

Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

FOR THE YEARS

1949 and 1950

T. McKEEN CHIDSEY, Attorney General

CHARLES J. MARGIOTTI, Attorney General

From July 5, 1950

Compiled by

FREDERIC E. RAY

Department of Justice

Harrisburg

OFFICIAL OPINIONS

1949 - 1950

OPINION No. 589

Charities—Solicitation of funds—Necessity for registration—Solicitation Act of May 13, 1925, as amended—War veterans' organization—Relatives of former service men.

1. The term "war veterans" as used in the Solicitation Act of May 13, 1925, P. L. 644, as amended, means a former member of the military or naval forces of the United States.

2. An organization composed of the mothers of former members of the armed forces is not a war veterans' organization within the meaning of the Solicitation Act of May 13, 1925, P. L. 644, as amended, exempting such organizations from the necessity of obtaining a certificate of registration from the Department of Welfare before soliciting money or other property for certain purposes enumerated thereon.

Harrisburg, Pa., May 26, 1949.

Honorable Emlyn Jones, Acting Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice is in receipt of your request to be advised whether the "American War Mothers" is a war veterans' organization, and accordingly, exempt from compliance with the provisions of the Solicitation Act.

The act referred to is the Act of May 13, 1925, P. L. 644, as amended, 10 P. S. § 141 et seq., usually referred to as the Solicitation Act, the title of which is as follows:

An act relating to and regulating the solicitation of moneys and property for charitable, religious, benevolent, humane, and patriotic purposes.

Section 1 of the Solicitation Act, as amended, *supra*, 10 P. S. § 141, provides as follows:

Thirty days after the approval of this act it shall be unlawful for any person, copartnership, association, or corporation, except in accordance with the provisions of this act, to appeal to the public for donations or subscriptions in money or in other property, or to sell or offer for sale to the public any thing or object whatever to raise money, or to secure or

attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment, or exhibition, or by any similar means for any charitable, benevolent, or patriotic purpose, or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere, or of relieving suffering of animals, or of inculcating patriotism, unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, or association holding a valid certificate of registration from the Department of Welfare, issued as herein provided.

Subsequent sections of the act regulate the applications for, and the issuance of, such certificates, and prescribe the conditions under which such appeals for funds, etc., may be made.

Under the provisions of Section 11 of the Solicitation Act, as amended, *supra*, 10 P. S. §151, certain organizations and purposes are exempt as follows:

This act shall not apply to fraternal organizations incorporated under the laws of the Commonwealth, religious organizations, raising funds for religious purposes, colleges, schools, universities, or associations of alumni or alumnae thereof, raising funds for fellowships or scholarships, federated women's clubs, labor unions, municipalities, or subdivisions thereof, nor to charitable institutions or agencies required by the provisions of existing law to file reports with the Department of Welfare or with any other department or office of the Commonwealth, nor to *any war veterans' organization* or any subordinate units thereof, whenever the purpose for which it is soliciting funds has been approved by the Department of Military Affairs. (Italics ours)

The precise question presented by your request for advice is whether or not the "American War Mothers" is a veterans' organization, within the meaning of Section 11 of the Solicitation Act, as amended, *supra*, and accordingly, exempt from compliance with the requirements of that act.

With your request for advice, you submitted a copy of the constitution and by-laws of the organization, and a blank form of application for membership therein.

It appears that the organization has not furnished you with a copy of its charter, although several times requested by you to do so.

American War Mothers was incorporated by act of Congress, the Act of February 24, 1925 c. 303, 43 Stat. 966, Section 1 of which, 36 U.S.C.A. Section 91, provides, in part, as follows:

The following-named persons, * * * and their associates and successors duly chosen are hereby incorporated and declared to be a body corporate of the District of Columbia by the name of American War Mothers, and by such name shall be known and have perpetual succession with the powers, limitations, and restrictions herein contained.

The nature of the organization appears from Section 2 of said Act of 1925, supra, 36 U.S.C.A. Section 92, which is, in part, as follows:

The persons named * * * and such other persons as may be selected from among the membership of American War Mothers, *an association of women whose sons and daughters served the allied cause in the great World War* * * * are hereby authorized to meet * * * (Italics ours)

In the constitution, a copy of which accompanied your request, the "objects" of the organization are stated, in article II thereof, as follows:

* * * the object of the corporation shall be to keep alive and develop the spirit that prompted world service; to maintain the ties of fellowship borne of that service and to assist and further any patriotic work; to inculcate a sense of individual obligation to the community, State, and Nation; to work for the welfare of the Army and Navy; to assist in any way in their power men and women who served and were wounded or incapacitated in the World War; to foster and promote friendship and understanding between America and the Allies in the World War.

The foregoing language follows that of Section 3 of the Act of 1925, supra, 36 U.S.C.A. Section 93.

Membership in the organization is limited by Article VI of the constitution as follows:

"* * * the membership of American War Mothers is limited to women, and no woman shall be and become a member of this corporation unless she is a citizen of the United States and unless her son or sons or daughter or daughters of her blood served in the Army or Navy of the United States, or in the military or naval service of its allies, in the great World War of 1917-1918, at some time during the period between April 6, 1917, and November 11, 1918, or in the present World War which commenced in the year 1941, and at some time on and after December 7, 1941, and until the termination of said war, having an honorable discharge from such service, or who is still in the service."

The foregoing language follows section 7, as amended, of the Act of 1925, supra, 36 U.S.C.A. Section 97.

In order to determine whether the "American War Mothers" is a war veterans' organization, consideration must be given to the word, "veteran", which requires little definition, and has been simply defined in Webster's Collegiate Dictionary, Fifth Edition, at page 1116, as follows:

One long exercised in any service or art, esp. in war; one who has had much experience in service or who has seen specific service; as Napoleon's veterans.

A typical definition of the word, "veteran", as used in Pennsylvania statutes, is found in the Act of May 17, 1933, P. L. 803, Section 1, 35 P. S. § 257, relating to veterans' hospitals and is as follows:

* * * within the meaning of this act, "veteran" shall mean *any ex-service man or woman*, having a legal residence in this Commonwealth, who has been honorably discharged from any branch of the military or naval forces of the United States, and ex-members of the army nurse corps (female), ex-members of the navy nurse corps (female), and women who were transported from the United States by the United States Government to serve in base hospitals overseas, and whose service with the United States Government terminated honorably, whether by discharge or otherwise. (Italics ours)

The foregoing definitions of the word, "veteran", render unnecessary any extended resort to rules of construction or interpretation of statutes.

* * * Words and phrases shall be construed * * * according to their common and approved usage; * * * (The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Section 33, 46 P. S. Section 533)

When a statute is free from ambiguity as enacted, there is no occasion for resorting to rules for statutory interpretation. *Narcise v. Board of Trustees, Eastern State Penitentiary*, 9A. 2d 165, 137 Pa. Super. 394, 1940. (46 P. S. § 551 n.1)

As illustrative of what is meant by "war veterans' organization", the Act of June 26, 1939, P. L. 1105, Section 1, 46 P. S. § 465, authorizing the publishing of a pamphlet containing a compilation of the laws of Pennsylvania relating to soldiers, sailors, marines, their dependents, and war veteran organizations, enumerated the following:

* * * the Veterans of Foreign Wars of the United States, the American Legion, the United States Spanish War Veterans, the Grand Army of the Republic, and the Disabled Veterans of the World War.

This act clearly differentiated between dependents of service men and war veteran organizations.

The scope of the foregoing act was extended by the Act of July 5, 1947, P. L. 1342, Section 1 of which, 46 P. S. § 465 (note), authorized the publication of a revised pamphlet containing a compilation of the laws of Pennsylvania relating to war veterans to be made available to the Veterans of Foreign Wars of the United States, the American Legion, the United States Spanish War Veterans, the Grand Army of the Republic, the Disabled Veterans of the World War, and the American Veterans of World War II (AMVETS) and the Marine Corps League.

As used in the Veterans' Compensation Act, the Act of January 5, 1934, 1933 Special Session, P. L. 223, Section 2, as amended, 51 P. S. § 443-2:

* * * the word "veteran" includes any individual, a member of the military or naval forces of the United States * * *

You call our attention to the provisions of Section 1 of the Act of April 25, 1945, P. L. 300, amending The Penal Code, the Act of June 24, 1939, P. L. 872, Section 892, 18 P. S. § 4892, so as to protect the sale of the American War Mothers' carnation, by adding to that section of The Penal Code the words, "American War Mothers' carnation", and the words, "American War Mothers", to the enumerations of the groups of organizations therein named.

The purpose of said amendment to The Penal Code was merely to permit and protect the sale of the American War Mothers' carnation and, therefore, is not determinative of the issue involved in your request for advice.

By the Act of June 25, 1947, P. L. 969, Sections 889 and 891 of The Penal Code, supra, 18 P. S. §§ 4889 and 4891, respectively, prohibiting the illegal wearing of military insignia, and military uniforms, were amended by adding, "the American Veterans of World War II (A.M.V.E.T.S.), or the Marine Corps League," to the list of veterans' organizations therein enumerated, which in Section 889, as amended, supra, is as follows:

* * * the Loyal Legion of the United States, or the Grand Army of the Republic, or the Union Veteran Legion, or the Order Sons of Veterans, or the Spanish-American War Veterans, or the Society of Spanish-American or Philippine Wars, or the American Legion, or the Veterans of Foreign Wars of the United States, or the Disabled American Veterans of the

World War, or the American Veterans of World War II (A.M.V.E.T.S.), or the Marine Corps League, * * *

The enumeration of such organizations, contained in section 891 as amended, *supra*, is as follows:

* * * The Grand Army of the Republic, the United Spanish War Veterans, the Veterans of Foreign Wars of the United States, the American Legion, or the Disabled American Veterans of the World War, or the American Veterans of World War II (A.M.V.E.T.S.), or the Marine Corps League,
* * *

In neither of said sections is the "American War Mothers" mentioned; from the foregoing language, it is clear that the General Assembly did not intend to classify the "American War Mothers" as a war veterans' organization, no doubt fully realizing that it could not, by legislative fiat, endow a patriotic women's organization with the attributes of a war veterans' organization.

If the legislature had intended that result, it could have manifested its intent in clear and unmistakable language.

And if the organizations of mothers of persons who served in the Army or Navy of the United States, or in the military or naval service of its allies, are war veterans' organizations, then why not organizations of wives and sisters and others of such persons?

Perhaps the most that can be said concerning the nature of the organization is that it constitutes a group of servicemen's kin similar to numerous other organizations, among them the following:

Navy Mothers Clubs
Army Mothers Club of America
Gold Star Mothers
American Gold Star Mothers
American Gold Star Sisters
Gold Star Wives of America.

If organizations composed of veterans' mothers, wives, sisters or others were to be considered war veterans' organizations, it would lead to hopeless confusion in the interpretation of the numerous statutes relating to veterans' rights, privileges, preferences, etc.

Examination of the material you have submitted is not convincing that "American War Mothers" is a war veterans' organization, within the meaning of Section 11 of the Solicitation Act, as amended, *supra*.

We are of the opinion, therefore, that the "American War Mothers"

is not exempt, as a war veterans' organization, from compliance with the provisions of the Solicitation Act, the Act of May 13, 1925, P. L. 644, as amended, 10 P. S. § 141, et seq.; and therefore, it is required to obtain a certificate of registration from the Department of Welfare before soliciting money or other property for the purposes enumerated in the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. J. WOODWARD,

Deputy Attorney General.

OPINION No. 590

Salaries—Increases—Parole Board member.

As an appointee may not enter upon the duties of the office until he or she has taken the oath of office, it follows as a legal conclusion, that the new rate of compensation may not be paid until that date.

Harrisburg, Pa., June 22, 1949.

Honorable Henry C. Hill, Chairman, Board of Parole, Harrisburg, Pennsylvania.

Sir. In your letter of May 6, 1949, addressed to the Department of Justice, you have asked whether Miss S. M. R. O'Hara is entitled—(1) to receive the salary increase of \$1,000 provided by the Act of July 3, 1947, P. L. 1248, referred to in your letter as Act No. 512; and (2) to receive the increase from the date of the confirmation of her appointment, or from the date of her taking the oath of office.

The answer to the first question will depend upon Section 13 of Article III of the Pennsylvania Constitution which provides as follows:

No law shall extend the term of any public Officer, or increase or diminish his salary or emoluments, after his election or appointment.

The Act of July 3, 1947, which is the most recent amendment to the Act of August 6, 1941, P. L. 861, provides:

Section 5. The chairman of the board shall receive a salary of eleven thousand dollars (\$11,000) per annum and each of the other members of the board shall receive a salary of ten thousand dollars (\$10,000) per annum.

This act became effective on July 3, 1947, the date of its final enactment.

The official records show that Miss O'Hara's former term of office expired on January 21, 1949, and that she continued to hold office until her successor should be chosen. Her reappointment was confirmed by the Senate on April 28, 1949, and her commission is dated on the same date. She took the oath of office on April 30, 1949.

It therefore appears that the increase in salary was made before, and not after her second appointment, and the section of the Constitution quoted above does not apply.

The answer to the second question can be found in Section 218 of The Administrative Code of 1929, 71 P. S. § 78, which provides:

All persons appointed by the Governor under the provisions of this act, and all deputy heads of administrative departments, shall, before entering upon the duties of their offices, take and subscribe the constitutional oath of office, which shall be filed in the office of the Secretary of the Commonwealth.

As an appointee may not enter upon the duties of the office until he or she has taken the oath of office; it follows, as a legal conclusion, that the new rate of compensation may not be paid until that date.

We are, therefore, of the opinion that Miss O'Hara is entitled to receive the increased salary from and after April 30, 1949.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

H. F. STAMBAUGH,
Special Counsel.

OPINION No. 591

Salaries—Increases—Executive Director of the Pennsylvania Fish Commission.

The Honorable Charles A. French is entitled to occupy the position of Executive Director of the Pennsylvania Fish Commission and to receive the salary fixed by the Commission for that office, for the period beginning April 25, 1949.

Harrisburg, Pa., June 22, 1949.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked whether the increased salaries can be legally approved by you for certain officials, one of whom is the Honorable Charles A. French, who has been appointed Executive Director of the Pennsylvania Fish Commission.

The Pennsylvania Fish Commission was created by House Bill No. 982, approved by the Governor on April 25, 1949, as Act No. 180 of the Session of 1949.

Prior to the approval of this act Mr. French held the office of Commissioner of Fisheries by appointment of the Governor, and was the President and Executive Officer of the Board of Fish Commissioners, under Section 302 of The Administrative Code of April 9, 1929, P. L. 177, 71 P. S. § 102. His salary was \$6,750 per year (The Administrative Code, Section 210, as amended by the Act of June 25, 1947, P. L. 945, 71 P. S. § 70).

Section 9 of Act No. 180 expressly abolished the Board of Fish Commissioners as of April 25, 1949, the date of the approval of this act by the Governor.

Other sections of this act created a new administrative commission, called "The Pennsylvania Fish Commission", and further provided that the then Commissioner of Fisheries should become the Executive Director of the Pennsylvania Fish Commission for a period of ten days following the effective date of the act; and that a meeting of the members of the Pennsylvania Fish Commission should be held not later than ten days after such effective date, and they should appoint an Executive Director for the new commission, and with the approval of the Governor, fix his salary. The act further provided that with the exception of the Commissioner of Fisheries, the members of the Board of Fish Commissioners in office at the effective date of the act, and one new member to be appointed, should constitute the Pennsylvania Fish Commission created by this office, and should hold office until the terms for which they had been appointed as members of the Board of Fish Commissioners, or as the new member of the Fish Commission, should expire.

At a meeting of the Pennsylvania Fish Commission, duly held on April 25, 1949, the members unanimously appointed Honorable Charles A. French as its Executive Director, to hold office until the regular meeting of the Commission in July next, and further by motion, unanimously carried, fixed the salary of the Executive Director at \$9,500 per year. This salary has been approved by the Governor.

The legal effect of Act No. 180 in abolishing the former Board of Fish Commissioners, was to terminate the existence of that Commission and the office of Commissioner of Fisheries, then held by Mr. French, and his term of office as such, on the effective date, namely, April 25, 1949. Thereafter there existed no term of office, and no salary attached to the office formerly known as Commissioner of Fisheries.

The present Commission is created by Act No. 180. The Executive Director of the new Commission is not appointed by the Governor, as was the former Commissioner of Fisheries, but is elected by the members of the Pennsylvania Fish Commission.

Act No. 180 provides definite terms of office for each member of the new Commission, but does not provide any term of office for the Executive Director, but expressly provides that he shall remain in office "during the pleasure of the Commission". While the salary of the Commissioner of Fisheries had been fixed at \$6,750 per year by Section 210, as amended, of The Administrative Code of April 9, 1929, P. L. 177, 71 P. S. Section 70, Act No. 180 does not fix the salary of the Executive Director of the new Commission, but provides that such salary shall be determined by the members of the Pennsylvania Fish Commission with the approval of the Governor.

Therefore, before the members of the Pennsylvania Fish Commission elected Mr. French as its Executive Director and fixed his salary, his former office of Fish Commissioner had been legally abolished and his term of office terminated by the enactment of Act No. 180.

With the repeal of the old law the office of the Fish Commissioner ceased to exist. The members of the new Commission could have appointed any other person whom they chose to the position of Executive Director. The term of the appointee to the new office began with his appointment in the manner provided by the new act, and his taking of the oath of office. No definite term of office whatever was fixed, but the appointee could serve only "during the pleasure of the Commission".

