the Acts of Assembly which dictate the procedure to be followed. And if the laws of the Commonwealth treating specifically with the institution concerned are clear in their terms they may not be disregarded in favor of the

general authority with which the Department of Welfare claims to be cloaked by the section of The Administrative Code which has heretofore been referred to. In this connection then, we must consider the provisions of section 5 of the Act of June 21, 1937, P. L. 1944, 61 P. S. § 545-5 and section 1 of the Act of May 25, 1937, P. L. 808, 61 P. S. § 541-1. The former has to do with the Pennsylvania Industrial School at White Hill and the latter with the State institution at Huntingdon.

Section 5 of the White Hill act, the Act of June 21, 1937, reads as follows:

Upon the completion of the new Pennsylvania Industrial School, and after the execution of a lease of the same by the Commonwealth of Pennsylvania from The General State Authority, the Department of Welfare shall transfer, under the provisions of The Administrative Code of one thousand nine hundred twenty-nine, from the Pennsylvania Industrial School at Huntingdon, all persons who are then detained therein, unless directed otherwise as provided by the Mental Health Act of July eleventh, one thousand nine hundred thirty-three (Pamphlet Laws, nine hundred ninety-eight), and all books, papers, records, and documents in the possession of the said school and the board of trustees thereof. Thereafter, all commitments which were heretofore made by the courts of this Commonwealth to the Pennsylvania Industrial School at Huntingdon shall be made to the new Pennsylvania Industrial School erected under the provisions of this act. The Department of Welfare shall advise all of the courts of this Commonwealth of the date from and after which commitments shall be made to the new school.

Section 1 of the Huntingdon act, the Act of May 25, 1937, reads as follows:

Upon the completion of the new Pennsylvania Industrial School, in accordance with the provisions of the act, approved the twenty-first day of June, one thousand nine hundred and thirty-seven, Act No. 376 entitled "An act providing for the erection, construction, and equipment of a new Pennsylvania Industrial School, to take the place of the present Pennsylvania Industrial School at Huntingdon; designating the manner of acquiring or setting aside of land for the erection and construction of the new school by The General State Authority; authorizing the Commonwealth to lease the new school and its grounds from The General State Authority upon its completion, and the Department of Welfare to manage and operate the same; providing that the cost of maintaining inmates therein be borne by the Commonwealth and the counties to the extent and in the manner provided by law in the case of inmates maintained in the Pennsylvania Industrial School at Huntingdon; and conferring powers, and imposing duties upon certain State departments, boards, commissions, and officers"; and the

transfer thereto of all persons detained in the Pennsylvania Industrial School at Huntingdon, unless otherwise committed, the Department of Welfare, with the approval of the Governor, shall, either through the Department of Property and Supplies or The General State Authority, have prepared and properly equipped (including any necessary construction) the said institution at Huntingdon, and the farm connected therewith, as a place for the reception, care, maintenance, detention, employment, and training of defective delinquents who have been convicted of crime, and who may hereafter be committed to said institution by the courts of this Commonwealth in accordance with this act.

In the event it is determined to have the said institution prepared and equipped (including any necessary construction) by The General State Authority, the Department of Property and Supplies, with the approval of the Governor, is hereby authorized to either lease for a period not in excess of ninety-nine (99) years, or grant and convey to The General State Authority (whichever may be required by said Authority) such land and buildings comprising said institution as may be necessary to enable The General State Authority to prepare and equip the institution, as aforesaid. The Department of Property and Supplies, with the approval of the Governor, is hereby authorized to enter into a lease for not more than fifty (50) years with The General State Authority to acquire the use of the institution and its grounds after it is prepared and equipped by The General State Authority, as aforesaid, for use as a State institution for defective delinquents.

Said institution shall be known as the Pennsylvania Institution for Defective Delinquents.

Under the White Hill act, it is clear that upon completion of this institution, all persons then confined at Huntingdon unless held under the Mental Health Act, the Act of June 11, 1923, P. L. 998, are to be transferred from that institution to White Hill and that thereafter all commitments [not defective delinquents] are to be made by the courts to the new school.

In regard to this it is to be noted that in accordance with the last sentence of the quoted section of the White Hill act, the Department of Welfare by letter, dated May 17, 1941, and signed by the Secretary, did advise the courts of the Commonwealth that commitments should not be made to the new school until May 1, [1941]. This must be taken to be advice of the date from and after which commitments should be made to the new school. From it we are bound to conclude that the Pennsylvania Industrial School at White Hill was completed May 1, 1941.

Under section 1 of the Huntingdon act, it is specified that upon completion of the White Hill School and the transfer of the persons

detained at Huntingdon, except those committed under the Mental Health Act that the Huntingdon institution and the land connected with it, were to be prepared and properly equipped for the reception, care, maintenance, detention, employment and training of defective delinquents convicted of crime "and who may *hereafter* be committed to said institution by the courts of this Commonwealth." [Emphasis in the foregoing quotation is ours.] The word hereafter as used above must be construed to mean, after the effective date of the Huntingdon act of 1937. Consequently, it must be presumed the legislature intended the preparation and equipment of the Huntingdon institution to be made after most of its inmates had been transferred to the White Hill institution and while the Huntingdon institution was receiving commitments from the courts in accordance with the provisions of the new law.

In these circumstances, we are obliged to conclude that the Pennsylvania Industrial School at Huntingdon immediately after May 1, 1941, and after the transfer of inmates thereof, except mental health cases, to the new Pennsylvania Industrial School at White Hill, became the Pennsylvania Institution for Defective Delinquents under the last paragraph of section 1 of the Huntingdon Act above quoted.

This conclusion is reached notwithstanding the fact that since May, 1941, appropriations have been made and trustees appointed and confirmed to the Pennsylvania Industrial School at Huntingdon and that many courts have sentenced offenders under the age of 25 years to that institution. For what has been done under a misinterpretation of law or because of ignorance of fact, does not change the law itself, or alter that which has already been accomplished. Nor are we persuaded from our position because to date all of the non-defective delinquents have not been transferred from Huntingdon to White Hill. The Huntingdon authorities have had since May 1, 1941—three and one-half years—to purge the institution of young criminals who are not defectively delinquent. And White Hill, even now has ample room for them.

Under section 3 of the Huntingdon act, 61 P. S. § 541-3, the age for admission to the Pennsylvania Institution for Defective Delinquents is fixed at "over the age of 15 years." Therefore, unless the State institution at Huntingdon is now filled to capacity with defective delinquents committed thereto since immediately subsequent to May 1, 1941, or those committed under the Mental Health Act, it may not refuse admission to the four male defective delinquents committed by Judge Jones regardless of their ages, since they are each over the age of 15 years. If taking these men into the institution will be detrimental to those now in the institution, the problem is clearly



a legislative and not an administrative one. We are advised that the Huntingdon institution has a number of cases which should be transferred to White Hill and still lacks approximately one hundred inmates to capacity.

We are of the opinion that the four persons, to wit, George Lomax, John Simmons, Patrick McDonald and Frank Brusco, committed to the Pennsylvania Institution for Defective Delinquents at Huntingdon July 28, 1944, July 21, 1944, September 29, 1944, and August 11, 1944, respectively, from the Municipal Court of Philadelphia, must be accepted by that institution in accordance with the terms of their commitments.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 521

*Insurance—Self-insurer of Workmen's Compensation—Excess coverage—Supervision by Insurance Department—Acts of June 2, 1915, and July 8, 1919—Construction by Insurance Commissioner—Subsequent reenactment—The Insurance Company Law of 1921, secs. 653 and 654.*

(Withdrawn due to opinion of the Court of Common Pleas of Dauphin County in case of Indemnity Insurance Company of North America v. Gregg L. Neal, Insurance Commissioner, 42 Commonwealth Docket, 1945, No. 1709 Equity Docket.)

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OPINION No. 522

*Corporations—Decrease of capital stock—Procedure—Necessity for filing election return—Incorporation prior to 1874—Subsequent merger with corporations organized after 1874—Act of June 13, 1883, relating to amendments to charters—Availability for purpose of decrease of capital stock.*

1. A corporation organized by special act of assembly prior to 1874, which later merged with another corporation organized under the Act of April 29, 1874, may decrease its capital stock by the procedure provided in either the Act of June 8, 1839, P. L. 351, as amended by the Act of April 22, 1905, P. L. 264, or section 23 of the Act of April 29, 1874, P. L. 73, as last amended by the Act of June 12, 1931, P. L. 561, both of which require the filing with the Secretary of the Commonwealth of a return of election of the stockholders showing the adoption of the resolution to reduce the capital stock by a majority vote. The Act of June 13, 1883, P. L. 122, as amended by the Act of March 31, 1905, P. L. 93, permitting corporations "to improve, amend or alter the arti-

cles" by filing with the Secretary of the Commonwealth a certificate acknowledged by the president and secretary, is not available for the purpose of amendments the practical effect of which will result in an increase or decrease of capital stock.

2. Whether or not the Secretary of the Commonwealth may require that all articles of amendment to a corporate charter, filed with him pursuant to the Act of June 13, 1883, P. L. 122, as amended by the Act of March 31, 1905, P. L. 93, be accompanied with written evidence of the shareholders' approval of the resolution authorizing such amendment, *not answered*.

Harrisburg, Pa., March 20, 1945.

Honorable Charles M. Morrison, Secretary of the Commonwealth,  
Harrisburg, Pennsylvania.

Sir: You state that a certain domestic corporation, which we shall call "Corporation A," originally came into existence by a special act of the legislature, the Act of February 9, 1849 (1850), P. L. 929. On May 12, 1911, another domestic corporation, which we shall designate as "Corporation B," incorporated April 21, 1911, merged and consolidated with Corporation A, forming a new or consolidated corporation, "Corporation C," which, on August 27, 1925, changed its corporate title to what we shall call "Corporation D," which in turn, on July 28, 1941, was changed to "Corporation X."

Under the 1911 merger and consolidation agreement, Corporation C's capital stock was fixed at \$1,400,000, consisting of 28,000 shares of the par value of \$50 each. Later the capital stock was increased and converted by shareholders' action into (a) 15,000 shares 7% cumulative preferred stock at \$100 par value, and (b) 150,000 shares common stock at \$10 par value, of which all of the authorized preferred stock and 120,000 shares of the common stock have been issued and are presently outstanding.

Corporation X now contemplates, by amendment to its charter, effecting a decrease of its capital stock under provisions of the Act of June 13, 1883, P. L. 122, by eliminating all of the now outstanding common stock of the company and substituting for the presently outstanding preferred stock, 30,000 shares of common stock of the par value of \$20. It is proposed to eliminate all of the outstanding common and preferred shares and issue the new common stock to the present holders of the preferred stock, without the consent of the owners of the common stock.

You ask (1) if the Secretary of the Commonwealth has authority to require the submission of written evidence of consent of the shareholders to an amendment of its charter under the provisions of the Act of June 13, 1883, P. L. 122, the practical effect of which amendment will result in a decrease of the authorized capital stock of the

corporation and (2) whether the reduction of capital stock of this corporation should be effected under the provisions of the Act of June 8, 1893, P. L. 351, as amended, 15 P. S. § 281-5; the Act of June 13, 1883, P. L. 122, as amended, 15 P. S. 401; or the Act of April 29, 1874, P. L. 73, section 23, as amended, 15 P. S. § 1.

Since the enactment of the Corporation Act of 1874, you state that it has been the practice of the Department of State to require articles of amendment to be accompanied with written evidence of the shareholders' approval of the resolution authorizing such amendment, and the department has held that both increases and decreases in the capital structures of corporations were proceedings which did not fall within the provisions of the supplemental act of 1883. We believe this practice and interpretation of the above acts have been correct.

The supplementary act to the Corporation Act of 1874, the Act of June 13, 1883, P. L. 122, as amended by the Act of March 31, 1905, P. L. 93, 15 P. S. § 403, contains general authority for any corporation of the second class authorized by the Corporation Act of 1874, which has accepted the Constitution of this Commonwealth and the provisions of the act, "to improve, amend or alter the articles and conditions of the charter or instrument upon which said corporation is formed and established." The act of 1883 then provides for the method of effecting the proposed improvement, amendment or alteration and at section 4 contains the following for construction of its provisions:

Nothing in this act contained shall be construed to repeal or authorize the repeal of any of the requirements or restrictions of the said act of April 29, 1874, and its supplements, nor to dispense with any of the provisions of the said act, nor to authorize the right of eminent domain to be given to any corporation by amendment of its charter, nor to permit any change in the objects and purposes of such corporation as shown by its original charter.

A company of the type of Corporation X may, at its election, effect a reduction of its capital share structure by complying with either the provisions in section 23 of the Corporation Act of 1874, as amended, or following the course set out in the Act of June 13, 1893, P. L. 351, as amended.

Both acts provide, inter alia, for a return to the Secretary of the Commonwealth of a copy of the return of the elections of the stockholders showing that the reduction of the capital stock was made at the will of the holders of the majority of the outstanding stock.

It is our opinion that an amendment may not be made under the supplementary Act of June 13, 1883, P. L. 122, to decrease the capital stock of a corporation, such as Corporation X, but either the Act

of June 8, 1893, P. L. 351, or the Corporation Act of 1874, the Act of April 29, 1874, P. L. 73, as amended, may be used to effect this purpose, both of which, among other requirements, direct that the Secretary of the Commonwealth be furnished with written evidence of the shareholders' consent to the reduction of the corporation's capital structure in the manner set out in the respective statutes.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RAYMOND C. MILLER,  
*Deputy Attorney General.*

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OPINION No. 523

*Insurance—Employer's indemnity policy—Liability arising from employment contract—Insurance Company Law of 1921, secs. 107 and 202.*

1. Under section 202(c)(4) of The Insurance Company Law of May 17, 1921, P. L. 682, providing that stock casualty insurance companies may be chartered to insure persons against liability "resulting from injuries suffered by employes or other persons for which the persons insured is liable, there is no distinction between a liability imposed upon an employer by statute and one which he assumes to an employe by contract; in either case he is liable to his employe and thus his coverage by an indemnity policy is authorized.

2. Section 107 of The Insurance Company Law of 1921 prohibiting the doing of an insurance business by private individuals, associations or partnerships was designed to protect the general public, and it does not bar the issuance of indemnity policies to employers who have assumed liability for accidental injury or death under the terms of employment contracts, since the employer does not hold himself out to the public as being in the insurance business, no cash premiums are involved, and the indemnifying features are subordinated to the main contract of employment.

3. Casualty insurance companies authorized to do business in Pennsylvania, their charters permitting, may issue policies of indemnity to employers for fatal or nonfatal accident or injury to employes where employers have assumed such liability under the terms of employment contracts.

Harrisburg, Pa., April 19, 1945.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have inquired if a company authorized to write casualty insurance in Pennsylvania may issue a policy insuring an employer against liability to his employes for fatal or non-fatal accident or injury other than those which fall within the provisions of the Workmen's Compensation Laws.

Foreign Stock Casualty Companies under section 601, Foreign Mutual Casualty Companies under section 801 and Domestic Mutual Casualty Companies under section 202 (d) of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. §§ 721, 911 and 382, if their charters permit, may write the same type policies which Domestic Stock Casualty Companies may write.

Under section 202 (c) (4) of The Insurance Company Law of 1921, 40 P. S. § 382, stock casualty insurance companies may be chartered "to insure any one against loss or damage resulting from accident to or injury, fatal or non-fatal, suffered by an employee or other person, for which the person insured is liable; \* \* \*"

This is the provision of the Insurance Code under which casualty companies are authorized to write workmen's compensation insurance. It was taken bodily from section 1 (Four) of the Act of June 1, 1911, P. L. 567, which was, therefore, in the law several years before our first Workmen's Compensation Act of 1915, whereby a liability was imposed by law upon employers to employees.

We cannot see that the legislature has made any distinction in section 202 (c) (4) between a liability imposed upon an employer by statute and one which he assumes to an employe by contract. In either case, he is "liable" to his employe and thus his coverage by an indemnity policy is authorized under section 202 (c) (4) of The Insurance Company Law of 1921.

This conclusion is in keeping with the general purposes of the legislature with regard to the division of the types of insurance which various companies are authorized to write as is evidenced by subsection (c) (2) of section 202 of The Insurance Company Law of 1921, pertaining to casualty companies, which reads as follows:

To insure against injury, disablement, or death resulting from traveling or general accident, and against disablement resulting from sickness, and every insurance appertaining thereto, including a funeral benefit to an amount not exceeding one hundred dollars.

We are not unmindful of the interpretation placed by the Supreme Court upon section 107 of The Insurance Company Law of 1921 in *Commonwealth v. Fidelity Land Value Assurance Company*, 312 Pa. 425, 432 (1933), where it was held that only those meeting the qualifications imposed by the laws of the Commonwealth upon insurance companies may engage in the insurance business. The relevant portion of section 107 above referred to is here quoted:

Except as herein provided, the doing of any insurance business in this Commonwealth, as prescribed in this act,

for insurance companies, by any private individual, association or partnership, is prohibited \* \* \*.

The distinction between that case and this one is: (1) that the employer here does not hold himself out to the public as being in the insurance business, whereas, section 107 above quoted was designed to protect the general public; (2) the employer in this case is not carrying on an insurance business because the indemnity feature attached to an employment contract makes it, more or less, benevolent in character; (3) no cash premiums are involved; and (4) the indemnifying features are subordinate to the main contract of employment. Employment contracts like service contracts are distinguishable from insurance contracts: *Commonwealth v. Provident Bicycle Association*, 178 Pa. 636 (1897).

Apparently, the intention of the legislature was to permit casualty companies to indemnify employers against a type of risk which the employers assumed or had placed upon them and which could have been written direct to the employe by a casualty company. Since casualty companies may write accident and injury policies, it seems to be clear that they may agree to indemnify employers against loss by reason of contracts pertaining to accident or injury of employes.

We are of the opinion that casualty insurance companies authorized to do business in Pennsylvania, their charters permitting, may issue policies of indemnity to employers for fatal or non-fatal accident or injury to employes where employers have assumed such liability under the terms of employment contracts.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 524

*Architects—Right to practice—Act of July 12, 1919, as amended by Act of June 27, 1939—"Grandfather clause"—Failure to file affidavit within five years—Distinction between titles "architect" and "registered architect."*

1. Under the provisions of the Act of July 12, 1919, P. L. 933, as amended by the Act of June 27, 1939, P. L. 1188, a person who engaged in the practice of architecture under the title of "architect" prior to July 12, 1919, may continue to do so without a certificate or registration, provided an affidavit setting forth

these facts is filed with the State Board of Examiners of Architects at any time before so doing.

2. Such person may be styled "architect" but cannot be styled or known as "registered architect" unless his aforesaid affidavit was filed prior to January 1, 1940, and application for qualification and registration as a registered architect was made prior to January 1, 1942.

3. The requirement of the Act of 1919, *supra*, that in order to continue to practice as "architect" the aforesaid affidavit must be filed within five years of the date of approval of that statute, was repealed by the amending Act of 1939, *supra*.

4. In re Practice of Architecture (No. 2), 38 D. & C. 60, modified.

Harrisburg, Pa., July 18, 1945.

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

Sir: This department is in receipt of your inquiry asking whether the State Board of Examiners of Architects may authorize the use of the title "Architect" by an individual who filed an affidavit under date of February 14, 1940, setting forth that he had been engaged in the practice of architecture, under the title "Architect," for more than one year prior to July 12, 1919. You state that the records in your department do not indicate that the applicant filed an affidavit during the five years subsequent to the Act of July 12, 1919, P. L. 933, nor was any such affidavit filed prior to January 1, 1940, in accordance with the Act of July 27, 1939, P. L. 1188, which amended the Act of July 12, 1919, P. L. 933.

The practice of architecture in the Commonwealth of Pennsylvania is regulated by the Act of July 12, 1919, P. L. 933, as amended, 63 P. S. § 21, et seq.

Section 6 of the act of 1919, *supra*, 63 P. S. § 21, reads as follows:

\* \* \* Any person \* \* \* engaged in the practice of architecture under the title of "architect" prior to the approval of this Act may continue so to do without a certificate or registration, *provided that an affidavit setting forth these facts be filed with the board of examiners*; but such person shall not be styled or known as a registered architect unless the board shall have issued to him or her a certificate of qualification and registration as herein provided. (Italics ours.)

Paragraph (e) of section 7 of the act of 1919, as amended, *supra*, 63 P. S. § 22, reads:

The board shall, upon application made at any time prior to January 1, 1942, issue a certificate of qualification and

registration to all persons entitled to engage in the practice of architecture by reason of filing, before January first, one thousand nine hundred and forty, with the board, the affidavit provided for in Section six hereof.

You call attention to the fact that the applicant did not file the affidavit within the five years subsequent to the passage of the act of 1919, *supra*, nor was it filed prior to January 1, 1940. You also call attention to Formal Opinion No. 32 dated March 5, 1940 (1939-1940 Op. Atty. Gen. 228).

Your reference to the failure of the applicant to file an affidavit within the five years subsequent to the passage of the act of 1919, *supra*, arises from the fact that the act of 1919 provided in section 6 thereof that the affidavit therein provided be filed *within five years from the date of approval of this act*. This italicized portion of the original act of 1919 was eliminated by the amendments of 1939, and there is, under present law, no period specified within which the affidavit must be filed.

In the case of *McClymont v. Gitt*, 90 Pa. Super. Ct. 395 (1927), Judge Trexler said, on page 399:

\* \* \* Any person engaged in the practice of architecture under the title of architect may continue to do so under said title without registration provided before the end of 5 years from the date of the approval of the act, he files "an affidavit setting forth the facts." It will be seen that such person is not required to register and get a certificate unless he wishes to assume the title of "registered architect." The use of the term "architect" is allowed him if he files the affidavit within five years \* \* \*.

This case was decided prior to the amendments of 1939, which amendments eliminated the provision providing for filing the affidavit within five years from the date of the approval of the act of 1919, *supra*, said act having been approved July 12, 1919.

Formal Opinion No. 328, *supra*, held that:

1. Any person who shall have been engaged in the practice of architecture under the title of "architect" prior to July 12, 1919, may continue so to do without a certificate or registration providing an affidavit setting forth these facts was filed with the State Board of Examiners of Architects prior to January 1, 1940 \* \* \* but such person may not be styled or known as a registered architect unless application for qualification and registration as such be made with the board prior to January 1, 1942 \* \* \*.

This opinion was based upon the fact that the apparent mandatory effect of section 7(e) was modified by the provisions of section 6.



We are constrained to modify Formal Opinion No. 328 for the following reasons:

1. Section 6 authorizes a person engaged in the practice of architecture under the title "architect" prior to the approval of the act of 1919, *supra*, to continue to do so without a certificate or registration, provided that an affidavit setting forth these facts is filed with the Board of Examiners. No other requirements are specified, but such a person is prohibited from using the title "registered architect."

2. Section 7(e) stands for the proposition that a person who filed an affidavit as provided in section 6, before January 1, 1940, and made an application prior to January 1, 1942, for a certificate of qualification and registration shall be entitled to such certificate of qualification and registration.

Under Formal Opinion No. 328, it is apparent that a person filing an affidavit, but failing to apply for a certificate of qualification and registration would be denied the right to practice his profession, and thus the express language of section 6 would be rendered ineffective.

However, if we take the position that section 6 refers to the person, who having filed an affidavit, is thereby authorized and desires to continue practice without a certificate or registration, while 7(e) refers to the person who once so practiced, but before January 1, 1942, applied for a certificate of qualification and registration, all parts of the act become effective.

In other words, section 6 authorizes the practice of architecture as an "architect," while section 7(e) authorizes the practice of architecture as a "registered architect."

That the act of 1919, *supra*, as amended, contemplated this result, is borne out by section 13 of the act of 1919, as last amended by the act of 1939, *supra*, 63 P. S. § 28, which reads in part as follows:

In order to safeguard life, health and property, *no person shall practice architecture in this Commonwealth* or engage in preparing plans, specifications or preliminary data for the erection or alteration of any building located within the boundaries of this Commonwealth, except as hereinafter set forth, or use the title "architect," or display or use any words, letters, figures, title, sign, card, advertisement, or other device to indicate that such person practices or offers to practice architecture, or is an architect or is qualified to perform the work of an architect, *unless such person shall have secured from the board a certificate of qualification and registration or an affidavit card in the manner herein pro-*

vided, and shall thereafter comply with the provisions of the laws of the Commonwealth of Pennsylvania governing the registration and licensing of architects. (*Italics ours.*)

The italicized portion of the above clearly indicates two methods of lawful practice as an architect, to wit, qualification and registration, or an affidavit card.

The first conclusion of Formal Opinion No. 328 is therefore modified to read as follows:

1. Any person who shall have been engaged in the practice of architecture under the title of "architect" prior to July 12, 1919, may continue so to do without a certificate or registration, providing an affidavit setting forth these facts was filed with the State Board of Examiners of Architects \* \* \*, but such person may not be styled or known as a registered architect unless application for qualification and registration as such be made with the board prior to January 1, 1942, and *such person has filed an affidavit setting forth the necessary facts prior to January 1, 1940.* (*Italics ours.*)

We are, therefore, of the opinion and you are accordingly advised that, an applicant who files an affidavit pursuant to the provisions of section 6 of the Act of July 12, 1919, P. L. 933, as amended, 63 P. S. § 21, et seq., to the effect that he was engaged in the practice of architecture, under the title of "architect" prior to July 12, 1919, is entitled to an "affidavit card," and may continue to practice architecture under the title of "architect." Such person, however, shall not be styled or known as a "*registered architect.*"

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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OPINION No. 525

*Corporations—Stock insurance companies—Right to issue preferred stock—Limitations—Par value—Voting rights—Callability and redeemability—The Insurance Company Law of 1921, sections 328 to 331, inclusive.*

A domestic stock insurance company, if its charter permits, has the power to issue preferred stock of the par value of \$5 or more a share, providing the holders thereof receive the right to cast one vote per share in the choice of directors and trustees and in all meetings of the company, and providing that

such preferred stock shall be callable or redeemable only in accordance with the provisions of sections 328 to 331, inclusive, of The Insurance Company Law of May 17, 1921, P. L. 682, 40 P. S. § 361 et seq.

Harrisburg, Pa., August 14, 1945.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You inquire whether a domestic insurance company may issue preferred stock, and if so what are the voting and other rights of the holders of such stock.

In the absence of legislation forbidding it, a corporation has the inherent right to issue preferred as well as common stock: 11 Fletcher Cyclopedia Private Corporations, Section 5284; 18 Corpus Juris Secundum, Section 222 (c); *Hoffman v. The Pennsylvania Warehousing & Safe Deposit Co., et al.*, 18 Phila. 331; 43 Legal Intelligencer 250; 1 C. C. 598 (1886).

The Insurance Laws of Pennsylvania under which insurance companies are formed and operate contain no restriction or limitation against the issuance of preferred stock by an insurance company. The various sections of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. § 361 et seq., throw no light on this subject since they refer merely to capital stock.

In section 205 of this act, it is provided that the capital stock of all stock insurance companies shall be divided into shares of not less than \$5.00. In section 302 it is provided that the stock of every insurance company shall be deemed personal property and that any stockholder shall be entitled to receive a certificate of the number of shares standing to his or her credit on the books of the company. Section 306 provides for transfer of stock on the books of the company and for voting in person and by proxy.

Section 309 provides that in the choice of directors or trustees, and at all meetings of the company, each share of stock in a stock company, shall be entitled to one vote. Section 310 provides for cumulative voting for directors. Sections 323 and 324 provide for increase of capital stock. Sections 328, 329, 330 and 331 provide the method for reducing capital stock. Sections 520 and 607 provide the procedure when capital is impaired.

From the foregoing it follows that an insurance company, its charter permitting, may issue preferred as well as common stock. Both common and preferred stock must be at a par value of not less than \$5.00 a share, but they need not have the same par. Each, however, must have voting rights of one vote per share. The preferred

stock may not be called or redeemed, except the capital of the company be reduced in accordance with the provisions of sections 328 and 331, inclusive, of The Insurance Company Law of 1921. The preferred stock may be preferred as to dividends or in distribution ahead of common stockholders, but since it represents the capital of the company, it cannot be preferred over creditors or to the reduction of legal reserves. The other sections of The Insurance Company Law heretofore referred to are applicable to both common and preferred stock.

The common law throws certain safeguards around the issuance of preferred stock by any corporate entity to protect the interest of preexisting common stockholders or subscribers. These, of course, must be observed where an insurance company is concerned. As an instance, without unanimous consent of common stockholders, a new preferred stock may not be issued under terms which will impair their vested rights.

We have given you in the above a general statement of our views but because preferred stock may contain as many different covenants as the ingenuity of corporation counsel may devise, we feel that in the case of the proposed issuance of preferred stock by any insurance company, the particular issue should be studied and passed upon to determine whether it meets or fails to meet the requirements of law.