While Act No. 180 made Mr. French Executive Director for a period of ten days after its enactment, Act No. 180 did not provide or define

any term of office or fix any salary for him. Consequently, no rate of salary had been fixed for Mr. French prior to the meeting of the members of the new Commission on April 25, 1949, and the action of the Commission in fixing his salary as Executive Director could not, and did not increase his salary within the meaning of Section 13 of Article III of the Pennsylvania Constitution which provides as follows:

No law shall extend the term of any public Officer, or increase or diminish his salary or emoluments, after his election or appointment.

The facts recited above would clearly refute any argument that Act No. 180 provided merely a change in name and form in the administration of the department formerly known as the Board of Fish Commissioners. In addition Act No. 180 provides an elaborate new system of administration. The provisions in regard to the Executive Director create a new office with a different method of selection and appointment and a different body to determine the compensation of the Executive Director. The Legislature terminated the term of office of the Fish Commissioner. It did more,—it abolished the office itself.

The new Act No. 180 made other substantial changes. The number of members of the Commission was increased from seven to eight. The members of the old Commission were appointed for six years; those of the new Board for eight years, and their terms of office were staggered so that the terms of two members would expire at the end of each two years. Each member of the new Commission is to be appointed from a separate geographical district defined in the act itself. Under the old law the Board appointed the Fish Wardens, one of them to be the Chief Warden. Under the new law the Commission appoints the Fish Wardens but the act makes the Executive Director the Chief Warden. The new law requires the Executive Director to furnish a bond in the sum of \$40,000.

The Supreme Court of Pennsylvania has ruled in a number of decisions that Section 13 of Article III of the Pennsylvania Constitution does not prevent the substitution of a new system of administration or government, although the necessary effect is to "extend the term of a public officer" or terminate his compensation.

Thus in Pittsburgh's Petition, 217 Pa. 227 (1907), the Supreme Court said:

"Finally, in a supplemental brief, counsel for appellant contend that sec. 10 of the act, which will have the effect of extending the term of councilmen in the city of Allegheny, violates Art. III, sec. 13 of the constitution, which pro-

vides that 'no law shall extend the term of any public officer.' This objection does not seem to be seriously pressed and as to it we need only repeat what was said in *Commonwealth v. Moir*, supra: 'The substitution of a new system for one under which government has been previously carried on is always accompanied with some shifting of offices and duties, and some inconvenience. To reduce this to a minimum by temporary adjustment of the changes is the province of a schedule. In well-considered legislation which involves such changes a schedule of temporary expedients is usually and properly added, and the expedients provided would need to be very clearly unconstitutional to justify a court in overturning them. In *Lloyd v. Smith*, 176 Pa. 213, it is said: "In an exchange of offices there may naturally be some overlapping of terms and duties, and if in the legislative view the need for a controller was immediate, but the existing terms of the auditors prevented his present assumption of all the duties that would finally pertain to his office, it would not have been unwise, certainly not unconstitutional, to meet the case by a temporary expedient." (239)

We are therefore of the opinion that the Honorable Charles A. French is entitled to occupy the position of Executive Director of the Pennsylvania Fish Commission and to receive the salary fixed by the Commission for that office, for the period beginning April 25, 1949.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. F. STAMBAUGH,

Special Counsel.

OPINION No. 592

State Government—Purchase of tires and tubes—Restricting bidders to "approved list"—Requiring manufacturer's name on product.

The Department of Property and Supplies cannot lawfully restrict bidding on tires and tubes for State use to an "approved list" of manufacturers, or require that the name of the manufacturer be stamped on each tire and tube: such restrictions have no relation to quality, which can be assured by proper specifications and tests.

Harrisburg, Pa., June 28, 1949.

Honorable C. M. Woolworth, Secretary of Property and Supplies,
Harrisburg, Pennsylvania.

Sir: Request has been made to the Department of Justice to determine if language contained in existing Commonwealth specifications for furnishing tires and tubes is legal. The language questioned is as follows:

Proposal must be of the manufacturer and manufacturer's trade name as inserted by the bidder. No bids or proposals will be considered covering tires and tubes that do not bear the trade name of the actual manufacturer. So-called "special brand" tires will not be considered under this proposal. The words "special brand" as used herein are meant to cover tires and tubes sold or dealt in under name other than those of the actual manufacturer.

A protest has been filed on behalf of Cities Service Oil Company that prevailing specifications and conditions in Commonwealth bids are discriminatory, unlawful and restrictive of competition. It states that it is a Pennsylvania corporation and markets tires and tubes which are indisputably of first quality and which will pass any quality specifications which may be exacted by the Department of Highways or the Bureau of Standards of the Department of Property and Supplies. It asserts that there is no connection between having the tire manufacturer's name stamped on the tire and tube and the quality or durability of any tire or tube.

Our duty is to determine if there is any basis to support the specifications and to see if the law applicable to bidding is being properly applied.

The undisputed facts disclose that the Department of Property and Supplies has invited bids on tires and tubes and has inserted in said specifications so-called "approved manufacturers" whose tires and tubes may be bid upon. Among the list of tire manufacturers is included United States Rubber Company, manufacturer of United States tires.

The Department of Property and Supplies has never solicited bids from persons other than so-called manufacturers or their qualified agents for the reason that it felt generally the manufacturers would bid a cheaper price than any of their dealers. Although Cities Service Oil Company is not a tire manufacturer, it is admitted that it is a contractor with the United States Rubber Company and huge quantities of tires and tubes are manufactured for it under the name of "Cities Service".

The Department of Property and Supplies has been furnished with a letter from the United States Rubber Company certifying that Cities

Service tires and tubes are of first quality and equal in quality to United States tires and tubes.

In all proposals there is contained under "Conditions and Instructions to Bidders", paragraph "W", which is considered part of the contract and which reads as follows:

Wherever in these proposal forms and specifications an article or material is defined by using a trade name and/or the name and catalogue number of a manufacturer or vendor the term "or equal" if not inserted therewith, shall be implied. It is to be understood that any reference to a particular manufacturer's product, either by trade name or by limited description has been made solely for the purpose of more clearly indicating the minimum standard of quality desired. The term "or equal" is defined as meaning any other make equal in material, workmanship and service, and as efficient and economical in operation. An article meeting these conditions may be accepted.

Since all conditions stated in the proposal are part of the contract they must be given effect. We cannot, in paragraph "W" state bidders may bid on "equal" products and then in an earlier paragraph restrict the class of bidders by imposing a duty upon the bidder to have a special source of supply. (See McQuillin on Municipal Corporations, Second Edition, Vol. 3, Section 1301, page 1193).

Section 2403(a) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, imposes a duty upon the Department of Property and Supplies to "* * * (a) formulate established standards or specifications whenever practicable for articles, materials, supplies * * *".

Likewise, Section 2409 imposes a duty on the Department of Property and Supplies "* * * to award contracts to the lowest responsible bidder on each of the items of the several classifications of the schedules * * *".

To award a bid to the lowest responsible bidder means the bidders must be on an even plane. Specifications must not be unreasonably restricted. All persons or corporations having the ability to furnish tires or tubes should be allowed to compete freely without any unreasonable restriction. The Department of Property and Supplies cannot assert that limiting bidders to approved manufacturers of tires is not restricting bidding although this may be an argument that a manufacturer will be able to bid cheaper than one of his dealers. The right of a party to bid whether or not he is a manufacturer must be preserved unless there is some legal reason to the contrary.

We do not wish to say that the Department of Property and Supplies cannot insert proper conditions in their proposals for bids. In fact, many Commonwealth proposals are filled with such conditions, and bidders are bound to observe them. Thus, the Department of Property and Supplies may make restrictions as to kind and quality of the material to be used. It may require bidders to furnish a certificate of the manufacturer of certain materials to be used in order that an uninterrupted supply may be available during the time fixed for completion of a contract, and the specifications may even require a specimen of the material to be submitted by the bidders. (Present practice in coal contracts). (See *United States v. Brookridge Farm*, 111 F. 2d, 461 (Colo.) (1940)).

It does not follow that because the Department of Property and Supplies may impose reasonable conditions on the quality of supplies to be furnished by the bidder, the class of bidders must be limited solely to so-called "approved manufacturers". This appears to be the error in the present specifications. It is well known that testing laboratories are available to make tests of products furnished. The spirit of fair competition is best set out at page 463 of the Opinion in *United States v. Brookridge Farm*, *supra*, as follows:

* * * The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis. Conditions or limitations which have no reasonable relation to the actual needs of the service and which are designed to limit bidding to one of several sources of supply are interdicted, and render the award or a contract made in such circumstances voidable.

Likewise, our Pennsylvania Courts have held in many instances that free competition is essential in public bidding and public agencies cannot limit purchase of products to those made only by one company. See *Pearlman v. Pittsburgh*, 304 Pa. 24 (1931).

For these reasons, we conclude that the language in question in the invitation bid proposals submitted for furnishing tires and tubes and the listing of approved manufacturers is discriminatory and restricts free competition.

It is our opinion that the language in the specification in question first above quoted, is illegal; that the listing in the specification of approved manufacturers is likewise illegal; and that Cities Service Oil

Company should be allowed to bid on tires and tubes required by the Commonwealth under products manufactured by the United States Rubber Company and bearing the name "Cities Service" on the tires and tubes.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. ALBERT LEHRMAN,

Deputy Attorney General.

OPINION No. 593

Public officers—Salary increase—Act approved on day of election or appointment—Effective date of appointment—Confirmation by Senate—Constitution, art. III, sec. 13, and art. IV, sec. 8.

Article III, sec. 13, of the Pennsylvania Constitution, providing that no law shall increase or diminish the salary of a public officer after his election or appointment, does not render the Act of April 28, 1949, P. L. 776, increasing the salary of the Secretary of Commerce inapplicable to a secretary whose previous appointment was confirmed by the Senate, as required by article IV, sec. 8, of the Constitution, on the same date the act was approved, since his appointment was not complete until confirmed and since fractions of a day will not be considered in determining whether the salary increase became effective "after" the appointment.

Harrisburg, Pa., June 28, 1949.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked whether the increased salaries provided by the Act of April 28, 1949, designated as Act No. 192, can be legally approved by you for certain officials, one of whom is the Honorable Theodore Roosevelt, III.

The nomination of Mr. Roosevelt, to the Secretary of Commerce was received by the Senate on April 27, 1949, and was confirmed by the Senate on April 28, 1949.

Senate Bill No. 105 was approved by the Governor on April 28, 1949, and became Act No. 192 of the Session of 1949. Mr. Roosevelt took the oath of office on May 2, 1949.

The question arises under Section 13 of Article III of the Pennsylvania Constitution, the language of which is as follows:

No law shall extend the term of any public Officer, or increase or diminish his salary or emoluments, after his election or appointment.

“Appointment” in the sense in which that term is used in the language just quoted, does not take place until the Senate has consented to or confirmed the nomination made by the Governor.

The appointment by the Governor was made under Section 8 of Article IV, which is as follows:

He shall *nominate* and, *by and with the advice and consent of two-thirds of all the members of the Senate*, appoint a Secretary of the Commonwealth and an Attorney General during pleasure, a Superintendent of Public Instruction for four years, and such other officers of the Commonwealth as he is or may be authorized by the Constitution or *by law to appoint*; * * * *In acting on executive nominations the Senate shall sit with open doors, and, in confirming or rejecting the nominations of the Governor, the vote shall be taken by yeas and nays and shall be entered on the journal.* (Italics ours)

The act of transmitting the name to the Senate is designated in the Constitution by the word “nominate”, not “appoint”.

Furthermore, Section 8 just quoted expressly provides that the Governor “shall * * * by and with the advice and consent * * * of the Senate, appoint”. The consent of the Senate must be obtained before the appointment is made or is complete.

The confirmation of the Senate must intervene between the nomination and the appointment. The nomination and the appointment are not simultaneous, but the appointment must follow after the nomination and takes place when the consent of the Senate is given.

The language of Section 207 of The Administrative Code of April 9, 1929, P. L. 177, 71 P. S. § 67, providing for the nomination and appointment, is identical with the language of section 13 quoted above.

This interpretation was adopted by the Supreme Court of Pennsylvania in *Commonwealth v. Waller*, 145 Pa. 235 (1892), in which Mr. Chief Justice Paxson said:

* * * his appointee having been confirmed by the senate, the respondent is in office by virtue of an appointment properly made under the constitution and laws of the state. The confirmation of respondent by the senate necessarily extends his

original appointment for the balance of the unexpired term.
(257)

Likewise, Article II, Section 2, Clause 2 of the Constitution of the United States, dealing with the appointive power of the President, provides:

* * * he shall *nominate*, and by and with the Advice and Consent of the Senate, shall *appoint* * * *. (Italics ours)

In construing this provision, the Supreme Court of the United States has held that the appointment is not complete until confirmed by the Senate.

In *United States v. Bradley*, 35 U. S. (10 Pet.) 343 (1836), Mr. Justice Story said:

* * * Hall's appointment, as paymaster, was complete, when his appointment was duly made by the President, and confirmed by the senate. * * * (364)

Likewise, the rule is stated in 46 C. J., "Officers", Section 68, page 953, as follows:

Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete until the action of all bodies concerned has been had; * * *

The conclusion, therefore, follows that the appointment of Mr. Roosevelt was legally made on April 28, 1949, the same day on which Senate Bill No. 105 increasing salaries was approved by the Governor.

Section 13 of Article III does not say that the increase of compensation must be made "before" election or appointment. On the contrary it says that no law shall increase the salary "*after* his election or appointment". It would follow, therefore, that if the appointment and the approval of Senate Bill No. 105 were simultaneous, the increase granted does not violate the constitutional provision.

This interpretation will not conflict with the purpose of Section 13 of Article III, as declared by Mr. Justice Drew in *Hadley's Estate*, 336 Pa. 100 (1939), as follows:

* * * The purpose of the framers of the Constitution in placing limitations upon legislative interference with the compensation received by a public officer for the duties normally incident to the office was to eliminate political or partisan pressure upon the incumbents of office after they had been elected or appointed: 8 Deb. Pa. Const. 332, 333. * * * (105)

The appointment and the approval of Senate Bill No. 105, will be regarded as simultaneous for, as was said by Mr. Justice Lewis in Long's Appeal, 23 Pa. 297 (1854):

It is a principle of the common law, that in judicial and other *public proceedings* there are no fractions of a day, and that all transactions of the same day are, in general, regarded as occurring at the same instant of time. This principle has been established from necessity and from a regard to public convenience. * * * (299) (*Italics ours*)

The same rule has been announced and followed in Murray's Petition, 262 Pa. 188, 191 (1918); Cascade Overseers v. Lewis, 148 Pa. 333, 336 (1892); Duffy v. Ogden, 64 Pa. 240, 242 (1870); Cromelien v. Brink, 29 Pa. 522, 525 (1858).

In Boyer's Estate, 51 Pa. 432 (1866), Mr. Justice Agnew said:

The rule that, in the entry of judgments and liens of like character, rejects fractions of the day, is not a legal fiction, but a measure of policy to prevent litigation, and serve as a guide to the public. It is firmly established, and is not to yield, unless to the certain demands of justice. * * * (437)

This principle has been applied to questions arising out of the date of approval of an Act of Assembly.

A case in point is Huber's Estate 27 Pa. Dist. 25 (1917), in which a widow claimed the \$500 exemption provided in the Fiduciaries Act of June 7, 1917, P. L. 447. Her husband had died at 5:00 o'clock in the morning of June 7. The Orphans' Court of Philadelphia County held that the court should not attempt to ascertain whether the Governor signed the act before or after the death of the decedent, and that the widow was entitled to the exemption claimed.

President Judge Lamorelle said:

* * * to attempt to inquire into what time of day the Governor signed the act known as Fiduciaries Act of 1917—, and, for that matter, any other act—would result in hopeless confusion and contention. We are on safe ground when we follow the time-honored rule and hold that the Fiduciaries Act became effective on the first moment of June 7, 1917, the day it purports to have been signed. (26)

The rule is stated in Endlich on the Interpretation of Statutes, Section 389, —

* * * The doctrine that the law knows no fraction of a day, has, in general, been adhered to in this country, both as to contract rights and *statutes*. * * * (544) (*Italics ours*)

Again in *O'Connor v. City of Fond Du Lac*, 109 Wis. 253, 85 N. W. 327 (1901), in construing the words "from and after its passage" in a statute, Mr. Justice Marshall said:

* * * That would exclude the day on which the act was done, as fractions of a day are not ordinarily counted. * * *
(330)

It is our opinion, therefore, that fractions of the day on which the appointment was confirmed and Senate Bill No. 105 was approved, should not be considered, and that the increase of salary was not made after the appointment.

We are therefore of the opinion that the Honorable Theodore Roosevelt, III, is entitled to the salary fixed by Act No. 192, from and after the date on which he took the oath of office.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. F. STAMBAUGH,

Special Counsel.

OPINION No. 594

Insurance—Mutual company other than life—Writing health and accident insurance—Right to amend charter to become life company—The Insurance Company Law of May 17, 1921, sec. 322.

A Pennsylvania insurance company incorporated as a mutual insurance company other than a mutual life insurance company, even though it is engaged in writing health and accident insurance, may not amend its charter under section 322 of The Insurance Company Law of May 17, 1921, P. L. 682, so as to become a mutual life insurance company.

Harrisburg, Pa., July 5, 1949.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to whether a Pennsylvania insurance company incorporated as a mutual insurance company other than a mutual life insurance company, which is engaged presently in writing health and accident insurance, may amend its charter so as to become a mutual life insurance company.

The authority for the amendment of the charter of an insurance company is set forth in Section 322 of the Insurance Company Law of May 17, 1921, P. L. 682, 40 P. S. § 445, as follows:

Any stock or mutual insurance company of this Commonwealth may procure an amendment to its charter for the purpose of changing its name, changing the location of its principal office or place of conducting its business, increasing or diminishing the par value of the shares of its capital stock, if any, or changing its purpose or purposes, or for any other purpose, by calling a special meeting of the stockholders or members.

That section further provides for the approval of the amendment by a two-thirds vote of the stockholders or members.

Under this statute, the amendment procedure will be available to an insurance company for "changing its purpose or purposes, or for any other purpose". Thus, it becomes necessary to determine whether this language in the statute will permit the desired change.

Section 201 of the Insurance Company Law, 40 P. S. § 381, permits the incorporation of five *classes* of insurance companies, i. e., (a) Stock Life Insurance Companies; (b) Mutual Life Insurance Companies; (c) Stock Fire, Stock Marine, and Stock Fire and Marine Insurance Companies; (d) Stock Casualty Insurance Companies; and (e) Mutual Insurance Companies of any kind other than mutual life insurance companies. Your present inquiry concerns a company in class (e) which desires by amendment to change to class (b).

Section 202 of the Insurance Company Law, 40 P. S. § 382, in setting forth the purposes for which companies may be incorporated, carefully distinguishes the purposes for each class. The purposes for both stock and mutual life insurance companies are set forth in paragraph (a); paragraph (b) relates to fire and marine insurance companies; paragraph (c) enumerates the purposes for which casualty insurance companies may be incorporated, and paragraph (d) authorizes mutual insurance companies of any kind other than life insurance companies to transact only such kind of insurance "as may be transacted by a stock company writing the same kinds of insurance". Thus, a mutual insurance company writing casualty insurance would be limited to those purposes enumerated in Section 202 (c), *supra*.

The classes of insurance companies are mutually exclusive and only one class of company can write a given type of insurance. The outstanding exception to this rule is found in the field of health and accident insurance, which is common to both life insurance and casualty

insurance companies. Both of these classes of companies may be authorized "to insure against personal injury, disablement, or death resulting from traveling or general accidents and against disablement resulting from sickness and every insurance appertaining thereto". In addition to this purpose, life insurance companies insure lives and grant and dispose of annuities; whereas, in addition to the health and accident insurance, casualty companies may be incorporated for twelve other purposes.

The distinction between the life class and the casualty class of insurance companies is carefully preserved in other parts of the statute. For example, Section 206 of the Insurance Company Law, 40 P. S. § 386, establishes the minimum financial requirements for doing business as an insurance company. Under paragraph (d) thereof, companies organized to insure lives under the mutual plan must have applications for insurance by not less than 400 persons in the aggregate amount of \$1,000,000, and must also have the guarantee capital of \$200,000. Under paragraph (e) thereof, a mutual casualty company would require twenty policies to at least twenty members in the same kind of insurance upon not less than 200 separate risks; a cash premium must be collected with each application, and these premiums must total not less than five times the maximum single risk assumed. This striking difference between the financial requirements for life insurance companies and casualty insurance companies emphasizes the distinction between these two classes. Moreover, the reserve requirements for these two classes of companies are computed differently: Sections 301, 311 of the Insurance Department Act of May 17, 1921 P. L. 789, 40 P. S. §§ 71, 92.

Section 215 of the Insurance Company Law, 40 P. S. § 405, deals with the examination of a company by the Insurance Commissioner before issuing a certificate of authority to commence business. Paragraph (b) relates to mutual life insurance companies, whereas paragraph (c) relates to mutual companies other than life insurance companies.

Article IV of the Insurance Company Law (40 P. S. §§ 501-615) deals exclusively with life insurance companies, both stock and mutual, whereas Article VI (40 P. S. §§ 721-860) covers casualty insurance. It is interesting to note that the provisions regarding health and accident insurance policies are found under the general heading of casualty insurance in Article VI (b) (40 P. S. §§ 751-764). Article VIII (40 P. S. §§ 911-919) specifically covers mutual insurance companies other than mutual life insurance companies.

When viewed broadly, the Insurance Company Law plainly reveals the legislative intent to maintain throughout the law the distinction between the various classes of insurance companies which may be incorporated thereunder, as set forth in Section 201.

Prior to the development of general corporation laws, when charters and amendments to charters were specifically enacted by the legislature, a radical amendment changing the nature of the corporation was not considered binding upon non-consenting shareholders. In *Everhart v. Philadelphia and West Chester Railroad Company*, 28 Pa. 339, 352 (1857), the Court said:

Nothing is plainer than that an *alteration* of a charter by the legislature may be so extensive and radical as to work an entire dissolution of the contract entered into by a subscriber to the stock, *as by procuring an amendment which superadds to the original undertaking an entirely new enterprise.* * * * (Italics supplied)

In *Ashton v. Burbank*, Fed. Cas. No. 582 (1873), the Court said:

The change in the charter, by which a life and accident company was authorized to transact fire, marine, and inland insurance, *is an organic change of such a radical character as to discharge previous subscribers to the stock of the company from any obligation to pay their subscription, unless the change is expressly or impliedly assented to by them.* * * * (Italics supplied)

In the more recent case of *Midland Co-Operative Wholesale v. Range Co-Operative Oil Ass'n*, 200 Minn. 538, 274 N. W. 624, 111 A. L. R. 1521 (1937), the Court decided that an amendment to a corporate charter was invalid under a statute which provided that the articles could be amended so as to change the name or title, to decrease or diminish its capital stock or to change the number and par value of shares of capital stock, or "in respect to any other matter which the original articles of incorporation of the same kind might lawfully have contained". The Court said:

* * * The reserved power to amend must be exercised within the limits of the reservation. * * * If the reservation is general and not limited in terms, the reserved power of amendment *does not permit a change so fundamental as to change the nature and purposes of the corporation. It does not comprehend change to such an extent as to make an entirely different kind of corporation.* * * * 14 C. J. 188; 7 Fletcher, Cyc. Corporations, 886, 887, § 3718; 1 Thompson on Corporations (3d Ed.), § 400; *Perkins v. Coffin*, 84 Conn. 275, 79 A. 1070, Ann. Cas. 1912C, 1188, and note, 1203. * * * (Italics supplied)

The foregoing authorities suggest that the proposed amendment transforming a casualty insurance company into a life insurance company would be an organic change of a radical character and not in accord with the letter or the spirit of Section 322 of the Insurance Company Law of 1921. The authority therein conferred upon an insurance company to change its purpose is not broad enough to permit the company to change its class also.

When the Insurance Company Law of 1921 was enacted it superseded the separate Acts of June 1, 1911, providing for life, health and accident insurance companies (P. L. 581), and for casualty insurance companies (P. L. 567). Both of those acts permitted the amendment of corporate charters, but obviously charters issued thereunder could not be amended so as to take the corporation out of the statute of incorporation and place it under the other statute. When these acts were codified into the Insurance Company Law of 1921, there was no evidence of any legislative intent to grant to insurance companies a power which they did not theretofore possess, i. e., the power to change from one class to another by amendment.

A study of the corporation statutes of Pennsylvania following the Constitution of 1874 clearly indicates a well defined policy not to permit amendments except those which were in accord with the purpose of the charter. See Act of March 31, 1905, P. L. 93; Act of June 13, 1883, P. L. 122 § 4; Act of May 1, 1876, P. L. 53 § 31: In Re Pennsylvania Bottling and Supply Co., 6 Pa. Dist. 530 (1897), and In Re Coal and Timber Publishing Co., 15 Pa. Dist. 571 (1906).

The general language in section 322 permitting the amendment of the charter of an insurance company "for any other purpose" is likewise not sufficient to confer the power to change from one class of insurance company to another by amendment. Section 322 permits an insurance company to change its name, location of its office or place of business, the par value of its capital stock if any, and its purpose or purposes. There are undoubtedly other similar changes which may be necessary from time to time, particularly for charters granted by special acts of Assembly. The general language "for any other purpose" should be limited in its construction to changes of the types thereinbefore enumerated.

The rules of statutory construction aid in this conclusion. In Myers' Petition, 39 D. & C. 712, 715 (1940), the Court said:

* * * Under section 33 of the Statutory Construction Act of May 28, 1937, P. L. 1019, it is provided: "*General words shall be construed to take their meanings and be restricted by*

preceding particular words." Our appellate courts have frequently held that in construing statutes a general word which follows particular and specific words of the same nature as itself takes its meaning from them, and is presumed to be restricted to the same genus as those words, or in other words, as comprehending only things of the same kind as those designated by them, unless there is something to show that a wider sense was intended: *City of Corry v. The Corry Chair Co.*, 18 Pa. Superior Ct. 271; *Dalzell's Estate*, 96 Pa. 327, 331. It follows from the language of the Act of 1915, *supra*, and the rules of construction applicable thereto, that the expression "other claims" cannot be construed to include an easement or right of way. (*Italics supplied*)

The fact that the mutual casualty insurance company now seeking the amendment in question has been engaged solely in the health and accident insurance business does not alter the general principle hereinbefore discussed. It furnishes a persuasive argument in favor of the granting of an exception by the legislature to a company which seeks by amendment to convert itself into another class in which the same kind of insurance may be written. However, the legislature has not as yet authorized such a transition and we can find no basis for reading such authority into the Insurance Company Law.

Accordingly, you are advised that a Pennsylvania insurance company incorporated as a mutual insurance company other than a mutual life insurance company, even though it is engaged in writing health and accident insurance, may not amend its charter so as to become a mutual life insurance company.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

GEORGE W. KEITEL,

Deputy Attorney General.

OPINION No. 595

General State Authority—Department of Property and Supplies—Opinion concerning certain legal problems:

1. (a) The Contract to Lease and Lease itself, if for a term of not more than thirty years, will be when properly approved, executed and delivered a valid,

legal and binding obligation to pay the rental therein provided out of current revenues;

(b) Once a contract to lease a project is properly approved, executed and delivered, neither the Department of Property and Supplies nor the Commonwealth can specifically direct or compel the Authority not to complete the particular project;

2. The proposed form of approval by the Governor appended to the Contract to Lease is legally valid and a sufficient approval to require the Department of Property and Supplies to execute a lease upon the terms and conditions of the Contract to Lease and the attached form of Lease, without further approval by the Governor.

3. The aggregate of the rentals under the Contract to Lease and the Lease itself do not constitute a prohibited debt of the Commonwealth within the meaning and provisions of Article IX, Section 4 of the Constitution of Pennsylvania; and

4. The Bonds of the Authority do not constitute debts of the Commonwealth within the meaning and provisions of Article IX, Section 4 of the Constitution of Pennsylvania.

Harrisburg, Pa., July 11, 1949.

Honorable C. M. Woolworth, Secretary of Property and Supplies,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion concerning certain legal problems which have arisen due to the program of The General State Authority and the Department of Property and Supplies. We understand the Authority will construct buildings and improvements, low head dams, impounding basins, desilting dams and various other projects for the State as authorized by The General State Authority Act of 1949, Act No. 34, approved March 31, 1949. Prior to the commencement of construction, the Authority and the Department of Property and Supplies propose to enter into a Contract to Lease the project at a rental based upon the estimated cost of the project and an estimated rate of interest for which its bonds will be sold. Provision is made for adjustment of rental when actual costs are known so that the rental charged will in all respects comply with the provisions of the Resolution authorizing the bonds of the Authority. The Contract to Lease has reference to the attached form of Lease containing the terms and conditions of the tenancy to be created, but the rental, the term and the date of commencement are to be fixed pursuant to the terms of the Contract to Lease. There is also appended to the Contract to Lease a form of approval by the Governor.

We shall answer your questions seriatim. The first question is:

1. (a) Is the contract to lease and the lease itself, when properly signed, a binding obligation to pay out of current revenues?

The Act of 1949, *supra*, in Section 4(h) empowers the Authority:

To fix, alter, charge, and collect rates, rentals, and other charges for the use of * * * projects * * * at reasonable rates, to be determined by it, for the purpose of providing for the payment of the expenses of the Authority * * * the payment of the principal of and interest on its obligations, and to fulfil the terms and provisions of any agreements made with the purchasers or holders of any such obligations.

By Section 9.1 of the Act, the Department of Property and Supplies:

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

In our opinion, each Contract to Lease and Lease when properly approved, executed and delivered, if for a term permitted by law will be a legal, valid and binding instrument in accordance with its terms, obligating the Commonwealth to pay the rentals provided for therein out of its current revenues. The validity of long-term leases, payable out of current revenues, has been sustained many times. See *Kelley v. Earle*, 325 Pa. 337, 347, 190 Atl. 140, 145 (1937); *Scranton Electric Co. v. Old Forge Boro.*, 309 Pa. 73, 163 Atl. 154 (1932); *Wade v. Oakmont Borough*, 165 Pa. 479, 30 Atl. 959 (1895).

Your next question is:

1. (b) Once the contract to lease is signed, executed and delivered, can the Department of Property and Supplies or the Commonwealth direct the Authority not to complete the project?

This question must be answered in the negative. The essence of a binding contract is that it can be terminated only by mutual consent. Once the Contract to Lease is made, unilateral termination by the Commonwealth will not be possible. This is especially true where the Authority has, on faith of the Commonwealth's obligation, sold bonds. The Act specifically provides in Section 14, that:

The Commonwealth does hereby pledge to and agree with any person, * * * subscribing to or acquiring the bonds to be issued by the Authority * * * that the Commonwealth will not limit or alter the rights hereby vested in the Authority until all bonds at any time issued, together with the interest thereon, are fully met and discharged. * * *

Your next question reads:

2. Is the proposed form of approval by the Governor in the contract to lease sufficient so that Property and Supplies can execute the form of lease in accordance with the contract to lease without further approval by the Governor?

By its terms, the approval of the Governor appended to the Contract to Lease specifically approves the execution of the Lease in accordance with the terms of the Contract to Lease without further approval by the Governor. In our opinion, the form of approval is valid, legal and binding. It authorizes only ministerial acts in the future, a mathematical calculation of costs and interest and execution and delivery of documents containing terms previously approved. The provision in Section 9.1, quoted above, that "upon the completion of the said projects, the department shall have power and authority, with the approval of the Governor, to lease as lessee" is satisfied by the proposed form of approval, as the statute does not state when the approval is to be given. It is only the entry into the Lease that must await completion of the project. Any other interpretation would render meaningless the preceding sentence as the Contracts to Lease there mentioned would be wholly ineffective. In our opinion, further approval of the Governor will only be required whenever the proposed Lease contains terms not covered by the prior approval. And, of course, specific approval is required should a project be constructed and leased or acquired and leased without a previous Contract to Lease. As a matter of evidence, the department and the Authority must be able to demonstrate that the formal lease, when entered into, is in accordance with the approval. This can readily be done by attaching to the formal lease as an exhibit the relevant Contract to Lease, appended approval and attached form of Lease.

You next ask:

3. Will the aggregate of the rentals under the contract to lease and the lease itself constitute a debt of the Commonwealth within the meaning of the Constitution?

You refer, of course, to Article IX, Section 4, of the Constitution. The Supreme Court in the very recent case of *Greenhalgh v. Woolworth et al.*, 361 Pa. 543, 64 A. (2d) 659 decided on March 21, 1949,

ruled in almost the precise situation that the aggregate of rentals did not constitute a prohibited indebtedness. The case involved an attack upon the constitutionality of the State Public School Building Authority. That Authority and the School District of the Borough of West Mifflin had entered into a Contract to Lease a school building to be constructed by that Authority. The contract was similar to the one involved in your question.

The Court in upholding that Act and contract said:

* * * And, inasmuch as the rental is, by the terms of the proposed lease, payable solely from current revenues, there is no question present of any possible increase in the indebtedness of the School District through its execution of the proposed contract with the Authority and the consequent lease. As was said in Appeal of the City of Erie, 91 Pa. 398, 403,—“If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them, however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment, and so no debt is created.” See also, *Wade v. Oakmont Borough*, 165 Pa. 479, 488, 30 A. 959.

An identical question was raised with regard to the Leases and Contracts to Lease of the former General State Authority. In ruling that the aggregate of the lease rentals did not constitute an unconstitutional indebtedness, the Supreme Court in *Kelley v. Earle et al.*, 325 Pa. 337, 190 Atl. 140 (1937) said:

It was conceded at the argument that contracts or leases to meet recurrent needs the obligation of which is to be met by the Commonwealth from current revenues extending beyond the biennium are not within the constitutional limitation. This court, through Mr. Justice Drew, so expressed itself in the former decision on this case: *Kelley v. Earle*, supra, at page 457. See also *Scranton Elec. Co. v. Old Forge Boro.*, 309 Pa. 73; *Wade v. Oakmont Boro.*, 165 Pa. 479; *Metropolitan Elec. Co. v. City of Reading*, 175 Pa. 107. As far as municipalities are concerned if such obligations are met from current revenues from year to year, they cannot be considered debts in the constitutional sense, even though the aggregate or sum total of all payments should exceed the constitutional limitation. See *Wade v. Oakmont Boro.*, supra. The same rule applies to the State. The amended record shows revenues on hand sufficient to meet rent charges during the biennium, and other similar demands will be taken care of in appropriations by the legislature. The effect of the above decisions is unquestionably controlling in the matter before us. The court has held that these contracts extending over a long period of time were not to be considered in their aggregate so as to violate the constitutional inhibition. * * *

It is our opinion, therefore, that the aggregate of the rentals under the Leases and the Contract to Lease does not constitute an unconstitutional debt of the Commonwealth within the meaning and provisions of Article IX, Section 4 of the Constitution of Pennsylvania.