We are of the opinion that a domestic stock insurance company, its charter permitting, may issue preferred stock provided it has par value of at least \$5.00 a share; provided, it allows the shareholders voting rights of one vote per share; and provided, that the stock is not callable or redeemable, except in compliance with sections 328 to 331, inclusive, of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. § 361 et seq.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

## OPINION No. 526

*Physicians—Osteopaths—Mental Health Act of 1923, sec. 302.*

Under section 302 of The Mental Health Act of July 11, 1923, P. L. 998, as amended, providing for the commitment of persons who are mentally ill to hospitals for mental diseases on the certificate of two qualified physicians, a duly-licensed osteopathic physician of the Commonwealth of Pennsylvania is a qualified physician within the meaning of the act.

Harrisburg, Pa., August 28, 1945.

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

Madam: You have requested us to advise you concerning certain aspects of section 302 of The Mental Health Act of one thousand nine hundred twenty-three, the Act of July 11, P. L. 998, as last amended October 11, 1938, Special Session, P. L. 63, 50 P. S. § 42, particularly in view of Formal Opinion No. 456, dated May 27, 1943, and addressed to the Secretary of Health. 1943-1944 Op. Atty. Gen. 56.

In Formal Opinion No. 456, *supra*, we held that an osteopathic physician that is licensed as such by the Commonwealth is "a physician qualified to practice medicine" within the meaning of section 1501 of the School Code, the Act of May 18, 1911, P. L. 309, as amended, 24 P. S. § 1501, and section 1503 of said code, as amended, 24 P. S. § 1503. These two sections of the School Code relate to school medical inspectors, and in referring to the qualifications of such inspectors recite respectively that, "All such medical inspectors shall be physicians legally qualified to practice medicine in this Commonwealth"; and "All such medical inspectors shall be legally qualified physicians."

Section 302 of The Mental Health Act, *supra*, relates to the commitment of persons who are mentally ill to hospitals for mental diseases. Amongst other things, this section provides that such persons may be committed to such hospitals on the "certificate of two qualified physicians."

The question you desire us to decide for you is whether an osteopathic physician is a qualified physician within the meaning of said section 302 of The Mental Health Act.

It is not our task to examine the relative qualifications of doctors of medicine and doctors of osteopathy; the conflict, if any, between these two schools of medicine; or to express our opinion as to whether we deem practitioners of either or both of these schools, or of one only, professionally equipped to perform the duties with relation to

the certification required by the section of The Mental Health Act under discussion. All that we are required to do, and all that we shall do, is to interpret the meaning of the language of the statute, with due respect to the ordinary rules of statutory construction and the decisions of the courts relating thereto.

Section 101 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, as last amended May 21, 1943, P. L. 301, 46 P. S. § 601, in paragraph (87), defines the word "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 of the same act, in paragraph (80), defines the word "osteopath" as:

\* \* \* an individual licensed under the laws of this Commonwealth to practice osteopathy.

And the same section of the same act, in paragraph (81), defines the words "osteopathic surgeon" as:

\* \* \* an individual licensed under the laws of this Commonwealth to practice osteopathy and osteopathic surgery.

The word "physician" is defined in Webster's New International Dictionary, Second Edition (1944), at page 1852, as "1. A person skilled in physic or the art of healing." The same authority at page 1527, defines the word "medicine" as "2. a. The science and art dealing with the prevention, cure, or alleviation of disease." The word "osteopathy" is defined by the same authority, at page 1728, as "b. A system of therapeutics." Webster defines "therapeutics" as "that part of medical science which treats of the application of remedies for diseases." (Page 2621.)

Section 1 of the Medical Practice Act, the Act of June 3, 1911, P. L. 639, as amended August 6, 1941, P. L. 903, 63 P. S. § 401, contains the following definition of "medicine and surgery" and "healing art":

(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 of any ailment of the human body.

We have it, therefore, from Webster and from various statutory declarations of the General Assembly, that medicine is the science

and art dealing with the prevention, cure or alleviation of disease; that therapeutics is that part of medical science which treats of the application of remedies for diseases; that medicine and surgery are the art and science having for their object the cure of diseases, including all practice of the healing art with or without drugs; that the healing art is the diagnosis and treatment in any manner whatsoever of disease of any ailment of the human body; and that osteopathy is a system of therapeutics. It would seem that we have gone far enough to answer your question; but we shall go further.

In *Commonwealth v. Seibert*, 262 Pa. 435 (1918), it was held that the practice of neuropathy constituted the practice of medicine under the Medical Practice Act. In *Commonwealth v. Mollier*, 122 Pa. Super. Ct. 373 (1936), it was held that the practice of chiropractic constitutes the practice of medicine within the meaning of The Mental Health Act. On page 375 of 122 Pa. Super. Ct. it was said, quoting from *Commonwealth v. Seibert*, supra:

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

Again, in *Long et al. v. Metzger et al.*, 301 Pa. 449 (1930), the Superior Court held that the practice of chiropraxis is the practice of medicine within The Mental Health Act.

The Superior Court has said:

The law is settled in Pennsylvania that the term "medicine" as used in \* \* \* [the Medical Practice Act] \* \* \* 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 the "practice of medicine" includes all practice of the healing art with or without drugs  
\* \* \* 100 Pa. Super. Ct. 150, 152 (1930).

The Superior Court has also decided that osteopaths are comprehended within the term "licensed physicians," as used in section 4 of the Act of July 11, 1917, P. L. 758, 35 P. S. § 854. The said act of 1917 is commonly referred to as the Anti-Narcotic Act. (*Commonwealth v. Cohen*, 142 Pa. Super. Ct. 199 (1940).)

We hold that an osteopath is a qualified physician within the meaning of section 302 of The Mental Health Act of one thousand nine hundred twenty-three.

It is our opinion, therefore, that a duly licensed osteopathic physician of the Commonwealth of Pennsylvania is qualified to certify to

the commitment papers required by section 302 of The Mental Health Act of 1923, as amended.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 527

*Pymatuning Lake—Operation of watercraft—Compact with State of Ohio—Licenses—Acts of May 2, 1925, P. L. 448; May 28, 1931, P. L. 202; May 31, 1933, P. L. 1122; May 7, 1935, P. L. 147; May 28, 1937, P. L. 1019; June 5, 1937, P. L. 1664; June 21, 1937, P. L. 1984; April 20, 1945, P. L. 282.*

Rowboats, sailboats and canoes, owned by Pennsylvania residents, may be operated on the lake only if they are licensed by the Water and Power Resources Board. Gas and electric motorboats and boats propelled by outboard motors authorized to be operated by Pennsylvania residents on Pymatuning Lake must first be licensed by the Department of Revenue under the Act of May 28, 1931, P. L. 202. It follows from the very nature of the compact itself that licenses issued under the regulation of the State of Ohio, as long as they meet the conditions imposed by the compact, must be given full faith and credit by Pennsylvania.

Harrisburg, Pa., September 11, 1945.

James A. Kell, Chairman, Water and Power Resources Board, Department of Forests and Waters, Harrisburg, Pennsylvania.

Sir: You inquire as to the duties of the Water and Power Resources Board with regard to licensing of rowboats, sailboats, and canoes, which may be operated by Pennsylvanians on Pymatuning Lake under the compact with the State of Ohio, ratified by the Act of June 5, 1937, P. L. 1664, and with regard to motorboats and boats equipped with outboard motors recently authorized by a modification of that agreement, ratified by the Act of April 20, 1945, P. L. 282, 71 P. S. § 1840 et seq.

The answer to your query involves the construction of the Act of May 28, 1931, P. L. 202, as amended by the Acts of May 31, 1933, P. L. 1122; May 7, 1935, P. L. 147 and June 21, 1937, P. L. 1984, 55 P. S. § 483 et seq., in connection with the Act of June 5, 1937, P. L. 1664, as amended by the Act of April 20, 1945, P. L. 282, 71 P. S. § 1840 et seq.



The act of 1931 as last amended in 1937, provides for licensing motorboats on inland waters by the Department of Revenue, and fixes procedure and fees.

"Inland waters" are defined as "any public stream, river, lake, artificial or natural body of water within the Commonwealth." Pymatuning Lake is a boundary lake between the Commonwealth of Pennsylvania and the State of Ohio and is in our opinion an inland water within the above definition.

Were we to conclude this question otherwise, we would be obliged to supply in the foregoing definition after the noun "water" and before the preposition "within," the adverb "wholly." This we cannot do in the face of legislative evidence which clearly indicates that when the legislature intends to exclude from the application of any part of the law a lake wholly within the confines of Pennsylvania, it has no difficulty in expressing that purpose with the utmost clarity. An example of this is found in the Fish Law of May 2, 1925, P. L. 448. Section 60 of that act as amended by the Act of July 12, 1935, P. L. 1145, 30 P. S. § 60, specifically defines "boundary lake," and section 90 makes certain provisions for licenses which are applicable to fishing only in such bodies of water.

It follows that had the legislature intended to exclude boundary lakes from the application of the act of 1931, as amended, it would not have used the all inclusive phraseology "any \* \* \* lake \* \* \* within the Commonwealth," or it would have qualified the word "lake" by an expression such as, except boundary lakes.

"Motorboats" as defined in the act of 1931, as amended, is "any boat electrically propelled, or any boat propelled by any type of internal combustion motor of one or more cylinders including any type of water craft propelled by an outboard motor." This language can hardly be misinterpreted, since under the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 533, "words and phrases shall be construed according to rules of grammar and according to their common and approved usage; \* \* \*"

Quite obviously all motorboats and all electric boats, the operation of which is authorized on Pymatuning Lake by law, must be licensed by the Department of Revenue as must all boats propelled thereon by outboard motors.

Under the compact between the Commonwealth of Pennsylvania and the State of Ohio of 1937, relative to Pymatuning Lake, it was provided in subdivision 5 as follows:

No power or motor boats, nor hydroplanes or aquaplanes, shall be permitted anywhere on said lake, except such police or administration motor boats, to the number of which shall be mutually agreed upon by the parties hereto. Sail boats, row boats, and canoes, shall be permitted provided they first obtain a license from the respective state of which the owner is a resident under such regulations as each party to this agreement may now have or hereafter adopt.

From the foregoing, it appears that rowboats, sailboats, and canoes, owned by Pennsylvanians and operated on Pymatuning Lake, must be licensed under such regulations as the Commonwealth of Pennsylvania, one of the high contracting parties, shall provide. And pursuant to that authority, we are advised that the Water and Power Resources Board, acting for the Commonwealth of Pennsylvania, has established a license fee of one dollar for rowboats and canoes capable of carrying not more than five persons and fifty cents additional for each individual capacity in excess of five. The license fee for sailboats is computed upon the length of hull in feet, multiplied by the greatest width of beam in feet divided by thirty to represent the amount in dollars to be paid for the annual license. The average fee for a sailboat is approximately three dollars.

There being no other statute requiring licenses on Pymatuning Lake for rowboats, sailboats, and canoes, the provisions in the Act of June 5, 1937, P. L. 1665, control, unless changed by the amendment of April 20, 1945, P. L. 282. The regulations of the Water and Power Resources Board adopted pursuant thereto, are the regulations of the Commonwealth of Pennsylvania within the meaning of subdivision 5 of the interstate compact.

The Act of April 20, 1945, changed subdivision 5 of the interstate compact to permit "boats equipped with a motor not in excess of six horsepower \* \* \* on that portion of the lake (Pymatuning) extending from the main dam near Jamestown northwardly to the causeway at or near Espyville," but did not change the proviso in the original law that the owners of rowboats, sailboats and canoes (motorboats added), first obtain a license from the respective state of which the owner is a resident under existing or future regulations of the appropriate party to the agreement.

While as heretofore indicated, the Water and Power Resources Board had ample authority under the interstate compact to make reasonable regulations with regard to licensing of rowboats, sailboats, and canoes, it has no authority to make regulations with regard to licensing motorboats or boats equipped with outboard motors, since the act of 1931 outlines the procedure in such cases and constitutes the Department of Revenue its agent for such purposes.

The compact of 1937, as amended in 1945, authorizes the Commonwealth of Pennsylvania as one of the high contracting parties, to make regulations with regard to licensing motorboats of its residents for use on Pymatuning Lake. And by the act of 1931, the Commonwealth has acted through the legislature on this particular subject, which by necessary implication precludes the Water and Power Resources Board from promulgating regulations which would in any way supersede or vary the provisions of that law. In brief, the principal by prescribing the manner and method of licensing motorboats through its agent, the Department of Revenue, has curtailed the authority of its agent, the Water and Power Resources Board to do that very thing.

The very nice question of whether Lake Pymatuning is a navigable water and as such free from state regulation of interstate commerce under Article 1, Section 8, Clause 3, of the Constitution of the United States, has been obviated by congressional approval of state regulation of motorboats on this lake by specific ratification of the amended compact on July 24, 1945, H. R. 3294, Chapter 326 Public Law 160, 79th Congress, 1st Session.

We are of the opinion and you are accordingly advised:

1. Rowboats, sailboats, and canoes, owned by Pennsylvania residents, may be operated on Pymatuning Lake only if they are licensed by the Water and Power Resources Board.

2. Gas and electric motorboats and boats propelled by outboard motors, authorized to be operated by Pennsylvania residents on Pymatuning Lake by the Act of April 20, 1945, P. L. 282, 71 P. S. § 1840 et seq., which amends section 5 of the Act of June 5, 1937, P. L. 1664, must first be licensed by the Department of Revenue under the Act of May 28, 1931, P. L. 202, as amended, 55 P. S. § 483 et seq.

3. It follows from the very nature of the contract itself that licenses issued under regulation of the State of Ohio to its residents for the operation of rowboats, sailboats, canoes and motorboats on Lake Pymatuning, so long as they meet the conditions imposed by the compact, must be given full faith and credit by Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

OPINION No. 528

*Taxation—Foreign casualty insurance companies—Tax on premiums—Distribution of collections—Police pension funds—Acts of June 1, 1889, P. L. 420; May 25, P. L. 212; May 12, 1943, P. L. 259; April 6, 1945, P. L. 160.*

Under the Act of May 12, 1943, as amended by the Act of April 6, 1945, the remission of one-half the tax collected on premiums from foreign casualty insurance companies in the year 1944 is to be made as of January 1, 1945. Only municipal treasurers where police pension organizations were set up on that date, will qualify for distribution of any portion of the tax collected in 1944. On January 1, the Auditor General will determine what treasurers will receive remittances from the tax collected in 1945. Specifically, if a police pension organization is set up at any time after January 1, 1945, and before January 1, 1946, it will be entitled to its full share of its funds collected by the Commonwealth during the year 1945.

Harrisburg, Pa., September 26, 1945.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: We have before us your request of September 19, 1945, for our opinion concerning the distribution of collections made in 1944 and 1945 of tax on premiums of foreign casualty insurance companies. You are concerned with the interpretation of the Act of May 12, 1943, P. L. 259, as amended by the Act of April 6, 1945, P. L. 160 (Act No. 72), as it applies to the distribution of one-half of the tax for the benefit of Police Pension Funds.

The following are excerpts quoted from the pertinent portions of the Act of 1945, 72 P. S. § 2263.1:

On and after the first day of January, one thousand nine hundred and forty-four, and annually thereafter, there shall be paid by the State Treasurer to the treasurers of the several municipalities within the Commonwealth, and to the State Employees' Retirement Fund for State police pension and retirement purposes, one half of the net amount received from the two per centum tax paid upon premiums by foreign casualty insurance companies. \* \* \*

\* \* \* \* \*

The first allocation made under the provisions of this act shall include all moneys accumulated from the said one-half of the tax paid on premiums by foreign casualty insurance companies since the passage of the act to which this is an amendment.

The use in this statute of the words "on and after the first day of January, one thousand nine hundred and forty-four" followed by the words "and annually thereafter" indicate a clear intention that one distribution a year is to take place as of January 1 of each year.

The tax on premiums from foreign casualty insurance companies is payable annually on the fifteenth day of each March, Act of June 1, 1889, P. L. 420, as last amended by the Act of May 25, 1935, P. L. 212, 72 P. S. § 2261.

Thus the funds to be distributed each year are those collected in the preceding year, and since they are payable to municipal treasurers as of January 1, they are payable to those treasurers where police pension organizations are qualified on that date to receive them.

We are of the opinion that under Act of May 12, 1943, P. L. 259, as amended by the Act of April 6, 1945, P. L. 160, the remission of one-half the tax collected on premiums from foreign casualty insurance companies in the year 1944 is to be made as of January 1, 1945. Only municipal treasurers where police pension organizations were set up on that date, will qualify for distribution of any portion of the tax collected in 1944.

On January 1, 1946, you will determine what treasurers will receive remittances from the tax collected in 1945. Specifically, if a police pension organization is set up at any time after January 1, 1945, and before January 1, 1946, it will be entitled to its full share of its funds collected by the Commonwealth during the year 1945.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 529

*Veterans—Preferences in public appointments—Act of May 22, 1945, P. L. 837, secs. 5 and 7—Construction—Meaning of “disabled” soldier—Rights of veteran’s widow or remarriage—Right of wife to share benefits—Rights of widow of soldier who is killed in action or dies subsequent to honorable discharge—Waiver of minimum experience qualifications.*

1. A soldier is “disabled,” within the meaning of the term as used in section 7 of the Act of May 22, 1945, P. L. 837, relating to veterans’ preferences, if he has an official statement from the Veterans Administration, the War Department, the Navy Department, or the Coast Guard certifying to his disability.

2. A husband and wife cannot both share the benefits extended a disabled veteran under section 7 of the Act of May 22, 1945, P. L. 837, if the husband is only partially disabled.

3. The term "widow," as used in section 7 of the Act of May 22, 1945, P. L. 837, means the widow either of a soldier killed in action or of an honorably discharged veteran who subsequently dies, whether or not disabled prior to death.

4. The widow loses her preference upon remarriage, since she then ceases to be the widow of the veteran.

5. The term "preferential rating," as used in section 7 of the Act of May 22, 1945, P. L. 837, refers to all veterans' preferences specified in any preceding section of the act.

6. Section 5 of the Act of May 22, 1945, P. L. 837, does not waive the requirement that the veteran shall possess the minimum experience qualifications designated for public positions.

Harrisburg, Pa., September 26, 1945.

Honorable Ruth Glenn Pennell, Commissioner, State Civil Service Commission, Harrisburg, Pennsylvania.

Madam: You have requested interpretation of several sections of the recently enacted Veterans' Preference Act of May 22, 1945, P. L. 837. We have revised your inquiries and list them as follows:

1. What is the interpretation of the word "disabled" as used in section 7 of said act?

2. Can a husband and a wife both share the benefits extended under section 7 if the husband is only partially disabled?

3. What does the term "widow" as used in section 7 of said act mean?

4. Does the widow lose her preference if she remarries?

5. What do the words "preferential rating" as used in section 7 mean?

6. Does section 5 of the act waive the necessity of the soldier possessing the minimum experience qualifications required for public positions?

Certain aspects of the subject of statutory preferential treatment of United States war veterans in public employment in the Commonwealth have been carefully reviewed by this department in Formal Opinion No. 315, dated January 31, 1940, 1939-1940 Op. Atty. Gen. 171; Formal Opinion No. 320, dated February 15, 1940, 1939-1940 Op. Atty. Gen. 190; Formal Opinion No. 436, dated September 2, 1942, 1941-1942 Op. Atty. Gen. 228.

These opinions construe the Acts of June 27, 1939, P. L. 1198, 51 P. S. § 491.1 et seq.; April 12, 1939, P. L. 27, 51 P. S. § 481; August 5, 1941, P. L. 872, 51 P. S. § 491.6, all of which have been expressly repealed by section 9 of act of 1945, supra, the act under discussion.

Your questions deal with the interpretation of said act, which attempted to codify the existing laws and to add several new provisions.

Turning now to the first question; you wish advice on the interpretation of the word "disabled" in section 7.

Section 7 of the act of 1945, *supra*, reads as follows:

The same preferential rating given to soldiers under the provisions of this act shall be extended to include the widows and wives of *disabled* soldiers. (Italics ours.)

Webster's Dictionary defines the term "disabled" as being one who is incapacitated as by illness, injuries, wounds, or the like.

Our investigation of the interpretation of the word "disabled" finds it has different legal meanings depending on the relation of its use.

In the case of *Keiser v. Philadelphia and Reading Coal and Iron Company*, 134 Pa. Super. 104, 5 Atl. (2d) 1939, the court in discussing the meaning of the word "disability" said "\* \* \* It must always be borne in mind that the disability contemplated by our compensation law is the loss of earning power as the result of an injury. If the compensation authorities find on sufficient evidence that a claimant is not able to do continuously even light work of a general character, then he is entitled to compensation for total disability \* \* \*."

Moreover, it is our understanding that the United States Veterans Administration, the War Department, the Navy Department, and the Coast Guard certify to a veteran's disability upon discharge and each disabled veteran receives an official statement of such fact.

The United States Civil Service Commission applies this test in determining what is a disabled veteran. Uniformity of determining the status of a disabled veteran is highly desirable. Therefore, it is our opinion that the word "disabled" as used in this act denotes any soldier, within the meaning of this act, who has an official statement from the Veterans Administration, the War Department, the Navy Department, or the Coast Guard certifying to his disability.

Your second question is:

2. Can a husband and a wife both share the benefits extended under section 7 if the husband is only partially disabled?

In construing this act certain basic principles of statutory construction must be kept in mind. One of these principles reiterated by the Statutory Construction Act of May 28, 1937, P. L. 1019, Section 51, is as follows:

Section 51. Construction of Laws; Legislative Intent Controls.—The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Nothing is said in the act about sharing the preference. Hence, the plain construction of the act would prevent this interpretation.

By your third question you ask the definition of the term "widow" as used in section 7. The act is silent on what type of widow is meant. Does it refer to widows of all soldiers who may have died from any cause whatsoever? Does it refer to widows of soldiers killed in action, or does it refer only to widows of *disabled soldiers*?

Unfortunately, the legislation is not clear as to the use of this word since it has several meanings. Section 52 of the Statutory Construction Act, supra, reads as follows:

Section 52. Presumptions in Ascertaining Legislative Intent.—In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions among others:

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

\* \* \* \* \*

(5) That the Legislature intends to favor the public interest as against any private interest.

The title of the present act reads as follows:

Providing for and requiring in certain cases preference in appointments to public position or on public works for honorably discharged persons who served in the military or naval service during any war in which the United States *engaged and in certain cases for the widows and wives of such persons.* (Italics ours.)

Section 1 defining the term "soldier" reads as follows:

The word "soldier" as used in this act shall be construed to mean a person who served in the armed forces of the United States or in any women's organization officially connected therewith during any war in which the United States engaged *and who has an honorable discharge from such service.* (Italics ours.)

We cannot imagine that the legislature by defining the word "soldier" in section 1 of the act intended only the widow of a soldier



who has obtained an actual honorable discharge from the army to be the recipient of the benefits of this act. We are informed that soldiers killed on the field of battle do not technically receive an honorable discharge, but their family or next of kin receive a notice of death, accompanied by a formal citation that the deceased was killed in line of duty in defense of his country. No certificate in the form of an honorable discharge is, however, granted. It does not seem probable or possible that the legislature intended by the use of the language in section 1 to eliminate the widow of a soldier who was killed in action.

Nor does it seem probable that the legislature intended to disqualify the widow of an honorably discharged soldier who later dies in preference to a widow of a disabled soldier. Hence, it would seem improbable that the legislature did not intend to take care of all widows of deceased soldiers whether they be soldiers killed on the field of battle, soldiers who obtained honorable discharges and later died in civilian life, or honorably discharged soldiers who were in fact disabled. We, therefore, construe the word "widow" in section 7 as meaning a widow of any type of honorably discharged soldier, whether the soldier is killed on the field of battle or dies at some later date. The fact that the soldier was not disabled before he died would not prevent his widow from enjoying the benefits of this law.

Your fourth question is:

4. Does the widow lose her preference if she remarries?

The primary question is as to the interpretation to be placed upon the term "widow" as used in section 7. Ordinarily the word means "a woman whose husband is dead and who has not married again." Webster's New International Dictionary, page 2334. However, there is considerable authority holding that the term may, when used in a statute, be applied to a woman who, although a widow of her former husband, has remarried. See *Hansen v. Braun and S. Co.* (1917), 90 N. J. Law Reports 444, 103 Atl. 696. See also Annotation at 72 A. L. R. 1324.

Such decisions are of no direct aid in the solution of our problem, for they indicate that the term "widow" as used in statutes is not fixed and positive but on the contrary calls for construction. We must decide what legal import, meaning or effect the legislature intended by the term "widow" as used in this act.

In *Commonwealth v. Powell*, 51 Pa. 438 (1866), our Supreme Court had occasion to construe the word "widow." It held the word "widow" was entirely and exclusively descriptive of an unmarried condition and in order to secure the benefits she must bring herself clearly within the class indicated. The remarried defendant could not be

held to be a widow. To the same effect is the case of Kerns' Appeal, 120 Pa. 523 (1888). In that case the court said:

\* \* \* she ought to be at that time the person who is qualified by law to exercise the right, to wit, the "widow" of the decedent. She is not his widow if she is then the wife of another man \* \* \*.

The purpose of this act is to aid veterans, their wives or widows in gaining employment. The act is meant to help the widow while she remains unmarried. We do not think the legislature intended her to reap benefits after her remarriage to some other person. *Commonwealth v. Stauffer*, 10 Pa. 350 (1849).

Your next question is:

5. What do the words "preferential rating" as used in section 7 mean?

The legislative intent is not clear by the use of the language "same preferential rating," under the provisions of this act, in section 7 as to what these words mean.

Analyzing the preceding sections of the act it is evident this law is composed of numerous features to aid the veteran.

Section 6 of the act requires contractors in construction of public works to give preference to veterans.

Section 3 imposes the duty on civil service powers to give an additional 10% grade to veterans in examinations.

Section 4 requires the appointing powers to prefer veterans in various instances. The first paragraph deals with appointment or promotion to public office where no civil service examination is required. In making such appointment or promotion whenever the soldier possesses the necessary qualifications, the appointing power is required to give preference to such soldier.

The second paragraph deals with appointment or promotion where a civil service examination is required. If a soldier possesses the requisite qualifications and his name appears on the eligible or promotional list certified, the appointing power is required to give preference to such soldier notwithstanding that he is not the highest on the list.

The third paragraph deals with appointment or promotion to public office where a civil service examination is required. But where the name of a soldier who has passed the required examination for appointment or promotion and who possesses the requisite qualifications does not appear on the eligible or promotional list, in such case

the promotional power may give preference to the soldier who has thus passed the required examination.

In the case of *Commonwealth v. O'Leary, et al.*, 46 D. & C. 397 (1942), Judge Soffel construed the provisions of the 1941 act dealing with veterans, and analyzed the preferences given under that act, of which section 4 is identical to section 4 of the present act.

The cardinal question in determining the meaning of the words "preferential rating" is what the legislature intended, by reference to the other language in the act. The preceding sections as hereinbefore discussed specify certain types of preferences which the soldier is entitled to. The words "preferential rating" are not restricted by reference to any preceding section. Hence, it would appear the legislature intended these words to apply to all the preceding sections, and used it in a descriptive manner to relate back to all preferences given by virtue of any section of the act.

It is our opinion, therefore, that the words "preferential rating" as used in section 7 refer to any preferences specified in any preceding section of this act.

Turning now to the last question it is:

6. Does section 5 of the act waive the necessity of the soldier possessing the minimum experience qualifications required for public positions?

Section 5 of the act reads as follows:

Section 5. The lack of academic or scholastic training or experience age loss of limb or other physical impairment which not in fact incapacitate any such soldier shall not be deemed to disqualify him provided he possesses the other requisite qualifications to satisfactorily perform all of the duties which the position requires.

Since the language of the act is plain and on its face susceptible of a logical construction, we are not authorized to go beyond it.

Statutory preferential treatment of veterans in public employment in the Commonwealth is no new departure. It has long been an established principle that men who have served their country faithfully during wars should by their service be given preferential treatment in public office. This principle has been recognized by the Federal Government and many states.

In *Commonwealth v. Schmid*, 333 Pa. 568, Mr. Justice Kephart reviewed the veterans' preferential legislation and stated at page 577:

Our conclusion from these decisions is that, so long as the statute requires passage of the examination, a veteran may

constitutionally be preferred over nonveterans whether the statute be mandatory or directory. In either case the minimum qualification for appointment is success in an examination. Its passage satisfies the requirement that appointments of public employees be made only of persons reasonably fitted for the position.

We do not think that language gives a preference to a veteran without the minimum qualifications for holding the job. That is to say, a stenographer would not be eligible for a public stenographic position if she had no ability in typewriting. However, so long as she possesses the minimum qualifications of typing she would be eligible for appointment in obtaining preference under this act.

To summarize, you are advised as follows:

1. The interpretation of the word "disabled" in section 7 means a soldier who has an official statement from the Veterans Administration, the War Department, the Navy Department, or the Coast Guard certifying to his disability.

2. A husband and wife cannot share the benefits extended under section 7 of the act if the husband is only partially disabled.

3. The term "widow" as used in section 7 means a widow of any type of honorably discharged soldier, whether the soldier is killed on the field of battle or later dies as a result of some disability.

4. In order that a widow may qualify for the benefits given under section 7 of this act, she must be the widow of an honorably discharged soldier and remain unmarried.