Your fourth and final question is:

4. Are the bonds of the Authority a constitutional debt of the Commonwealth?

The act before us follows very closely the provisions of the former General State Authority Act. The differences in our opinion have no significance so far as the question here raised is concerned. The bonds state that they do not constitute obligations of the Commonwealth and the act specifically so provides. We feel that the question is controlled by the case of *Kelley v. Earle*, *supra*. Other cases have likewise held that Authority bonds are not debts of the political entity leasing its projects. See *Greenhalgh v. Woolworth, et al., Tranter v. Allegheny County Authority, et al.*, 316 Pa. 65, 173 Atl. 289 (1934) and in *Kelley v. Earle*, *supra*, the Court said:

It is urged that the transaction is in effect a purchase of capital assets by installments. To sustain this conclusion, of necessity we must hold the agreement a sale; we have held the agreement is a lease and nothing more. If this were an outright purchase of property to be paid for in the future it would undoubtedly be within the constitutional objection, but it is not a purchase nor does it have the attributes of a purchase. The title to the property is in the lessor Authority, it may be subjected to defined uses and purposes by the trustee under the deed of trust; the Commonwealth, under the lease, cannot intermeddle with it if a default in the payment of rent exists. The fact that the proposed plan might be termed an evasion of the Constitution, would not condemn it unless such evasion was illegal. "It is never an illegal evasion to accomplish a desired result, lawful in itself, by discovering a legal way to do it": *Tranter v. Allegheny County Authority*, *supra*, at p. 84. The bonds of the Authority are to be paid out of its revenues. * * *

By way of summation, we are therefore of the opinion and you are accordingly advised that:

1. (a) The Contract to Lease and Lease itself, if for a term of not more than thirty years, will be when properly approved, executed and delivered a valid, legal and binding obligation to pay the rental therein provided out of current revenues;

(b) Once a contract to lease a project is properly approved, executed and delivered, neither the Department of Property and Supplies

nor the Commonwealth can specifically direct or compel the Authority not to complete the particular project;

2. The proposed form of approval by the Governor appended to the Contract to Lease is legally valid and a sufficient approval to require the Department of Property and Supplies to execute a lease upon the terms and conditions of the Contract to Lease and the attached form of Lease, without further approval by the Governor.

3. The aggregate of the rentals under the Contract to Lease and the Lease itself do not constitute a prohibited debt of the Commonwealth within the meaning and provisions of Article IX, Section 4 of the Constitution of Pennsylvania; and

4. The Bonds of the Authority do not constitute debts of the Commonwealth within the meaning and provisions of Article IX, Section 4 of the Constitution of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

HARRINGTON ADAMS,

Deputy Attorney General.

OPINION No. 596

Salaries—Increases—Member Liquor Control Board, Members of Workmen's Compensation Board, Workmen's Compensation Referee:

Each of the officials listed is entitled to receive the salary provided by Act No. 192 from and after the date when the official took his oath of office.

Harrisburg, Pa., July 12, 1949.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked whether the increased salaries provided by the Act of April 28, 1949, designated as Act No. 192, can be legally approved by you for certain officials. Among these officials are the following:

Honorable David R. Perry, appointed a member of Pennsylvania Liquor Control Board.

Honorable Daniel G. Murphy, reappointed as a member of Workmen's Compensation Board.

Honorable Wilmer J. Jacoby, reappointed as a member of Workmen's Compensation Board.

Honorable Leo G. Knoll, reappointed as a member of Workmen's Compensation Board.

Honorable Charles C. McGovern, appointed as Workmen's Compensation Referee.

The facts in each of these cases are similar and these appointments are therefore considered in one opinion.

Senate Bill No. 105 was approved by the Governor on April 28, 1949, and become Act No. 192 of the Session of 1949. Each of the officials listed above, was confirmed by the Senate on the same date, April 28.

Section 13 of Article III of the Constitution prohibits an increase of compensation of a public officer only when it is made "*after* his election or appointment". It would follow, therefore, that if the appointment and the approval of Senate Bill No. 105 were simultaneous, the increase granted does not violate the constitutional provision.

Furthermore, the principal of law is well established that in public proceedings fractions of a day will not be considered, and that all transactions occurring upon the same day will be regarded as occurring at the same point of time. This question is considered more fully in Formal Opinion No. 593.

It is our opinion, therefore, that fractions of the day on which the appointment was confirmed and Senate Bill No. 105 was approved, should not be considered, and that the increase of salary was not made after the appointment.

We are therefore of the opinion that each of the officials listed is entitled to receive the salary provided by Act No. 192 from and after the date when such official took his oath of office.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. F. STAMBAUGH,

Special Counsel.

OPINION No. 597

Public officers—Incompatible offices—Inactive reserve of armed forces—Notaries public—Constitution, article XII, sec. 2.

A person in the inactive reserve of the armed forces of the United States or of the federally recognized National Guard, is not the holder of a federal office for trust or profit within the meaning of article XII, sec. 2 of the Pennsylvania Constitution, and is not therefore disqualified from holding the office of notary public in Pennsylvania.

Harrisburg, Pa., July 13, 1949.

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

Sir: We are in receipt of a request from your office for an opinion as to whether persons holding reserve commissions in the armed forces of the United States or in the federally recognized Pennsylvania National Guard are eligible to hold the office of notary public in Pennsylvania.

Article XII, Section 2 of the Constitution of the Commonwealth of Pennsylvania reads as follows:

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

Under the Act of May 15, 1874, P. L. 186, 65 P. S. § 1, the General Assembly declared, *inter alia*, notaries public and offices of trust or profit under the government of the United States, to be incompatible offices. However, by an amendment, the Act of July 2, 1941, P. L. 231, 65 P. S. § 1, a proviso was enacted that the incompatible provisions should not apply to persons "who shall enlist, enroll or be called or drafted into active military or naval service of the United States or any branch or unit thereof during any war or emergency."

This proviso was held in *Commonwealth ex rel. Crow, Appellant, v. Smith*, 343 Pa. 446 (1942) ineffective to permit a municipal mayor to retain his office while on *active duty* under a commission as Major in the United States Army. Later the Supreme Court declared any member of the armed forces on active duty to be the holder of an office of trust or profit under the United States, within the meaning of Article XII, Section 2 of our Constitution. (See *Commonwealth ex rel. Adams v. Holleran, Appellant*, 350 Pa. 461 (1944)).

We are concerned therefore with the sole question of whether a person in the inactive reserve of the Armed Forces of the United States or of the federally recognized National Guard fits into the same category. For an answer we need only to look to the language used by the Supreme Court itself in *Commonwealth ex rel. Crow, Appellant, v. Smith*, *supra*, where at pages 449 and 450 is found the following:

* * * Indeed, the Act of Congress of July 1, 1930, c. 784, 46 Stat. 841, as amended by the Act of June 15, 1933, c. 87, § 3, 48 Stat. 154, U. S. C. A. Title 10, § 372, in providing that "Members of the Officers' Reserve Corps, *while not on active duty*, shall not, by reason solely of their appointments, oaths, commissions, or status as such, or any duties or functions performed or pay or allowances received as such, be held or deemed to be officers or employees of the United States, or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States," suggests, by innuendo, that officers of the Reserve Corps, when they are on active duty, must be deemed to be persons holding an office of trust or profit under the United States. (*Italics ours*)

It would appear from this expression that our courts have adopted the definition spelled out by Congress as interpretative of the intention of the framers of the Constitution of this Commonwealth with respect to what is an office or appointment of trust or profit within the meaning and intent of Article XII Section 2 of the Constitution of our Commonwealth. This conclusion is strengthened by the court's discussion of an officer's absence from state and country. On page 465 in *Commonwealth ex rel. v. Holleran, Appellant, supra*, the court said:

* * * It was the intention of the makers of the Constitution to promote, as far as possible, a sound public policy. And certainly it is in the public interest to require that an elected or appointed officer be confined to the performance of the duties of his office, and prevented from leaving it without resigning to take office or employment elsewhere. In good public service a man cannot serve two masters or perform the duties of different offices * * * Civil government must be maintained.
* * *

We note that Section 4 of the Act of May 18, 1949, P. L. 1440 (Act No. 426 effective September 1, 1949) reads:

Disqualification Exception. The following persons shall be ineligible to hold the office of notary public.

* * * * *

(2) Every member of Congress and any person whether an officer, a subordinate officer or agent holding any office or appointment of profit or trust under the legislative executive or judiciary departments of the government of the United States to which a salary, fees or perquisites are attached.

We conclude that a person in the inactive reserve of the Armed Forces of the United States or of the federally recognized National Guard is not the holder of a federal office of trust or profit.

In light of the foregoing, we are of the opinion that persons otherwise qualified to hold the office of notary public in Pennsylvania are not disqualified solely by reason of their holding reserve commissions in the armed forces of the United States or in the federally recognized National Guard.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

HARRINGTON ADAMS,

Deputy Attorney General.

OPINION No. 598

Mines and mining—Mine inspectors—Salary increases—Inspectors in office—Anthracite—Bituminous—Acts of June 1, 1937, June 9, 1911, as amended, and May 26, 1949—Constitution, article III, sec. 13.

1. Since anthracite mine inspectors are, under section 9 of the Act of June 1, 1937, P. L. 2461, entitled to hold office during good behavior unless removed by a court of common pleas under the provisions of the act, they do not fall within the constitutional prohibition of article III, sec. 13, that the salary of a public officer shall not be increased or diminished after his election or appointment, and they are therefore entitled to the increased salaries provided by the Act of May 26, 1949 (No. 548).

2. Since bituminous mine inspectors who have served continuously for eight years, who have passed two examinations consecutively, and who have been re-appointed are, under article XIX, sec. 4, of the Act of June 9, 1911, P. L. 756, as amended by the Act of June 1, 1915, P. L. 706, entitled to hold office during good behavior unless removed or suspended as provided in the act, such inspectors are entitled to receive the increased salaries provided by the Act of May 26, 1949 (No. 548).

Harrisburg, Pa., July 29, 1949.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg, Pennsylvania.

Sir: You have asked us whether the increased salaries provided by the Act of May 26, 1949, designated as Act No. 548, can be legally

approved for Anthracite Mine Inspectors and Bituminous Mine Inspectors.

The answer depends upon the interpretation of Section 13 of Article III of the Pennsylvania Constitution which provides as follows:

No law shall extend the term of any public Officer, or increase or diminish his salary or emoluments, after his election or appointment.

The practice of the Legislature of Pennsylvania has been to regulate the mining of anthracite coal and bituminous coal by separate laws.

However, the provisions relating to mine inspectors in the bituminous and anthracite regions are similar and the questions as to their right to the increased compensation will be considered in one opinion.

Section 5, of Article II of the Act of June 2, 1891, P. L. 176, provides that upon the recommendation of the Board of Examiners the Governor shall appoint inspectors for the term of five years. Section 13 of Article II provides that on petition of fifteen or more coal operators or miners the court of common pleas may find that an inspector is neglectful of his duties, incompetent or guilty of malfeasance in office, and upon its certification to that effect the Governor shall declare the office of the inspector vacant, and appoint a successor.

The Act of June 8, 1901, P. L. 535 amended Article II of the Act of June 2, 1891 and provides that anthracite mine inspectors shall be elected at the General Election in November, but the candidates shall file with the county commissioners a certificate of the mine examining board that they have successfully passed the prescribed examination.

Section 11 of the same act provided that an inspector so elected should hold office for a term of three years and until his successor was duly elected and qualified.

Under this statute it was ruled in an opinion dated June 20, 1916, and entitled "In Re Salary of Mine Inspectors", by Deputy Attorney General Hargest, Op. Atty. Gen., 1915-1916, page 153, that an anthracite mine inspector was a public officer within the meaning of Section 13 of Article III of the Constitution; and that he was not entitled to receive an increase of salary during the term for which he was elected.

It will be noted that under the statute in force at the date of that opinion, an anthracite mine inspector was elected by the people at the General Election, and for a definite period or term of three years.

Later it was ruled by the Supreme Court in Commonwealth ex rel. Woodring v. Walter, 274 Pa. 553 (1922), that—

* * * The salary of the *elective* officer is fixed as of the date of his election, and no alteration in the amount thereof is permissible under the Constitution, * * *. (557) (Italics ours)

The same ruling was also made in re appeal of Harry W. Bowman, 111 Pa. Super, 383, 386 (1934); In re Petition of Drake, 106 Pa. Super. 383, 387, (1932); Jones v. Northumberland County, 120 Pa. Super. 132, 139, (1935).

The Act of May 17, 1921, P. L. 831 abolished the election of inspectors, and provided in section 8 that the Governor should appoint inspectors for a term of four years, from the names certified by the Board of Examiners.

Both the Act of June 8, 1901 and the Act of May 17, 1921 continued the provision for removal of inspectors by the court of common pleas.

The office of Anthracite Mine Inspector is now regulated by Section 9 of the Act of June 1, 1937, P. L. 2461, 52 P. S. § 185(i), which provides:

The tenure of office of anthracite mine inspectors appointed under this act shall be during good behavior, subject to the provisions of section twelve of this act, and the Constitution of this Commonwealth.

Section 5, provides that after an inspector has served for a period of four years his certificate of qualification should become permanent.

Section 12 repeats the provision that upon petition of fifteen miners or operators, the court of common pleas might certify that an inspector was neglectful, incompetent or guilty of malfeasance in office and that upon such certificate the Governor should appoint a successor.

Under this section an anthracite mine inspector no longer holds office for a definite period or term, as he had done previously, but is entitled to remain in office during good behavior until removed upon a finding of a court of common pleas under section 12 that he is neglectful, incompetent or guilty of malfeasance in office; or removed by the power by which he was appointed under Section 4 of Article VI of the Constitution.

Section 4 of Article VI of the Constitution provides that—

* * * Appointed officers, other than judges of the courts of record and the Superintendent of Public Instruction, may be

removed at the pleasure of the power by which they shall have been appointed. * * *

The Supreme Court, however, has held in *Milford Township Supervisors' Removal*, 291 Pa. 46 (1927) that this section—

* * * is not applicable where the legislature, having the right to fix the length of a term of office, has made it determinable, by judicial proceedings, on other contingencies than the mere passage of time. * * * (52)

To the same effect are: *Weiss v. Zeigler*, 327 Pa. 100, 105 (1937); *Zuerman v. Hadley*, 327 Pa. 190, 200 (1937); *Commonwealth ex rel. Houlahan v. Flynn*, 348 Pa. 101, 103 (1943).

The anthracite mine inspector is therefore now entitled to hold office during good behavior, unless removed by a court of common pleas under the provisions above cited.

An official tenure "during good behavior" is for life, unless sooner determined by cause: *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652 (1902); *Manor of Hennen*, 38 U. S. (13 Pet.), 230, 259 (1839).

The Supreme Court has uniformly held that Section 13 of Article III of the Constitution is applicable only to officers who are elected or appointed for *a definite or certain term or period of time*.

Thus in *Commonwealth ex rel. v. Moffitt*, 238 Pa. 255 (1913), Mr. Justice Mestrezat held that an officer is within Section 13 of Article III "If he is chosen by the electorate for a definite and certain tenure" (262).

This same language is repeated in *Tucker's Appeal*, 271 Pa. 462, 464 (1921).

In *Re: Appeal of Harry W. Bowman*, 111 Pa. Super, 383 (1934), President Judge Trexler, speaking of Article III, Section 13, said:

* * * The standard fixed by numerous cases is that an officer to come within the constitutional prohibition of the above section is such as is chosen for a definite term * * *. (385-386)

In *Jones v. Northumberland Co.*, 120 Pa. Super. 132 (1935), Judge Rhodes said:

It is apparent that the salary of Bowman was fixed as of the date of his election, and that an increase, by subsequent legislation, could not be allowed during the term for which he had been elected. (139)

In *Richie v. Philadelphia*, 225 Pa. 511 (1909), Mr. Justice Brown, quoting from the opinion of the Superior Court in the same case (37 Super. 190, 197) said that an officer is within Section 13 of Article III if "his office is for a fixed term" (516).

In *Finley v. McNair*, 317 Pa. 278 (1935), Mr. Justice Linn said:

* * * Other elements in the problem are whether the duties are designated by statute, whether the incumbent serves for a fixed period * * *. (281)

In *Glessner's Case*, 289 Pa. 86 (1927), Mr. Justice Frazer said of Section 13 of Article III:

* * * It refers to such officers as are chosen for a definite and certain time * * *. (89)

In *Wiest v. Northumberland Co.*, 115 Pa. Super. 577 (1935), President Judge Trexler said an officer is within Article III of Section 13 if "the term if [is] defined and the tenure certain" (578).

In *Alworth v. Lackawanna County*, 85 Pa. Super. 349 (1925), Judge Gawthorp said that a counsel for the Board of Registration Commissioners was not within Section 13 of Article XV, because "his appointment is for no definite term" (352).

Commonwealth v. Moore, 71 Pa. Super. 365 (1919), Judge Henderson said:

Where the term is definite and the tenure certain * * * the occupant of the place is a public office. (368)

within Section 13 of Article III.

This decision was affirmed by the Supreme Court on the opinion of Judge Henderson, in *Commonwealth v. Moore*, 266 Pa. 100, 101 (1920).

It is true that the Superior Court has said in several earlier cases that an officer need not be elected or appointed *for a definite term* to come within the provision of Section 13 of Article III. See *Evans v. Luzerne County*, 54 Pa. Super. 44, 46 (1913); *Dewey v. Luzerne County*, 74 Pa. Super. 300, 304, 309 (1920).

However, the decisions of the Superior Court have since conformed to the ruling of the Supreme Court. See *Commonwealth v. Moore*, 71 Pa. Super. 365, 367 (1919); *Alworth v. County of Lackawanna*, 85 Pa. Super. 349, 352 (1925); *Foyle v. Commonwealth*, 101 Pa. Super. 412, 418 (1931); *Kosek v. Wilkes-Barre Township School District*, 110 Pa. Super. 295, 300 (1933), affirmed in 314 Pa. 18; *In Re: Appeal*

of Harry W. Bowman, 111 Pa. Super. 383, 385, 386 (1934); Wiest v. Northumberland Co., 115 Pa. Super. 577, 578 (1935).

In Saar v. Hanlon, 163 Pa. Super. 143 (1948), Judge Hirt, in holding that a city plumbing inspector was not within Article III, Section 3, said:

* * * Other elements in the problem are whether the duties are designated by statute, whether the incumbent serves for a fixed period * * *. (147)

* * * Such inspector, unlike a public officer is not appointed for a definite term * * *. (148)

Following the interpretation placed upon Section 13 of Article III in the above decisions, we are of the opinion that anthracite mine inspectors do not come within the constitutional prohibition, because—

(1) Such inspectors are not appointed for a certain and definite term.

The words “extend the term of any public officer”, imply that the officer is one who is serving for a term that *can be extended*. A term is defined as a fixed and definite period of time.

Thus in State v. Board of County Commissioners, ——— Mont. ———, 191 Pa. (2d) 671 (1948), the Supreme Court of Montana said:

* * * “Term” when applied to the holding of a public office, refers to a fixed and definite period of time.

It is also held that permanency or continuity of the tenure is an element necessary to make the holder of a position a public officer. * * * (672)

Unless the incumbency was limited to a definite period of time, it would not be practicable to “extend” the term.

At any rate, a term, if it were “during good behavior”, i. e., for life, could not be extended. To abolish the requirement of good behavior would not be an extension in the ordinary sense of the word. It would be abolishing the qualification or condition of the tenure, and making it possible for the incumbent to retain his office irrespective of his conduct.

In Section 13 of Article III the words “public officer” apply both to extending the term and to increasing the salary. The meaning of the word “public officer” would be the same whether the legislation extended his term or increased his salary. “His salary” therefore, means the salary of an officer serving for a term.

Hence, an officer serving during good behavior would not come within the prohibition against extending the term or increasing the salary.

(2) An appointment to serve during good behavior is for life, unless sooner terminated by cause, which, in this situation, would be a removal by a court of common pleas for neglect of duty, incompetence or malfeasance in office.

Therefore, if Section 13 of Article III should be held to include an anthracite mine inspector, the latter could never become entitled to the benefit of a legislative increase in salary, even though he served the Commonwealth with fidelity and distinction throughout the entire span of his life.

An interpretation which would produce such an unreasonable result and work such hardship, should not be adopted: *Duane v. Philadelphia*, 322 Pa. 33, 38 (1936).

BITUMINOUS MINE INSPECTORS

Section 6 of Article X of the Act of May 15, 1893, P. L. 52, provided that the Governor should appoint inspectors of bituminous mines for the term of four years.

Article XIII provided that upon petition of fifteen miners or operators the court of common pleas might certify to the Governor a finding that an inspector neglected his duties or was incompetent or was guilty of malfeasance in office, and the Governor should then declare the office of such inspector vacant.

Section 5 of Article XIX of the Act of June 9, 1911, P. L. 756, provided that the Governor should appoint, from the names certified to him by the Examining Board, a bituminous mine inspector for each district, for a term of four years.

Article XXI of the same act, 52 P. S. § 791, provided for removal of an inspector by the court of common pleas for the neglect of duty, incompetence or malfeasance in office.

The Act of June 1, 1915, P. L. 706, 52 P. S. § 732 amended Section 4 of Article XIX of the Act of 1911, relating to examinations for mine inspectors, providing as follows:

* * * any person who has served as a mine inspector, or continuously for eight years, and has passed two consecutive examinations for the office of mine inspector, shall be exempt from taking any further examination, and shall continue in said office without any further examination unless removed

or suspended, as provided by article twenty-one of the act of June nine, one thousand nine hundred and eleven (Pamphlet Laws, seven hundred and fifty-six), and Section four of the act of April fourteen, one thousand nine hundred and three (Pamphlet Laws, one hundred and eighty). * * *

Article XXI of the Act of June 9, 1911 (52 P. S. § 791) referred to, has already been summarized.

Section 4 of the Act of April 14, 1903, P. L. 180, 71 P. S. § 1344, also referred to in the above quotation from the Act of June 1, 1915, provides that upon petition of the Secretary of Mines to the court of common pleas of any county within the inspection district, upon finding that an inspector, whether in the bituminous or anthracite field, has been guilty of neglecting his official duties or is physically incompetent or guilty of malfeasance in office, shall certify this finding to the Governor, who shall declare this office vacant and supply the vacancy.

For the reasons already stated in discussing anthracite mine inspectors, we are of the opinion that bituminous mine inspectors are not appointed for a definite term and are therefore not within the constitutional prohibition. The bituminous mine inspector presents, if anything, a stronger case. After four years of service, and a reappointment the incumbent enters upon a period of office during good behavior,—a period of indefinite length without the necessity of any reappointment. His tenure continues without any further action by the Governor or any other official and by force of the Act of Assembly of June 1, 1915, which provides that he "shall continue in said office without any further examination unless removed or suspended". The incumbent continues in office, not as a hold-over, but by virtue of the statutory provision that he shall continue until removed. His office now is no longer controlled by any appointment and the provisions of Section 3 of Article III should therefore not apply to his case.

The history of the legislation for both anthracite and bituminous mine inspectors reveals that after years of experimenting with the various statutes providing for definite terms of service, the legislature has provided that inspectors after acquiring the requisite knowledge and experience shall hold their offices permanently. The purpose clearly has been to provide permanent officials of proved knowledge and experience and to remove their tenure of office from the political vicissitudes of election or appointment.

In conclusion, we are of the opinion that (1) Anthracite mine inspectors are entitled to receive the increase in salary provided by the Act of May 26, 1949.

(2) Bituminous mine inspectors who have served continuously for four years, have passed consecutively two examinations and have been reappointed are entitled to receive the increase in salary provided by the Act of May 26, 1949.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. F. STAMBAUGH,

Special Counsel.

OPINION No. 599

Insurance—Domestic companies other than life—Writing multiple lines of insurance—Act of April 20, 1949—Effect on existing companies—Necessity for charter amendment—Shareholder approval of addition to existing lines—Financial requirements—Insurance Company Law of 1921—Constitution, article XVI, secs. 6 and 10.

1. Article XVI, secs. 6 and 10, of the Pennsylvania Constitution require that the charter of a corporation reveal the business in which it is authorized to engage, and such business cannot be altered by the legislature if injustice would result to the shareholders.

2. The enactment of the Act of April 20, 1949, P. L. 132, did not and could not constitutionally be construed automatically to amend the charter of existing insurance companies to permit them to engage in broader lines of business.

3. Domestic fire and casualty insurance companies must ordinarily amend their charters before they may be authorized by the insurance commissioner to transact multiple lines of insurance as permitted by section 202(f) of The Insurance Company Law of May 17, 1921, P. L. 682, as amended by the Act of April 20, 1949 (No. 132).

4. Where by reason of the broad provisions of the charter of an insurance company, it is unnecessary for it to amend its charter to take advantage of the provisions of the Act of April 20, 1949 (No. 132), the insurance commissioner may nevertheless require evidence of approval by its shareholders or members of any radical or organic change in the lines of insurance business to be transacted by the company.

5. A domestic mutual company engaged in writing fire or casualty insurance must comply with the financial requirements for such companies contained in section 206(e) of The Insurance Company Law of 1921, before being authorized to write multiple lines of insurance pursuant to the Act of April 20, 1949 (No. 132).

Harrisburg, Pa., July 29, 1949.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning certain questions which have arisen under the provisions of Act No. 132, approved April 20, 1949, P. L. 620, which adds to Section 202 of the Insurance Company Law of May 17, 1921, P. L. 682, 40 P. S. § 382, a new subdivision (f), to read as follows:

(f) Domestic stock and mutual insurance companies, other than life or title, and, if their charters permit, foreign companies, may transact any or all of the kinds of insurance included in subdivisions (b) and (c) of this section upon compliance with all of the financial and other requirements prescribed by the laws of this Commonwealth for fire, marine, fire and marine, and casualty insurance companies transacting such kinds of insurance. Any domestic mutual fire insurance company which takes advantage of the provisions of this subsection (f) shall not be required to license any of its agents.

This new subdivision will become effective September 1, 1949. The existing subdivisions of section 202 set forth the purposes for which domestic insurance companies may be incorporated, and maintain the historical distinctions between the three general classes of insurance, i. e., life, casualty and fire insurance. Subdivision (a) relates to life insurance, and is not pertinent to this opinion. Subdivision (b) contains the purposes of fire, marine, and fire and marine insurance companies, hereinafter referred to as fire insurance companies for the sake of brevity. Subdivision (c) enumerates the thirteen fields of casualty insurance.

In the past, the legislature has adhered strictly to a policy of keeping separate the three classes of insurance companies, so that a fire insurance company could not write casualty insurance, nor could a casualty insurance company write fire insurance. See Formal Opinion No. 594 of this department sent to you under date of July 5, 1949.

In enacting Act No. 132, the legislature has now broken down the distinction between fire insurance companies and casualty insurance companies to the extent of permitting either class to transact any kinds of insurance permissible for the other class.

In your first inquiry, you ask whether it is necessary for insurance companies to amend their charters before they may be authorized to transact a different class of insurance, as authorized by Act No. 132.

It is unlikely that the charter of any domestic fire or casualty insurance company would be sufficiently broad to authorize such company to write the multiple lines of insurance permitted by Act No. 132, because any charter powers to write insurance of a class different from the class for which the company was incorporated would have been beyond the scope of the corporation laws of this Commonwealth. On the other hand, it would not be unusual for a casualty insurance company to possess charter powers broad enough to write all thirteen fields of casualty coverage, even though the company actually transacts only a few kinds of such insurance. In such a case, it would be necessary to amend the charter of the casualty company only if it wished to transact fire insurance.

Article XVI, Section 6 of the Pennsylvania Constitution provides that:

No corporation shall engage in any business other than that expressly authorized in its charter, * * *

Article XVI, Section 10 authorizes the legislature to "alter, revoke or annul" corporation charters whenever in the opinion of the legislature "it may be injurious to the citizens of this Commonwealth, in such manner, however, that *no injustice shall be done to the corporators.*" This provision was intended to permit the legislature to alter or annul a corporation charter without impairing the obligation of contracts under the Constitution of the United States. Cf. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 636 (1819).

These two provisions in the Pennsylvania Constitution establish the axiomatic principles that a corporation charter must reveal the business in which the corporation is authorized to engage, and that such business cannot be altered by the legislature if injustice will result to the corporators, i. e., the shareholders.

In view of the mandate contained in Article XVI, Section 6 of our Constitution, we conclude that it is necessary for any casualty insurance company to amend its charter before it may engage in the business of fire insurance; similarly, the charter of a fire insurance company must be amended before it may engage in the business of casualty insurance.

The enactment of Act No. 132 did not ipso facto or ipso jure achieve the necessary amendment to the charter of such an insurance company. The proper procedure is found in Section 322 of the Insurance Company Law of 1921, 40 P. S. § 445, which permits an insurance company to amend its charter so as to change its corporate purposes,

and such an amendment may be obtained only after the assets of two-thirds of the stockholders or members of the corporation.

Prior to the evolution of general corporation laws, corporate charters were granted by special acts of assembly, and amendments thereto were enacted in the same manner. In such cases, it was necessary to obtain the consent of the shareholders after such an amendment was passed by the legislature, and such an amendment was held ineffective where the shareholders did not accept it: *Commonwealth ex rel. Claghorn v. Cullen*, 13 Pa. 133 (1850).

In *Curry v. Scott*, 54 Pa. 270, 277 (1867), the court said:

* * * It is not to be questioned that the legislature may confer enlarged powers upon the managers of a corporation *with the assent of the shareholders*. * * *. (Italics supplied)

At common law, the unanimous approval of the shareholders was necessary where the amendment to the charter basically altered the corporate structure; see 7 *Fletcher Cyclopedia Corporations* (Perm. Ed.), Section 3726, and also *Ashton v. Burbank*, Fed. Cas. No. 582 (1873), where the court found that the change in a charter whereby the life and accident insurance company was authorized to transact fire, marine, and inland insurance was "an organic change of such a radical character" as to discharge stock subscribers from any obligation to pay.

The foregoing authorities make the approval by the shareholders a prerequisite to a fundamental change in a corporate charter, and indicate clearly that the legislature does not have the power to alter the basic contract rights between the shareholder and the corporation, so as to change the class of business engaged in by the corporation. Thus, Act No. 132 cannot be construed as automatically amending the charters of fire or casualty insurance companies.

Even if Act No. 132 were construed as a direct amendment to the charter of such a company, it would be unconstitutional to the extent that injustice would result to the shareholders. For example, the organic change resulting from the entry of a casualty insurance company, into the fire insurance field, without the consent of the shareholders, would seem to result in an injustice to the shareholders.

Finally, we are of the opinion that Act No. 132 cannot be construed as a direct amendment to the charter of an insurance company, even though it is accepted or approved by the shareholders. The authorities cited above with respect to charters and amendments

thereto granted by special acts, do not pertain to general corporation statutes, where the consent of the incorporators or of the shareholders is obtained *prior* to the filing of the articles of incorporation, or articles of amendment, as the case may be. If a corporation desires to engage in the multiple line coverage permitted by Act No. 132, it should amend its charter under the provisions of Section 322 of the Insurance Company Law, cited *supra*, and thus obtain the necessary consent of two-thirds of its shareholders or members in advance.

It may be noted parenthetically that foreign insurance companies may transact multiple lines of insurance in Pennsylvania under Act No. 132 only "if their charters permit". Furthermore, the provisions of Act No. 132 would not apply to any domestic insurance companies incorporated prior to October 13, 1857, which have not accepted the provisions of the Insurance Company Law of 1921, or are not subject thereto.

Accordingly, in answer to your first question, we conclude that it will be necessary for domestic casualty and fire insurance companies to amend their charters before they may be authorized to transact any kinds of insurance permitted by Act No. 132 which are not authorized by their charters.

You next inquire as to the procedure to be followed where an amendment to the charter of the insurance company is unnecessary.

Any casualty insurance company now engaged in one of the thirteen casualty coverages which hereafter desires to engage in other casualty coverages, would not be required to amend its charter, if its charter provisions were sufficiently broad to permit the additional coverages within the casualty class. The same observation should be made as to fire insurance companies.

Nevertheless, we feel that some fundamental rights of stockholders or members may be affected whenever an insurance company expands its present business to other coverages within the class presently permitted by its charter. For this purpose, you may require evidence of the approval by the stockholders or members of any radical or organic change in the lines of insurance business to be transacted by the insurance company, prior to the granting of a new certificate of authority, as required by the Act of June 4, 1937, P. L. 1640, 40 P. S. § 47a.

In your third query, you ask whether domestic mutual insurance companies seeking to engage in multiple line insurance under the authority of Act No. 132, *supra*, must meet the minimum financial re-

quirements for mutual companies other than mutual life and title insurance companies contained in Section 206 (e) of the Insurance Company Law of 1921, 40 P. S. § 386, as amended by the Acts of July 1, 1937, P. L. 2527 and 2528, the composite of which reads as follows:

(e) Mutual companies, other than mutual life companies, and title insurance companies, hereafter organized under this act, shall comply with the following conditions:

(1) Each such company shall hold bona fide applications for insurance upon which it shall issue simultaneously, or it shall have in force, at least twenty (20) policies to at least twenty (20) members, for the same kind of insurance, upon not less than two hundred (200) separate risks, each within the maximum single risk described herein.

(2) The 'maximum single risk' shall not exceed three times the average risk, or one per centum (1%) of the insurance in force, whichever is the greater.

(3) It shall have collected a cash premium upon each application, which premium shall be held in cash or securities in which insurance companies are authorized to invest; and shall be equal, in case of fire insurance, to not less than twice the maximum single risk assumed subject to one fire, nor less than twenty-five thousand dollars (\$25,000); and, in any other kind of insurance, to not less than five times the maximum single risk assumed nor less than fifty thousand dollars (\$50,000); and, in case of workmen's compensation insurance, to not less than one hundred thousand dollars.

(4) For the purpose of transacting employer's liability and workmen's compensation insurance, the application shall cover not less than five thousand (5,000) employees, each such employe being considered a separate risk for determining the maximum single risk. (As amended 1937, July 1, P. L. 2527, § 1.)

Act No. 132, quoted *supra*, imposes as a condition precedent the " * * * compliance with all of the financial and other requirements prescribed by the laws of this Commonwealth for * * * insurance companies transacting such kinds of insurance. * * * "

An analysis of the first paragraph of this subsection indicates that the financial requirements relate to the "same kind of insurance", and would thus provide for duplicate financial requirements when writing other "kinds" of insurance. This analysis is confirmed by the reference in paragraph (3) to fire insurance and workmen's compensation insurance, and in paragraph (4) to employer's liability and workmen's insurance.

Since Act No. 132 requires compliance with all financial requirements prescribed by law, presumably the legislature was referring, in

the case of mutual companies, to the requirements of section 206 (e), *supra*.

Therefore, we are of the opinion that a domestic mutual fire or casualty insurance company seeking to write any new kinds of insurance pursuant to the authority of Act No. 132, must meet the minimum financial requirements set forth in Section 206 (e) of the Insurance Company Law of 1921, as amended.

In conclusion, you are advised that:

(1) It will be necessary for domestic fire and casualty insurance companies to amend their charters before they may be authorized by you to transact multiple lines of insurance, as provided in Section 202 (f) of the Insurance Company Law of 1921, as amended by Act No. 132, approved April 20, 1949.

(2) Where, by reason of the broad provisions of its charter, it is unnecessary for such an insurance company to amend its charter to take advantage of the provisions of the said Act No. 132, you may require evidence of the approval by the stockholders or members of any radical or organic change in the lines of insurance business to be transacted by the company.

(3) A domestic mutual company engaged in writing fire or casualty insurance must comply with the financial requirements for such companies contained in Section 206 (e) of the Insurance Company Law of 1921 before being authorized to write multiple lines of insurance pursuant to Act No. 132.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

GEORGE W. KEITEL,

Deputy Attorney General.