5. Preferential ratings given to wives and widows in section 7 of the act relate to all preferences in the act to which the honorably discharged soldier would be entitled.

6. Section 5 of the act does not waive the necessity of the soldier being required to possess the minimum experience qualifications designated for public positions.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

H. ALBERT LEHRMAN,  
*Deputy Attorney General.*

## OPINION No. 530

*Beneficial associations—Regulation—Compliance with Act of 1937, P. L. 1643—Supervision by Insurance Commissioner—Discretion—Reasonable time for reorganization of methods of doing business—Issuance of certificate of authority to do business—Non-conduct of business on effective date of act—Failure to do business for period of two consecutive years—Insurance Company Law of 1921, section 339—Applicability to beneficial societies.*

1. Under Section 1, subsection A(1), of the Act of June 4, 1937, P. L. 1643, 40 P. S. § 1101, all beneficial societies and associations incorporated subsequently to October 13, 1857, are subject to regulation by and must comply with the provisions of the act, unless exempted therefrom by section 13 of the act, 40 P. S. § 1113.

2. The purpose of the Act of June 4, 1937, P. L. 1643, 40 P. S. §§ 1101 et seq., is to afford supervision of the activities of beneficial societies by the Insurance Commissioner for the adequate protection of their members and the public.

3. Section 1, subsection B, of the Act of June 4, 1937, P. L. 1643, 40 P. S. § 1101, was designed to permit beneficial societies regulated by the act such reasonable time as the Insurance Commissioner may determine requisite for transition from the method of doing business prior to adoption of the act to the method required by the act; hence if within a reasonable time after the adoption of the act a beneficial society has failed to reorganize its business so as to comply with the terms of the act, the Insurance Commissioner may notify the society that he has declined to issue a certificate of authority to do business, and if within such time the society has brought itself in conformity with the provisions of the act, the Insurance Commissioner may issue to it a certificate of authority; the determination of such reasonable time is left within the discretion of the Insurance Commissioner, and if such time has not yet elapsed, the Commissioner is justified in taking neither action, thus permitting the beneficial society to continue to do business as it sees fit.

4. If a beneficial society was not actually conducting business at the time when the Act of June 4, 1937, P. L. 1643, P. S. §§ 1101 et seq., was adopted, no certificate of authority may be issued by the Insurance Commissioner.

5. Under section 3, subsection D, of the Act of June 4, 1937, P. L. 1643, providing for regulation of beneficial societies in accordance with the law relating to insurance companies where not otherwise provided in the Act of 1937, section 339 of the Insurance Company Law of May 17, 1921, P. L. 682, 40 P. S. § 461, is applicable to beneficial societies; hence if a beneficial society, subsequent to the effective date of the Act of 1937, fails for a period of two consecutive years to issue policies of insurance, contracts or other forms of benefit agreements, its corporate existence ceases and the Insurance Commissioner must in such case refuse the issuance of a certificate of authority.

Harrisburg, Pa., October 16, 1945.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You advise that Tioga Sick and Beneficial Association with a principal office at Philadelphia, Pennsylvania, has applied for a Certificate of Authority to continue business in Pennsylvania, and

inquire if this association comes within the purview of the Act of June 4, 1937, P. L. 1643, and if so, what your duties are with regard to the issuance of the certificate requested.

Tioga Sick and Beneficial Association is a beneficial society incorporated under the Act of April 29, 1874, P. L. 73, on June 8, 1897, by Court of Common Pleas No. 1 of the County of Philadelphia as of No. 1196, March Term, 1897, for this purpose:

To raise a fund by dues and assessments for their mutual benefit, and distribute the same to those entitled thereto for sick and death benefits.

Subsection A (1) of section 1 of the Act of June 4, 1937, P. L. 1643, 40 P. S. § 1101, reads as follows:

A. That the provisions of this act shall apply to the following beneficial societies:

(1) All beneficial societies incorporated under general or special laws since the thirteenth day of October, one thousand eight hundred and fifty-seven.

It is obvious that this society comes within the provisions of the act of 1937 unless it falls within the exemptions specified in section 13 of that law, 40 P. S. § 1113, as follows:

Provisions of this act shall not apply to—

(1) Beneficial associations which are formed by or for the exclusive benefit of those who, at the time of becoming members of such associations, are engaged in educational work in any department or district of the public school system of the Commonwealth of Pennsylvania, or in any college or university therein, and which issues beneficiary certificates only to such members.

(2) Fraternal, charitable or secret societies issuing beneficial certificates and paying benefits to their membership through the lodge system.

(3) Insurance or relief associations formed by or for the exclusive benefit of employes or corporations or firms, or formed by or for the exclusive benefit of members of any religious corporation or association.

(4) Associations whose benefits are limited to post-mortem assessments of the members.

Although the purpose of the Tioga Sick and Beneficial Association, as expressed in its charter, is exceedingly broad, it does not meet any of the qualifications for exemption from the scope of the act above enumerated. Its members do not appear to be those engaged in educational work nor is it a fraternal, charitable, or secret society having a lodge system. It is not an insurance relief association

for employes or for members of a religious corporation. Its benefits are not limited to post mortem assessments of the members.

You indicate that an investigation of a number of associations, including the one whose problem is before us, which are doing business in Pennsylvania, discloses that policies or benefit certificates are not issued but benefits are made payable in accordance with the bylaws of such associations, which may be amended from time to time. In general, it was developed that these bylaws provide for the payment of specified amounts upon the occurrence of death, sickness, or disability, either in a lump sum or over fixed periods of time, and in some instances the payment of benefits is conditioned upon the status of the treasury or assessment of members.

It thus appears that many beneficial associations, including the Tioga Sick and Beneficial Association, are not conducting business in accordance with section 2 of the act of 1937, which provides for contracts to pay benefits; with section 5 of this act, which specifies the reserves which are to be maintained; section 7, which requires annual reports; or section 9, which makes mandatory the filing of policies, contracts and certificates with the Insurance Commissioner and his approval thereof. And the question, therefore, arises as to whether in view of their methods of doing business, these beneficial societies are required to meet the provisions of the act of 1937, and if so, when.

The purpose of the Beneficial Societies Act of 1937 is to afford supervision of the activities of those societies by the Insurance Commissioner for the adequate protection of members and the public. The provisions of section 9 that "No policy, contract or certificate of membership shall be issued or delivered by any beneficial society in this Commonwealth, nor applications, riders or endorsements used in connection therewith, until the forms of the same have been submitted to, and formally approved by, the Insurance Commissioner under such reasonable rules and regulations as he shall make concerning the terms and provisions contained in such policies, contracts or certificates of membership, and their submission to and approval by him" read with the provisions of section 2 that "Any beneficial society may pay or enter into contracts to pay money or benefits, not exceeding twenty dollars (\$20) per week, in the event of sickness, accident or disability, and not exceeding two hundred and fifty dollars (\$250), in the event of death" indicate that the word "may" as used in section 2, must be construed as mandatory in so far as written contracts are concerned, although permissive, as to the amount of benefits up to the maximums specified. Otherwise, the whole purpose of the law would be negated, and the presumption that the legislature does not intend a result that is absurd, rebutted. *McGregor Estate*, 350 Pa. 93 (1944); *Appeal of School Dis-*

trict of City of Bethlehem, 347 Pa. 418 (1943), 320 U. S. 782. See cases cited at Vale, Pennsylvania Digest Statutes, Key 174.

Having concluded that all beneficial societies in Pennsylvania incorporated since October 13, 1857, are, unless specifically exempted by Section 13, within the purview of the Act of June 4, 1937, P. L. 1643, and that under that law they are required to do business in conformity therewith in so far as amounts, reports and written contracts, policies or certificates of membership are concerned, we now come to the question of when this compliance must be made. This brings us to subsection B of section 1 of that act. It reads as follows:

B. Any beneficial society, heretofore incorporated as aforesaid, and now actually conducting business, *may continue such business* pending the issuance of a certificate of authority by the Insurance Commissioner, or until notified by the Insurance Commissioner that he has declined to issue such certificate of authority. (Italics supplied.)

This provision is obviously designed to permit beneficial societies coming under the act such reasonable time as the Insurance Commissioner may determine requisite for transition from the method of doing business employed before the act of 1937 to the method required by the act of 1937. In other words, the issuance of a certificate by the Insurance Commissioner to do business fixes the date when the provisions of the act of 1937 shall become applicable to the particular beneficial society concerned. We fail to see how, giving the emphasized portion of subsection B its full significance, the whole subsection can be otherwise interpreted.

If within a reasonable time after 1937 a beneficial society has not reorganized its business to comply with the terms of the act of 1937, then it would seem the Insurance Commissioner might reasonably issue his notification that he has declined to issue a Certificate of Authority. By a like token, if the beneficial society has brought itself in conformity with the provisions of the act of 1937, the Insurance Commissioner might well issue a Certificate of Authority. For him to do neither is justified if reasonable time and opportunity have not been afforded for reorganization, in compliance with the provisions of the act. What is a reasonable time, however, is a matter which has been left by the legislature to the discretion of the Insurance Commissioner—a matter which is administrative in the Insurance Department and upon which the Department of Justice is not called to pass.

It must be borne in mind, however, that subsection B of section 1 only extends the life of the beneficial associations which in 1937 were "actually conducting business," and only as to the types of business those associations were doing on that date. If investigation reveals



that a beneficial association was not actually conducting business in 1937, such fact would in itself justify the Insurance Commissioner in refusing to issue his Certificate of Authority. Or if for a period of two consecutive years after the effective date of the 1937 law a beneficial association wrote no policies of insurance or contracts or issued no certificates of membership, this also would be ground for refusing to authorize that corporation to do business in Pennsylvania.

Subsection D of section 3 of the act of 1937 reads as follows:

Except as otherwise provided in this act, the business and affairs of every beneficial society shall be run and regulated in accordance with the provisions provided by existing law relating to insurance companies.

There is no provision in the act of 1937 regarding the consequences of failure for a period of time to issue policies of insurance or other contracts for benefits. And we must, therefore, as directed by the 1937 act, look to existing law relating to insurance companies to determine the consequences of such inactivity.

Section 339 of the Insurance Company Law, the Act of May 17, 1921, P. L. 682, 40 P. S. § 461, makes the following provision:

\* \* \* if any insurance company shall cease for two years to make new insurances, its corporate powers and existence shall cease, \* \* \*

The inescapable conclusion follows that a beneficial association like an insurance company may not, if it would continue its existence, fail to write insurances for a period of two years.

An application of the foregoing principles to the specific question which you ask concerning the Tioga Sick and Beneficial Association brings us to the following conclusion.

We are of the opinion, and you are advised:

1. The Tioga Sick and Beneficial Association of Philadelphia, Pennsylvania, is a beneficial society within the meaning of the Act of June 4, 1937, P. L. 1643, 40 P. S. §§ 1101 et seq.

2. The issuance of a Certificate of Authority to do business in Pennsylvania to this association by the Insurance Commissioner or his declination to issue such a certificate is discretionary with the Insurance Commissioner, contingent upon whether the association is complying or is in a position to comply with all the provisions of that act and particularly those regarding the approval and issuance of written contracts or policies for benefits or certificates of membership.

3. If, however, the Tioga Sick and Beneficial Association was not actually conducting business in 1937, or for a period of two consecu-

tive years after 1937 failed to issue policies of insurance, contracts or other forms of benefit agreements, those facts in themselves would furnish ample justification to the Insurance Commissioner upon which to predicate a refusal to authorize that corporation to do business.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 531

*Insurance—Title insurance companies—Reinsurance reserve fund—Reserve for unpaid losses—Sections 690 and 692 of the Act of May 17, 1921, as amended.*

1. Under section 690 of the Insurance Company Law of May 17, 1921, P. L. 682, as amended by the Act of July 1, 1937, P. L. 2540, title insurance companies must create reinsurance reserve funds of \$500,000 each and may do so by setting aside a minimum of 10 percent of premiums until \$250,000 has accumulated; then 5 percent of premiums until an additional \$250,000 has accumulated; in no instance, however, may the amount set aside for the reinsurance reserve fund out of any premium be less than  $2\frac{1}{2}$  percent of one-fourth of 1 percent of the amount of the insurance in that case.

2. Under section 692 of the Insurance Company Law of 1921, P. L. 682, as amended by the Act of July 1, 1937, P. L. 2540, in addition to the reinsurance reserve fund required under section 690 of the same act, every title insurance company must maintain a reserve fund for unpaid losses calculated on loss estimates with which the insurance commissioner is satisfied.

Harrisburg, Pa., November 15, 1945.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked this office for an interpretation and construction of a portion of section 690 of the Insurance Company Law of 1921, P. L. 682, as added by the Act of July 1, 1937, P. L. 2540, 40 P. S. § 900. It pertains to the establishment and maintenance of reinsurance reserve funds by title insurance companies and reads as follows:

Each company, which shall possess the power to insure owners of real property, mortgagees, and others interested in real property, from loss by reason of defective titles, liens, and encumbrances, shall establish and maintain a reinsurance reserve fund, by setting aside a sum equal to ten per centum of the premium (that is the sum charged for insur-

ance over and above examination and settlement fee) paid on each policy which such company may hereafter issue, until the total amount set aside (including any reserve heretofore set up under any prior act of Assembly) shall equal the sum of two hundred fifty thousand dollars; and thereafter shall set aside a sum equal to five per centum of such premiums, until the total amount shall equal a sum not less than five hundred thousand dollars: Provided, That such premiums shall not be less than one-quarter of one per centum on the amount of insurance as issued, or, if less than one-quarter of one per centum, the amount set aside shall be equal to two and one-half per centum of said one-quarter of one per centum, \* \* \*

The dubious portion of the above quoted section is contained in the proviso at the latter part which must be interpreted in the light of certain relevant facts connected with the insurance of land titles. The premiums for such insurance in many instances must necessarily be considerably less than one-quarter of one percent of the amount of insurance issued. As an example, if an executor with the power of sale is desirous of selling real estate within one year of the date of the death of the decedent, he must secure insurance against the lien of the decedent's debts. Where the estate of the decedent is large and it is common knowledge that the personalty is ample to pay all debts, a premium of one-quarter of one percent of the amount of the policy would be exorbitantly high. Assuming that the insurance was for \$1,000,000, one-quarter of one percent would be \$2,500. A reasonable premium for such insurance might be only \$500.

In creating the \$500,000 reserve required by section 690, assuming that over \$250,000 has been accumulated, the title company, were it not for the proviso, would be required to set aside five percent of \$500 or \$25.00. This situation was just what the legislature intended to avoid. Therefore, it specified where the premium was less than one-quarter of one percent the title company should set aside not less than two and one-half percent of one-quarter of one percent of the insurance. Accordingly, under the proviso, the title company in the hypothetical case would be required to put in its reserve two and one-half per cent of \$2,500 or \$62.50.

Obviously then under section 690 every title insurance company is required to create a \$500,000 reinsurance reserve fund and is not required to add to that amount nor permitted to subtract from it. In other words, in establishing this reinsurance reserve fund a title company must set aside ten percent of its premiums until it acquires \$250,000; then five percent of its premiums until it acquires another \$250,000, but in the computation of the amount to be set aside in each instance, the sum may not be less than two and one-half percent of one-quarter of one percent of the amount of the insurance.

Section 692 of the Insurance Company Law of 1921, as added by the Act of July 1, 1937, P. L. 2540, 40 P. S. § 902, provides for the establishment and maintenance of reserve funds for unpaid losses by title companies, in the following language:

Each company, which shall possess the power to insure owners of real property, mortgagees, and others interested in real property, from loss by reason of defective titles, liens, and encumbrances, shall at all times maintain reserve funds for unpaid losses, in addition to funds for other reserves and liabilities; and shall calculate said reserves by making a careful estimate, in each case, of the loss likely to be incurred by reason of every claim presented or that may be presented pursuant to notice from or on behalf of the insured, of the occurrence of an event that may result in a loss. The sum of the items so estimated, shall be the total amount of the reserves for unpaid losses of said insurer.

While under section 690 of the act, a reinsurance reserve is fixed at a maximum amount of \$500,000, additional reserves over and above that sum for unpaid losses must be maintained by virtue of the provisions of section 692. Since those additional reserves are to be calculated after careful estimate in each case of the loss likely to be incurred, their amount is in the first instance determinable by the title insurance company itself. They are, however, subject to supervision and adjustment by the Insurance Commissioner. And it becomes his duty to see that such unpaid loss reserve is maintained.

We are of the opinion that under section 690 of the Insurance Company Law of 1921, P. L. 682, as added by the Act of July 1, 1937, P. L. 2540, 40 P. S. § 900, title insurance companies must create reinsurance reserve funds of \$500,000 each and may do so by setting aside a minimum of ten percent of premiums until \$250,000 is accumulated; then five percent of premiums until an additional \$250,000 is accumulated. But in no instance may the amount set aside for the reinsurance reserve fund out of any premium be less than two and one-half percent of one-quarter of one percent of the amount of the insurance in that case.

Under section 692 of the same act, 40 P. S. § 902, in addition to the reinsurance reserve fund, every title insurance company must maintain a reserve fund for unpaid losses calculated on loss estimates with which the Insurance Commissioner is satisfied.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

## OPINION No. 532

(Supplementing Opinion No. 528)

Harrisburg, Pa., December 5, 1945.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: This opinion supplements Formal Opinion No. 528 of September 26, 1945, relative to the construction of the Act of May 12, 1943, P. L. 259, as amended by the Act of April 6, 1945, P. L. 160, Act No. 72. This law provides for the distribution of one-half of the net amount received from the two percent tax on premiums of foreign casualty companies for the benefit of police pension funds. It specifically states:

On and after the first day of January, one thousand nine hundred and forty-four and annually thereafter, there shall be paid by the State Treasurer to the treasurers of the several municipalities within the Commonwealth, and to the State Employees' Retirement Fund for State police pension and retirement purposes, one-half of the net amount received from the two per centum tax paid upon premiums by foreign casualty insurance companies. . . .

You have asked (1) over what period of time collections are to be computed for each distribution; (2) which distributions are to include payments of delinquent taxes, and (3) from which distribution are refunds to taxpayers to be deducted. You also inquire (4) what status a police pension fund must occupy before it is entitled to distribution.

We will answer your last question first, and the three others *seriatim*.

The definition of police pension fund as supplied by the 1945 amendment (Act No. 72), 72 P. S. § 2263.1, reads as follows:

"Police Pension Fund" means any pension, or retirement fund, established in any municipality, and duly approved and recognized as such, by the council, commissioners, or supervisors, as the case may be, of the municipality to provide pension, retirement, or disability benefits to the policemen employed by such municipality or to the dependents of such policemen.

From this we take it that the police pension funds entitled to distribution are those which are established, approved and recognized by the proper municipal authorities. All three of these conditions must be met before a fund is entitled to distribution. It must truly be a "municipal" pension fund. In the case, however, where such fund has been duly established, approved, and recognized and has re-

ceived appropriations from the municipality or funds from other sources but not in sufficient quantum to make it actually feasible to provide for pension retirement or disability benefits at this time, it may nevertheless be recognized by your office as a fund entitled to its pro rata distribution, if you are satisfied as to its bona fides and that its ultimate purpose, when sufficient funds are available, is to provide pensions, retirement or disability benefits to its employees or their dependents.

Since the amendment of 1945 fixes January 1, 1944, as the date from which funds shall be accumulated for distribution and provides that they shall be distributed for that year and annually thereafter, we are obliged to conclude that the legislature has designated the calendar year as the period for computing amounts for distribution. And because it has also provided for the distribution of one-half of the net amount *received*, we must advise that in 1945 you will distribute one-half of the net sum received from the two percent tax on premiums of foreign casualty companies actually taken in during the calendar year December 31, 1943, to December 31, 1944. In 1946, you will distribute one-half of the net amount of the tax actually received during the calendar year December 31, 1944, to December 31, 1945.

We are not unmindful that much of this annual tax is collected between January 1 and March 15 in the year following its due date. However, this does not affect our conclusion other than to strengthen it. In the 1944 collections you will receive many 1943 taxes. Distributions of 1945 collections will include many 1944 taxes. The same will follow in successive years. Thus, annual distributions will be relatively balanced, and their computation simplified.

For the reasons above stated we are of the opinion that all delinquent taxes, no matter in what year due, shall be certified as of the year actually collected and distributed in the succeeding year.

Inasmuch as the amendment of 1945 provides for the payment of the *net* amount received, refunds of taxes arising out of resettlements, reviews, refunds and appeals should be deducted in the year in which they were allowed, from the gross amount of taxes collected in those years in order to arrive at the net amount received from the two percent tax on premiums from foreign casualty companies. And this figure should be used in the ascertainment of the one-half of such taxes to be allocated to municipal treasurers for Municipal Police Pension Funds and to the State Employees' Retirement Fund for State police pension and retirement purposes.

We are of the opinion and you are advised:

1. For the purposes outlined in the Act of May 12, 1943, P. L. 259, as amended by the Act of April 6, 1945, P. L. 160, Act No. 72, 72 P. S. § 2263.1, one-half of the net amount taken in from the two percent tax on premiums of foreign casualty companies during any calendar year is to be distributed for police pension purposes in the succeeding calendar year.

2. Delinquent taxes are to be added to current collections in the year they are actually paid.

3. Refunds made to taxpayers by way of resettlements, reviews, refunds or appeals are to be deducted from current collections of tax in the years in which they are actually paid or credited to the taxpayers.

4. Municipal pension funds to be entitled to participation in distributions must be established, approved and recognized by official act of the proper municipal authorities.

5. Our Formal Opinion No. 528, dated September 26, 1945, is hereby reaffirmed.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 533

*Hospitals—Maintaining a pharmacy—Acts of May 17, 1917, and May 26, 1921.*

1. The fee of \$2 for the permit issued to a pharmacy by the State Board of Pharmacy in accordance with the requirements of the Act of May 26, 1921, P. L. 1172, is a license fee and not a tax; consequently a hospital which maintains a pharmacy is not exempt from payment of the license fee in the absence of any specific exemption.

2. A hospital which maintains a pharmacy where medicines are compounded for patients must comply with the Act of May 7, 1917, P. L. 208, and its supplement, the Act of May 26, 1921, P. L. 1172, regulating the practice of pharmacies and requiring that a pharmacy be under the supervision of a registered pharmacist.

Harrisburg, Pa., December 5, 1945.

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

Sir: This department is in receipt of your inquiry asking whether a pharmacy maintained by a hospital must comply with the Pharmacy Law, and be under the supervision of a registered pharmacist.

The Act of May 17, 1917, P. L. 208, 63 P. S. § 291, et seq., regulates the practice of pharmacy, and the sale of poisons and drugs. Section 1 of said act defines the term "pharmacy" as follows:

- (a) The term "pharmacy," when not otherwise limited, shall, for all the purposes of this act, be taken to mean a retail drug-store, or any place where drugs, medicine, or poisons are compounded, dispensed, prepared, or sold at retail; \* \* \*

You inform us that some hospitals operate drug stores where medicines are compounded for patients of the various clinics, as well as for lying-in patients. Some patients pay, while others are unable to do so, and are given medicine without any charge.

At the outset, it may be said that the business or profession of pharmacy, by reason of the peril to health or life in the community generally which may result from incompetence therein, is a legitimate field for police regulation. (See 17 Am. Jur. Drugs and Druggists, section 7.)

The Act of May 26, 1921, P. L. 1172, 63 P. S. § 361, et seq., is a supplement to the act of 1917, supra, and the first section thereof, 63 P. S. § 361, reads as follows:

No Pharmacy, as defined by the act to which this is a supplement, shall be kept open for the transaction of business until it has been registered with and a permit therefor has been issued by the Pennsylvania Board of Pharmacy: [now State Board of Pharmacy] \* \* \*.

The act of 1917, supra, contains a provision exempting a "store or stores opened for the sale of proprietary or so-called patent medicines." Therefore, hospitals come within the purview of the Pharmacy Law, unless exempted by other laws.

An examination of the laws relative to hospitals reveals that there are no provisions generally exempting hospitals from the payment of license or permit fees. Our examination, however, does reveal that in specific instances hospitals have been exempted from the payment of fees, though in other respects they were subject to all the provisions of the laws. For example, the Act of May 1, 1929, P. L. 905, known as the Vehicle Code, 75 P. S. § 331, exempts hospitals from the payment of a fee for a certificate of title or registration of a motor vehicle.

It seems reasonable, therefore, to conclude that if the General Assembly of Pennsylvania had intended to exempt hospitals from the payment of a permit or license fee, that it would have so provided as it did in the instance cited.



However, a question arises as to whether the charge of \$2.00 for the permit is a tax or a license fee. If it is a tax, then a hospital is within the terms of those Acts of Assembly which exempt hospitals from taxation.

In 33 Am. Jur., section 19, page 340, it is said:

\* \* \* A license imposition upon a business or occupation which is not one calling for police regulation is a revenue tax. However, a license enactment is a tax when, and only when, revenue is the main purpose for which it is imposed. In general, therefore, where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is enacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax. In this respect, the amount of the license fee or tax is important and is to be considered in determining whether the exaction is one for regulation merely, or for revenue, the reason being that the amount of the fee might in some cases be so large as to suggest of itself, considering the character of the business to which it was applied, that it was in fact a tax for revenue.

\* \* \*

Applying these principles of law to the situation under consideration, and calling attention to the fact that the permit fee is \$2.00, it is our opinion that the permit fee is a license fee and not a tax, and consequently the hospital cannot claim the benefit of any tax exemption law.

This opinion is consistent with the opinion of this department rendered under date of July 18, 1913, to the Dairy and Food Commissioner, in which it was held that hospitals for the insane, penal and charitable institutions of the State, if operating a cold storage warehouse, are subject to the provisions of the Act of May 16, 1913, P. L. 216, known as the Cold Storage Act, which provides for the payment of a license fee of \$50.00. (1913-1914 Op. Atty. Gen. 287.)

We are, therefore, of the opinion that hospitals must meet the requirements of the Act of May 17, 1917, P. L. 208, 63 P. S. § 291, and its supplement, the Act of May 26, 1921, P. L. 1172, 63 P. S. § 361.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

## OPINION No. 534

*Physicians—Osteopaths—School Health Act of June 1, 1945, P. L. 1222.*

The definition of "medical examiner" in section 2 of the Act of June 1, 1945, P. L. 1222, includes osteopathic physicians and surgeons; this conclusion is fortified by reference to the legislative history of the act in which it appears that the words "doctor of medicine" were stricken out and the word "physician" inserted in lieu thereof with the intention to include osteopathic physicians within the definition of medical examiners.

Harrisburg, Pa., January 3, 1946.

Honorable Harry W. Weest, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether in the Act of June 1, 1945, P. L. 1222, Act No. 425, the definition of "medical examiner" in section 2 thereof includes an osteopathic physician or surgeon.

The aforesaid act provides for the complete medical and dental examination of all children of school age, and of teachers and other school employes in public and private elementary and secondary schools of the Commonwealth. The statute places the general administration of its provisions in the hands of the Department of Health and the Superintendent of Public Instruction.

The definition referred to, which occurs in section 2 of the act, is as follows:

"Medical Examiner" means a physician legally qualified to practice medicine in the Commonwealth who has been appointed or approved by the Secretary of Health.

As was said by Judge Elliott in *Humphries v. Davis*, 100 Ind. 274, 284 (1884):

A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. \* \* \* "Construction has ever been a potent agency in harmonizing the operation of statutes, with equity and justice." Statutes are to be so construed as to make the law one uniform system, not a collection of diverse and disjointed fragments.

This department and our courts have construed several different statutes which are germane to our present problem. To these sources we will look, therefore, in accordance with the principles enunciated by Judge Elliott, hereinbefore quoted, for guidance in coming to a conclusion in our present inquiry.

In Formal Opinion No. 456, 1943-1944 Op. Atty. Gen. 56 (1943), we held that osteopathic physicians were eligible to serve as school medical inspectors under the provisions of sections 1501 and 1503 of the Act of May 18, 1911, P. L. 309, as amended, 24 P. S. §§ 1501 and 1503. The first of these sections provided that:

\* \* \* All such medical inspectors shall be physicians legally qualified to practice medicine in this Commonwealth, \* \* \*

The second section provided that:

\* \* \* All such medical inspectors shall be legally qualified physicians, who have had not less than two years' experience in the practice of their profession \* \* \*.

In Formal Opinion No. 526, dated August 28, 1945, 1945-1946 Op. Atty. Gen. 18, we held that osteopathic physicians are qualified to certify to the commitment papers required by section 302 of The Mental Health Act of 1923, as amended, 50 P. S. § 42. The cited section of that act provided that persons who are mentally ill may be committed to hospitals for mental diseases on the "certificate of two qualified physicians."

Amongst supporting authorities cited in the foregoing opinions were *Commonwealth v. Long*, 100 Pa. Super. 150 (1930); *Commonwealth v. Seibert*, 262 Pa. 345 (1918); *Commonwealth v. Mollier*, 122 Pa. Super. 373 (1936); and *Long et al. v. Metzger*, 301 Pa. 449 (1930). See also, *Commonwealth v. Cohen*, 142 Pa. Super. 199 (1940). In our two former opinions which we have cited we discussed all of the foregoing authorities fully, and we see no reason why it is necessary to repeat that discussion and review here.