OPINION No. 600

Poor—Dependent children—Public assistance—Payments under Public Assistance Law of June 24, 1937, as amended—Right to require county institution districts to meet minimum requirements.

The Department of Public Assistance may in its discretion adopt a rule or regulation restricting payments for dependent children under section 9(f) of the Public Assistance Law of June 24, 1937, P. L. 2051, as amended by the Act of April 28, 1949 (No. 189), to those county institution districts which meet minimum standards imposed under the law by the Department of Welfare for the care of dependent and neglected children.

Harrisburg, Pa., August 17, 1949.

Honorable Frank A. Robbins, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: You ask to be advised concerning the imposition of standards for the proper administration of Section 9(f) of the Public Assistance Law, Act of June 24, 1937, P. L. 2051, as amended by the Act of April 28, 1949, P. L. 767, Act No. 189, 62 P. S. § 2509.

This new amendment establishes further 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:

* * * * *

(f) Any children who, at the time they are receiving assistance, are at the direction of the court removed from the home of their parents and placed in foster homes or children's homes maintained by a county institution district."

(Italics ours)

Since no date is specified in this act, the effective date of the amendment is September 1, 1949. See Section 4 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, as amended, 46 P. S. § 504.

Section 9(a) of the Public Assistance Law, *supra*, provided for assistance to dependent children as follows:

(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) has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or

mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, or aunt, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) has resided in this Commonwealth for one year immediately preceding the date of application for assistance, or has been born in this Commonwealth within one year immediately preceding the date of such application of a mother who has resided in this Commonwealth for one year immediately preceding the birth of the child.

Under this section 9(a), the Department of Public Assistance grants assistance to needy children who are living with their parents or other specified relatives. This section of the law, together with the generally accepted child welfare practice, indicated that a certain amount of protection for the welfare of a child receiving assistance was afforded by the fact that the child was living with relatives. However, when a child is placed in a foster home with other than relatives such as specified in section 9(f), necessary protection of the child's welfare is generally not assumed to be present, but rather governmental welfare agencies and private welfare agencies assure this protection by supervision of the child and of the foster parents.

In Pennsylvania, the county institution district is the local, county-wide public child care agency, charged by law with the responsibility for providing care for dependent and neglected children. See Section 401 of the County Institution District Law, the Act of June 24, 1937, P. L. 2017, 62, P. S. § 2301, which provides 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—*

* * * * *

(d) To contribute moneys to the county to pay all or part of the county cost of maintaining children in foster homes and in institutions and homes for children;

* * * * *

(Italics ours)

Under this provision of the law, local county institution districts are supervised by the Department of Welfare, and must operate within rules, regulations and standards established by the Department of Welfare for the care of indigent persons and children. See Bulletin 81, 1940, established by the Department of Welfare and approved by the State Welfare Commission May 14, 1940, pp. 16-17, as follows:

II. REGULATIONS RELATING TO THE INVESTIGATION, PLACEMENT AND SUPERVISION OF DEPENDENT CHILDREN

A. The local authorities, in exercising their powers in relation to the care of dependent children, may themselves act as a child-caring agency in the investigation, placement and supervision of dependent children; or the authorities may utilize the services of another child-caring agency, in the investigation, placement and supervision of dependent children. The local authorities have a responsibility in assuring themselves that any child-caring agency whose services they use in this capacity meets the Rules and Regulations contained herein.

B. The responsibilities of the child-caring agency are as follows:

1. To investigate the needs of children referred to care to determine whether such children are 'dependent children' within the meaning of the above definition.

2. To ascertain the needs of each child in order to determine the type of care that is best suited to meet the requirements of the individual child.

3. To study each foster home or institution in relation to its suitability and adaptation to give the care needed in relation to the individual child requiring such care.

4. To place children accepted for care away from their own homes in foster homes or institutions suited to their needs.

Under the provisions of this Act, 'no child under the age of sixteen years shall, unless he is physically or mentally handicapped, and no other care is available for him, be admitted to or maintained in an institution conducted by the local authorities for the care of dependents.'

5. To make such visits as may be needed in the case of each child accepted for care, for the purpose of assuring itself that the child is receiving the type of care required to meet his individual needs, that he has opportunities to avail himself of normal educational, religious and recreational facilities, and that conditions in the home, foster homes or institution in which he is receiving care are such as may be expected to aid in his normal development.

6. To supervise the health of each child through initial and periodic physical examinations and such follow-up health work as is indicated by such examinations.

7. To keep in touch with the situation in the child's own home when the child has been placed and plan to reestablish him in his home when this can and should be done, in the best interest of the child.

* * * * *

There do not appear to have been any amendments or changes in these rules, regulations and standards since May 14, 1940.

See also Section 405 of the County Institution District Law, *supra*, 62 P. S. § 2305, which provides for powers and duties of local authorities (county institution districts) as to children, as follows:

The local authorities of any institution district shall have the power, and it shall be their duty to place in foster homes or in institutions or homes for children all dependent children who are in, or committed to, their charge, and whose placement and care are not otherwise provided for by law.

No child under the age of sixteen years shall, unless he is mentally or physically handicapped, and no other care is available for him, be admitted to, or maintained in, an institution conducted by the local authorities other than a hospital or sanitarium.

Section 9 of the Act of May 25, 1921, P. L. 1144, 71 P. S. § 1469, imposes a duty and responsibility of supervision by the Department of Welfare over institutions. See also the Act of April 14, 1925, P. L. 234, as amended, 11 P. S. § 801 *et seq.*, which provides for licensing of boarding homes for children by the Department of Welfare.

Other responsibilities for dependent and neglected children are placed on the Department of Welfare under Sections 2303, 2310 and 2316 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. §§ 593, 600 and 606.

It is clear from the above that the Department of Welfare has the power and duty of supervising, regulating and licensing the various foster homes or children's homes in the Commonwealth.

The above cited laws and rules and regulations established thereunder were passed to further the best interests of the child, to use the language of our Pennsylvania Courts. See the recent case of *Commonwealth ex rel. Steele v. Steele*, Common Pleas Court of Clearfield County, September Term, 1947, No. 305 (*The Legal Intelligencer*, July 5, 1949, Vol. CXXI, pp. 9-12), in which Judge Bell, in an opinion filed June 20, 1949, stated:

Throughout all cases involving custody of the child, the prime consideration before the court has been what was to the best interest of said child. See *Commonwealth ex rel. Hespelien v. Hespelien*, 157 Pa. Superior Ct. 224; *Commonwealth v. Meighen*, 157 Pa. Superior Ct. 657. * * *

See also *Commonwealth ex rel. v. Daven (et al., Appellant)*, 298 Pa. 416, 419 (1930), in which the Supreme Court said:

* * * Orders fixing the custody of children are temporary in their nature and always subject to modification to meet changed conditions. * * *

Judge Bell, inserting this quotation from the Supreme Court, added:

The court affirmed the doctrine that the prime consideration was the welfare of the child, and said that the Municipal Court of Philadelphia fell into the error of putting too much stress on the full faith and credit doctrine of the United States Constitution. * * *

Under the County Institution District Law, *supra*, and before the passage of the amended section 9(f) of the Public Assistance Law, *supra*, the financial responsibility for the care of dependent and neglected children was wholly that of the county institution district in accordance with standards established by the Department of Welfare.

Under the amended section 9(f) of the Public Assistance Law, *supra*, the county institution district is to be subsidized by State funds. When one level of government subsidizes another, it should and ought to be contingent on compliance with certain minimum standards. The Department of Public Assistance, charged with the administration of the Public Assistance Law, has the responsibility of protecting the State Treasury from payment of State funds to foster homes or children's homes in county institution districts, which do not meet the minimum standards imposed by the Department of Welfare.

Section 501 of The Administrative Code of 1929, *supra*, 71 P. S. Section 181, is as follows:

The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for cooperation and coordination of work, *eliminating, duplicating, and overlapping of functions*, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. The head of any administrative department, or any independent administrative or departmental administrative board or commission, may empower or require an employe of another such department, board, or commission, subject to the consent of the head of such department or of such board or commission, to perform any duty which he or it might require of the employes of his or its own department, board, or commission." (Italics ours)

The amended section 9(f) of the Public Assistance Law, *supra*, does not place responsibility for the welfare of children on the courts; that is placed by law on the county institution districts and the Department of Welfare. In the absence of any other provisions of the welfare of dependent and neglected children, it follows that already established provisions of the law setting up standards for the welfare of dependent and neglected children should be complied with.

In formulating your rules and regulations under section 9(f) of the Public Assistance Law, *supra*, consideration should be given by your department to standards imposed by the Department of Welfare for the protection of dependent and neglected children of the Commonwealth, and county institution districts would not be eligible, under section 9(f), if such districts did not meet minimum standards of child care as provide for under section 401 of the County Institution District Law, *supra*, and Bulletin 81, 1940, established by the Department of Welfare and approved by the State Welfare Commission.

We are of the opinion, therefore, that you may in your discretion adopt a rule or regulation restricting payments under Section 9(f) of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended by the Act of April 28, 1949, P. L. 767, Act No. 189, 62 P. S. § 2509, to those county institution districts which meet minimum standards imposed under the law by the Department of Welfare for care of dependent and neglected children.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 601

State Highway and Bridge Authority and the Department of Highways—Legal questions concerning the program:

1. The Contract to Lease and the Lease itself, when properly signed, is a binding obligation to pay out of the current revenues of the Commonwealth, including the Motor License Fund.
2. Once the Contract to Lease is signed, executed and delivered, neither the Commonwealth nor the Department of Highways can compel the Authority to discontinue the project.
3. The proposed form of Approval by the Governor in the Contract to Lease is sufficient so that the Department of Highways can execute the Lease in accordance with said approval, upon completion of the project, without further approval of the Governor.

4. The aggregate rentals to become due under the Contract to Lease and the Lease itself will not constitute a prohibited indebtedness of the Commonwealth within the meaning of Article IX, Section 4 of the Constitution.

5. The bonds of the Authority are not in any way obligations or debts of the Commonwealth in excess of the limitations imposed upon Article IX, Section 4 of the Constitution of the Commonwealth of Pennsylvania.

6. The appropriation contained in Section 18 of the State Highway and Bridge Authority Act is unlimited in duration so that the rentals to become due under the leases of completed projects may be paid out of the Motor License Fund without further appropriation out of such fund by the General Assembly.

Harrisburg, Pa., November 22, 1949.

Honorable Ray F. Smock, Secretary, Department of Highways, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for an opinion concerning certain legal problems which have arisen due to the program of The State Highway and Bridge Authority and the Department of Highways. We understand that the Authority will construct public highways and bridges for the Commonwealth as authorized by the State Highway and Bridge Authority Act, approved April 18, 1949, (P. L. 604). We have examined the Authority's Proposed Official Statement and the form of Contract to Lease, Approval of the Governor and Lease attached thereto as exhibit 2.

Your questions are very similar to the questions asked by the Secretary of Property and Supplies with respect to the problems of The General State Authority, answered in our Formal Opinion No. 595 dated July 11, 1949, a copy of which is attached hereto.

We shall answer your questions in the order asked, without extended citation of cases or statutes where the matter is fully covered in our previous opinion with respect to The General State Authority.

The first question is:

1. Is the Contract to Lease and the Lease itself, when properly signed, a binding obligation to pay out of the current revenue of the Commonwealth, including the Motor License Fund?

The State Highway and Bridge Authority Act, *supra*, in section 4(h) empowers the Authority:

to fix, alter, charge, and collect . . . rentals and other charges for the use of . . . projects . . . at reasonable rates to be determined by it, for the purpose of providing for the

payment of the expenses of the Authority, . . . payment of the principal of and interest on its obligations, and to fulfil the terms and provisions of any agreements made with the purchasers or holders of any such obligations.

By Section 11 of the said act, the Department of Highways is given the power and authority with the approval of the Governor:

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

In our opinion, and for the reason stated in our Opinion No. 595, each contract to lease and lease, when properly approved, executed and delivered, if for a term permitted by law, will be a legal, valid and binding instrument in accordance with its terms, obligating the Commonwealth to pay the rentals provided therein out of its current revenues, including the Motor License Fund.

Your second question is:

2. Once the Contract to Lease is signed, executed and delivered, can the Department of Highways or the Commonwealth compel the Authority not to complete the project?

Again, for the reason stated in our Opinion No. 595, this question must be answered in the negative.

Your third question is:

3. Is the proposed Form of Approval by the Governor in the Contract to Lease sufficient so that the Department of Highways can execute the Lease in accordance with said approval, upon completion of the project, without further approval of the Governor?

This question must be answered in the affirmative for the reasons more fully set forth in our previous Opinion.

Your fourth question is:

4. Will the aggregate rentals to become due under the Contract to Lease and the Lease itself constitute a prohibited

indebtedness of the Commonwealth within the meaning of Article IX, Section 4 of the Constitution?

This question must be answered in the negative. The aggregate of the rentals will not constitute a prohibited indebtedness of the Commonwealth within the meaning of Article IX, Section 4 of the Constitution.

Your fifth question is:

5. Are the bonds of the Authority in any way obligations or debts of the Commonwealth in excess of the limitations imposed upon Article IX, Section 4 of the Constitution of the Commonwealth of Pennsylvania?

The act before us follows very closely the provisions of the former General State Authority Act and the provisions of the General State Authority Act of one thousand nine hundred forty-nine. The differences in our opinion have no significance so far as the questions raised are concerned, and we feel that the authorities cited in our previous Opinion No. 595 are equally controlling.

Your sixth question is:

6. Is the appropriation contained in Section 18 of the State Highway and Bridge Authority Act unlimited in duration so that the rentals to become due under the leases of completed projects may be paid out of the Motor License Fund without further appropriations from the General Assembly?

In our opinion, the appropriation is unlimited in duration and no further appropriation is necessary from the General Assembly to enable the Department of Highways to requisition upon the State Treasurer, or to enable the State Treasurer to pay and the State Auditor General to approve the payment of rentals becoming due under valid leases from the State Highway and Bridge Authority to the Commonwealth of Pennsylvania, acting through the Department of Highways. While the leases are payable out of the revenues of the Commonwealth, including the Motor License Fund, your attention is directed to the fact that the only appropriation made for the purpose is the appropriation contained in section 18 of the State Highway and Bridge Authority Act which is limited to the moneys in the Motor License Fund.

It is specifically provided in the State Highway and Bridge Authority Act that the rentals fixed by the Authority for its projects "at reasonable rates to be determined by it," may be so fixed "for the purpose of providing for . . . the payment of the principal of and interest on its obligations and to fulfil the terms

and provisions of any agreements made with the purchasers or holders of any such obligations." Inasmuch as the projects of the Authority are limited to the constructing and reconstructing, improving, equipping, furnishing, maintaining and operating State highway bridges, viaducts, toll bridges, tunnels, traffic circles on State highways, maintenance sheds, offices and garages and roadside rests, we are of the opinion that the bonds of the Authority are obligations incurred in the construction or reconstruction of State highways and bridges, and that the rentals fixed for their retirement may validly be paid from the Motor License Fund, under the existing statutes and Constitution of the Commonwealth of Pennsylvania.

Your attention is also directed to the fact that under the provisions of Article IX, Section 18 of the Constitution, the receipts from the various taxes now constituting the principal sources of revenue of the Motor License Fund cannot be used to pay the principal of or interest on any general obligation bonds of the Commonwealth of Pennsylvania unless the said bonds were issued to obtain funds to be used for the highway purposes specified in said Section 18 of Article IX of the Constitution.

By way of summation, we are therefore of the opinion that:

1. The Contract to Lease and the lease itself, when properly signed, is a binding obligation to pay out of the current revenues of the Commonwealth, including the Motor License Fund.
2. Once the Contract to Lease is signed, executed and delivered, neither the Commonwealth nor the Department of Highways can compel the Authority to discontinue the project.
3. The proposed form of Approval by the Governor in the Contract to Lease is sufficient so that the Department of Highways can execute the lease in accordance with said approval, upon completion of the project, without further approval of the Governor.
4. The aggregate rentals to become due under the Contract to Lease and the lease itself will not constitute a prohibited indebtedness of the Commonwealth within the meaning of Article IX, Section 4 of the Constitution.
5. The bonds of the Authority are not in any way obligations or debts of the Commonwealth in excess of the limitations imposed upon Article IX, Section 4 of the Constitution of the Commonwealth of Pennsylvania.

6. The appropriation contained in Section 18 of the State Highway and Bridge Authority Act is unlimited in duration so that the rentals to become due under the leases of completed projects may be paid out of the Motor License Fund without further appropriation out of such fund by the General Assembly.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

PHIL H. LEWIS,
Deputy Attorney General.

OPINION No. 602

Taxation—Liquid fuel tax—Partial reimbursement—Use on farm—Act of May 26, 1949, amending section 17 of The Liquid Fuels Tax Act of May 21, 1931—Tractor—Sprayer—Saw mill—Lighting system—Combines and harvesters—Reimbursements to one other than owner of farm—Proof of payment—Delivery slips.

1. A nonlicensed motor vehicle used exclusively on a farm in the production of farm products is "powered farm machinery" within the meaning of the Act of May 26, 1949, P. L. 1880, amending section 17 of The Liquid Fuels Tax Act of May 21, 1931, P. L. 149, by providing for the partial reimbursement of taxes paid on liquid fuels used by nonlicensed powered farm machinery.

2. If the Secretary of Revenue determines that a motor vehicle which cannot be used as a motor vehicle is a tractor, the tax paid on gasoline consumed by it in furnishing power to a sprayer mounted thereon is reimbursable under the Act of May 26, 1949, P. L. 1880.

3. Taxes paid on gasoline consumed in furnishing power for a saw mill for work done in connection with the operation of a farm, or in the operation of licensed or nonlicensed combines or harvesters while used in the actual production of farm products, are reimbursable under the Act of May 26, 1949, P. L. 1880.

4. Taxes paid on gasoline consumed in a lighting system used on a farm are reimbursable under the Act of May 26, 1949, P. L. 1880, only to the extent that the electrical current generated was used in operating powered farm machinery.

5. In order to be entitled to reimbursement of liquid fuels taxes under the Act of May 26, 1949, P. L. 1880, the applicant need not be the owner or operator of the farm on which the liquid fuels were used.

6. The Board of Finance and Revenue may accept current delivery slips of liquid fuels in support of claims for reimbursement under the Act of May 26,

1949, P. L. 1880, where the purchaser does not pay cash at the time of purchase and cannot furnish receipts indicating that the taxes were paid by him.

Harrisburg, Pa., January 9, 1950.

Honorable Elmer G. Graham, Secretary, Board of Finance and Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning the interpretation of the Act of May 26, 1949, P. L. 1880 (hereinafter referred to as Act No. 558), which amends Section 17 of The Liquid Fuels Tax Act of May 21, 1931, P. L. 149, 72 P. S. § 2611q.

Act No. 558 provides in part as follows:

Any person who shall use or buy liquid fuels on which the tax imposed by this act shall have been paid and shall consume the same in the operation of any non-licensed farm tractor or licensed farm tractor when used off the highways for agricultural purposes or *non-licensed powered farm machinery for purposes relating to the actual production of farm products shall be reimbursed one-half the amount of such tax.* (Italics supplied)

Being in the nature of an exemption, these reimbursement provisions must be construed strictly against the person seeking the benefits thereof: Section 58(5) of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 558.

In order to answer your inquiries, it will be necessary to construe the meaning of the terms "tractor" and "powered farm machinery", since those terms are not defined in the act. The act further qualifies those terms with the words "licensed" or "non-licensed", apparently referring to the registration requirements of self-propelled vehicles contained in The Vehicle Code and The Tractor Code.

"Motor vehicles" are defined in The Vehicle Code as "Every vehicle * * * which is self-propelled, except tractors * * * agricultural machinery * * *": Section 2 of the Act of May 1, 1929, P. L. 905, as amended, 75 P. S. § 2. "Tractor" is defined in the same section as "Every vehicle of the tractor type, as defined in The Tractor Code". The Vehicle Code contains no definition of agricultural machinery.

Section 401 of The Vehicle Code, 75 P. S. § 91, provides that motor vehicles determined by the Department of Revenue, "to be used exclusively * * * upon the farm or farms" owned or operated by the owner of the vehicle are exempt from registration.

Turning to The Tractor Code (Act of May 1, 1929, P. L. 1005) we find in Section 102, as amended by the Act of May 18, 1949, P. L. 1456, 75 P. S. § 862, that a "tractor" is

Every vehicle of the tractor type which is self-propelled, originally constructed under a distinctive name, make, model or type, by a generally recognized manufacturer, excepting road rollers, ditch diggers, or vehicles used exclusively upon stationary rails or tracks. *In the case of motor vehicles, as defined in the Vehicle Code, which cannot be used as motor vehicles the secretary may determine in each case whether or not such motor vehicle is of the tractor type*, and in making such determination the secretary shall consider the purpose for which such motor vehicle shall be used. (Emphasis supplied)

"Farm Tractor" is defined by the said 1949 amendment to the Tractor Code as

Every vehicle of the tractor type which is self-propelled, designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry.

Section 201 of The Tractor Code, 75 P. S. § 891, exempts from the registration requirement those tractors which are

* * * used exclusively by any person upon the farm or farms he owns or operates, or upon highways, connecting by a direct route, any farms or portions of farms under the ownership or operation of such person, to any other farm or to any garage for the purpose of having the same repaired, * * *

These provisions of The Vehicle Code and The Tractor Code exempt both motor vehicles and tractors respectively from registration if used exclusively in farming. The registration requirements for motor vehicles and tractors are mutually exclusive.

As noted supra, Act No. 558 refers to tractors and powered farm machinery, but contains no express reference to motor vehicles. Since a motor vehicle is not embraced within the term "tractor", it cannot be included within the scope of Act No. 558 unless it is construed to be "powered farm machinery".

According to Section 33 of the Statutory Construction Act, supra, 46 P. S. § 533, "Words and phrases shall be construed * * * according to their common and approved usage * * *". Judicial opinions have expressed this same rule in various ways, e.g., "statutes are presumed to employ words in their popular sense"; such words must be given their "common or popular meaning, or be interpreted "as the ordinary man would understand them".

Thus, the terms "powered farm machinery" must be construed in their common and ordinary meanings. "Powered" means equipped with, or capable of operating with, power, presumably power furnished by gasoline motor. "Powered" is broader than "self-propelled", and would not necessarily require that the gasoline motor be an integral part of the machinery so long as it furnishes the power therefor. The machinery could obtain its power from a stationary or a portable gasoline engine as well as from a self-contained motor.

In *Voorhees v. Patterson*, 20 Kan. 555, 556 (1878), it was held that a McCormick reaper was a "farm utensil"; and a hay-baler and a silo-filler were held to be "farm machinery" in *Lewis v. Insurance Company of North America*, 234 N. W. 499, 500 (Wis. 1931). In *West v. Springfield F. & M. Ins. Co.*, 178 P. 423 (Kan. 1919), it was held that a corn shredding machine operated by a gasoline engine was within the term "gasoline and steam power machinery". The term "farm machinery" is further restricted in the act to such as is used "in the actual production of farm products". In common parlance, this would clearly include reapers, harvesters, hay-balers, corn shredders, silo-fillers, and other machinery of a similar nature.

You first inquire as to whether a non-licensed automobile, truck or jeep used exclusively on a farm for the transportation of fertilizer, crops, etc., may be considered as powered farm machinery. The mere fact that such equipment, if used on a public highway, would be required to be registered under The Vehicle Code does not prevent it from being construed as powered farm machinery. In our opinion, such a non-licensed motor vehicle can be construed as powered machinery.

Accordingly, you are advised that a non-licensed automobile, truck or jeep used exclusively on a farm for the transportation of fertilizer and crops, etc., is within the reimbursement provisions of Act No. 558.

You next inquire as to whether gasoline consumed by a sprayer mounted on a licensed truck which furnishes power to the sprayer is reimbursable under this section. You state that the owner of such a truck is engaged in the business of spraying trees for various farms.

Under the provisions of The Tractor Code, the Secretary of Revenue must determine whether a motor vehicle "which cannot be used as a motor vehicle" is "of the tractor type". If the secretary concludes that this is a tractor, then it would be within the reimbursement provisions of Act No. 558. On the other hand, if the truck is deemed to be a licensed motor vehicle and not a tractor, the gasoline used therein would not be reimbursable even when used for agricultural purposes.

The act does not require that the person using the gasoline for agricultural purposes be the owner or operator of the farm on which it is used. For that reason, the reimbursement provisions apparently apply to an independent contractor as well as to the farmer.

You further inquire as to whether the tax paid on gasoline consumed in furnishing power for a saw mill and other equipment used in cutting down trees and preparing lumber for market is reimbursable under this amendment. This raises the question of whether lumber is a "farm product".

In *Commonwealth v. Carmalt*, 2 Binn. (Pa.) 235, 238 (1810), in considering the meaning of the word "farm", the Court said:

* * * By a farm we mean an indefinite quantity of land, some of which is cultivated. Most farms contain parcels of land applied to different purposes. Some are used for the cultivation of grass, some of grain, *and some remain in wood. It is very common for the proprietors of farms to have a piece of wood land, not contiguous to the place of their residence, but appurtenant to it.* * * *

(Emphasis supplied)

In *Marple Township v. Lynam*, 151 Pa. Superior Ct. 288, 292 (1943), it was held that a nursery where ornamental and other trees and shrubs were grown was a "farm" within the permitted use of a township zoning ordinance. The Court said:

The lower court found that "the popular connotation of a 'farm' is a place of several acres where the owner or tenant resides, a substantial portion of which is devoted to the raising of crops, such as wheat, oats, hay, etc., and some vegetables, such as corn and beans, and generally accompanied by the breeding of certain animals such as pigs, cows, chickens, etc., the principal use of the produce being to maintain the farmer and his family and only the excess being sold." Obviously defendants' contemplated use does not come within that definition and the injunction was granted on that ground.

We cannot agree that the township, in the ordinance in question used the word "farm" in that sense. *But even a farm of that class has its woodlot and if, for example, locust trees are propagated and grown for sale as fence posts or evergreens as Christmas trees, it is still a farm.*

(Emphasis supplied)

Contra, *Collins v. Mills*, 30 S. E. (2d) 866, 870 (Ga. 1944).

The foregoing authorities in Pennsylvania indicate that the trees cultivated on a farm and sold are farm products.

In *Ammon v. Bowles*, 154 Fed. (2d) 698 (C. C. A. 8th 1946), the Court decided that portable gasoline engines, the principal ultimate use of which was a source of power to operate various mechanical devices on farms, were "farm equipment" within a maximum federal price regulation relating to "mechanical equipment * * * used primarily in connection with the production and farm processing for market and farm use of agricultural products * * *". Thus, a saw used to prepare such trees for sale or use is functioning as farm machinery; and when it is powered by a gasoline engine, it is powered farm machinery engaged in the actual production of farm products within the meaning of Act No. 558.

You next inquire as to whether the tax paid on gasoline consumed in a lighting system for the purpose of lighting barns and other farm buildings as well as the farmer's home may be reimbursed under this section.

The fact that the gasoline motor furnishes mechanical power to a generator, which in turn furnishes electric power for certain farm machinery, would not prevent the application of the reimbursement provisions.

The use of the electricity produced by the lighting system would determine whether the gasoline was used in "powered farm machinery" for "the actual production of farm products". For example, electric power used in operating a milking machine would meet the reimbursement requirements, whereas power furnished to light the home would not meet such requirements.

Accordingly, reimbursements should be permitted for tax paid on gasoline consumed in a lighting system only for the proportion of gasoline corresponding to the ratio between the amount of electric current used in powered farm machinery for the actual production of farm products and the total amount used for all purposes.

You also ask whether a person is entitled to reimbursement of tax paid on liquid fuels consumed by a licensed combine or corn harvester which is self-propelled. You state that some farmers in Pennsylvania own licensed combines and corn harvesters which are self-propelled while others own non-licensed combines and corn harvesters which are drawn by tractors.

A self-propelled combine or corn harvester could be "licensed" only under the provisions of The Tractor Code, *supra*. It would necessarily be a "tractor" within the definition of that code, and the reimburse-

ment provisions of Act No. 558 relative to "licensed tractors" would apply to such licensed combines or corn harvesters, which are self-propelled.

As to a combine and corn harvester drawn by a tractor, the reimbursement provisions of Act No. 558 would apply to the tractor, whether licensed or non-licensed.

Finally, you inquire as to the correct interpretation of the requirement in Act No. 558 that "every claim [for reimbursement] shall be accompanied by receipts indicating that the liquid fuels tax was paid on the liquid fuels for which reimbursements are claimed". A question arises where the farmer purchases the gasoline, together with other equipment and supplies, from a cooperative association or another firm on credit, paying for all purchases periodically or on an installment basis. Thus he would not be able to submit with his claim for reimbursement an individual receipt for the gasoline purchased showing the tax paid by him thereon.

In our opinion, it would be sufficient compliance with the act for the farmer to furnish you with the current delivery slips for his liquid fuels, showing the amount of Pennsylvania tax payable thereon, because the tax in every instance would have been paid to the Commonwealth by the licensed distributor prior to the time of its purchase by the farmer.

Our conclusions in this opinion may be summarized as follows and you are advised in accordance therewith:

1. A non-licensed motor vehicle used exclusively on a farm in the production of farm products is "powered farm machinery" within the reimbursement provisions of Act No. 558.
2. If the Secretary of Revenue determines that a motor vehicle which cannot be used as a motor vehicle is a tractor, the tax paid on gasoline consumed by it in furnishing power to a sprayer mounted thereon, would be reimbursable.
3. The person seeking reimbursement of liquid fuels tax is not required to be the owner or operator of the farm on which the liquid fuels was used, so long as it was used for requisite agricultural purposes.
4. Tax paid on gasoline consumed in furnishing power for a saw mill is reimbursable when done in connection with the operation of a farm.

5. Tax paid on gasoline consumed in a lighting system may be reimbursed only in proportion to the amount of electric current used in operating powered farm machinery.

6. The tax on all liquid fuels consumed in the operation of licensed or non-licensed combines and harvesters while engaged in the actual production of farm products is reimbursable.

7. The Board of Finance and Revenue has authority to accept current delivery slips of liquid fuels in support of claims for reimbursements, where the purchaser does not pay cash for his liquid fuels when purchased, and cannot furnish receipts indicating that the liquid fuels tax was paid by him.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

GEORGE W. KEITEL,

Deputy Attorney General.

OPINION No. 603

World War II Veterans—Compensation Act—Application blanks—Notarial fee for administering oath:

Notaries public or other officials authorized to administer oaths in Pennsylvania may not charge a fee for taking acknowledgments or administering oaths to veterans or their representatives on application forms for veterans' compensation.

Harrisburg, Pa., January 27, 1950.

Major General F. A. Weber, The Adjutant General, Harrisburg, Pennsylvania.

Sir: You have requested advice whether notaries public or other officials authorized to administer oaths in Pennsylvania may charge a fee for administering oaths on application forms for compensation under the World War II Veterans' Compensation Act.

You state that Forms 1 and Forms 2, which are being used by applicants in making claim for veterans' compensation, have contained at

the end thereof, an affidavit requiring the veteran or his representative to make oath before a notary public that the information contained in said application is true to the best of his knowledge, information, and belief. Such affidavit is not required under the Act of June 11, 1947, P. L. 565, but the use of said affidavit in appropriate form has been adopted by the Adjutant General as the official form to be used.

Section 5 of the Act of June 11, 1947, P. L. 565, 51 P. C. 455.1, known as the "World War II Veterans' Compensation Act", provides in part as follows:

Applications for compensation shall be made to the Adjutant General on such forms *and in such manner* as he shall prescribe. (Italics ours)

The only question you raise is whether notaries public or other officials authorized to administer oaths may charge a fee to veterans or their representatives for affidavits in making application for compensation under said act. Section 26 of the Act of May 18, 1949, P. L. 50, entitled, "The Notary Public Law" authorizes a fee of fifty cents to notaries for administering oaths. However, the Act of May 25, 1933, P. L. 1035, as amended by the Act of July 15, 1935, P. L. 1009, 51 P. S. 401, provides as follows:

Hereafter it shall be the duty of any magistrate, alderman, justice of the peace, or any other person authorized to take acknowledgments and administer oaths, to perform such service for any soldier, widow or orphan of a soldier, or soldier's parents, who may apply to them for the purpose of making affidavit to papers for the purpose of obtaining pensions *and all other papers connected with and referring to the military service of any ex-service person*, free of charge therefor. * * * (Italics ours)

In the case of *People of the State of New York v. Westchester National Bank of Peekskill, New York*, 132 N. E. 241, 231 N. Y. 465, 16 A. L. R., 1344, the New York Court of Appeals approved the payment of bonus to soldiers and said in its opinion at page 1347 of 15 A. L. R.:

The payment of a pension or a bonus for past service, showing the gratitude of the people, showing that the state is mindful of those who have made sacrifices for it, is an incitement to patriotism, and an encouragement to defend the country in future conflicts. * * *

* * * Nor may a distinction be made between such a bonus as our act provides and a pension. The one is a reward for past military services, payable at once; the other, such a reward, payable in instalments. * * *

The case of *Busser v. Snyder*, 282 Pa. 440, 128 Atl. 80, (1925), contains a discussion of the nature of compensation under veteran pension laws. The court, speaking through Mr. Justice Kephart at page 449 said:

* * * Pensions or gratuities for military service are in the nature of compensation for a special and highly honored service to the State, implying the idea of a moral obligation on the part of the government; * * *

Words must be construed in their popular sense and the word "compensation" and the word "bonus" may be considered synonymous with "pension" as used in the 1933 Act, *supra*. In any event, the words "all other papers connected with and referring to the military service of any ex-service person" contained in said act, clearly cover the situation and answer in the negative the question here posed.

Formal opinion No. 73 of the Attorney General, released November 10, 1932, 1931-1932 Op. Atty. Gen. 263, discusses a similar question with reference to the Act of June 11, 1879, P. L. 148. The conclusion of then Deputy Attorney General S. M. R. O'Hara is to the same effect in interpreting the Act of May 25, 1933, P. L. 1035, 51 P. S. 401, as amended.

It is our opinion, that notaries public or other officials authorized to administer oaths in Pennsylvania may not charge a fee for taking acknowledgments or administering oaths to veterans or their representatives on application forms for veterans' compensation under the World War II Veterans' Compensation Act.

Respectfully submitted,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

H. ALBERT LEHRMAN,
Deputy Attorney General.

OPINION No. 604

Insurance Commissioner—Powers and duties as statutory receiver under The Insurance Department Act of 1921—Keystone Mutual Casualty Company:

The present liquidation proceedings should be continued under the court decree of June 26, 1947. The plan submitted by the persons interested in the Keystone Mutual Casualty Company, should not be approved.

Harrisburg, Pa., January 31, 1950.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: By your letter to the Attorney General, dated October 18, 1949, you request an opinion regarding the powers and duties of your office as statutory receiver under The Insurance Department Act of 1921, the Act of May 17, 1921, P. L. 789, Section 501 et seq., 40 P. S. § 201 et seq., and its amendments.