While not controlling it is interesting to note the legislative history of Act of June 1, 1945, P. L. 1222. The Legislative Journal, Session of 1945, volume 29, No. 22, beginning at page 796, reveals the following which took place in the House of Representatives February 27, 1945, when section 2 of the act was adopted in its present and aforesaid form.

\* \* \* \* \*

The second section was read.

On the question,

Will the House agree to the section?

Mr. Modell offered the following amendment:

Amend section 2, page 2, line 1, by striking out the following "[doctor of medicine]" and insert in lieu thereof the following "physician."

On the question,

Will the House agree to the amendment?

\* \* \* \* \*

On the question recurring,

Will the House agree to the amendment to section 2?

Mr. Lichtenwalter. Mr. Speaker, I object to the amendments offered by the gentleman from Philadelphia, Mr. Modell, and ask the House to vote "no."

Mr. Modell. Mr. Speaker, I introduced the amendment to section 2 of this act for the purpose of eliminating a discrimination against osteopathic physicians and surgeons, who would by this bill be prevented from appointment as examiners of school children and teachers.

In reading this particular act we find the language different from other laws that have been enacted in this Assembly. Other acts have stated that physicians duly qualified and licensed to practice medicine shall have certain rights. This particular bill speaks only of doctors of medicine.

I desire to point out to the membership of the House that under the act of 1909 as amended in 1937, P. L. 1649, osteopathic physicians and osteopathic surgeons shall observe and be subject to all state and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths and all matters pertaining to public health the same as physicians of other schools. In 1937 the words were added "with the same force and effect as the certificates issued by physicians of other schools."

If we look into the Act of May 18, 1911, P. L. 309, we find the words:

"Every school district of the first and second and third class in this Commonwealth shall annually provide medical inspection of all pupils in the public schools by proper medical inspectors to be appointed by the school directors in the district in sufficient number to conduct the required inspection in conformity with the standards of requirements prescribed by the Commissioners of Health for the medical inspection of schools in such districts. Such medical inspection shall be made in the presence of the parents or guardian of the pupils when so requested by the parent or guardian."

The following words were added

"all such medical inspectors shall be physicians legally qualified to practice medicine in this Commonwealth."

Now, Mr. Speaker, I see no reason why they should not be included in this particular bill since they have every right to practice medicine in this Commonwealth, and certainly they should not be made an exception in this bill; for that reason they should not be excluded in this particular bill, and accordingly I have introduced these amendments.

On the question recurring,

Will the House agree to the amendment?

The Speaker declares the "noes" appeared to have it,

Whereupon a division was called for, eighty-six Members having voted in the affirmative and fifty-nine in the negative, the question was determined in the affirmative and the amendment was agreed to.

The section as amended was agreed to. \* \* \*

From the foregoing it is clear beyond any doubt that when the words "doctor of medicine" were stricken out of section 2 and the word "physician" inserted in lieu thereof the House of Representatives knew exactly what it was doing, and intended by so doing to include osteopathic physicians within the definition of medical examiners. This fortifies the conclusion we have already reached.

It is our opinion, therefore, that the definition of "medical examiner" in section 2 of the Act of June 1, 1945, P. L. 1222, includes osteopathic physicians and surgeons.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 535

*Insurance—Fire insurance companies—Deviation from rates established by fire-rating bureaus—Approval by Insurance Commissioner—Insurance Company Law of May 17, 1921.*

Under section 545 of the Insurance Company Law of May 17, 1921, P. L. 682, providing that insurers shall file with the Insurance Department any deviation from the schedule of rates established by fire-rating bureaus, the Insurance Commissioner has no authority to approve or disapprove deviations from the schedule of rates established; the act merely establishes the Insurance Department as the place where such deviations and the reasons therefor shall be filed.

Harrisburg, Pa., January 16, 1946.

Honorable Gregg L. Neel, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have inquired if under the law there is a duty upon you to examine into and approve or disapprove deviations by insurers from schedule of rates established by fire rating bureaus.

The answer to this query necessitates an interpretation of section 545 of the Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. § 695, which reads as follows:

Every insurer shall, at least fifteen days in advance of any variation by it from the bureau rate, file with the bureau of which it is a member a schedule showing such variations. Any deviation of any insurer from the schedule of rates established by such company shall be uniform in its application to all of the risks in the class from which the deviation is made, and no such uniform deviation shall be made unless notice thereof and the reason therefor shall be filed with the Insurance Commissioner.

From the foregoing it is to be noted that "no such uniform deviation shall be made unless notice thereof and the reason therefor shall be filed with the Insurance Commissioner." This section of the Insurance Company Law does not specifically state that the Insurance Commissioner is to approve or disapprove such deviation. Nor do we think we can supply it.

Had the legislature intended variations from fire bureau rates to be subject to the approbation or disapprobation of the Insurance Commissioner it certainly would have said so. For in section 654 of the Insurance Company Law of 1921 (40 P. S. § 814), concerning workmen's compensation rates, the Insurance Commissioner is specifically given authority to supervise rates and a procedure is set up for hearing and appeal. No such procedure is outlined in section 545 with regard to fire insurance rates.

In these circumstances we are obliged to conclude that the purpose of the legislature is manifestly to leave rates and rate deviations exclusively in the hands of fire rating bureaus and insurance companies and to impose upon the Insurance Commissioner in this regard no duty other than to make his office a place of record where deviations and reasons therefor may be filed as notice to all of their contents.

In section 51 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 551, it is provided:

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.

We are of the opinion that the Insurance Commissioner has no authority to approve or disapprove deviations from the schedule of rates established by fire rating bureaus in this Commonwealth. Section 545 of the Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. § 695, merely establishes the Insurance Department as the place where such deviations and the reasons therefor shall be filed.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 536

(Revoked by Opinion No. 545)

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OPINION No. 537

*State government—Department of Forests and Waters—Washington Crossing Park—Authority to appoint patrolmen—Act of April 9, 1929, as amended.*

Under section 1806(h) of article 18 of the Administrative Code of April 9, 1929, P. L. 177, as amended by the Act of June 21, 1937, P. L. 1865, the Department of Forests and Waters is vested with the power and duty to appoint and commission persons to preserve order in Washington Crossing Park, such persons to have the powers and prerogatives conferred by law upon members of the police force of cities of the first class and upon constables of the Commonwealth and to serve subpoenas; under the act the power to appoint patrolmen is thus vested in the Department of Forests and Waters as distinguished from the power to control such patrolmen in the exercise of their duties, which power is expressly withheld from the department by clause (a) of section 1806 and by clear implication is vested in the Washington Crossing Park Commission.

Harrisburg, Pa., March 7, 1946.

Honorable James A. Kell, Secretary of Forests and Waters, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice upon the following questions: By virtue of what authority may persons be

appointed as patrolmen to preserve order in the Washington Crossing Park, and with what powers are they vested upon appointment?

As a preliminary matter, it will be helpful to determine the legal status of the Washington Crossing Park Commission, prior to considering the statutory enactments directly relevant to the inquiry.

Section 202 of the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 62, entitled The Administrative Code of 1929, provides as follows:

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

\* \* \* \* \*

In the Department of Forests and Waters,

\* \* \* \* \*

\* \* \* Washington Crossing Park Commission, \* \* \*.

It is clear from a plain reading of this provision that the Washington Crossing Park Commission is a departmental commission in the Department of Forests and Waters, and not an independent commission.

The Act of July 25, 1917, P. L. 1209, as amended, 32 P. S. § 1081 et seq., provides for the establishment of Washington Crossing Park as a "public place or park"; for its improvement, preservation and maintenance; for its use by the National Guard; and for the creation of a commission to carry out the purposes of the act.

The Administrative Code of 1929 also provided in section 1812 that the Washington Park Crossing Commission shall continue to exercise the powers and perform the duties by law vested in and imposed upon the said commission. In order to determine the nature and scope of these powers and duties, reference must be made to the act of 1917, supra. The relevant provisions are contained in sections 4 and 5 of that act. The former section provides as follows:

The commissioners of the said park, after they shall have secured possession of the said grounds, shall adopt plans for the improvement, preservation, and maintenance thereof, and shall have power to carry the same into execution, \* \* \*.

The latter section provides:

After the said premises shall have, as aforesaid, passed into the possession of the Commonwealth, they may, at any



time or times hereafter, be used as a camping ground for the National Guard of Pennsylvania. Whenever the Governor, acting as Commander-in-Chief, shall direct said commissioners to open the grounds and park for the accommodation of the said Guard or any portion thereof, it shall be the duty of the commissioners to make all necessary arrangements for such camps, to provide for sufficient water supply and drainage, *and during such camps to relinquish to the commanding officer, for the time being, all police control over and through the said park and grounds.* (Italics ours.)

Section 4 provides generally for the improvement, preservation and maintenance of Washington Crossing Park by the commissioners, but is silent on the subject of policing the park. Section 5 touches upon the inquiry at hand only by statutory implication. Neither section provides in express terms for the control of police by the commission. The latter section of the act of 1917, above quoted, provides merely for the relinquishment of all police control of and through the said park and grounds, upon condition of the use of the park by the National Guard. It appears by implication only, that when the park is not in use by the National Guard, all police control is vested in the commission.

The Administrative Code of 1929 provides in Art. XVIII, Section 1806 (a), 71 P. S. § 466, as follows:

The Department of Forests and Waters shall have the power, and its duty shall be:

(a) To supervise, maintain, improve, regulate, *police*, and preserve, all parks belonging to the Commonwealth, *except* the Pennsylvania State Park at Erie, *Washington Crossing Park*, Valley Forge Park, and Fort Washington Park; (Italics ours.)

The power to police directly involves the power to control the policemen who may be authorized to carry out their police duties. Inasmuch as clause (a) expressly withholds from the Department of Forests and Waters the power to police or control policemen in Washington Crossing Park, it is consistent with the implication raised by section 5 of the act of 1917, that such power shall be vested in the Washington Crossing Park Commission. While the joint construction of these two provisions is not conflicting, and determines the matter of the control of policemen in Washington Crossing Park, it does not expressly or by implication settle the question of authority to *appoint* such policemen. With respect to the latter question, neither of these provisions are controlling. It is necessary to look to another enactment.

The Act of June 21, 1937, P. L. 1865, amended The Administrative Code of 1929, by adding clause (h) to section 1806 as follows:

The Department of Forests and Waters shall have the power and its duty shall be:

\* \* \* \* \*

(h) To appoint and commission persons to preserve order in the State parks, which persons shall have all of the following powers:

(1) To make arrests without warrant for all violations of the law which they may witness, and to serve and execute warrants issued by the proper authorities: Provided, however, That in cases of offenses for violation of any of the provisions of the Vehicle Code, the power to make arrests without warrant shall be limited to cases where the offense is designated a felony or a misdemeanor, or in cases causing or contributing to an accident resulting in injury or death to any person.

(2) To have all the powers and prerogatives conferred by law upon members of the police force of cities of the first class.

(3) To have all the powers and prerogatives conferred by law upon constables of the Commonwealth.

(4) To serve subpoenas issued for any examination, investigation or trial had pursuant to any law of the Commonwealth.

By virtue of this amending clause, the Department of Forests and Waters is given the express power and duty *to appoint and commission* persons to preserve order in the State parks without exception. Elementary principles of statutory construction establish the rule that every law shall be construed, if possible, to give effect to all its provisions, and the presumption that the legislature intends the entire statute to be effective and certain: Statutory Construction Law of May 28, 1937, P. L. 1019, Art. IV, Sections 51 and 52, 46 P. S. §§ 751 and 752.

Viewed in the light of these principles, there is no conflict between clause (a) of section 1806, enacted in 1929, and clause (h), amending that section by way of being added thereto in 1937. Clauses (a) and (h) are not irreconcilable. The former clause is general, and vests the Department of Forests and Waters with broad powers and duties to supervise, maintain, improve, regulate, police, and preserve all parks belonging to the Commonwealth, but specifically excepts Washington Crossing Park from the scope of that department's power.

There is a clear distinction between the power to police or control policing, and the power to appoint those persons whose duty it is to police. Whereas, the former clause expressly denies to the Department

of Forests and Waters the power among others, to police Washington Crossing Park, the latter section expressly and specifically vests the department with the power and duty to appoint and commission persons to preserve order in the State parks.

Any doubt as to the proper construction to be given to the general provisions contained in clause (a) and the particular provisions contained in clause (h), if irreconcilable, is resolved by the application of the Statutory Construction Act of 1937, *supra*. Section 73 of this act, 46 P. S. § 573, provides as follows:

Whenever a section or part of a law is amended, the amendment shall be construed as merging into the original law, become a part thereof, and replace the part amended and the remainder of the original law and the amendment shall be read together and viewed as one law passed at one time; \* \* \*.

Section 63 of this act, 46 P. S. § 563, provides as follows:

Whenever a general provision in a law shall be in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the Legislature that such general provision shall prevail.

In this case, the general provision, clause (a) was enacted prior to the special provision, clause (h). Section 64, 46 P. S. § 564, provides as follows:

Except as provided in section sixty-three, whenever, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

In Section 1806 of The Administrative Code of 1929, as amended, clause (h) is last in order of position as well as in order of date.

Clearly then in view of these provisions, the power to appoint patrolmen in Washington Crossing Park, as distinguished from the power to control such patrolmen in the exercise of their duties is vested in the Department of Forests and Waters.

The extent of the powers which such patrolmen, upon appointment, may exercise, is governed by the express provisions contained in subsections one to four inclusive of clause (h), Section 1806 of The Administrative Code of 1929, *supra*, as quoted.

We are, therefore, of the opinion, and accordingly advise that by virtue of Section 1806 (h) of Article XVIII of The Administrative Code of April 9, 1929, P. L. 177, Art. XVIII, as amended by the Act of June 21, 1937, P. L. 1865, Section 1 and as otherwise and further amended, the Department of Forests and Waters is vested with the power and duty to appoint and commission persons to preserve order in Washington Crossing Park, which persons, in the wording of the said act shall have all the following powers:

(1) To make arrests without warrant for all violations of the law which they may witness, and to serve and execute warrants issued by the proper authorities: Provided, however, That in cases of offenses for violation of any of the provisions of the Vehicle Code, the power to make arrests without warrant shall be limited to cases where the offense is designated a felony or a misdemeanor, or in cases causing or contributing to an accident resulting in injury or death to any person.

(2) To have all the powers and prerogatives conferred by law upon members of the police force of cities of the first class.

(3) To have all the powers and prerogatives conferred by law upon constables of the Commonwealth.

(4) To serve subpoenas issued for any examination, investigation or trial had pursuant to any law of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

DAVID FUSS,  
*Deputy Attorney General.*

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OPINION No. 538

*State government—Employes in military service—Reenlistment after discharge—Extension of military leave—Act of June 7, 1917.*

Until there is proper action by way of ratification of a treaty of peace or a proclamation by Congress, or the President, declaring a prior date of termination, World War II has not been legally terminated and a state of war exists; hence employes of the State who have been on military leave of absence and have been honorably discharged and who now elect to reenlist rather than to return immediately to their former State employment, do not by such reenlistment waive their rights to the benefits of the Act of June 7, 1917, P. L. 600, authorizing military leaves of absence for employes who enlist or are drafted in time of war or contemplated war, and, therefore, their military leave must be extended.

Harrisburg, Pa., March 8, 1946.

Honorable Robert P. Wray, Acting Secretary of Public Assistance,  
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting advice as to whether or not employes who have been on military leave of absence and have been honorably discharged may extend or renew their military leave if they reenlist.

Section 1 of the Act of June 7, 1917, P. L. 600, 65 P. S. § 111, provides as follows:

Whenever any appointive officer or employe, regularly employed by the Commonwealth of Pennsylvania in its civil service, or by any department, bureau, commission, or office thereof, or by any county, municipality, township, or school district within the Commonwealth, *shall in time of war or contemplated war enlist*, enroll, or be drafted in the military or naval service of the United States, or any branch or unit thereof, he shall not be deemed or held to have thereby resigned from or abandoned his said office or employment, nor shall he be removable therefrom during the period of his service, but the duties of his said office or employment shall, if there is no other person authorized by law to perform the powers and duties of such officer or employe during said period, be performed by a substitute, who shall be appointed by the same authority who appointed such officer or employe, if such authority shall deem the employment of such substitute necessary. Such substitute shall receive so much of the salary or wages attached to said office or employment as shall not be paid to the dependent or dependents of said officer or employe, as hereinafter provided, and such substitute may receive such further compensation, from appropriations made for that purpose or otherwise, as may be required, when added to the amount received under the provisions of this act, to constitute a reasonable compensation for his services, in the opinion of the authority appointing him. (Italics ours.)

It can be stated generally that courts give a liberal interpretation to legislation favoring veterans. To enlist or reenlist in time of war or contemplated war is one and the same thing. The provisions of the above section are specifically limited to "time of war or contemplated war." If the war is terminated and the country is not faced with an emergency requiring training of military personnel, the provisions of the act do not apply. However, though the actual firing has ceased, our country is still legally and technically at war, since there has been no formal action by Congress or the President to terminate the war.

The classic rule of international law is that a war is not ended until a treaty of peace has been signed. In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 156, 40 Sup. Ct. 106, 64 L. Ed. 194 (1919), Mr. Justice Brandeis, speaking for the Court, said: "In the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace."

Again in *Commercial Cable Co. v. Burleson*, 255 Fed. 99, 104 (1919), Judge Learned Hand rejected the contention that certain war-time powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added: "\* \* \* Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war. \* \* \*" See also *Kahn v. Anderson*, 255 U. S. 1, 10, 41 Sup. Ct. 224, 65 L. Ed. 469 (1921); *Ware v. Hylton*, 3 Dall. 199, 236, 1 L. Ed. 568 (1796).

In 67 C. J., Section 195, page 429, we find the general rule states as to the period of war in a legal sense, as follows:

War, in the legal sense, continues until, and terminates at the time of, some formal proclamation of peace by an authority competent to proclaim it. It is the province of the political department, and not of the judicial department, of government to determine when war is at an end, and a legislative act designating a particular day as that upon which a war closed should be accepted by the courts. In the United States, to declare war, rests exclusively with congress, and the president has no such authority except as has been given him by congress.

The World War was terminated, as between the United States and both Germany and Austria-Hungary, by the joint resolution of congress of July 2, 1921. \* \* \*

In the Pension and Veterans' Relief Reorganization Act, the Act of March 20, 1933, c. 3, Title I, Section 4, 48 Stat. 9, 38 USCA Section 704, the President was authorized to fix the beginning and termination of any war. Under the power thus conferred, the President issued Executive Order No. 6098, dated March 31, 1933, 38 USCA page 685, under which Executive Order it was provided: The beginning and termination dates of the wars shall be: The World War, April 6, 1917, and November 11, 1918, but as to service in Russia the ending date shall be April 1, 1920, etc.

As to the end of former wars, see *The Speedwell*, 2 Dall. 40, 1 L. Ed. 280 (1784); *Nephews v. United States*, 222 U. S. 558, 32 Sup. Ct. 179, 56 L. Ed. 316 (1908); *MacLeod v. United States*, 229 U. S.

416, 33 Sup. Ct. 955, 57 L. Ed. 1260 (1913); and that World War I did not cease on the day of the armistice: *Weisman v. United States*, 271 Fed. 944 (1921).

Where the alien property custodian determined funds were alien property, the signing of the armistice did not entitle adverse claimants to the fund on the theory that the war had ceased, the statute involved declaring that the end of the war shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall by proclamation, declare a prior date; it appearing that no such prior date has been declared. *Salamander Insurance Company v. New York Life Insurance and Trust Company*, 254 Fed. 852 (1918).

As to World War I, the state of war still technically existed on May 29, 1920. *United States v. Russel*, 265 Fed. 414 (1920).

As to World War II, the President has declared that the emergency is over for one purpose only. He fixed September 29, 1945, as the termination of the emergency period fixed under Section 124 of the Internal Revenue Code for the amortization of defense facilities. 10 Fed. Reg. 12475 (October 4, 1945).

That World War II has not been legally terminated, see *In re Yamashita*, — U. S. —, 66 Sup. Ct. 340 (1946) (decided February 4, 1946), wherein Mr. Chief Justice Stone, speaking for the majority of the Court, held that a state of war still exists, as follows:

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

\* \* \* \* \*

The extent to which the power to prosecute violation of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. \* \* \*

For a general article on The Termination of War, see Vol. 19 Mich. Law Review 819 (1920-21).

Until there is proper action by way of ratification of a treaty of peace or a proclamation by Congress or the President declaring a prior date of termination, a state of war exists. Therefore, employes who now enlist or reenlist before such action by Congress or the President come within the provisions of the Act of June 7, 1917, P. L. 600, *supra*, authorizing military leaves of absence for employes who enlist, enroll, or are drafted in time of war or contemplated war.

It is our opinion, therefore, that employes who have been on military leave of absence and have been honorably discharged and who now elect to reenlist rather than to return immediately to their former State employment do not by such reenlistment waive their rights to the benefits of the Act of June 7, 1917, P. L. 600, 65 P. S. § 111, and, therefore, their military leave must be extended.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 539

*Poor—Public Assistance Law of 1937—Assistance to persons in institutions.*

Under sections 1 and 2 of the Public Assistance Law of June 24, 1937, P. L. 2051, the Department of Public Assistance may legally grant public assistance to eligible persons who are able to maintain for themselves and their dependents, with the assistance granted, a decent and healthful standard of living in accordance with rules, regulations and standards established by the Department of Public Assistance; the department may not, however, make grants to persons who require institutional care because of physical or mental infirmity and who are unable to maintain for themselves and their dependents a decent and healthful standard of living as required by the Public Assistance Law.

Harrisburg, Pa., March 13, 1946.

Honorable Robert P. Wray, Acting Secretary of Public Assistance,  
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communications requesting advice on the responsibility of the Department of Public Assistance to grant assistance to indigent persons requiring institutional care because of "physical or mental infirmity."



Section 1 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. § 2501, declares the legislative intent and purpose of the act as follows:

This act shall be known, and may be cited, as the "Public Assistance Law."

It is hereby declared to be the legislative intent that the purpose of this act is to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all of its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life, and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self-respect, self-dependency and the desire to be a good citizen and useful to society.

Section 2 of the Public Assistance Law, as amended, *supra*, 62 P. S. § 2502, defines "assistance" as follows:

"Assistance" means assistance in money, goods, shelter, medical care, work relief or services, provided from or with State or Federal funds, for indigent persons who reside in Pennsylvania and need assistance *to enable them to maintain for themselves and their dependents a decent and healthful standard of living*, and for indigent homeless or transient persons. \* \* \* (Italics ours. )

Section 9 of the Public Assistance Law, as amended, *supra*, 62 P. S. § 2509, provides for eligibility for assistance, as follows:

Except as hereinafter specifically otherwise provided in the case of pensions for the blind, all persons of the following classes, except those who hereafter advocate and actively participate by an overt act or acts in a movement proposing a change in the form of government of the United States by means not provided for in the Constitution of the United States, shall be eligible to receive assistance, *in accordance with rules, regulations and standards established by the Department of Public Assistance, with the approval of the State Board of Assistance, as to eligibility for assistance, and as to its nature and extent:*

(a) Dependent Children. A dependent child is defined as any needy child under the age of sixteen or under the age of eighteen if found to be regularly attending school who  
(1) \* \* \*

(b) Aged Persons. An aged person is defined as one who  
(1) is seventy years of age, or more, or who, after December thirty-first, one thousand nine hundred thirty-nine, is sixty-five years of age, or more, (2) \* \* \* (3) *is not, at the time of receiving assistance, an inmate of a public institution*, and  
(4) \* \* \*

(c) Blind Persons. A blind person is defined as one who (1) is twenty-one years of age, or more, (2) \* \* \* (4) is not receiving assistance as an aged person during the period for which he is receiving assistance as a blind person, (5) *is not, at the date of making application, an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution.* \* \* \*

(d) Other persons who are citizens of the United States and who have a settlement in Pennsylvania, and all aliens who have within two years previous to the first day of January, one thousand nine hundred and forty, filed their declaration of intention to become a citizen, and who have a legal settlement in Pennsylvania, and need assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living, *and who do not require institutional care because of physical or mental infirmity.*

(e) Any person within any group, defined in this section, who has a quasi-settlement in this Commonwealth until he is removed to his place of legal settlement. (Italics ours.)

Section 401(a) of the County Institution District Law, the Act of June 24, 1937, P. L. 2017, 62 P. S. § 2301, defines the powers and duties of a County Institution District as to care of dependents, as follows:

The local authorities shall have the power, and it shall be their duty with funds of the institution district or of the city, according to rules, regulations, and standards established by the State Department of Welfare—

(a) To care for any dependent, having a settlement in the county or city, *who is not otherwise cared for;* (Italics ours.)

Dependents are defined in Section 102, 62 P. S. § 2202, as follows:

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

The responsibility of the Commonwealth of Pennsylvania, Department of Public Assistance, and of the County Institution Districts for the care of the needy is thus fixed by statute.

Indigent persons in Pennsylvania were formerly the responsibility of local authorities. By a series of legislative enactments, responsibility for certain categories of the needy was placed on the Commonwealth. For example, the Mothers' Assistance Program was set up by the Act of April 29, 1913, P. L. 118, and the Act of July 10, 1919, P. L. 893; Old Age Assistance Program by the Act of January 18, 1934, P. L. 282, and the Act of June 25, 1936, P. L. 28; the Blind Pension Program by the Act of June 17, 1934, P. L. 246, and the

Act of July 9, 1935, P. L. 621; and the Unemployment Relief Program by the Act of August 19, 1932, P. L. 88, creating the State Emergency Relief Board. See Poor District Case (No. 1), 329 Pa. 390, 395, footnote quoting Goodrich Report, December 15, 1936, pp. 99, 100.

A series of five acts passed in 1937, including the County Institution District Law, *supra*, and the Public Assistance Law, *supra*, made comprehensive changes in the legislation theretofore providing for the care and maintenance of indigent persons; the power to make the change was sustained in Poor District Cases (No. 1 and No. 2), 329 Pa. 390 and 410, 194 A. 334, 196 A. 837.

By the Public Assistance Law, *supra*, the above recited four programs, namely, Aid to Dependent Children, Old Age Assistance, Blind Pension and Unemployment Relief, were unified, simplified and consolidated into one system, to be administered by the Department of Public Assistance. See the Act of June 24, 1937, P. L. 2003, 71 P. S. §§ 664-666.

The Department of Public Assistance was given full responsibility to provide for outdoor or non-institutional relief, including unemployables. However, from the above recited sections 1 and 2 the legislative intent is obviously limited to those needy persons who can maintain for themselves and their dependents a decent and healthful standard of living and was never intended to cover grants to those persons who could not maintain such standard of living. This intent is manifest by the express provisions of section 9(b) that aged persons who are inmates of public institutions are disqualified and further that "other persons," that is those who receive general assistance, are ineligible if they require institutional care because of physical or mental infirmity. This leaves only dependent children and blind persons. Though there is no express prohibition in the law regarding these two categories, the legislative intent as set forth in Section 1 of the Public Assistance Law, *supra*, and the definition of "assistance" in section 2 show without doubt an intention to grant public assistance only to those needy persons who can care for themselves, and it is not a proper function of your Department to make grants of assistance to persons requiring institutional care by reason of physical or mental incapacity.

See Section 51 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 551, as follows:

The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legisla-

ture. Every law shall be construed, if possible, to give effect to all its provisions.

\* \* \* \* \*

Moreover, if public assistance were afforded in such cases, the whole purpose of the Public Assistance Law to give assistance only to those who are able to care for themselves, that is outdoor relief, would be negatived and the presumption that the legislature does not intend a result that is absurd, impossible of execution or unreasonable would be rebutted. See Section 52 of the Statutory Construction Act, *supra*, 46 P. S. § 552; *McGregor Estate, to use, v. Young Township*, 350 Pa. 93 (1944); *Brown's Case*, 151 Pa. Super. 522, affirmed in 347 Pa. 418 (1943); *Cammie vs. I. T. E. Cir. Breaker Co.*, 151 Pa. Super. 246, 253 (1943).

Moreover, the Act of September 29, 1938, Special Session, P. L. 53, as reenacted and amended by the Act of May 19, 1943, P. L. 262, 50 P. S. § 1051, and further amended by the Act of May 25, 1945, P. L. 1074, provided for the transfer to the Commonwealth of institutions for the care, maintenance and treatment of mental patients, and also provided for the management and operation of these mental institutions and the care, maintenance and treatment of mental patients therein by the Department of Welfare. These acts vested in the Commonwealth title to and the right to operate all property theretofore used by counties, cities or institution districts. The acts were sustained as constitutional in *Chester County Institution District et al. v. Commonwealth et al.*, 341 Pa. 49 (1941) and *Lawler v. Commonwealth*, 347 Pa. 568 (1943). The Department of Public Assistance has no responsibility for mental patients, that is the mentally ill, mentally defectives, epileptics, or inebriates, as under the above Act of September 29, 1938, Special Session, P. L. 53, as reenacted and amended, *supra*; and under the above section 401(a) of the County Institution District Law, *supra*, the mentally incapacitated if and when committed in the manner provided by law are the responsibility of the Department of Welfare of the Commonwealth of Pennsylvania, otherwise of the Institution Districts.

Nor does section 4(k) of the Public Assistance Law, as amended by the Act of May 2, 1943, P. L. 434, 62 P. S. § 2504, which empowers the Department of Public Assistance, with the approval of the State Board of Public Assistance, to provide for special needs of individuals eligible for assistance, enlarge the scope of your authority. This amendment merely provides for certain special needs for applicants in their own homes, such as special diets for the tubercular, hearing devices, etc. However, eligibility standards, together with the provision that applicants be able to maintain for them-

selves and their dependents a decent and healthful standard of living as defined by rules and regulations of the State Board of Public Assistance, must be adhered to.

We are of the opinion, therefore, and you are advised that the Department of Public Assistance, under sections 1 and 2 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, 62 P. S. §§ 2501 and 2502, may legally grant public assistance to eligible persons who are able to maintain for themselves and their dependents, with the assistance granted, a decent and healthful standard of living in accordance with rules, regulations and standards established by the Department of Public Assistance, with the approval of the State Board of Public Assistance, as to eligibility for assistance and as to its nature and extent, as provided for in section 9 of the Public Assistance Law. It is not, however, a proper function of the Department of Public Assistance to make grants of assistance to persons who require institutional care because of physical or mental infirmity and who are unable to maintain for themselves and their dependents a decent and healthful standard of living as required by the Public Assistance Law, *supra*.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

M. LOUISE RUTHERFORD,  
*Deputy Attorney General.*

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OPINION No. 540

*Domestic Insurance Companies—Incorporation—Charter—Amendments—Additional Purposes—Commissioner—Certificate—Procedure.*

(Revoked and recalled)

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OPINION No. 541

*Schools—Elementary teachers—Minimum salary requirements—Inclusion of professional employees—Act of May 29, 1945.*

The phrase, "elementary teacher," as used in clauses 1, 2, and 3, section 1209.1 of act approved May 29, 1945, P. L. 1112, amending the School Code of May 18, 1911, P. L. 309, and prescribing minimum salaries and increments for teachers, means a teacher in the elementary schools, and is to be interpreted in the light of the definition of "teacher" under clause 6 of the same section of the act, which defines "teacher" to include all professional employees and temporary professional employees who devote 50 percent of their time or more to teaching or other educational activities.

Harrisburg, Pa., March 26, 1946.

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

Sir: This department is in receipt of your request for an opinion with regard to the meaning of the term "elementary teacher," as used in clauses 1, 2 and 3 of section 1290.1 of act approved May 29, 1945, P. L. 1112, 24 P. S. § 1163.1, et seq.

This act amends the Act of May 18, 1911, P. L. 309, known as the School Code, by adding a new section. It prescribes minimum salaries and increments for teachers employed in the various school districts and authorizes you to withhold the payment of moneys due school districts when such school districts fail to pay the members of their teaching and supervisory staffs the full amount of salaries and increments.

Clauses 1, 2 and 3 of section 1209.1 of Act of May 29, 1945, read:

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:

Districts of the first class

1. Elementary teachers, minimum annual salary, one thousand four hundred dollars (\$1,400), minimum annual increment, one hundred dollars (\$100), minimum number of increments thirteen (13); junior high school and special class teachers, minimum annual salary, one thousand eight hundred dollars (\$1,800), minimum annual increment, one hundred twenty dollars (\$120), minimum number of increments ten (10); high school teachers and vocational school teachers, minimum annual salary, two thousand dollars (\$2,000), minimum annual increment, one hundred seventy-five dollars (\$175), minimum number of increments eight (8); supervisors, minimum annual salary, two thousand dollars (\$2,000), minimum annual increment, one hundred dollars (\$100), minimum number of increments ten (10); elementary principals, minimum annual salary, two thousand three hundred dollars (\$2,300), minimum annual increment, one hundred seventy dollars (\$170), minimum number of increments ten (10); all other principals, except as herein otherwise provided, minimum annual salary four thousand dollars (\$4,000), minimum annual increment two hundred fifty dollars (\$250), minimum number of increments four (4).

## Districts of the second class

2. Elementary teachers, minimum annual salary, one thousand four hundred dollars (\$1,400), minimum annual increment, one hundred dollars (\$100), minimum number of increments nine (9); high school teachers, minimum annual salary, one thousand six hundred dollars (\$1,600), minimum annual increment, one hundred dollars (\$100), minimum number of increments nine (9); supervisors, minimum annual salary, one thousand six hundred dollars (\$1,600), minimum annual increment, one hundred dollars (\$100), minimum number of increments eight (8); elementary principals, minimum annual salary, two thousand two hundred dollars (\$2,200), minimum annual increment, one hundred dollars (\$100), minimum number of increments five (5); high school principals, minimum annual salary, three thousand dollars (\$3,000), minimum annual increment, one hundred twenty-five dollars (\$125), minimum number of increments eight (8).

## Districts of the third and fourth classes

3. Teachers, minimum annual salary, one thousand four hundred dollars (\$1,400), minimum annual increment, one hundred dollars (\$100), minimum number of increments seven (7); principals, having less than twenty-five (25) teachers under their supervision, and who devote one-half or more of their time to supervision and administration, minimum annual salary, two thousand dollars (\$2,000), minimum annual increment one hundred dollars (\$100), minimum number of increments five (5); principals, having twenty-five (25) or more teachers under their supervision, and who devote one-half or more of their time to supervision and administration, minimum annual salary, two thousand two hundred dollars (\$2,200), minimum annual increment, one hundred dollars (\$100), minimum number of increments five (5); supervising principals, having less than twenty-five (25) teachers under their supervision, minimum annual salary, two thousand four hundred dollars (\$2,400), minimum annual increment, one hundred dollars (\$100), minimum number of increments five (5); supervising principals, having twenty-five (25) or more teachers under their supervision, minimum annual salary, two thousand eight hundred dollars (\$2,800), minimum annual increment, one hundred dollars (\$100), minimum number of increments five (5).

Clause 6 of the same section reads:

The term "teacher" as used in these amendments shall include all professional employes and temporary professional employes who devote fifty per centum (50%) of their time, or more, to teaching or other direct educational activities, such as class room teachers, demonstration teachers, museum teachers, counselors, librarians, school nurses, dental hygienists, home and school visitors, and other similar professional

employees and temporary professional employees, certificated in accordance with the qualifications established by the State Council of Education.

The question is: Does the term "elementary teachers," as used in clauses 1, 2 and 3, as above set forth, mean teachers in the elementary schools, and also those other individuals named in clause 6, such as counselors, librarians, school nurses, dental hygienists and home and school visitors, some of whom we do not ordinarily think of as teachers; or is the term to be restricted to teachers in elementary schools, exclusive of the others named in clause 6?

It is to be noted that the term "teacher," in clause 6 is to be limited in its application to act of 1945, *supra*. In other words, it is to be given a special meaning in the act. This meaning includes those individuals designated as professional employees and temporary professional employees.

Section 1201 of the Act of May 18, 1911, P. L. 309, as amended, known as the School Code, 24 P. S. § 1121, defines the term "professional employe," as including:

\* \* \* 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.

It also defines the term "temporary professional employe" as meaning:

\* \* \* 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.

By comparison, it will be seen that the definition set forth in clause 6 of section 1209.1 of Act of May 29, 1945, *supra*, is a broader term than the terms "professional employe," and "temporary professional employe," as defined in the School Code. It is well known that the general intent of the act was to increase the salaries of school teachers. While these increases were classified, first, according to districts, and secondly, to types of schools in which the instruction was being given, there appears neither in the legislation, nor in the legislative history, anything which would indicate that these increases were to be limited to certain classes of teachers. Neither the law, nor the legislative history indicates that the General Assembly intended to favor or discriminate against any particular class of teacher.



Section 33 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 533, provides that "Words and phrases shall be construed \* \* \* according to their common and approved usage."

Applying the definition of "teacher" in clause 6 of the same section, as above set forth, we must give to the phrase "teacher in the elementary schools" the meaning which the General Assembly provided should be given to it. Certainly, the General Assembly had a definite purpose in mind when it gave to the word "teacher" a meaning which would apply specifically to these amendments. The Statutory Construction Act, *supra*, commands us that the object of all interpretation and construction of law is to extend and effectuate the intention of the legislature, and further that it is presumed that the legislature intended the entire statute to be effective and certain.

We are, therefore, of the opinion that the phrase "elementary teacher," as used in clauses 1, 2 and 3 of section 1209.1 of the Act of May 29, 1945, P. L. 1112, means a teacher in the elementary schools, and is to be interpreted in the light of the definition of "teacher" in clause 6 of the same section of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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OPINION No. 542

*State government—Elimination of obstructions to air travel—Obstructions on private property or on right of way of State highways—Act of June 4, 1945 (No. 85-A).*

Funds from the Appropriation Act of June 4, 1945 (No. 85-A) may be expended for the removal or elimination of obstructions which menace air travel on private property or on the right of way of State highways provided that no more may be expended than is required to match an equal sum contributed by a political subdivision of the Commonwealth or by the Federal Government or both.

Harrisburg, Pa., March 27, 1946.

Honorable Floyd Chalfant, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion as to whether the Pennsylvania Aeronautics Commission may grant

financial assistance to a borough under Appropriation Act No. 85-A, approved June 4, 1945.

You call our attention to the fact that about twenty-five percent of the sum requested is to be expended for the removal of telephone lines that are located off the bounds of the municipally owned lands. These telephone pole lines are to be removed to a location over which the Department of Highways of the Commonwealth has obtained the right of easement. Specifically, you ask:

1. May these funds be expended on the right-of-way of the Pennsylvania Highway Department?
2. May these funds be expended on property owned by private individuals?

Section 202 of the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 62, known as The Administrative Code of 1929, reads:

The following boards, commissions, and offices are hereby placed and made departmental administrative \* \* \* commissions: \* \* \*.

In the Department of Commerce,  
 Pennsylvania Aeronautics Commission, \* \* \*

Section 503 of The Administrative Code of 1929, supra, 71 P. S. § 183, reads:

Section 503. Departmental Administrative Boards and Commissions.—Except as otherwise provided in this act, departmental administrative bodies, boards, and commissions, within the several administrative departments, shall exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected, *but, in all matters involving the expenditure of money, all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected. Such departments shall, in all cases, have the right to make such examinations of the books, records, and accounts of their respective departmental administrative boards and commissions, as may be necessary to enable them to pass upon the necessity and propriety of any expenditure or proposed expenditure.* (Italics ours.)

The Act of May 25, 1933, P. L. 1001, 2 P. S. § 1460, et seq., known as "The Aeronautical Code," defines the powers and duties of the Pennsylvania Aeronautics Commission, and section 201, 2 P. S. § 1463, reads:

It shall be the duty of the commission to—

\* \* \* \* \*

(f) Encourage and assist in the establishment and construction of airports, civil airways, and other air navigation facilities.

The Act of May 25, 1933, P. L. 1016, as amended, 2 P. S. § 1503, reads as follows:

Section 1. The Pennsylvania Aeronautics Commission, in connection with the designation and establishment of civil airways within, over and above the lands and waters of this Commonwealth as provided by law, shall have the power, to the extent to which the General Assembly shall have appropriated funds to it or to the Department of Property and Supplies for the purpose:

(a) Either alone or in cooperation with counties, cities, boroughs, or townships, to establish, operate and maintain along such airways all necessary navigation facilities, including airports, landing fields and intermediate landing fields.

\* \* \* \* \*

(d) To make additions and improvements in or to airports, landing fields or intermediate landing fields and facilities under its control, and, either alone or in cooperation with others, to provide personnel, heat, light, water, fuel, telephone service, drainage, runways, fueling facilities, and lighting facilities, *and to remove or otherwise eliminate such obstructions as shall menace air travel.* (Italics ours.)

Act No. 85-A, supra, reads as follows:

An act making an appropriation to the Department of Commerce to be used by the Pennsylvania Aeronautics Commission for the encouragement and development of aeronautics.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. The sum of three million seven hundred twenty-five thousand dollars (\$3,725,000), or so much thereof as may be necessary, is hereby specifically appropriated out of moneys in the General Fund to the Department of Commerce for the two fiscal years beginning the first day of June, one thousand nine hundred forty-five, to be used by the Pennsylvania Aeronautics Commission for the encouragement and development of aeronautics, for the development and maintenance of State airports, for assistance to political subdivisions of the Commonwealth in the construction and improvement of airports and other aeronautical facilities, including the making of surveys and plans and the necessary construction work and equipment: Provided, however, That no more shall be expended from this item for such purposes or any of them than may be required to match an equal sum contributed by any political subdivision of the Commonwealth

or by the Federal Government or by a political subdivision and the Federal Government.

The Act of May 4, 1927, P. L. 519, known as the "Pennsylvania Borough Act," 53 P. S. § 14792, authorizes boroughs to establish, equip and operate airports.

That part of Act No. 85-A, which reads:

\* \* \* for the encouragement and development of aeronautics \* \* \* for assistance to political subdivisions of the Commonwealth in the construction and improvement of airports and other aeronautical facilities, \* \* \*

is authority for granting financial assistance to a borough or other political subdivision, for the improvement of airports. The removal of telephone poles would remove a hazard and thus improve the airport.

Paragraph (d) of the Act of May 25, 1933, supra, gives specific authority to the Pennsylvania Aeronautics Commission to remove or otherwise eliminate such obstructions as shall menace air travel. The fact that such obstructions are on land owned by private individuals is immaterial. No restriction of expenditures to the State-owned lands appears in the general law or appropriation act.

We are, therefore, of the opinion that funds from Appropriation Act No. 85-A, approved June 4, 1945, may be expended for the removal or elimination of obstructions which menace air travel on private property or on the right-of-way of State highways; Provided, however, That no more shall be expended than may be required to match an equal sum contributed by a political subdivision of the Commonwealth, or by the Federal Government, or by a political subdivision and the Federal Government.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
Attorney General.

HARRINGTON ADAMS,  
Deputy Attorney General.

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OPINION No. 543

*Schools—State aid—Vocational courses in public schools—Attendance by private school pupils—Inclusion in statistics for purpose of calculating amount of State aid—Sections 401, 1241, 1242, 1245 of School Code of 1911, as amended by Act of May 29, 1945.*

1. Under the provisions of section 401 of the School Code of May 18, 1911, P. L. 309, as amended, pupils in attendance at private schools are nevertheless entitled to admission to manual training, vocational and domestic science courses given in the public schools of the district wherein they reside.

2. Private school pupils in part-time attendance at public school courses for manual training or home economics may be counted as being in attendance at the public school, for the proportionate amount of time spent there, in calculating the "average daily membership" of the school under section 1241 of the School Code of 1911, as amended by the Act of May 29, 1945, P. L. 1112, in order to determine the number of "teaching units" for which the district is entitled to State aid under section 1242 of the same statute.

3. The State aid per pupil to which a school district is entitled for courses in vocational home economics by the provisions of section 1245 of the School Code of 1911 as amended by the Act of May 29, 1945, P. L. 1112, is to be calculated by including those private school pupils in attendance in such curriculum in the public school.

4. Section 1245 of the School Code of 1911, as amended by the Act of May 29, 1945, P. L. 1112, improperly punctuated at passage, may be *corrected* as to punctuation for purposes of interpretation, pursuant to section 53 of the Statutory Construction Act of May 28, 1937, P. L. 1019.

Harrisburg, Pa., April 12, 1946.

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

Sir: This department is in receipt of your request for advice concerning reimbursement of school districts, under the provisions of Act No. 403 of the General Assembly, approved May 29, 1945, P. L. 1112, 24 P. S. § 1163.1, which amends the Act of May 18, 1911, P. L. 309, known as the School Code.

Your request arises from the following situation: In some public school districts, certain classes are attended by pupils who spend the major portion of their time in private schools. In the larger cities the number of such part-time students is considerable, and in one city it is estimated that more than five thousand of these pupils attend manual training and home economics classes one-half day each week, or ten percent of the total time.

Your first question reads:

May these part-time pupils be counted as being in "average daily membership" one-half day per week, and may this number be included in determining the number of units on account of which the school district is entitled to receive reimbursement under the provisions of Sections 1241 and 1242 of Act No. 403, *supra*?

Preliminarily, it is to be noted that section 401 of the Act of May 18, 1911, P. L. 309, as amended, 24 P. S. § 331, reads:

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 \* \* \* namely:

\* \* \* \* \*

Manual training schools.

Vocational schools.

Domestic science schools.

\* \* \* \* \*

*Provided, That no pupil shall be refused admission to the courses in these additional schools or departments by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school. (Italics ours.)*

This section was held to be constitutional by the Supreme Court in the case of *Commonwealth v. School Dist. of Altoona*, 241 Pa. 224 (1913).

In sections 1241 and 1242 of the Act of May 29, 1945, *supra*, a method or formula of reimbursing school districts is set forth, and an important factor in the formula is "the number of pupils in average daily membership."

Section 1241 of the Act of May 29, 1945, *supra*, defines "district pupils" as follows:

"District Pupils" of a school district shall designate *all* pupils enrolled in the public schools of the Commonwealth who are residents of a given school district, \* \* \*. (Italics ours.)

Sub-paragraph (2) provides:

A district's number of teaching units shall be obtained as follows: (1) divide by twenty-two (22) the number of district pupils in average daily membership in a public high school; (2) divide by thirty (30) the number of district pupils in average daily membership in a public elementary school; and (3) add the quotients obtained under (1) and (2) above.

Sub-paragraph (3) provides:

"Average Daily Membership" shall be computed in accordance with the rules of procedure as established by the Department of Public Instruction for the school term 1944-1945.

Under the definition of "district pupils," all pupils who are enrolled in public schools would seem to be included. Though these pupils come to school for only one-half day a week, they would be enrolled as pupils of the school. Unless enrolled there would be no record kept of attendance or grades and it would not be possible to issue a credit due a pupil for completing the course.

The provision that "Average Daily Membership" shall be computed in accordance with rules established by the department would not, we believe, permit the department to decide who was or was not a district pupil, or to make a ruling that pupils taking vocational courses one-half day a week were not "district pupils." In other words, their rules of procedure could not narrow their interpretation of the act so as not to include "all pupils enrolled."

Your second question reads:

May reimbursement be made to a school district under Section 1245 of the School Code, where part-time pupils attend classes in vocational home economics?

Section 1245 of the Act of May 29, 1945, *supra*, reads as follows:

Section 1245. Every school district and every vocational school district, regardless of classification, shall be paid by the Commonwealth for the school term 1945-1946, and for every school term thereafter, the sum of thirty-five dollars (\$35); in vocational agriculture and vocational industrial education, twenty dollars (\$20), in vocational home economics education; and fifty dollars (\$50), in vocational distributive education per pupil in average daily membership in vocational curriculums, approved by the Superintendent of Public Instruction.

It is to be noted that the above section is incorrectly punctuated, and inasmuch as section 53 of the Act of May 28, 1937, P. L. 1019, known as the Statutory Construction Act, 46 P. S. § 553, provides that "in no case shall the punctuation of a law control or affect the intention of the Legislature in the enactment thereof," the section should be interpreted as follows:

Section 1245. Every school district and every vocational school district, regardless of classification, shall be paid by the Commonwealth for the school term 1945-1946, and for every school term thereafter, the sum of thirty-five dollars (\$35) in vocational agriculture and vocational industrial education; twenty dollars (\$20) in vocational home economics education; and fifty dollars (\$50) in vocational distributive education per pupil in average daily membership in vocational curriculums, approved by the Superintendent of Public Instruction.

What we have said concerning daily average membership applies with equal force to this question, and as these students are to be counted in the calculations of average daily membership, it follows that the school district is entitled to receive reimbursement for these pupils for the proportionate amount of time spent in approved classes in vocational and home economics.

We are, therefore, of the opinion that: 1. Pupils who attend private schools, and who are in part-time attendance in the public schools for manual training and home economics, may be counted as being in average daily membership for the purpose of determining the reimbursement due the school district, under the Act of May 29, 1945, P. L. 1112, 24 P. S. § 1163.1.

2. Reimbursement may be made to a school district under section 1245 of the Act of May 18, 1911, P. L. 309, known as the School Code, where part-time pupils attend classes in vocational home economics.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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OPINION No. 544.

*Counties—Public libraries—State aid—Necessity for authorization of library by referendum—Act of January 20, 1917, as amended—Act of June 23, 1931.*

1. Section 4 of the Act of January 20, 1917, P. L. 1143, as amended by the Act of May 13, 1931, P. L. 127, providing for a referendum on the question of establishing in (inter alia) a county a free public library, if the county commissioners decide to submit such question or if three percentum of the voters petition for such submission, provides merely an alternative method, and under section 3 of the same statute, as amended by the Act of April 3, 1945, P. L. 111, the county commissioners, if they choose, may establish such library without a referendum.

2. In order that a free, public, nonsectarian county library may be entitled to the State aid provided by the Act of June 23, 1931, P. L. 1203, it is not necessary that the establishment of such library shall have been approved by a vote of the electorate of the county.

Harrisburg, Pa., April 17, 1946.

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



Sir: This department is in receipt of your request for an opinion with regard to State aid for the maintenance of certain free, public, non-sectarian libraries. State aid is rendered to these libraries as the result of appropriations made by the General Assembly to your department. A question has been raised as to whether these libraries are legally established, and you wish to be advised whether it is proper for your department to grant state aid to such libraries.

Authority for the establishment and maintenance of free public non-sectarian libraries is found in the Act of January 20, 1917, P. L. 1143, as amended, 53 P. S. § 1701 et seq. Sections 1, 2, 3 and 4 of this act, 53 P. S. § 1701 to § 1704 inclusive, read as follows:

The term "municipality," wherever used in this act, shall be interpreted as meaning any county, city, borough, town, or township, as the case may be, but shall not be interpreted as meaning school district.

The term "municipal authorities," wherever used in this act, shall be interpreted as meaning the mayor and council of any city, the burgess and council of any borough or town, the commissioners or supervisors of any township, or the commissioners of any county, as the case may be.

"The municipal authorities of any municipality may make appropriations out of current revenue of the municipality, or out of moneys raised by the levy of special taxes to establish or maintain, or both, a free, public, nonsectarian library, for the use of the residents of such municipality. The appropriations for maintenance shall not exceed a sum equivalent to two mills on the dollar on all taxable property, annually. Special taxes for these purposes may be levied on the taxable property of the municipality, or the same may be levied and collected with the general taxes. The provisions of this section shall not be construed to limit appropriations made for library purposes to those made from special tax levies.

The municipal authorities of any municipality may submit to the qualified electors of such municipality at any general or municipal election, the question of establishing, maintaining and/or aiding in maintaining a free, public, non-sectarian library, and must submit such question, if petitioned for by three per centum of the voters at the last preceding general election. At such election the question of establishing an annual tax at a certain rate, not exceeding two mills on the dollar, on all taxable property of the municipality, shall be submitted.

It should be noted that under section 4 of the above act, when the question of establishing a public library is submitted to the vote of the electorate, the question of establishing an annual tax at a certain rate is also to be submitted at the same time to the electorate. Sec-

tion 3, however, provides for the direct appropriation by the municipal authorities for the establishment of public libraries.

The Act of June 23, 1931, P. L. 1203, 53 P. S. § 1730 et seq., established a system of state aid for the maintenance of free public non-sectarian county libraries, and, by the Act of May 29, 1945, Act No. 39-A, the General Assembly appropriated funds to the Department of Public Instruction to carry into effect the provisions of the act of 1931 *supra*.

You inform us that in one county a threat of surcharge has been made against the county commissioners for the reason that the library was not established by the vote of the electorate; and you ask whether, in view of such failure, your department should allocate funds to the county in question. The question, therefore, for us to decide is whether it is necessary for a free, public, non-sectarian library to be authorized by a vote of the electorate before your department grants state aid to such library.

Section 3 of the Act of 1917, *supra*, as amended by the Act of April 3, 1945, P. L. 111, 53 P. S. § 1703, is, in our opinion, a definite grant of authority to a county to make appropriations out of current revenue or out of special tax levies to establish, or maintain, or both, a free, public, non-sectarian library. The provision with regard to an election is found in section 4 of the act, and it seems to us that this is a permissive grant of authority to submit the question of the establishment of a library to the voters, if the county commissioners so decide; and a mandatory provision that such question be submitted, if a petition signed by three percent of the voters at the last preceding general election is presented to the county commissioners. In other words, it seems to us that action may be taken with regard to the establishment of libraries when any one of the three following situations exists:

1. Where the county commissioners have no doubt about the advisability of establishing a library, and they take such action.
2. Where the county commissioners deem it advisable to submit such a question to the electorate.
3. When the electorate petitions for the submission of the question to the voters.

This opinion is borne out by the provisions of Section 12 of the Act of 1917 *supra*, as amended by the Act of April 3, 1945, P. L. 111, 53 P. S. § 1712, which reads:

- (a) The municipal authorities of any municipality may make appropriations out of current revenue of the municipality, or out of moneys raised by the levy of special taxes, not to exceed a sum equivalent to two mills on the dollar

annually, on all taxable property in the municipality, to maintain or aid in the maintenance of a free library established by deed, gift, testamentary provision, or in any manner otherwise than under the provisions of sections three, four, and seven of this act: Provided, That the municipal authorities shall be represented by at least two members of the board having control of the affairs of said library.

Section 3 is the section which empowers the county commissioners to make appropriations for a library. Section 4 is the section which provides for the submission of the question to the electorate, and section 7 is the provision which provides for the raising of funds for the establishment of a free, public, non-sectarian library by public subscription.

Our opinion is also strengthened, we feel, by the provisions of the Act of May 2, 1929, P. L. 1278, known as the General County Law, 16 P. S. § 605, which provides that:

Counties shall have power to take, purchase or acquire, through condemnation proceedings, property for the purpose of erecting thereon \* \* \* public libraries \* \* \*

Section 606 of said law, 16 P. S. § 606, reads:

Counties, by order of the commissioners thereof, shall have power to appropriate money from the public funds \* \* \* for the erection on said property taken, purchased or acquired \* \* \* libraries, \* \* \*

The General County Law makes no provision for the submission of such a question to the electorate, and we do not think the General Assembly would attach such a condition to the appropriation in one law, and fail to make a similar condition in another law. If we take the position that the submission of the question to the electorate is permissive in the one act, then both laws are more readily reconcilable.

We are, therefore, of the opinion, that you may exercise the authority granted to you by the Act of May 29, 1945, P. L. 111, and the Act of June 23, 1931, P. L. 1203, and make appropriations to free, public, non-sectarian libraries established by virtue of the Act of June 20, 1917, P. L. 1143, notwithstanding the fact that the establishment of such libraries was not approved by the votes of the electorate.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

OPINION No. 545

Harrisburg, Pa., May 6, 1946.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: Formal Opinion No. 536 of the Department of Justice dated February 13, 1946, addressed to you, concerning signatures necessary on contracts awarded by the Department of Property and Supplies for purchasing so-called "non-schedule" supplies and "non-constitutional" items, is hereby revoked.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

H. ALBERT LEHRMAN,  
*Deputy Attorney General.*

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OPINION No. 546

*Debtor and creditor—Usury—Installment loans by banks—Interest charges—Validity—Deduction in advance—Amount of loan and interest—Banking Code of 1933, sec. 1001—Act of April 6, 1945.*

1. Under subsection (4) of section 1001 of the Banking Code of May 15, 1933, P. L. 624, as amended by the Act of April 6, 1945, P. L. 155, if a rate of interest of \$6 per \$100 loaned is charged and collected in advance by a bank or bank and trust company upon the original face amount of an instrument or instruments evidencing an installment loan, payable in substantially equal installments over a period not exceeding three years, the face amount of the loan may not legally exceed the sum of \$3,500; nor may multiple loans of this type be legally made by a bank or bank and trust company to any one person where the aggregate face amount of the loan exceeds the sum of \$3,500; nor may the period for which the loan is made legally extend beyond three years from the time of its inception.

2. The practice of collecting \$6 per annum in advance per \$100 loaned on installment loans exceeding \$3,500 in face amount under the guise of holding installment payments as collateral to be applied to the debt at maturity, is usurious in character and violates the Act of May 28, 1858, P. L. 622.

3. In making installment loans a lending bank must comply so far as interest charges are concerned, with either the provisions of subsection (4) of section 1001 of the Banking Code of May 15, 1933, P. L. 624, as amended, or with the Act of May 28, 1858, P. L. 622; otherwise the contract will be usurious in character.

Harrisburg, Pa., May 8, 1946.

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

Sir: You have requested us to interpret subsection (4) of section 1001 of the Banking Code of 1933, as amended by the Act of April 6,

1945, P. L. 155, as it pertains to a transaction wherein a bank has loaned a sum in excess of \$3,500, payable in substantially equal installments over a period not exceeding three years and has charged and collected in advance six dollars per one hundred dollars per annum upon the original face amount of the instrument evidencing the loan for the entire period of the loan.

Subsection (4) of Section 1001 of the Banking Code of May 15, 1933, P. L. 624, 7 P. S. §§ 819-1001, as amended by the Act of April 6, 1945, P. L. 155, relating to the powers of banks and bank and trust companies, reads as follows:

To lend money either upon the security of real or personal property, or otherwise; to charge or to receive in advance interest therefor; to contract for a charge for a secured or unsecured installment loan, which in principal amount shall not exceed thirty-five hundred dollars, and which under its terms shall be repayable in substantially equal installments over a period not exceeding three years, which charge shall be at a rate not exceeding six dollars per one hundred dollars per annum upon the original face amount of the instrument or instruments evidencing the loan for the entire period of the loan, and which such charge may be collected in advance: Provided, That if the entire unpaid balance outstanding on the loan is paid by cash, renewal, or otherwise at any time prior to maturity, the bank, or bank and trust company, shall give a refund or credit of the unearned portion of such charge, calculated at the original contract rate of charge on the total amount of installments to become due for the term of all subsequent full installment periods. No additional amount shall be charged or contracted for, directly or indirectly, on or in connection with any such installment loan, except the following: (a) Delinquency charges not to exceed five cents for each dollar of each installment more than fifteen days in arrears: Provided, That the total of delinquency charges on any such installment loan shall not exceed fifteen dollars, and only one delinquency charge shall be made on any one installment; (b) Premiums paid by the bank, or bank and trust company, for insurance required or obtained as security for or by reason of such installment loan; (c) Such amounts as are necessary to reimburse the bank, or bank and trust company, for fees paid to a public officer for filing, recording, or releasing any instrument or lien; and the actual expenditures including reasonable attorneys' fees for legal process or proceedings, to secure or collect any such installment loan. Any advertising concerning such installment loans which contains a statement of an amount, or rate of charge, shall also contain the percentage rate, either per month or per year, computed on declining balances of the face amount of the loan instrument to which such charge would be equivalent if the loan were repaid according to contract: Provided, That this re-

quirement may be complied with by stating the equivalent percentage rate which would earn the charge for such a loan repayable in twelve equal consecutive monthly installments, and such stated rate may be closely approximate, rather than exact, if the statement so indicates: And provided further, That this requirement shall not apply to an advertisement in which an amount, or rate of charge, is indicated only by a table which contains and is confined to examples of the face amount of the loan instrument, the proceeds to the borrower exclusive of the charge, and the amount, number and intervals of the required payments.

From time to time the legislature has in specific instances authorized certain classes of lenders to charge more than what is generally known as the legal rate of interest, and has thus made exceptions to the general rule of 6% as a maximum established by the Act of May 28, 1858, P. L. 622, 41 P. S. §§ 3 et seq. The 1945 amendment to section 1001 of the Banking Code of 1933 is one such exception. While it must be liberally construed to effect its object and to promote justice (Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 558), its words, if free from ambiguity, are not to be disregarded under the pretext of pursuing its spirit (46 P. S. § 551).

The words of the statute according to their common and approved usage (46 P. S. § 533) have a conjunctive meaning which is free from doubt. Interest of 6% a year on the face amount of reducing loans not over \$3,500, payable in three years or less, may be collected by banks in advance. The only additional charges which may be made against the borrower, are those specified in clauses (a) to (c) of the amended subsection (4) of section 1001 of the Banking Code.

The very inclusion of these clauses indicates a preciseness of draftmanship which must be attributed to the preceding portion of the subsection. And we must conclude if a charge of more than the normal 6% per annum on sums actually due the creditor bank is to be collected, that the loan may not at any time exceed \$3,500, nor may any subterfuge be used to circumvent this provision. This simply means for instance, that extra interest, i. e., above the normal 6%, may not legally be collected from one person by the use of multiple notes each less than \$3,500, if all exceed that sum, or by the expedient of calling installment payments, collateral to be applied to the debt at maturity.

Unless then the lender bank keeps itself within the limitations prescribed in subsection (4) of section 1001, it must keep the interest charge to the normal 6% allowed by the Act of May 28, 1858, P. L. 622, elsewise its contract will be usurious.

In *Simpson v. Penn Discount Corporation et al.*, 335 Pa. 172, 175 (1939), Mr. Justice Barnes appropriately spoke for the Supreme Court in this language:

\* \* \* The statute against usury forms a part of the public policy of the state and cannot be evaded by any circumvention or waived by the debtor: *Moll v. Lafferty*, 302 Pa. 354, 349. It is immaterial in what form or pretence the usurious interest is covered in the contract: *Earnest v. Hoskins*, 100 Pa. 551, 559. As usury is generally accompanied by subterfuge and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, and the right to relief will not be denied because parol proof of the usurious character of the transaction contradicts a written instrument. In *Hartranft v. Uhlinger*, 115 Pa. 270, it is said (p. 273) It is, indeed, wholly immaterial under what form or pretence usury is concealed, if it can by any means be discovered our courts will refuse to enforce its payment.

We are of the opinion that under subsection (4) of section 1001 of the Banking Code of May 15, 1933, P. L. 624, as amended by the Act of April 6, 1945, P. L. 155, 7 P. S. §§ 819-1001, if a rate of six dollars per one hundred dollars per annum in advance upon the original face amount of an instrument or instruments evidencing an installment loan, payable in substantially equal installments over a period not exceeding three years is to be collected by a bank, or bank and trust company, the face amount of that loan may not exceed \$3,500 nor may multiple loans of this type be made by a bank, or bank and trust company, to any one person where the aggregate face amount of those loans will exceed \$3,500. Specifically, where a single loan or a series of loans is made pursuant to subsection (4) of section 1001, as amended, the aggregate to a single borrower may at no time exceed \$3,500 nor may any single loan extend beyond three years from the time of its inception.

The practice of collecting six dollars per one hundred dollars in advance on installment loans, the face amount of which exceed \$3,500 under the guise of holding installment payments as collateral to be applied to the debt at maturity, is a vicious and usurious one contrary to the provisions of the Act of May 28, 1858, P. L. 622, 41 P. S.

§ 3 et seq., and should not be countenanced by the Department of Banking.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 547

*Foods—Necessity for marking weight or measure—Act of May 18, 1945.*

The Act of May 18, 1945, P. L. 788, requires that commodities such as groceries, meats and vegetables ordered by telephone or personal contact from merchants or their representatives and not weighed, measured or counted in the presence of the purchaser, when wrapped in paper, placed in bags, or put in some other kind of a container for delivery at a later time, either be marked to show their net content in weight, measure or numerical count, or be accompanied by a statement clearly indicating such weight, measure or numerical count.

Harrisburg, Pa., June 11, 1946.

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

Sir: This department is in receipt of your request for advice, in which you ask if commodities, such as groceries, meats and vegetables, ordered by telephone or personal contact from merchants or their representatives, and not weighed, measured or counted in the presence of the purchaser, when wrapped in paper, placed in bags or put in some other kind of a container for delivery at a later time, should be marked to show their net content in either weight, measure or numerical count and considered as packages, under the provisions of the Act of July 24, 1913, P. L. 965, as amended, sometimes referred to as the Commodities Act, 76 P. S. §§ 241-249, inclusive.

The Commodities Act of 1913, as amended, 76 P. S. 241, contains, among others, the following definitions:

The word "commodity," as used in this act, shall mean anything, goods, wares, merchandise, compound, mixture or preparation, products of manufacture of any tangible personal property, which may be lawfully kept, sold, or offered for sale.

\* \* \* \* \*

The word "package," as used in this act, shall mean everything containing one or more than one unit of any com-



modity, tied or bound together, or put up in box, bag, pack, bundle, container, bottle, jar, can or any other form of receptacle or vessel, not considered as an approved measure, except cases, cartons, crates, bundless or bales used for bulk shipping or storage: Provided, That enclosed packages are marked as to weight, measure or numerical count.

The word "department," as used in this act, shall mean the Department of Internal Affairs.

The word "person," as used in this act, shall be construed to include any individual, firm, partnership, unincorporated association, corporation, association, agent, representative or employe thereof.

The act, as amended, defines "package" as meaning everything containing one or more units of any commodity, except cases, cartons, crates, and bundles or bales used for bulk shipping.

Section 7, as amended, exempts packages selling for less than five cents or less or containing liquid commodities of less than one ounce liquid measure or containing dry commodities of less than one ounce avoirdupois from the provisions of the act.

Section 10 expressly provides that the act does not apply to wholesalers, jobbers or commission merchants. They are not required to mark the net quantity of the contents on containers, or packages handled, sold or offered for sale by them.

The original act of 1913 did not contain an express definition of the word "package," nor provide for a manner of sale of commodities, nor contain a provision requiring a statement of the counting, measuring or weighing of commodities not considered as packages in full view of the purchaser at the time of sale, as now required by the amending act of May 18, 1945, P. L. 788, Section 2, 76 P. S. § 241, which provides as follows:

(1) All liquid commodities, when sold in bulk or from bulk, shall be sold by weight or liquid measure. All dry commodities, when sold in bulk or from bulk, shall be sold by weight, dry measure or numerical count, unless otherwise designated to be sold in a special manner. No dry commodities shall be sold by liquid measure.

(2) All meat and meat products, poultry and poultry products, except eggs, shall be sold by weight; only eggs may be sold by numerical count.

(3) Wood used for fuel shall be sold by weight or by the cord of 128 cubic feet, or fraction thereof, and accompanied by a statement or invoice certifying the amount sold.

All commodities not considered as packages within the meaning of the act or labeled as to net contents at the time

of sale, shall be counted, measured or weighed in full view of the purchaser at the time of sale, and on weighing or measuring devices as approved by the department and inspected as to accuracy by the several State, county and city inspectors of weights and measures; and statement of result of such count, measure or weight to be made to the purchaser by the person making the sale.

Any dry commodity sold in bulk must be accompanied by a statement of weight.

Section 7 of the act, as amended, 76 P. S. § 247, prohibits any person from distributing, selling or having in his possession with intent to sell any commodity in package form, unless the net quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count, provided, however, that reasonable variations shall be permitted, and tolerance may be established by rules and regulations of the Department of Internal Affairs. Producers and manufacturers of commodities are required to secure permission for any tolerances desired from the Department of Internal Affairs.

Section 7, as supplemented, 76 P. S. § 247.1, authorizes the Secretary of Internal Affairs to adopt and promulgate rules and regulations, not inconsistent with the provisions of the act, to carry into effect the intent and purpose of the act.

The purposes of the act are clearly to improve mercantile relationships and practices in the commercial transactions affected by the establishment of the required uniform methods. The legislature has provided a means of lessening the possibilities of frauds and errors in transactions involving sales or distributions of the commodities covered, by requiring the sellers and distributors, to whom the act is applicable, to communicate the net weights, measures or numerical counts of the commodities to the buyer or distributor in the manner directed by the act.

Commodities, such as groceries, meats and vegetables, when ordered by telephone or personal contact from merchants or their representatives and not weighed, measured or counted in the presence of the purchaser, are within the purview of the act.

In circumstances where the buyer is not physically present at the time the commodities are weighed, counted or measured, the seller is still required to communicate to him the weights, measures or numerical counts of the commodities sold to the buyer. This may be done in compliance with section 2 of the act, as amended, 76 P. S. § 242.2 in the case of dry commodities sold in bulk, by a statement of weight accompanying the commodities. If the statement

of weight, measure or count is marked on each package containing a commodity or clearly expressed in the account accompanying the order, the purposes and express provisions of the act are met.

We are, therefore, of the opinion that commodities, such as groceries, meats and vegetables, ordered by telephone or personal contact from merchants or their representatives, and not weighed, measured or counted in the presence of the purchaser, when wrapped in paper, placed in bags or put in some other kind of a container for delivery at a later time, either must be marked to show their net content in weight, measure or numerical count, or must be accompanied by a statement clearly indicating such weight, measure or numerical count.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RAYMOND C. MILLER,  
*Deputy Attorney General.*

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OPINION No. 548

*Constitutional law—County officers—County superintendent of schools—Residence within county—Section 3 of article XIV of Pennsylvania Constitution—Acts of May 18, 1911 and May 2, 1929.*

A county superintendent of schools is not a county officer within the meaning of section 3, article XIV of the Constitution of Pennsylvania, providing that no person shall be appointed to any office within the county who shall not have been an inhabitant thereof one year prior to his appointment, and there is no statutory requirement either in the School Code of May 18, 1911, P. L. 309, or in the General County Law of May 2, 1929, P. L. 1278, that a county superintendent be a citizen and a resident of any county of which he was elected or appointed county superintendent.

Harrisburg, Pa., June 26, 1946.

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

Sir: This department is in receipt of your request for advice as to whether a county superintendent of schools must reside in the county in which he is elected or appointed for a period of one year prior to such election or appointment. You call our attention to an opinion of this department dated January 6, 1906, from the Honorable Hampton L. Carson, then Attorney General, to the Honorable Nathan C. Schaeffer, then Superintendent of Public Instruction, which held that under Section 3 of Article XIV of the Constitution of

Pennsylvania, no person was eligible for the position of county superintendent of schools who had not been a citizen and an inhabitant of the county for a space of one year before his election.

You ask for a review of Mr. Carson's opinion, which is found in the "Report and Official Opinions of The Attorney General of Pennsylvania for the Two Years Ending December 31, 1906," pages 202 and 203. We quote the following excerpts from said opinion:

The Constitution expressly says, in the section and article above referred to that "No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment." There can be no doubt of the fact that the office of county superintendent is a county office. The act of 8th of May, 1854, in the 37th section (P. L. 628), provides that there shall be chosen, in the manner hereinafter directed, an officer for each county, to be called the county superintendent; \* \* \*

\* \* \* \* \*

I am not convinced by the argument made under Article XIV that, because of the designation of county officers in Section 1, the county superintendent not being included in the list, therefore the county superintendent was excluded. The provision is that county officers shall consist not only of the enumerated officers, but of such others as may from time to time be established by law, and inasmuch as the act making the office in question a county office was in full force and was not disturbed by the Constitution, I see no reason for concluding that the Constitution in effect destroyed the existing system of the State, which has remained unchallenged for more than half a century.

The Act of May 8, 1854, P. L. 617, provided in section 37, as follows:

Section 37. That there shall be chosen in the manner hereinafter directed an officer for each county, to be called the county superintendent. \* \* \*

The Act of May 8, 1854, *supra*, was repealed by the Act of May 18, 1911, P. L. 309, known as The School Code, 24 P. S. § 1, et seq.

The provisions of the Constitution of Pennsylvania involved in the consideration of your question are:

(a) Section 1 of Article XIV, which reads:

County officers shall consist of sheriffs, coroners, prothonotaries, registers of wills, recorders of deeds, commissioners, treasurers, surveyors, auditors or controllers, clerks of the courts, district attorneys, and such others as may from time to time be established by law; and no treasurer shall be eligible for the term next succeeding the one for which he may be elected.

(b) Section 3 of Article XIV, which reads:

No person shall be appointed to any office within any county who shall not have been a citizen and an inhabitant therein one year next before his appointment, \* \* \*

With this background, we shall examine the law as it exists today, particularly with regard to the question: "Is the county superintendent of public schools a county officer?"

Section 1104 of the Act of May 18, 1911, P. L. 309, 24 P. S. Section 971, reads:

Every four years there shall be elected as herein provided, in every county in this Commonwealth, a person to be known as the county superintendent.

The following sections are also pertinent:

Section 1101. For the superintendence and supervision of public schools of this commonwealth, there shall be elected or appointed, in the manner herein provided, county superintendents, district superintendents, assistant county and district superintendents, associate superintendents and supervisors of special education. (24 P. S. § 931)

Section 1102. Every person elected or appointed as county, district, or assistant county or district superintendent, or associate superintendent, or supervisor of special education must be a person of good moral character. (24 P. S. § 951)

Section 1103. No person shall be eligible for election or appointment as a county, district, or assistant county or district superintendent, or associate superintendent, unless he holds a diploma from a college or other institution approved by the State Council of Education of this Commonwealth.

Provided, That no person shall be elected or appointed a county, district, or assistant county or district superintendent, or associate superintendent, who has not had six years successful teaching experience, not less than three of which shall have been in a supervisory or administrative capacity: And provided further, That he has completed in a college or university a graduate course in education approved by the State Council of Education: And provided further, That serving either as county, district, or assistant county or district superintendent, or associate superintendent, in this Commonwealth, at the time this act becomes effective, shall be considered sufficient qualification for any of the aforesaid offices. (24 P. S. § 952)

Section 1121. The annual salary of each county superintendent elected or appointed under the provisions of this act shall be paid by the State \* \* \* (24 P. S. § 1002)

An examination of these provisions reveals no requirement that residence in the county is a qualification for election or appointment as county superintendent. The fact that this requirement or qualification

is omitted, while others are set forth, makes the legal maxim, "*Expressio unius est exclusio alterius*", applicable.

Comparing section 37 of the act of 1854, *supra*, with section 1104 of the act of 1911, *supra*, known as "The School Code", we find two dissimilar provisions, so far as phraseology is concerned, as the result of which we believe that the intent in The School Code was to create a school officer who would serve within the limits of a county, rather than a county officer as created in the act of 1854 (repealed).

In view of the fact that Section 1 of Article XIV of the Constitution lists the county officers, and then states: "and such others as may from time to time be established by law", we turn now to the Act of May 2, 1929, P. L. 1278, 16 P. S. § 1 et seq., known as "The General County Law", as the most appropriate place to find a county officer established by law.

Section 51 of the Act of May 2, 1929, *supra*, as amended (16 P. S. § 51), contains the following provision:

In each county, there shall be the following officers elected by the qualified electors of the county: (a) three county commissioners; (b) three auditors, or in all counties where the office of auditor has heretofore or shall hereafter be abolished, one controller; (c) one treasurer; (d) one county surveyor; (e) one coroner; (f) one recorder of deeds; (g) one prothonotary; (h) one clerk of the court of quarter sessions and of the court of oyer and terminer; (i) one clerk of the orphans' court, (j) one register of wills; (k) one sheriff; (l) one district attorney; and (m) two jury commissioners. All such offices shall remain as now constituted in each county.

All such officers shall be elected at the municipal election next preceding the expiration of the terms of the officers now in office, and quadrennially thereafter, and shall hold their offices for a term of four years from the first Monday of January next after their election and until their successors shall be duly qualified, but in the event that any such officer, so elected, shall fail to qualify, or if no successor shall be elected, then the officer then in office shall continue in office only until the first Monday of January following the next municipal election, at which time his successor shall be elected for a term of four years. This section does not create any office in any county where such office does not now exist.

No reference is made to county superintendents, nor have we been able to find in any other law a provision establishing the county office of county superintendent. The only case we have been able to find involving the question of whether the county superintendent is a county officer is the following:

In *Hower v. Wayne County*, 21 C. C. 289 (1898), the court had before it the consideration of the Act of June 18, 1895, P. L. 197, which provided that the county commissioners should furnish office furniture etc., for each of the county officers whose offices were located in the county building at the county seat. The question was raised as to whether or not the county superintendent, created by the Act of May 8, 1854, *supra*, was a county officer, and the court held:

The common school system is separate and independent from that of the government machinery of the counties and township, and while the plaintiff is an officer of the county having an office located in the county building at the county seat, we are of the opinion that he is not a county officer within the meaning of the Act of June 18, 1895.

The court also called attention to Section 1 of Article XIV of the Constitution, and applied the legal maxim, "*Expressio unius est exclusio alterius*."

In view of the fact that we have been unable to find any provision in the law establishing the county superintendent as a county officer, the phrase in Section 1 of Article XIV of the Constitution, which reads "and such others as may from time to time be established by law", has no present significance.

In Volume 7 of "*Debates of the Convention to Amend The Constitution of Pennsylvania*", at pages 724 and 725, an attempt was made to add "county superintendents of public schools" to the list of county officers, as set forth in Section 1 of Article XIV. This motion was not agreed to. See page 725.

We therefore conclude that a county superintendent is not a county officer.

Summing up our examination of the law, we find:

(a) There is no requirement in the act of 1911, *supra*, known as The School Code, which requires a county superintendent to be a resident or inhabitant of the county within which he is elected or appointed a county superintendent.

(b) The language used in section 1104 of the act of 1911, *supra*, known as The School Code, does not show an intent to create a county office, as designated in Section 1 of Article XIV of the Constitution.

(c) The legislature has not availed itself of the authority granted in section 1 of article XIV, to establish a county superintendent as a county officer.

(d) The Debates of the Constitutional Convention reveal a determination by the convention that the county superintendent of public schools should not be a county officer.

We are now faced with the question as to whether the county superintendent of schools comes within the language of section 3 of article XIV, which reads:

No person shall be appointed to any office within any county who shall not have been \* \* \* an inhabitant therein one year next before his appointment, \* \* \*

Article XIV is entitled "County Officers". Section 1 thereof is headed "County Officers" and names them.

Section 2 is headed "Election of County Officers".

Section 3 is headed "Qualifications".

Section 4 is headed "Where Offices shall be Kept", and names the county officers.

Section 5 is headed "Compensation of County Officers".

Section 6 refers specifically to county, township and borough officers.

Section 7 refers to county commissioners and auditors. In other words, all references in article XIV are to county officers and the only exception is where township and borough officers are specifically named in conjunction with county officers.

We are therefore, of the opinion, that a county superintendent is not a county officer within the meaning of Section 3, Article XIV of the Constitution of Pennsylvania; and under the law, as it exists today, a county superintendent is not required to be a citizen and resident of the county of which he is elected or appointed county superintendent.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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OPINION No. 549

*Banks and banking—Rights of the holders of fractional shares of capital stock of banks, bank and trust companies and trust companies under supervision of the Department of Banking—Act of April 17, 1861, P. L. 341; May 5, 1933, P. L. 364; May 15, 1933, P. L. 624; January 2, 1934, P. L. 128:*



Holders of fractional shares of stock of a bank, a bank and trust company, or a trust company in Pennsylvania, have no right to vote such fractional shares at any meeting of the stockholders, nor did they have any right prior to July 3, 1933, the effective date of the Banking Code.

Fractional shareholders of such institutions had a right ratably to share in all dividends declared to stockholders of the same class and of this right they were not deprived by the Banking Code.

Holders of scrip or other evidences of ownership of fractional shares may not vote such fractional shares at any stockholders' meeting, nor could holders thereof vote the same at any stockholders' meeting prior to the effective date of the Banking Code.

Holders of scrip or other evidences of ownership of fractional shares, may not share in any dividends declared on the capital of the corporation. They may, however, share in a liquidation. Whether the holders of scrip or other evidences of ownership of fractional shares could have participated in dividends prior to the effective date of the Banking Code, is a phase of the question which has become moot. It is not answered.

Harrisburg, Pa., July 19, 1946.

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

Sir: You have submitted to us several questions with regard to the rights of the holders of fractional shares of capital stock of banks, bank and trust companies and trust companies under your supervision. Specifically you refer to Section 409 of the Banking Code of 1933, the Act of May 15, 1933, P. L. 624, as amended, 7 P. S. § 819-409.

For the purpose of better answering your questions we state them as follows:

1. What voting rights have fractional shares under the Banking Code and what voting rights had they before the effective date of the Banking Code?
2. What rights to dividends had fractional shares before the effective date of the Banking Code and what rights to dividends do they now have?
3. What voting rights did the holders of scrip or other evidences of ownership of fractional shares have before the effective date of the Banking Code and what voting rights do holders of such scrip and other evidences of ownership now have?
4. What rights to dividends did the holders of scrip or other evidences of ownership of fractional shares have before the effective date of the Banking Code and what rights to dividends do holders of such scrip or other evidences of ownership now have?

Section 409 of the Banking Code, the Act of May 15, 1933, P. L. 624, as last amended by the Act of January 2, 1934, P. L. 128, Sp. Sess., 1933, 7 P. S. § 819-409, reads as follows:

A bank, a bank and trust company, or a trust company may, in paying a dividend, or in pursuance of a plan of merger, consolidation, or reorganization, issue a certificate for a fractional share, and, by action of its board of directors, may issue in lieu thereof scrip or other evidence of ownership which shall entitle the holder to receive a certificate for a full share upon the surrender of such scrip or other evidence of ownership aggregating a full share, but which shall not entitle the holder to exercise any voting right or to receive any dividend. However, any such holder shall be entitled to participate proportionately in any of the assets of the bank, bank and trust company, or trust company in the event of liquidation. The board of directors may cause such scrip or evidence of ownership to be issued subject to the condition that it shall become void if not exchanged for share certificates before a specified date, or subject to the condition that the shares for which such scrip or evidence of ownership is exchangeable may be sold by the bank, the bank and trust company, or the trust company, and the proceeds thereof distributed to the holders of such scrip or other evidence of ownership, or subject to any other conditions, not prohibited by this act, which the board of directors may deem advisable.

The Banking Code became effective July 3, 1933, by the express provisions of its Section 1601, 7 P. S. § 819-1601.

1. Section 409 is permissive rather than mandatory and allows a bank, a bank and trust company, or a trust company, in certain circumstances, to issue its certificates for fractional shares of stock, and as an alternative authorizes the issuance of scrip or other evidences of ownership of fractional shares redeemable in full shares of stock when such accumulated portions will equal a whole.

Section 604 of the Banking Code, 7 P. S. § 819-604, with regard to voting rights, provides as follows:

Every shareholder of record of a bank, a bank and trust company, or a trust company shall have the right, at every shareholders' meeting, to one vote for every share standing in his name on the books of the bank, the bank and trust company, or the trust company. \* \* \*

This provision is similar to that contained in Section 504 of the Business Corporation Law, the Act of May 5, 1933, P. L. 364, 15, P. S. § 2852-504, which reads as follows:

Except as otherwise provided in the articles and this act, every shareholder of record shall have the right, at every shareholders' meeting, to one vote for every share standing in his name on the books of the corporation. \* \* \*

With respect to Section 504 of the Business Corporation Law and the right to vote fractional shares, Mr. Chief Justice Maxey in *Commonwealth ex rel. Cartwright v. Cartwright et al.*, 350 Pa. 638, 646 (1944), had this to say:

The power in a stockholder to vote fractional shares of stock is not required for the exercise of the corporation's power to issue such shares of stock. If a corporation merely issued shares of stock and the law did not confer on the owner thereof the power to vote all of such shares, he would have only one vote, as at common law. When a holder of more than one share of stock claims the right to cast more than one vote he must point to a statute giving him that right. In Pennsylvania he can show his statutory authority to cast one vote for every full share of stock he owns, but he cannot show any statutory authority for his casting fractional votes for every fractional share of stock he owns. This right is clearly not conferred by implication for it is not necessary to the exercise of any right expressly granted. \* \* \*

That interpretation of Section 504 of the Business Corporation Law must be adopted as our interpretation of Section 604 of the Banking Code.

Under Section 2 of the Act of April 17, 1861, P. L. 341, Purdon's Digest, 13th Edition, relating to banks, shareholders were authorized to vote as follows:

\* \* \* For every share of stock, not exceeding ten shares, the holder shall be entitled to one vote; for every two shares of stock, above ten, and not exceeding twenty additional shares, the holder shall be entitled to one vote; and for every five shares of stock above thirty, and not exceeding one hundred, the holder shall be entitled to one vote; and for every ten shares above one hundred, one vote.

The reasoning of the Cartwright decision is applicable to this older banking law and makes inevitable the conclusion that before the effective date of the Banking Code, fractional shares of stock of a bank, a bank and trust company, or a trust company had no voting rights whatsoever.

2. The rights of holders of fractional shares of stock of a bank, a bank or trust company, or a trust company, to receive dividends is predicated, not upon a specific authority granted by statute, but rather on the inherent right of every member of a corporation to share equally in the profits of that corporation.

In 18 C. J. S. on Corporations, Section 469, page 1116, we have the following:

The right to dividends is incident to, and dependent on, the ownership of stock, and hence, as a general rule, all

persons who own shares of stock at the time a dividend is declared thereon are entitled to share in the dividend in proportion to the amount of their holdings, regardless of the time when they acquired the shares. \* \* \*

In 55 A. L. R., 65 and 66, it is stated:

The rule is well settled that, in the declaring and paying of dividends, directors of a corporation have no legal right to discriminate between stockholders of the same class, but all are entitled to participate equally in the distribution of the net profits, unless otherwise provided by the terms of their contract with the corporation. Discrimination in the payment of dividends as between stockholders of the same class is not within the discretion of the officers of the corporation. And, since a person holding as owner the stock of a corporation becomes thereby entitled to a proportionate share in the profits of the company, a duty is imposed by law on the corporate body to distribute all dividends which from time to time may be declared ratably on all the capital stock; and from this duty springs an implied promise upon the part of the corporation to pay a particular stockholder the same rate of dividends which it has declared to the other stockholders, which duty, it has been held, may be enforced in an action of assumpsit.

It is said in 13 Am. Jur., on Corporations, Section 680:

Except where preferences as to dividends are lawfully given to stock of certain classes, a duty is imposed by law on the corporate body to distribute all dividends which from time to time may be declared ratably on all the capital stock, and from this duty springs an implied promise upon the part of the corporation to pay a particular stockholder the same rate of dividends which it has declared to the other stockholders. Discrimination between stockholders of the same class in declaring and paying dividends is not within the discretion of the officers of a corporation, and the directors have no legal right to discriminate between them. A declaration of a dividend is unwarranted which relates only to certain holders of a particular class of stock and is not a ratable distribution among all the holders of such stock; the corporation cannot discriminate as regards dividends between the large and the small stockholders, \* \* \*

These case quotations are illustrative:

\* \* \* Where, therefore, the issue of capital stock is all of one class, dividends must be declared to all shareholders in proportion to their respective holdings. \* \* \* (*Thiry v. Banner Window Glass Co.*, 93 S. E. 958, 960 (1917) ).

\* \* \* It is certainly true, as a general rule, that a stockholder in a corporation has an interest in proportion to his stock in all the corporate property, and has a right to share in any surplus of profits arising from its use and employment in

the business of the company; and this legal right does not depend upon the question whether he is a stockholder of long standing or of recent date. The moment a person becomes a stockholder in a corporation all the incidents of interest or quasi ownership in the corporate property attach. \* \* \* (*Jones v. Terre Haute and Richmond Railroad Co.*, 27 N. Y. Sup. 196, 205 (1874) ).

While we can find no case which in so many words states that dividends are payable by a corporation on outstanding fractional shares, we have no hesitancy, in the light of the foregoing authorities, in concluding this to be the law in Pennsylvania.

Certainly, the reasoning in the Cartwright case with regard to voting rights has no applicability where dividends are concerned, since voting rights in Pennsylvania are dependent entirely on statute and dividend rights are dependent on the premise that all persons who have any ownership whatsoever in a corporation are entitled to share ratably in the profits of that corporation.

Nor do we think that the latter portion of section 409 of the Banking Code in any way impugns the correctness of our conclusion. The provision, "but which shall not entitle the holder to exercise any voting right or to receive any dividend" modifies that which immediately precedes it and applies only to scrip or other evidences of ownership which may be issued in lieu of fractional shares. Had the legislature intended the quoted clause to apply to fractional shares of stock it could easily have said so. The common law right of fractional shareholders to participate in dividends was not taken away by the Banking Code.

3. Scrip and other evidences of ownership of fractional shares, under the ruling of the Supreme Court in the Cartwright case, clearly had no voting rights before 1933. Subsequently, they did not acquire them. For in no uncertain language the legislature has stated in section 409 of the Banking Code that holders of scrip and other evidences of ownership of fractional shares shall not be entitled to vote.

4. Since July 3, 1933, its effective date by section 409 of the Banking Code, except in liquidation, holders of scrip and other evidences of ownership of fractional shares are not entitled to dividends. Whether before that date holders of such rights were entitled to dividends would seem to depend upon whether they could be considered holders of part of the capital indebtedness of the corporation. And while we think such persons would not be entitled to dividends we find it unnecessary here to decide the question. Scrip or other evidence of ownership of fractional shares issued by a bank before 1933 have either been redeemed or cancelled by this time. This phase of the question appears to be moot.

We are of the opinion that: 1. Holders of fractional shares of stock of a bank, a bank and trust company, or a trust company in Pennsylvania, have no right to vote such fractional shares at any meeting of the stockholders nor did they have any such right prior to July 3, 1933, the effective date of the Banking Code, the Act of May 15, 1933, P. L. 624, as amended, 7 P. S. § 819 et seq.

2. Fractional shareholders of such institutions had a right ratably to share in all dividends declared to stockholders of the same class and of this right they were not deprived by the Banking Code, supra.

3. Holders of scrip or other evidences of ownership of fractional shares of a bank, a bank and trust company, or a trust company, may not vote such fractional shares at any stockholders' meeting; nor could holders thereof vote the same at any stockholders' meeting prior to the effective date of the Banking Code, supra.

4. Holders of scrip or other evidences of ownership of fractional shares of a bank, a bank and trust company, or a trust company in Pennsylvania, may not share in any dividends declared on the capital of the corporation. They may, however, share in a liquidation. Whether the holders of scrip or other evidences of ownership of fractional shares could have participated in dividends prior to the effective date of the Banking Code, supra, is a phase of the question which has become moot. It is not answered.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RALPH B. UMSTED,  
*Deputy Attorney General.*

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OPINION No. 550

*Allegheny County Sanitary Authority—Plants for treatment of sewage and industrial waste—Engineering and architectural plans—Stream pollution—Resolution of Sanitary Water Board—Power and authority of Department of Health—Appropriation Act No. 82-A, approved June 4, 1945.*

Under Appropriation Act No. 82-A, the Department of Health has the legal power and authority to make a grant-in-aid of a sum of not in excess of \$100,000 to the Allegheny County Sanitary Authority for the purpose of having it applied to the cost of preparing engineering and architectural plans and estimates for the construction of plants for the treatment of sewage or industrial waste, in accordance with the terms of the recommendations embodied in the resolution of the Sanitary Water Board.

Harrisburg, Pa., July 23, 1946.

Honorable Harry W. Weest, Secretary of Health, Harrisburg, Pennsylvania.

Sir: The Department of Health requests the opinion of this department as to whether it has the legal power and authority, under Appropriation Act No. 82-A, approved June 4, 1945, to make an expenditure in accordance with the following resolution of the Sanitary Water Board:

"The Sanitary Water Board recommends to the Department of Health that a sum not in excess of \$100,000 be granted to the Allegheny County Sanitary Authority for the purpose of having it applied to the cost of preparing engineering and architectural plans and estimates for the construction of plants for the treatment of sewage or industrial waste to end stream pollution in Allegheny County, and that said grant be made in advance of the submission by the Authority of plans, specifications, reports and estimates for the construction of said plants: Provided, however, that no part of the monies granted be used for the payment of salaries of the Board Members of the Authority.

"It is also understood that the sum so granted be deducted pro rata from such future grants to the municipalities involved which the Secretary of Health may make for the preparation of plans for sewage treatment works within the county".

The factual and legal circumstances occasioning your inquiry merit some preliminary consideration.

The Sanitary Water Board of the Commonwealth, pursuant to the authority conferred by the Act of June 22, 1937, P. L. 1987, as amended by the Act of May 8, 1945, P. L. 435, 35 P. S. §691.1 et seq. ordered and directed cities, boroughs and townships in Allegheny County to discontinue the discharge of sewage into the waters of the Commonwealth on or before May 16, 1947, and in connection therewith to submit to the said Board for approval, a report and detailed construction plans and specifications for the necessary facilities to accomplish the said purpose. Such discontinuance can be accomplished in most cases only by the treatment of the sewage in order to reduce or remove its polluting properties, and by the construction and operation of works to accomplish this end.

The situation in the County of Allegheny is a peculiar one. There the sewage problems of some 125 separate municipalities are so interrelated that they can probably best be solved by cooperative action on a county-wide basis. By reason of this circumstance, a large majority of municipalities, including the City of Pittsburgh, within the County of Allegheny, have by respective resolutions or ordinances requested and

authorized the County of Allegheny by its Board of County Commissioners to organize a county authority under the Municipal Authorities Act of 1945 in order to provide for the preparation of plans and specifications, and the construction and operation on a county-wide basis of works to abate pollution. Accordingly, the Board of County Commissioners of Allegheny County, on March 12, 1946, filed Articles of Incorporation for the Creation of the Allegheny County Sanitary Authority for the purpose of carrying into effect a county-wide project for the prompt abatement of the pollution of waters caused by the discharge of sewage therein.

The Allegheny County Sanitary Authority by reason of its incorporation has assumed the duty and is given the power to aid in the abatement of stream pollution through carrying into effect a project for sewage disposal under section 4 of the Municipal Authorities Act of May 2, 1945, P. L. 382, 53 P. S. § 2900z-5. The Allegheny County Sanitary Authority has recently filed a formal application with the Department of Health for a grant-in-aid from the Commonwealth for the preparation of plans and specifications for the collection and treatment of sewage and industrial waste in Allegheny County. Upon due consideration of this application, the Sanitary Water Board of the Commonwealth has recommended to the Department of Health in the form of a resolution recited above, the granting of a sum not exceeding \$100,000 for the purpose of preparing the necessary plans. Thereupon the Department of Health in turn requested this department for an opinion as to the legality and propriety of making such an expenditure under Appropriation Act No. 82-A in accordance with the recommendation embodied in the said resolution.

Act No. 82-A, approved June 4, 1945, makes an appropriation to the Department of Health in the sum of \$10,325,000 inter alia, for the following purpose:

\* \* \* (2) for payment by the Commonwealth of a share not to exceed fifty per cent (50%) of the cost of preparing engineering and architectural plans and estimates for the construction of plants for the treatment of sewage or industrial waste to be constructed by municipalities, municipal authorities and private corporations to end stream pollution, and for the payment by the Commonwealth of a share of the cost of constructing such plants for the treatment of industrial waste; \* \* \*

By this act the legislature made an appropriation for various "purposes" as set forth therein, among which is the one above quoted. Thereby, the Department of Health is authorized to share in the cost of preparing plans and estimates in an amount not in excess of fifty percent.



While the purpose of the appropriation is set forth in clear language, there are no restricting or limiting words determinative of the time when the expenditure out of the appropriation is to be made by the department. The duty of the department to make the expenditure is limited to the purpose for which the appropriation was made. There is no specific requirement that the plans and estimates for the construction of the contemplated plant be submitted by the recipients of the grant in advance of the grant itself. Presumably, if the legislature had intended that the grant be withheld until after the submission of plans and specifications, it could and would have so said. That the legislature had not so intended is particularly clear when we consider the very nature of the appropriation involved.

Subsection (2) of section 1 of this appropriation act is in the nature of a grant-in-aid for a particular purpose, and is clearly distinguishable from the type of legislation that appropriates a sum supplying the consideration for payment of goods sold or services rendered to the Commonwealth. This part of the appropriation makes funds available to the department not for the purpose of contracting for or purchasing anything for its own use, but rather to enable the department to make grants to proper authorities in aid of carrying out a general design for abating stream pollution by paying a share of the cost of preparing the plans initiating the project. The appropriation act was passed at the same session of the legislature with the anti-pollution amendments to the Act of June 22, 1937, *supra*, and was approved by the Governor within a month following the enactment of the legislation it was designed to assist. The appropriation act therefore merits a construction in aid of the project contemplated by the substantive legislation concurrently enacted. The legislature was planning, not scheming. It is apparent, therefore, that the exercise of discretion in making the expenditure for this purpose is clearly within the legal authority of the Department of Health.

The only remaining matter to be considered is that involving the amount of the expenditure contemplated, *viz.*, \$100,000. The only limitation in this respect is that provided for by the act itself. The act limits the Commonwealth's share to an amount not exceeding fifty percent of the cost of preparing the plans.

On August 7, 1945, the Governor approved a plan of the Department of Health, prepared by the Sanitary Water Board, containing a schedule of sums, based upon percentages of the estimated costs of the construction of sewage treatment works. These sums determine the limit that the department may, in its discretion, contribute as its share to the cost of preparing plans and estimates for the construction of sewage treatment works. On the basis of this schedule of per-

centages, a sum not exceeding \$100,000, presently contemplated by the Department of Health as a grant to the Allegheny County Sanitary Authority, is well within the fifty percent limit of the estimated cost of preparing plans for sewage treatment works for the area covered by the authority making the application.

Within the limit of the amount here involved, the Department of Health may exercise its discretion in the expenditure of such initial sum and such further sums with the progress of the work of preparing plans as it may see fit.

We are therefore of the opinion that under Appropriation Act No. 82-A, approved June 4, 1945, the Department of Health has the legal power and authority to make a grant-in-aid of a sum not in excess of \$100,000 to the Allegheny County Sanitary Authority for the purpose of having it applied to the cost of preparing engineering and architectural plans and estimates for the construction of plants for the treatment of sewage or industrial waste, in accordance with the terms of the recommendations embodied in the resolution of the Sanitary Water Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

DAVID FUSS,  
*Deputy Attorney General.*

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OPINION No. 551

*Solid Fuel—Transportation from mine to storage yard in another county—Necessity for weighing, etc.—Act of July 19, 1935, P. L. 1356.*

A mine owner may lawfully transport solid fuel from its point of origin in one county to his storage yard in another county without said vehicle being weighed and accompanied by a weighmaster's certificate, so long as no transfer of title is involved in the transportation.

Harrisburg, Pa., July 31, 1946.

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

Sir: This department is in receipt of your request for an opinion in which you ask if a mine owner's transportation of solid fuel in a vehicle from its point of origin in one county to his storage yard in another county, without said vehicle being weighed and accompanied by a weighmaster's certificate, is a violation of Section 2 of the Act of July 19, 1935, P. L. 1356, as amended, 76 P. S. § 343, known as the Solid Fuels Act of 1935.

Apparently your request is made due to the fact that, since our Formal Opinion No. 367, 1939-40 Op. Atty. Gen. 407, 40 D. & C. 117 (1940), advising you upon virtually the same question, section 2 of the act has been amended by inserting the word "transport", as underscored by us in that section, as quoted hereinafter.

Section 2 of the Solid Fuels Act of 1935, as last amended May 27, 1943, P. L. 684, provides:

It shall be unlawful to sell solid fuels excepting by avoirdupois weight. No person shall sell, *transport* or deliver, or start out for delivery, less than two thousand (2000) pounds avoirdupois of weight to the ton of any solid fuel or a proper proportion thereof in quantities less than a ton, and such solid fuel shall be duly weighed by a licensed weighmaster of the Commonwealth of Pennsylvania on accurate scales suitable for weighing a tare and the gross weight of the vehicle or vehicle and trailer transporting solid fuel located in this state and which has been tested and approved by an official empowered by law to test such scales. A tolerance at the rate of thirty (30) pounds to two thousand pounds shall be allowed for wastage and variation in scales.

Due consideration must be given the circumstances under which it was enacted, the mischief to be remedied and the object to be attained in arriving at the intention of the legislature, as directed by the Act of May 28, 1937, P. L. 1019, 46 P. S. § 551 and 552, known as the Statutory Construction Act, so that a result, absurd, impossible of execution, or unreasonable, will be avoided.

The Solid Fuels Act of 1935, as amended, as well as the previous statutes of the Commonwealth and the decisions of our courts on the subject, evidence a legislative and judicial intent to assure full and accurate weights to purchasers of coal, coke and other solid fuels by requiring a uniform method of computing and measuring these commodities.

The introductory sentence of section 2 of the Solid Fuels Act, 76 P. S. § 343, states, "It shall be unlawful to sell solid fuels excepting by avoirdupois weight". The remaining portions of section 2 further explains and enlarges the introductory sentence by provisions prohibiting the sale, transportation or delivery, or the starting out for delivery, of any solid fuels, except in the manner provided by the act.

The Solid Fuels Act assures sellers and purchasers of solid fuels of a uniform method of weight and measure by prohibiting the sale, transportation, delivery, or starting out for delivery, of solid fuels except in vehicles accompanied by weighmaster's certificates.

If the act requires that all vehicles loaded with solid fuels should be accompanied by weighmaster's certificates without regard to the object of the transportation, the operator of any vehicle loaded with coal or coke, not accompanied by a weighmaster's certificate, would be a violator of the act's provisions. An inspector, making an arrest for the act's violation, would not be obliged to produce evidence that the vehicle was loaded with fuel for the purpose of sale. The absence of the weighmaster's certificate accompanying the cargo would in itself supply the evidence to convict the operator of the vehicle.

Should the Solid Fuels Act be construed to require a weighmaster's certificate to accompany every vehicle with a solid fuel cargo, without regard to the object of the transportation, a mine owner would be required to have a weighmaster's certificate accompany each load of coal while his stock pile was in the process of being moved from one point to another by means of trucks or other vehicles. A farmer would be prohibited from hauling coal from his own mine to his home for his own domestic use without the required certificate. Each load would have to be weighed in the manner required by the Solid Fuels Act and contain only the tonnage and fractional parts thereof directed by the act. Such a rigid construction would simplify enforcement but at the cost of unnecessary and unreasonable burden and expense on persons transporting cargoes of solid fuels patently not intended for sale. The Commonwealth has no interest in regulating the manner of transporting solid fuel cargoes between an owner's mine and his storage yard, where no transfer of title is involved, so long as the maximum load provisions of The Vehicle Code and other laws are complied with.

In *Commonwealth v. Chalfant*, Appellant, 156 Pa. Super. 307 (1944), affirmed 352 Pa. 193 (1945), Judge Reno, speaking for the court, said:

It becomes eminently clear from a reading of the Solid Fuels Act of 1935, and its amendments as a whole, that the legislature was seeking to afford consumers of solid fuels protection against false weights by providing for licensed weighmasters, acting under the supervision of the Commonwealth, whose official responsibility is fixed by the issuance of a certificate. The statutory plan was to give the purchaser a two-fold assurance that he was receiving full measure: an official weighing; and in addition, a certificate bearing the signature of an individual whose livelihood as a weighmaster depends upon his continuing skill and integrity. To accomplish the intended result, it was made an offense to deliver solid fuel unaccompanied by a certificate, and *we think the conduct prohibited by the act is the transfer of physical control over solid fuel from the seller to the buyer unless a certificate is presented, regardless of the geographical point at which the transfer occurs.* \* \* \* (Italics ours.)

We are, therefore, of the opinion that a mine owner may lawfully transport solid fuel in a vehicle from its point of origin in one county to his storage yard in another county without said vehicle being weighed and accompanied by a weighmaster's certificate, without violating Section 2 of the Act of July 19, 1935, P. L. 1356, as amended, 76 P. S. § 343, known as the Solid Fuels Act of 1935, so long as no transfer of title is involved in the transportation.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RAYMOND C. MILLER,  
*Deputy Attorney General.*

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OPINION No. 552

*Taxation—Taxability of certain instruments and proceedings under the provisions of Section 3 of the Act of April 6, 1830 P. L. 272, PS 3172.*

Harrisburg, Pa., September 10, 1946.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: You have requested an opinion as to the taxability of certain instruments and proceedings under the provisions of Section 3 of the Act of April 6, 1830, P. L. 272, 72 P. S. § 3172, which reads in part as follows:

The prothonotaries of the courts of common pleas and of the district courts, and the prothonotary of the supreme court having original jurisdiction and the court of nisi prius of this commonwealth shall demand and receive on every original writ issued out of said courts (except the writ of habeas corpus), and on the entry of every amicable action, the sum of fifty cents; \* \* \* on every entry of a judgment by confession or otherwise, where suit has not been previously commenced, the sum of fifty cents; \* \* \*

You inform us that a difference of opinion exists among the various prothonotaries as to which proceedings and instruments are taxable under the statute, and you have submitted a list of the disputed proceedings and instruments attached to your request. Although this list does not in every instance designate the precise writ, amicable action or judgment concerning which a question has been raised, we will answer them in order given.

First of all, however, reference is made to our opinion to you dated June 2, 1910, reported in 1909-10 Op. Atty. Gen. 67, 37 Pa. C. C. 522.

This opinion construed the words "original writ" as used in the statute to mean "the first process or judicial instrument by which the court commands something, therein mentioned, to be done."

In determining the taxable status of the various classes of writs enumerated it is important to differentiate between writs of original process and writs of mesne or intermediate process: the former are taxable; the latter are not

1. *Breve de Partitione Facienda.*

This writ is mesne process. The action of partition is commenced by a writ of summons. In the course of the action the court may enter judgment *quod partitio fiat*, i. e., that partition be made. Upon this judgment the *breve de partitione facienda* issues, commanding the sheriff and his inquest to divide or value the premises. Being mesne process, the writ is not taxable. It should be noted that this action is extremely rare.

Partition may also be had in equity, in which case the endorsed bill or summons would be the original process, and would be taxable.

2. *Summons in Assumpsit upon Ground Rent.*

This writ is original process and therefore taxable, as is the writ of summons in *assumpsit* for any other cause of action. The remedy was formerly by writ of covenant, which was abolished by the Act of May 25, 1887, P. L. 271, 12 P. S. 1, *Shermet v. Embick*, 90 Pa. Super. 269. The present remedy is *assumpsit*.

3. *Fraudulent Debtors Attachment.*

The Act of March 17, 1869, P. L. 8, and the Act of May 24, 1887, P. L. 197, 12 P. S. § 2711, provide for the commencement of actions against fraudulent debtors by writ of attachment. The writ is original process and therefore taxable.

4. *Garnishment.*

a. *Attachment Execution.* This is a writ which issues upon a judgment against A. seeking to acquire certain rights of A. against B., the garnishee, who was not a party to the judgment. As to A. it is a writ of execution, but as to B., the garnishee, it is original process, *Kennedy v. Agricultural Insurance Co.*, 165 Pa. 179, and therefore taxable.

b. *Foreign Attachment.* This is a writ to attach property of a non-resident in the hands of a resident, the garnishee. It may be used to commence an action against the non-resident and in any case is original process against the garnishee, and therefore taxable.

c. *Domestic Attachment*. This is an original writ against a debtor who absconds or conceals himself, and operates for the benefit of all his creditors. Act of June 13, 1836, P. L. 606, 12 P. S. § 2741 et seq. As it is original process both as to the debtor and the garnishee, it is taxable.

5. Estrepeement.

This is a writ to preserve real property from waste or injury. Whether or not it is original or mesne process must be determined separately in each case. If it arises out of a pending action (usually ejectment), it is mesne process and not taxable. Otherwise it is taxable.

6. Error.

The writ of error was one of three methods of appeal employed prior to the passage of the Act of May 9, 1889, P. L. 158, 12 P. S. § 1131. While preserving the distinction between the writ of error, certiorari, and statutory appeal, the act directed that all such proceedings in the Supreme Court should be taken in a proceeding to be called an appeal. The tax on appeals is abolished by Section 3 of the Act of May 19, 1897, P. L. 67, 12 P. S. § 1135.

A writ of error coram vobis is for the purpose of acting on a judgment previously rendered, similarly to the granting of a new trial. It is therefore not original process and it is not taxable.

7. Attachment for Contempt.

This writ issues only where the person to be attached has failed to obey an existing order of the court, and must generally be based upon a previous rule to show cause why the writ should not issue. Thus it is apparent that the writ is mesne or intermediate process and not taxable.

8. Citation.

There are several writs of citation which issue out of the courts of common pleas, probably the most common of which is the citation provided in the Act of April 20, 1905, P. L. 239, Par. 1, 12 P. S. § 2571. This act provides that purchasers of real estate at judicial sales and their grantees, heirs and devisees, have certain rights, remedies and duties in acquiring possession of said real estate. Citation will issue to the person in possession to appear and show cause why possession of real estate should not be delivered to the purchaser.

It is our opinion that where the persons in possession are other than the defendants in the original execution or order of sale, the citation is original process within the meaning of the language of the Act of Assembly in question and is, therefore, taxable. Where the person in

possession are the defendants under the original execution or order of sale, the citation then assumes the character of an execution writ rather than one of original process and, accordingly, would not be taxable.

9. *Capias*.

a. *Capias ad respondendum* is original process against the person of the defendant to compel him to appear and is taxable.

b. *Capias ad satisfaciendum* is a writ of execution upon a judgment and is not taxable.

10. *Dower*.

The common law writ for recovery of dower in Pennsylvania is the writ of "dower unde nihil habet." It is a real action against the tenant of the freehold which is instituted by the filing of a praecipe for the issuance of the writ. The writ is the original process in the proceedings and, therefore, is taxable.

11. *Injunction*.

An injunction is not original process and is not taxable. Suits in equity may be begun " \* \* \* by the filing of a bill in equity, by an amicable action, or by a writ of summons." Eq. Rule 26. An amicable action usually provides that it shall have the same effect as though there had been a writ and declaration. An injunction (even preliminary) cannot issue in the absence of an endorsed bill, an amicable action, or a writ.

You are advised, therefore, that an injunction is not taxable.

12. *Testatum Fieri Facias*.

A *testatum fieri facias* is a writ of execution. It is not original process and therefore is not taxable.

13. *Scire Facias to Garnishee*.

After judgment has been entered against the defendant in proceedings by foreign attachment, the act provides that the plaintiff may have a writ of *scire facias* against the garnishee to show cause why the plaintiff should not have execution of his judgment out of the property attached in the hands of the garnishee. Act of June 13, 1836, P. L. 568, Section 54, 12 P. S. § 2994. While the *scire facias* proceeding has many of the aspects of a new action, in that issues may be raised that were not involved in the foreign attachment, it cannot be considered an original process. The original process in such case is the



original attachment whereby the garnishee was made a party and which forms the basis for the scire facias. The writ is not taxable.

14. Bill of Discovery.

A bill of discovery in aid of execution when filed against a party to the original proceeding upon which execution is sought is mesne process and not taxable. When, however, it is filed against strangers to the original proceeding, it becomes original process and thus taxable. A bill of discovery in advance of suit would also be taxable.

15. Scire Facias Quare Executionem Non.

This writ issues upon a judgment the lien of which has expired, and requires the defendant to show cause why execution should not issue. It is mesne process in aid of execution not taxable. When combined with or used as a scire facias to revive the lien of a judgment, the same rule applies, as cited in our opinion of June 27, 1916, *supra*.

16. Scire Facias to Join Additional Defendant.

The writ of scire facias to join an additional defendant is provided by the Act of April 10, 1929, P. L. 479, 12 P. S. § 141, as amended. The operation of this act and its amendments has been suspended by Pa. R. C. P. 2275.

17. Scire Facias to Executor or Administrator.

The Fiduciaries Act of 1917, the Act of June 7, 1917, P. L. 447, § 15 (i), 20 P. S. § 529, provides that no execution on property of any decedent shall be issued upon a judgment against the decedent obtained in his lifetime unless his personal representatives have first been warned by a writ of scire facias to show cause why execution should not issue. This is but a continuation of the original action and in aid of execution. It is not taxable.

18. Scire Facias to Surviving Spouse, Heirs, etc.

The Fiduciaries Act of 1917, the Act of June 7, 1917, P. L. 447, Section 15 (e), 20 P. S. § 525, provides that no execution on the real estate of any decedent shall be issued upon a judgment obtained against his personal representatives unless the surviving spouse and heirs, and the devisee, alienee, or owner of the land, shall have been made parties to the action or warned by "a writ of scire facias against them on such judgment." The scire facias in this case by joining new parties amounts to original process and is taxable. This case is distinguishable from the scire facias to join personal representatives, because the personal representatives stand in the same position as the

decedent and their rights rise no higher than his, whereas equities and additional rights may arise in favor of widows, bona fide purchasers, etc.

## JUDGMENTS

### 1. Declaratory Judgments.

A declaratory judgment may be entered in proceedings by petition or in any civil proceeding or suit, no matter how commenced. Under the terms of the act a tax is levied upon "the entry of every amicable action" and the "entry of a judgment by confession or otherwise, where suit has not been previously commenced." It follows that a declaratory judgment, which must be preceded by a petition or action, is not taxable.

### 2. On Award of Workman's Compensation Board.

The tax on judgments is levied on the entry of what are termed "office judgments", a proceeding of long standing in Pennsylvania. They provide a simple and expeditious means for obtaining the security of a judgment lien. The award of the Workmen's Compensation Board is the result of a quasi-judicial proceeding in which issues of law and of fact have been raised and determined, but such proceeding is not a "suit." The entry of such award as a judgment is, therefore, a judgment by confession or otherwise, where suit has not been previously commenced. Such judgment is taxable.

### 3. By Confession on Twenty-Year-Old Bond and Warrant.

This is clearly taxable as a judgment by confession. The fact that the Rules of Court in certain counties require a petition and rule to show cause why judgment should not be confessed on the warrant of attorney where it is 20 years old does not affect the matter. The proceedings do not amount to a suit but amount to obtaining permission to *confess* the judgment.

### 4. Lease.

Leases customarily permit two forms of "office judgments": (a) Judgment by confession in an amicable action of ejectment for the premises demised, and (b) judgment by confession for rent, etc. Both types of judgment come clearly within the statute and are taxable.

### 5. Exemplification of Record From Other Counties.

In our opinion addressed to your department dated June 2, 1910, 1909-10 Op. Atty. Gen. 67, 37 Pa. C. C. 522, we conclude as follows:

"The language of the Act quoted is sufficiently comprehensive, and in my opinion, includes every entry of a

judgment on an exemplified record from another county whether the tax had been paid on the original note or not."

We do not question the correctness of that opinion.

6. Exemplification of Record From Other States.

Although there is no general authority for the entry of judgment of the Prothonotary on an exemplified record of a judgment of the court of another state, an exception exists with respect to certain judgments outstanding in the State of Delaware which bind or affect lands located within the limits of the Commonwealth of Pennsylvania. This exception is provided for by the Act of May 16, 1923, P. L. 242, Par. 2, 21 P. S. § 582. Therefore, you are advised that where judgment is properly entered in the one exception to which we have referred on an exemplified record of a judgment of the court of another state, the tax should be collected.

7. Contest of Will "Indexed as Judgment".

8. Lien For Debt—Not Yet Due—"Indexed as Judgment".

9. No Lien Agreement—"Indexed as Judgment".

The very designations given to these last three entries upon the records in the Prothonotary's office clearly indicate that they do not fall within the classes of amicable actions or judgments upon the entry of which tax must be paid.

Lis pendens is not a writ, an amicable action or a judgment: it is a situation. The pendency of an action against certain property might be "noticed" in the judgment index, but this would not be a judgment; it would simply be notice of the pending litigation: i. e., lis pendens. This comment applies to contest of a will, lien for debt not yet due, and no lien agreements.

Yours very truly,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

CARL F. CHRONISTER,  
*Deputy Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

## OPINION No. 553

*Public School Employees' Retirement Board—Adoption of new mortality tables—Adoption of new contribution rates—Acts of July 18, 1917, P. L. 1043; July 12, 1935, P. L. 698.*

New mortality tables may apply only to school employees who are employed on or after September 1, 1946, and the board has the right to adopt new contribution tables for employees who enter service after September 1, 1946, but may not change the contribution rates for employees who are in school service prior to September 1, and who are in school service thereafter.

The board may not alter the amount of lump sum payments of employees in service prior to September 1, 1946, and may not adopt new contribution rates to be paid to the School Employees' Retirement Fund by the State and local school districts.

Harrisburg, Pa., October 30, 1946.

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

Sir: We are in receipt of your request for advice concerning the right of the Public School Employees' Retirement Board to adopt new mortality tables for employees in school service, and new mortality tables and new rates of contributions for employees entering school service on or after September 1, 1946. Specifically you ask the following questions:

1. May the Public School Employees' Retirement Board adopt new mortality tables to apply to all school employees retiring after September 1, 1946?

2. May the Board adopt new contribution rates for all employees entering school service on or after September 1, 1946?

3. May the Board adopt new contribution rates for employees in school service prior to September 1, 1946, and who are in school service thereafter?

4. May the Board permit employees who are in school service prior to September 1, 1946, and who are in service thereafter to make lump sum payments at certain ages in order to have the "employees' annuity" equal the standard prescribed in section 8, paragraph 6 of the act?

5. May the Board adopt new contribution rates for payments to the School Employees' Retirement Fund by the State and by local school districts as recommended by its actuary to provide funds required by the increase in life expectancy and the increase in salaries?

You state that as a result of the last five (5) year investigation and valuation of the retirement system made by the actuary of the board in accordance with section 4, paragraph 7, of the School Employees' Retirement Act and as recommended by the actuary, the board adopted

new mortality tables and new rate contributions for employes entering school service on or after September 1, 1946.

You further state that the Retirement Board decided to permit school employes in service prior to September 1, 1946, to contribute to the system at the new rates based on their present ages and also to contribute lump sum payments in certain cases.

The old and new rates are discussed in an article appearing in the October, 1946, issue of the Pennsylvania School Journal entitled "Retirement Board Announces Increase in Rates" wherein it is stated:

\* \* \* Studies by the actuary in his recent five-year evaluation, as required by law, show that teachers are living longer after retirement than was anticipated when the retirement act was established. This means that the employe's annuity must be spread over a longer period of years. To illustrate, previous to the recent evaluation and with the use of the former mortality tables \$10.001 bought an employe's annuity of \$1 for a man who retired at age 62. Under the new mortality tables which show a longer period of life after retirement, \$10.604 is required to purchase an annuity of \$1 for such a man.

Similarly it requires \$11.923 to purchase an annuity of \$1 for a woman retiring at age 62 as compared with the previous cost of \$11.338. It is obvious, therefore, that as the cost of the annuity increases due to longer life expectancy a larger amount must be available in accumulated deductions and interest to maintain the given standard of 1/160 of the average salary for the last ten years multiplied by the number of years of membership in the system. It is for this reason that it was necessary to revise upward the rates of contribution for new members entering the system.

The smaller amount, therefore, that an employe receives as an annuity after retirement is brought about by the fact that today people, and particularly teachers, are living longer. The same amount is paid out to the annuitant but, since he lives longer today than he did five (5) years ago, the yearly amount would be less than when he had a shorter life expectancy.

Thus, it would seem that for employes in service prior to September 1, 1946, the board intends to apply the new mortality tables and to give such employes the option of contributing under the old or new rates of deduction.

We have no doubt that the board has ample authority to make an actuarial investigation every five (5) years and on the basis of such investigation to make a valuation of the various rates created by the

act. This is pursuant to section 4, paragraph 7, of the Act of July 18, 1917, P. L. 1043, as amended, which provides:

In the years nineteen hundred twenty-one and nineteen hundred twenty-four, and in every fifth year thereafter, the actuary of the retirement board shall make an actuarial investigation into the mortality and service experience of the contributors and beneficiaries as defined in this act, and shall make a valuation of the various accounts created by this act, and, on the basis of such investigation and valuation, the retirement board shall—

(a) Adopt for the retirement system one or more mortality tables and such other tables as shall be deemed necessary;

(b) Certify the rates of deduction from salary necessary to pay the annuities authorized under the provisions of this act; and

(c) Certify the rates of contribution, expressed as a percentage of salary of new entrants at various ages, which shall be made by the Commonwealth to the School Employees' Retirement Fund and credited to the contingent reserve account.

The last sentence of section 8, paragraph 6, of the aforesaid act, as amended July 12, 1935, P. L. 698, provides:

\* \* \* The rate percentum of said deduction from salary shall be based on such mortality and other tables as the retirement board shall adopt, together with regular interest, and shall be computed to remain constant during the prospective school service of the contributor.

It has been pointed out that an interpretation of this sentence places emphasis on the term "computed" rather than on the phrase "constant during the prospective service of the contributor". This may be an actuarial interpretation but is one with which we cannot agree.

School teachers and employes of the various school districts throughout the Commonwealth enter service under a definite contract. Part of that contract is the law of the Commonwealth with reference to their joining the School Employees' Retirement System. The law is mandatory and they may not become employes of a school district or any institution to which the act applies, without becoming members of the retirement system. We recognize that at the time of their employment, it would be impossible for them actually to compute the amount that they would receive on retirement at age 62. But under the law they are entitled to believe that during the course of their service they will receive the various increments in salary which the law provides. The Retirement Act spells out a formula, therefore, relative to mortality tables in existence at the time the employee joined

the system and also as to rates of deduction from the salary of such employee. We do not believe that the formula or the rules can be changed in the middle of the game.

We believe, therefore, that a fair and just interpretation of section 4, paragraph 7, of the School Employees' Retirement Act, confines its provisions to employees entering the service after the actuarial investigation is made and the new tables and rates have been adopted; that under section 8, paragraph 6, of said act, as well as the Constitution of Pennsylvania, the rates must remain constant during the prospective school service of the contributor; and that the computation must be made on mortality tables in effect at the time of employment.

We recognize that over the course of years some hardship may be occasioned to the system and its administration but it is also our opinion that any deficiency occasioned by the fact that people live longer or that salaries have been increased beyond that which was contemplated at the time of the passage of the act, is the obligation of the Commonwealth. Authority for this position, we believe, is contained in the language of section 10 of the Act of July 18, 1917, P. L. 1043, which provides:

Regular interest charges payable, the creation and maintenance of reserves in the fund created by this act to the credit of the contingent reserve account, and the maintenance of employees' annuity reserves and State annuity reserves as provided for in this act, and the payment of all retirement allowances and other benefits granted by the retirement board under the provisions of this act are hereby made obligations of the Commonwealth of Pennsylvania. \* \* \*

The foregoing reasoning applies with equal force to the lump sum payments which are permitted by the act and also to the authority of the board to alter the rates of employers.

For the above reasons it is our opinion:

- (1) That new mortality tables may apply only to school employees who are employed on or after September 1, 1946.
- (2) That the board has the right to adopt new contribution rate tables for employees who enter service after September 1, 1946.
- (3) That the board may not change the contribution rates for employees who are in school service prior to September 1, 1946, and who are in school service thereafter.

(4) That the board likewise may not alter the amount of lump sum payments of employes in service prior to September 1, 1946.

(5) That the board may not adopt new contribution rates to be paid to the School Employes' Retirement Funds by the State and local school districts. This must be done by the General Assembly.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

SAMUEL M. JACKSON,  
*Deputy Attorney General.*

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OPINION No. 554

*Coal mining—Anthracite region—Barrier pillars—Property lines—Purpose—Act of June 2, 1891, P. L. 176.*

The legislature intended that the barrier pillars described in section 3 of the act, are to be established and maintained only if the engineers and district inspector deem them essential in consideration of any safety purpose.

Harrisburg, Pa., November 14, 1946.

Honorable Richard Maize, Secretary of Mines, Harrisburg, Pennsylvania.

Sir: We have your request asking us to define precisely the purpose for which barrier pillars are required to be established along property lines of coal lands in the anthracite region. The answer to this is found in Section 10 of Article 3, Act of June 2, 1891, P. L. 176, 52 P. S. § 264, reading as follows:

It shall be obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, of such width, that taken in connection with the pillar to be left by the adjoining property owner, will be a sufficient barrier for the safety of the employes of either mine in case the other should be abandoned and allowed to fill with water; such width of pillar to be determined by the engineers of the adjoining property owners together with the inspector of the district in which the mine is situated, and the surveys of the face of the workings along such pillar shall be made in duplicate and must practically agree. A copy of such duplicate surveys, certified to, must be filed with the owners of the adjoining properties and with the inspector of the district in which the mine or property is situated.



Did the legislature intend that the barrier pillar described be established and maintained for purposes other than the holding back of water that might accumulate in either one or the other mine?

Any doubt which may have existed that the legislature intended a pillar should be established for purposes other than that of preventing water flowing from one mine to another was clarified by the Supreme Court of Pennsylvania in the case of *Commonwealth v. Plymouth Coal Company*, 232 Pa. 141 (1911), which was affirmed by the Supreme Court of the United States in 232 U. S. 531 (1914). In the Pennsylvania Supreme Court decision, at page 143, the court said:

It might, perhaps, be well argued that the legislature did not intend to impose upon the owners the burden of leaving a boundary pillar of unmined coal where it clearly appears to be unnecessary for the safety of the employees. If none at all were needed it would seem idle for the inspector and engineers to fix a width of, say, one foot, for the sake, merely, of literal compliance with the statutory obligation of leaving a pillar of some width. If, therefore, we may apply the maxim that the law does not require a vain thing, there is room for the construction that, in vesting in the inspector and engineers the power to determine how wide the barrier pillar should be to secure safety, the intent of the law making power was to also empower them to say, if such be the fact, that the safety of the men does not require a barrier pillar of any width at all. But, be that as it may, it is evident that the act does not warrant a mine owner in refusing to permit his engineer to participate in determining the question of the width of, or the need for, a barrier pillar simply because he, the mine owner, does not consider one necessary. In our opinion, the law requires such a pillar to be left, unless the inspector and engineers, after due examination of the premises and consideration of the subject, determine that none is needed to secure the safety of the men employed in either mine in case the other should be abandoned and allowed to fill with water.

At page 150 of the same opinion the court restates the reason for leaving the pillar, namely, to prevent the flooding of mines.

\* \* \* The act does not transfer the right to mine out the coal from the owner to some one else, for the public benefit, but prohibits that right from being exercised by anyone—that is, destroys it, to prevent a possible calamity, to-wit, the flooding of mines, and to protect the lives of that class of the general public whose safety would be thereby endangered, and, incidentally, to conserve the mine property of the owners themselves. \* \* \*

To contend that the law makes it obligatory on the adjoining owners to leave a pillar of coal in each seam for purposes other than preventing the flow of water from mine to mine, and that such pillars shall

be of sufficient width to support a water pressure developed in case either mine is allowed to fill with water, despite the advice of engineers and district inspector to the contrary, would constitute a result that is absurd and unreasonable. If the legislature did intend that the purpose of the pillar should include such things as the prevention of ventilation interruption, the movement of gasses from mine to mine and the like, it would not have established a standard based upon water pressure for the calculation of the width of the pillars. It is a well known fact that the width of a pillar needed to withstand any head of water would be far greater than that required merely to separate a ventilating system. To require the same width of pillar in both cases would constitute an unreasonable waste of coal.

The act sets up a tribunal consisting of the engineers of the adjoining property owners, together with the inspector of the district in which the mine is situated, for the purpose of establishing barrier pillars. They are directed by law to determine the width of all such pillars established, and the legislature has laid down a factor which must be considered by the tribunal when calculating the required width of a pillar, namely, the water pressure which might be created if and when a mine "should be abandoned and allowed to fill with water". Therefore, in all cases where this legally established factor cannot possibly exist a pillar is not required.

For the above reasons it is our opinion, that the legislature intended that the barrier pillars described in the section here cited, are to be established and maintained only if the engineers and district inspector deem them essential in consideration of any safety purpose.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

E. A. DELANEY,  
*Deputy Attorney General.*

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OPINION No. 555

(Revoked by Opinion No. 556)

*Small loan lenders, pawnbrokers, consumer discount companies—Assessable for the overhead expenses of Department of Banking—Acts of June 17, 1915, P. L. 1012; May 15, 1933, P. L. 565; April 6, 1937, P. L. 200; April 8, 1937, P. L. 262; May 28, 1937, P. L. 1019*

OPINION No. 556  
(Revoking Opinion No. 555)

Harrisburg, Pa., November 26, 1946.

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

Sir: Formal Opinion No. 555 of the Department of Justice dated November 22, 1946, addressed to you, concerning the assessability of small loan lenders, pawnbrokers and consumer discount companies, for the overhead expenses of the Department of Banking, is hereby revoked and recalled.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 557

*Public School Employes' Retirement System—Membership—Status of employes of the Pennsylvania Area College Centers Program—Acts of July 18, 1917, P. L. 1043; April 13, 1943, P. L. 37—Formal Opinion No. 538 cited.*

1. Employes of the Pennsylvania Area College Centers Program, who are under sixty-two years of age, and who are regularly engaged on a full-time occupational basis outside of vacation periods and who receive their full compensation for such services from Commonwealth funds, are required to become members of the retirement association, unless they elect otherwise in writing filed with the retirement board within one year after beginning their employment. Full-time employes of the Pennsylvania Area College Centers Program, who have attained sixty-two years of age, and are less than seventy years of age, are not required to contribute or to become active members of the retirement association, but they may do so if they so desire. However, persons, who have attained seventy years of age or more, are ineligible to make contributions or receive credits for retirement benefits by reason of their service as employes of the Area Centers Program.

2. All employes engaged on a full-time basis in the Service of the Pennsylvania Area College Centers Program are subject to all of the provisions of the Public School Employes' Retirement Act and are subject to the same duties, restrictions and benefits in the same manner as other employes of the Commonwealth in school service. A Public School employe, who returned from retirement for superannuation to active employment in the service of the Pennsylvania Area College Centers Program, upon return to retirement for superannuation, is entitled to the resumption of his retirement allowance payments in amounts which shall not be less than he received prior to such active school service.

Upon his death during active employment in the service of the Pennsylvania Area College Centers Program, his designated beneficiary is entitled to receive the balance or allowance as elected by the employe for the beneficiary at or before the time of his original retirement, which balance or allowance shall not be less in amount than such beneficiary would have received if the employe had not returned to active employment.

Harrisburg, Pa., December 9, 1946.

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

Sir: This department is in receipt of your request for advice on several questions, as follows:

1. Are certain employes of the Pennsylvania Area College Centers Program eligible for membership in the Public School Employees' Retirement System?

2. If such employes of the Pennsylvania Area College Centers Program are eligible for membership in the Public School Employees' Retirement System, are they subject to all of the provisions of the existing law and interpretations thereof with reference to other members of the Public School Employees' Retirement System?

3. Should a retired former teacher, now seventy-one years of age and receiving a retirement allowance under the provisions of the Public School Employees' Retirement Act, return to active service as an employe of the Pennsylvania Area College Centers Program, which would require him to give up the receipt of his retirement benefits during the period of his active service, die during such active service, would his beneficiary be entitled to the optional benefits elected by him at the time of his original retirement?

Your request states that the teaching staffs of high schools and colleges in the vicinity of the proposed college areas will be recruited on a part time basis, and that available qualified instructors will be recruited on a full time basis as members of the instruction staffs. The Pennsylvania Area College Centers Program is operated under the direction and control of the Department of Public Instruction, wholly financed through funds of the Commonwealth, and its personnel will be paid by checks issued through the State Treasurer in the same manner as other State employes. You further state that they will be employed by the Commonwealth through the Department of Public Instruction and will receive all of their instructions and supervision through representatives of the Department of Public Instruction.

Section 1, paragraph 7, of the Act of July 18, 1917, P. L. 1043, known as the Public School Employees' Retirement Act, 24 P. S. § 2081, provides as follows:

"Employee" shall mean any teacher, principal, supervisor, supervising principal, county superintendent, district superintendent, assistant superintendent, any member of the staff of the State Normal Schools, or of the staff of the State Department of Public Instruction, or of the staff of the State Council of Education, or any clerk, stenographer, janitor, attendance officer, or other person engaged in any work concerning or relating to the public schools of this Commonwealth, or in connection therewith, or under contract or engagement to perform one or more of these functions: Provided, That no person shall be deemed an employe, within the meaning of this act, who is not regularly engaged in performing one or more of these functions as a full-time occupation, outside of vacation periods. In all cases of doubt the retirement board shall determine whether any person is an employe as defined in this act: And provided further, That those employes of the Department of Public Instruction who are members of or are entitled to membership in the retirement system herein established may withdraw from the system, and be entitled to reimbursement of moneys which they have paid in, by so electing in writing filed with the retirement board on or before the first day of July, one thousand nine hundred and thirty-six. After said date all new employes in the Department of Public Instruction shall be members of said system, unless they elect otherwise in writing filed with the retirement board within one year after beginning their employment.

Section 1, paragraph 5, as amended, of the same act, 24 P. S. § 2081, provides as follows:

"Public School" shall mean any class, school, high school, normal school, training school, vocational school, truant school, parental school, and any or all classes or schools within the State of Pennsylvania, conducted under the order and superintendence of the Department of Public Instruction of the Commonwealth of Pennsylvania and of a duly elected or appointed board of public education, board of school directors, or board of trustees, of the Commonwealth, or of any school district or normal school district thereof, and shall include the officers of the State Department of Public Instruction and the State Council of Education.

Section 1, paragraph 12, of the Retirement Act, 24 P. S. § 2081, provides as follows:

"School Service" shall mean any service as an employe as defined by paragraph seven of this section.

Section 8, paragraph 8, of the act, 24 P. S. § 2121, provides as follows:

No contributor shall be required to continue to contribute to the School Employees' Retirement Fund after he or she

shall have become eligible for superannuation retirement; all contributions made thereafter to said Fund shall be voluntary.

Section 12, paragraph 1, of the act, 24 P. S. § 2133, provides 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.

A Pennsylvania College Area Center is within the definition of a public school, as defined in the Retirement Act. The retirement benefits and contribution requirements of employes of the centers are therefore governed by the Public School Employes' Retirement Act.

Under the provisions above recited and the facts stated in your letter, employes of Pennsylvania Area College Centers under sixty-two years of age regularly engaged on a full-time occupational basis outside of vacation periods, and who receive their whole compensation for such services from Commonwealth funds, are required to become members of the system, unless they elect otherwise in writing filed with the retirement board, within one year after their employment.

Full-time employes of area centers, who are sixty-two years of age, and less than the age of seventy years, are not required to contribute to, or to become active members of, the retirement association, but they may do so if they so desire. However, persons, who are seventy years of age or older, are ineligible to make contributions, or receive credits for retirement benefits by reason of their service as employes of the area centers.

In the situation referred to in question number three, you ask if a former teacher, seventy-one years of age, retired under the provisions of the Public School Employes' Retirement Act under an option which allows him a reduced retirement allowance during his lifetime, and at his death, a monthly allowance payable to his named beneficiary for life, returns to school service as an area center employe and gives up his retirement allowance during the period of his employment, would his beneficiary be entitled to the optional benefits elected by him at the time of his original retirement, in the event he should die while an employe in the active service of an area center.

Section 14, as amended, of the Retirement Act, 24 P. S. § 2134, directs the retirement of contributors, forthwith, at the time they attain

seventy years of age, or at the end of the school term in which said age of seventy years is attained.

Section 14, paragraph 4, of the Retirement Act, 24 P. S. § 2135, as amended by the Act of April 13, 1943, P. L. 37, provides as follows:

Any employe on retirement for superannuation who returns to active school service during the continuation of World War II, shall not, upon return to retirement for superannuation, receive any smaller retirement allowance than that received prior to such return to active school service.

The implication of this statute is clear that any contributor on retirement, whether under or over seventy years of age, may be re-employed.

Former contributors now receiving retirement allowances, upon reentering school service as full-time active employes of area centers, forego the right to receive retirement allowances for the period of such active full-time employments, as directed in section 13, paragraph 4, of the Retirement Act, 24 P. S. § 2131, which provides as follows:

Upon application of any beneficiary under the age of sixty-two years, drawing a retirement allowance under the provisions of this act, said beneficiary may be restored to active service by the employer by whom he or she was employed at the time of his or her retirement. Upon the restoration of a beneficiary to active service, his or her retirement allowance shall cease.

A factor in determining the amount of an employe's retirement allowance on termination, is his "final salary". The phrase "final salary" is defined in section 1, paragraph 17, of the Retirement Act, 24 P. S. § 2081, as the average salary of an employe for his last ten years of service while a member of the Public School Employees' Retirement Association. The legislature has provided for the protection of the retirement allowances of former employes who may return during the continuation of World War II to active school service at a salary lower in amount than was used as a basis for the final salary factors in the computation of their retirement allowances by the amendment of April 13, 1943, P. L. 37, 24 P. S. § 2135 supra.

In Formal Opinion No. 538, dated March 8, 1946, addressed to the Acting Secretary of Public Assistance, in discussing the status of emergency World War II legislation, the following statement is made:

However, though the actual firing has ceased, our country is still legally and technically at war, since there has been no

formal action by Congress or the President to terminate the war.

The retirement allowance of an employe upon return to superannuation retirement after active service during the continuation of World War II and the benefits he has elected for his designated beneficiary, are protected from impairment on his return to retirement for superannuation by the above cited amendment to section 14 of the Public School Employees' Retirement Act. This applies also to such an employe who dies during such active service.

It is our opinion that 1. Employees of the Pennsylvania Area College Centers Program, who are under sixty-two years of age, and who are regularly engaged on a full-time occupational basis outside of vacation periods and who receive their full compensation for such services from Commonwealth funds, are required to become members of the retirement association, unless they elect otherwise in writing filed with the retirement board within one year after beginning their employment. Full-time employes of the Pennsylvania Area College Centers Program, who have attained sixty-two years of age, and are less than seventy years of age, are not required to contribute or to become active members of the retirement association, but they may do so if they so desire. However, persons who have attained seventy years of age or more, are ineligible to make contributions or receive credits for retirement benefits by reason of their service as employes of the Pennsylvania Area College Centers Program.

2. All employes engaged on a full-time basis in the service of the Pennsylvania Area College Centers Program are subject to all of the provisions of the Public School Employees' Retirement Act and are subject to the same duties, restrictions and benefits in the same manner as other employes of the Commonwealth in school service. A public school employe, who returned from retirement for superannuation to active employment in the service of the Pennsylvania Area College Centers Program, upon return to retirement for superannuation, is entitled to the resumption of his retirement allowance payments in amounts which shall not be less than he received prior to such active service.

Upon his death during active employment in the service of the Pennsylvania Area College Centers Program, his designated beneficiary is entitled to receive the balance or allowance as elected by the employe for the beneficiary at or before the time of his original retirement, which balance or allowance shall not be less in amount than such



beneficiary would have received if the employee had not returned to active employment.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

RAYMOND C. MILLER,  
*Deputy Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

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OPINION No. 558

*Schools—Change in organization—Change in requirements for supervising principal—Disqualification:*

The supervising principal of an elementary school who does not possess the qualifications for a supervising principal of elementary and secondary schools, cannot legally be elected as such supervising principal of elementary and secondary schools, but this opinion does not affect the teacher's right to hold the position as supervising principal of the elementary schools of the district.

Harrisburg, Pa., December 12, 1946.

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

Sir: This department is in receipt of your request for advice as to whether a teacher, properly certified as a supervising principal of schools, under the then existing law, may subsequently be disqualified by a change in the organization of schools in the district, or by a change in the requirements for supervising principal made by the State Council of Education, pursuant to law.

The facts are, that in 1928 a teacher was elected supervising principal. At that time, the school district operated only elementary schools. Later, secondary schools were established. The objection is that inasmuch as the teacher's educational experience does not satisfy the present requirements of the law for supervising principal of elementary and secondary schools, the teacher is not properly certified for the position she is presently holding.

We shall review the law as it was at the time of the issuance of a supervising principal's certificate to the teacher in 1933.

Section 1214 of the Act of May 18, 1911, P. L. 309, as amended by the Act of May 29, 1931, P. L. 243, 24 P. S. § 1201, reads:

The board of school directors of any school district of the third or fourth class which has no district superintendent may employ for a term *not exceeding three years*, a supervising principal of a part or all of the public schools of said school district. Every supervising principal shall be properly certificated by the Department of Public Instruction in accordance with such standards as the State Council of Education may establish. (*Italics ours.*)

The State Council of Education established such standards pursuant to this authority. Paragraph 4 of said standards reads:

4. All persons serving as supervising principals up to and including May 29, 1931, and so elected by their respective Boards of School Directors, shall be considered as having fulfilled the qualifications requisite for the holder of a Supervising Principal's Certificate, provided their application for such a certificate is approved by their proper County Superintendent of Schools.

The teacher served from 1928 as supervising principal after election by the board of school directors, and the application for a supervising principal's certificate having been approved by the county superintendent, she was within the purview of said paragraph of the standards.

In 1935, a two year high school course was established in the school district, and this was extended to a four year course in 1936. Thus, the district had both elementary and secondary schools.

The teacher does not have the educational requirements established by the State Council of Education for supervising principals of elementary and secondary schools; hence your questions.

While paragraph 4 above quoted had the force and effect of putting the seal of approval upon her qualifications as supervising principal of the then established school system of elementary schools, it could not approve her qualifications to a position which was created later, that is, supervising principal of a school system consisting of elementary and secondary schools, particularly in view of the fact that this new position required additional educational qualifications. The election of the teacher to supervising principal of elementary and secondary schools was therefore illegal so far as secondary schools were concerned, and such illegality results from the inherent defect arising out of the lack of qualifications to hold the position to which the teacher was elected.

In 1922 the School Code provided that the qualifications of a supervising principal were the same as those required for a superintendent of schools; and in the case of School District of McAdoo *v.* Ferry, 19 Schuylkill L. R. 85 (1922), the controlling question was whether the teacher was qualified to hold the position of supervising

principal. The teacher held a permanent certificate, but not a teacher's state certificate. The court granted an injunction restraining her from exercising the duties of a supervising principal.

That it has long been the policy of the Commonwealth to insist upon the possession of the proper qualifications by its school teachers, may be shown by a reference to the cases of *Dillon v. Myers*, Bright N. P. 426 (1844); *Com. Ex Rel. Walton v. Lyndall*, 2 Brewst. 425, 7 Phila. 29, 25 L. I. 260 (1868); *Chestnut v. City of Phila.* 17 Phila. 32, 41 L. I. 232 (1884); or *Vales Pennsylvania Digest* 35, Section 131.

Not only has this been the policy, but we have a constitutional requirement that the General Assembly should provide for the maintenance and support of a thorough and efficient public school system. See Article X, Section 1 of the Constitution of the Commonwealth of Pennsylvania.

Turning now to the law as it is today, we find that section 1214 of the act of 1911, *supra*, was subsequently amended by the Act of April 6, 1937, P. L. 213, so that it now reads as follows:

The board of school directors of any school district of the third or fourth class which has no district superintendent may employ a supervising principal of a part or all of the public schools of the said school district, under and subject to the provisions of section one thousand two hundred five of this act. Every supervising principal shall be properly certificated by the Department of Public Instruction in accordance with such standards as the State Council of Education may establish.

Section 1205 of the act is, of course, a reference to the Teachers Tenure Act, which includes a form of contract to be executed by the teacher and the school district. This contract, however, is subject to all the provisions of the act of 1911, *supra*, known as The School Code. The form of teacher's contract set forth in section 1205 provides that the contract is subject to the provisions of the act approved May 18, 1911, P. L. 309, and the amendments thereto.

This amendment would have the effect of giving the teacher tenure so far as supervising principal of the elementary schools was concerned, but it could not give her tenure as supervising principal of elementary and secondary schools, if the teacher was not qualified for said position.

In *Walker's Appeal*, 332 Pa. 488 (1938), at page 495, it was said:

\* \* \* The legislature, in providing by the Act of 1929 the form of contract to be executed by the teacher, expressly recognized its qualified nature by including the proviso that it was to be subject to the provisions of the Act of 1911 and

amendments thereto. And the same provision is in the Act of 1937.

We are, therefore, of the opinion, that the supervising principal of an elementary school who does not possess the qualifications for a supervising principal of elementary and secondary schools, cannot legally be elected as such supervising principal of elementary and secondary schools, but this opinion does not affect the teacher's right to hold the position as supervising principal of the elementary schools of the district.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,  
*Attorney General.*

HARRINGTON ADAMS,  
*Deputy Attorney General.*

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