You state that on June 26, 1947, the Court of Common Pleas of Dauphin County found Keystone Mutual Casualty Company to be insolvent and in a hazardous condition, and ordered, adjudged and decreed that said company be dissolved and directed the Insurance Commissioner of the Commonwealth of Pennsylvania to take possession of its property and liquidate its business and affairs. The liquidation is still in progress. A petition for rehabilitation was presented to the court.

A new proposal to terminate the liquidation proceedings, not by rehabilitation of the old company, but by transfer of the assets of the old company to a new company which will assume or reinsure obligations of the old company, has been submitted to you as Insurance Commissioner. This new proposal has been made by a group consisting of some old company policyholders and some non-policyholder investors, who plan to incorporate in this Commonwealth a stock casualty insurance company. It is planned to capitalize this new stock company at \$1,000,000 capital and \$500,000 surplus, which exceeds the statutory requirements for transacting all lines of casualty business. The said paid in capital and surplus of the new company will be furnished by the above group and not from funds now in the possession of the statutory liquidator. Thereafter, the new corporation will enter into written agreement with the statutory liquidator or other appropriate party, to transfer all assets of the old company in possession of the statutory liquidator to the new company which will assume or reinsure all obligations of the old company or of the statutory liquidator. Such assets will then be used by the new company to settle and pay claims on the same basis as a going insurance company settles and pays claims.

You have posed the following questions:

1. If the petition for rehabilitation is withdrawn, may the order and decree of dissolution and liquidation be modified or supplemented at this date so as to permit the liquidation court to approve the proposed agreement to assume or reinsure?

2. Has the Insurance Commissioner in his capacity as statutory liquidator the legal authority to agree to transfer or to transfer to a stock casualty insurance company, under the proposed plan of assumption or reinsurance, the assets once owned by a mutual casualty insurance company which has been dissolved, its charter vacated and its corporate existence ended?

3. Has the Insurance Commissioner in his capacity as a supervisory official the legal authority, under Section 319 of The Insurance Company Law of 1921 or elsewhere, to approve reinsurance or assumption of the entire liabilities of such dissolved mutual casualty insurance company by a stock casualty insurance company?

4. Are assets, now in the possession of the statutory liquidator, to be considered in the nature of trust funds for the purpose of paying claims against the dissolved company?

(a) If so, is it proper for the new company to settle and pay claims from the said assets on a going company or non-uniform basis?

(b) If so, may the principal or income from such funds to pay such operating expenses of the new company as are necessary to settle and pay claims of the old company?

5. If notwithstanding the insolvency of the old company, the efforts of the new company, coupled with the risk of its invested capital and surplus of \$1,500,000, should enable it to discharge all liabilities of the insolvent old company, plus reasonable claim settlement expenses, for an amount less than the total value of the assets of the insolvent company received from the statutory liquidator, does the excess of such assets thus developed by the new company belong to the new company or to the members or policyholders of the old mutual company?

6. Has the new company any obligation to pay claims, not otherwise barred by any applicable statute of limitations, which were filed with the statutory liquidator subsequent to June 25, 1948, the final date fixed by the court for filing claims?

If the court, even initially, could not render a decree authorizing the Insurance Commissioner to approve such a transfer of assets, that is to say, if questions 2 and 3 are answered in the negative, then questions 1, 4, 5 and 6 will be rendered moot inasmuch as they are based on the assumption that either question 2 or 3 will be answered in the affirmative.

Turning our attention, then, to the question of whether or not the court could authorize the Insurance Commissioner to transfer the assets of the old company to the new company—Section 502 of The Insurance Department Act, *supra*, 40 P. S. § 202, provides that when an insurance company, *inter alia*, becomes insolvent—

* * * the Insurance Commissioner shall communicate the facts to the Attorney General, who shall, after hearing, apply to the court of common pleas of Dauphin County, or to the court of any county in which the principal office of such company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order is located, for an order directing such company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

This section relates primarily to circumstances giving rise to the Commissioner's application for a receivership; it does not purport to set forth the powers and duties of the Insurance Commissioner as statutory receiver.

The only sections contained in the act specifically dealing with the powers of the receiver are sections 505 and 506, and aside from the functions herein set forth, *viz.*, (1) conducting the business, and (2) liquidating the business, no others are mentioned in the act.

Section 505, 40 P. S. § 205, relating to the Commissioner's conducting the business reads, in part, as follows:

* * * On the return of such order to show cause, and after a full hearing before the court or before an examiner appointed by the court, the court shall either deny the application or direct the Insurance Commissioner forthwith to take possession of the property and conduct the business of such company, association, exchange, society, or order, and *retain such possession and conduct such business until*, on the application either of the commissioner, through the Attorney General, or of such company, association, exchange, society, or

order, *it shall, after a like hearing, appear to the court that the ground for such order directing the Insurance Commissioner to take possession has been removed, and that the company, association, exchange, society, or order can properly resume possession of its property and the conduct of its business.* (Italics ours)

It is obvious that this section contemplates the Commissioner's retaining the assets until such time as they are *returned* to the company. The proposal at hand is necessarily inconsistent with the provision for returning the assets to the Keystone Mutual Casualty Company. While such rehabilitation plans have been allowed in some jurisdictions, the statutes thereof have specifically provided therefor. But since section 505 of our statute makes no such provision, the authority to make such a transfer must come, if at all, by virtue of the provisions for liquidation contained in section 506.

Section 506, 40 P. S. § 206 reads, in part, as follows:

If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such company, association, exchange, society, or order, such liquidation shall be made by and under the direction of the Insurance Commissioner, who shall be vested by operation of law with title to all of the property, contracts, and rights of action of such company, association, exchange, society, or order as of the date of the order so directing him to liquidate. * * *

The term "liquidation" includes making distribution to creditors and policyholders. This is clearly evidenced by the fact that Section 510, 40 P. S. § 210, requires the liquidation report filed by the Commissioner to include—

* * * (e) the scheme of distribution to creditors, policyholders, or stockholders. * * *

Moreover, in construing the prior law, the Act of June 1, 1911, P. L. 599, the provisions of which were strikingly similar to the existing law, the court in *Donaldson, Insurance Commissioner, v. Fortna*, Appellant, 76 Pa. Superior Ct. 403, 406 (1921) stated:

* * * We apprehend that the words "liquidate" and "liquidation," used in the statute, need no interpretation or judicial construction. In the use of those words the legislature simply directed its officer to gather together the assets of the defunct company, convert them into cash and apply their proceeds to the payment of the expenses of liquidation and the discharge, in whole or in part, of the debts due to the creditors. * * *

The proposed plan would have the distribution administered by the new company rather than by the Commissioner. And while the Commissioner by virtue of section 509, 40 P. S. § 209, is authorized to delegate the administration of liquidation to special deputies, there is certainly no statutory authorization permitting him to delegate this duty to a private corporation such as the proposal contemplates.

The court should not enter a decree except in strict conformity with the provisions of the act. In construing the previous law, the Act of June 1, 1911, *supra*, Assistant Deputy Attorney General Hargest in 1913-1914 Op. Atty. Gen. 374, held that the statutory remedy was exclusive and was to be strictly complied with. The opinion reads at pages 374 and 375 as follows:

It also provides that after a full hearing "the court shall order the liquidation of the business of such corporation, or liquidation shall be made by and under the direction of the Insurance Commissioner."

It provides:

The order of liquidation shall, unless otherwise directed by the Court, provide that the dissolution of the corporation shall take effect upon the entry of such order in the office of the clerk of the county in which such corporation had its principal office for the transaction of business.

I am, therefore, of opinion that the Act of 1911, being a comprehensive system for the winding up of insolvent insurance companies, was intended to provide the only method therefor, and that after the passage of this act there was no jurisdiction in any court to appoint a receiver, or order the dissolution of an insurance company, except under the provisions of said Act, and that, therefore, the Cambria County Court had no jurisdiction to appoint a receiver in September 11, 1911, for the Flood City Mutual Fire Insurance Company.

This language was quoted with approval in the case of *Havilak v. Am. Union Fire Ins. Co.*, 17 Luz. 497, 498 (1914).

Likewise, in *Commonwealth ex rel. v. Penn General Casualty Company*, Appellant, 316 Pa. 1, 11 (1934), the court said:

* * * The jurisdiction of the state court thus invoked is a *special jurisdiction conferred by statute* as a part of the state's policy of insurance regulation and control. * * * (Italics ours)

While this case was reversed in *Penn General Casualty Co. v. Pennsylvania ex rel. Schnader*, Attorney General, 294 U. S. 189 (1934) on the question of conflicting State and Federal jurisdiction, the statement above quoted was not affected by the reversal.

Neither can the proposed plan be approved by the Commissioner as a reinsurance compact under Section 319 of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, 40 P. S. § 442.

In *Taggart v. Keim et al.*, 103 F. 2d 194, C. C. A. 3d (1939), the Insurance Commissioner of Pennsylvania approved a reinsurance treaty (*not* a liquidation plan—see p. 196), whereby the initial insurer pledged its assets to the reinsurer as the reinsurance premium. From the following statement made by the court at pages 197 and 198, it is clear that the present proposal does not constitute a reinsurance agreement:

* * * The agreement by its terms was a contract of reinsurance. It provided that "the Reinsurer hereby reinsures all of the outstanding liabilities of the" Independence. It was a promise to *indemnify the Independence* and was made directly to that company and not to its policyholders, who could claim under it only as donee beneficiaries. *Since there was no privity between the persons originally insured* by the Independence and the International as reinsurer it was a true agreement of reinsurance, and not a contract of guaranty. Goodrich and Hick's Appeal, 109 Pa. 523, 2 A. 209. (Italics ours)

The present proposal necessarily contemplates a privity between the new company and the original policyholders because the old company would have been liquidated, thereby removing that insulation between the reinsurer and the policyholders.

Therefore, we find no authority for the court to enter a decree permitting a transfer of the assets from the old company to a new company under The Insurance Department Act of 1921, *supra*. Moreover, the proposed plan does not constitute a reinsurance agreement under The Insurance Company Law of 1921, *supra*.

We are, therefore, of the opinion that the present liquidation proceedings should be continued under the court decree of June 26, 1947, and that you should refuse your approval of the plan submitted by the persons interested in the Keystone Mutual Casualty Company.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

ROBERT M. MOUNTENAY,
Assistant Deputy Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 605

Colleges and Universities—Corporate or fictitious names—Business college—Business university—Acts of May 7, 1937, P. L. 585; May 5, 1933, P. L. 289.

An institution comes within the prohibition of the acts restricting the use of the word "college" or "university" in its name when the word "college" or "university" is modified through the use of the word "business" or other modifying term, and applies to itself the descriptive title "business college" or "business university". Where the word "college" or "university" is used in incorporation change of name or registration under the Fictitious Act, the application must be accompanied by a certificate from the Department of Public Instruction that the applicant is entitled to use such designation.

Harrisburg, Pa., February 6, 1950.

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

Sir: You inquire as to the jurisdiction and responsibility of the State Council of Education in connection with the administration of the following acts, the Act of May 7, 1937, P.L. 585, as amended, the Act of May 5, 1933, P. L. 289, as amended, and the Act of May 5, 1933, P. L. 364, as amended, which acts restrict the use of the words "college" or "university" in corporate or fictitious names.

Your inquiry is limited particularly to the registration of the schools having in their name the words "business college" or "business university."

The acts restricting the use of the words "college" and "university" are prospective and do not govern or limit the use of these words when used in the name prior to the passage of the acts.

Sections 2 and 3 of the Act of May 7, 1937, P. L. 585, as last amended by Act No. 208, approved May 2, 1949, P. L. 808, 24 P. S. § 2422-2423, provide as follows:

Section 2. It is unlawful for any person, copartnership, association or corporation to apply to itself, either as a part of its name or in any other manner, the designation of "college" or "university" in such a way as to give the impression that it is an educational institution conforming to the standards and qualifications prescribed by the State Council of Education, unless it in fact meets such standards and qualifications: Provided, That any corporation heretofore formed, the corporate name of which, or any persons, partnership or association now conducting any educational institution, the trade or fictitious name of which, includes such designation, may continue to use such corporate, trade or fictitious name.

Section 3. The Secretary of the Commonwealth, the courts of common pleas and prothonotaries shall not approve any corporate name or register any assumed or fictitious name including the words "college" or "university" used in such a way as to give the impression that it is an educational institution conforming to the standards and qualifications prescribed by the State Council of Education, unless the application for incorporation or change of name or the application for registration is accompanied by a certificate from the Department of Public Instruction that the corporation or proposed corporation or the person or persons applying for registration is entitled to use such designation.

The word "college" was used in the Act of 1937 and its amendment the Act of March 12, 1945, P. L. 43, and it was not until the 1949 Act that the word "university" was added.

Section 202 of the Nonprofit Corporation Law, the Act of May 5, 1933, P. L. 289, as amended, 15 P. S. § 2851-202, provides:

* * * nor shall the corporate name contain the word "college" or "university" when used in such a way as to give the impression that it is an educational institution conforming to the standards and qualifications prescribed by the State Council of Education, unless there be submitted a certificate from the State Council of Education certifying that the corporation or proposed corporation is entitled to use such designation: * * *

Section 202 of the Business Corporation Law, the Act of May 5, 1933, P. L. 364, as amended, 15 P. S. § 2852-202, provides:

* * * nor shall the corporate name contain the word "college" or "university" when used in such a way as to give the impression that it is an educational institution conforming to the standards and qualifications prescribed by the State Council of Education, unless there be submitted a certificate from the State Council of Education certifying that the corporation or proposed corporation is entitled to use such designation.

Section 202 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. § 62, 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 Public Instruction,
State Council of Education, * * *

You state there appears to be some doubt as to whether the registration of an institution comes under the prohibition if the words "college" or "university" are modified through the use of the word "business" or other modifying term, and applies to itself, for example, the descriptive title "business college" or "business university."

We do not perceive that the legislature intended to use the word "business" or other modifying term to serve as a key to unlock the meaning of "college" or "university" with respect to registering the name under the Fictitious Names Act or Corporation Laws without certification from the Department of Public Instruction.

The acts herein referred to put the restriction on the word "college" or "university" without regard to the words that modify them.

We are of the opinion, that:

1. An institution comes within the prohibition of the acts restricting the use of the word "college" or "university" in its name when the word "college" or "university" is modified through the use of the word "business" or other modifying term, and applies to itself the descriptive title "business college" or "business university".

2. Where the word "college" or "university" is used in incorporation, change of name or registration under the Fictitious Names Act, the application must be accompanied by a certificate from the Department of Public Instruction that the applicant is entitled to use such designation.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

ELMER T. BOLLA,
Deputy Attorney General.

OPINION No. 606

Veterans—Eligibility for public assistance—Existence of other assets—Bonus payments under World War II Veterans' Compensation Act of June 11, 1947.

In view of the provisions of the World War II Veterans' Compensation Act of June 11, 1947, P. L. 565, designating payments made thereunder as a "bonus",

exempting such payments from attachment and from State taxation, and rendering them unassignable, such payments may not be treated as an asset or resource, the ownership of which by a veteran renders him ineligible to receive public assistance until exhausted.

Harrisburg, Pa., February 21, 1950.

Honorable Frank A. Robbins, Jr., Secretary of Public Assistance, Harrisburg, Pennsylvania.

Sir: You ask to be advised whether bonus payments under the World War II Veterans' Compensation Act, the Act of June 11, 1947, P. L. 565, 51 P. S. § 455.1 et seq., should be treated as an asset or resource and public assistance payments discontinued until the resource is exhausted.

Authorization of a debt of \$500,000,000 for payment of bonus to certain persons (veterans) for "service of such persons to their country" was provided for by a constitutional amendment passed by two legislatures (1947 and 1949) and approved by the electorate by an overwhelming majority.

Governor Duff, in his Budget Message to the 1947 General Assembly, requested consideration at the 1947 Session of a bonus for veterans of World War II in the following language:

An important subject to be considered in this Session is that of a *bonus* for veterans of World War II. I recommend that a resolution for a bond issue be passed at this Session in sufficient amount to pay a fair and liberal *bonus* to all veterans.
* * * (Italics ours)

Section 8 of the World War II Veterans' Compensation Act, supra, 51 P. S. § 455.8, provides for certain exemptions as follows:

Exemption from Attachment, Etc.—*No sum payable under this act to a veteran, or to any other person under this act, shall be subject to attachment, levy or seizure under any legal or equitable process and shall be exempt from all State taxation. No right to compensation under the provisions of this act shall be assignable, except as hereinafter provided or serve as a security for any loan. Any assignment or loan made in violation of the provisions of this section shall be held void: Provided, That assignments to any group or organization of veterans, incorporated or unincorporated, or to any nonprofit corporation, heretofore formed solely for aiding disabled or incapacitated veterans and assignments to the State Veterans' Commission shall be valid. The State Veterans' Commission is hereby authorized to accept such assignments, which shall be treated as confidential, and the funds realized from such assignments shall be expended by said commission solely for*

the aid of needy veterans and their families. *Except as in this section provided, the Adjutant General shall not direct the payment, nor shall payment be made, under this act to any person other than a veteran or the representatives of a veteran as in this act provided.* (Italics ours)

Section 6, paragraph (a) of the act covering payments to representatives of veterans who are mentally ill contains the following proviso:

* * * Provided, That no part of such compensation shall be paid to any county or State institution for the maintenance of the veteran. * * *

Section 9 of the act provides penalties for persons who charge or collect, or attempt to charge or collect, either directly or indirectly, any fee or other compensation for assisting in any manner a veteran in obtaining any of the benefits to which he or she is entitled under this act. Such charges or attempts, are designated as misdemeanors, and upon conviction the guilty persons are subject to fine and imprisonment.

From the above, it is clear that it was the intention of the legislature that the bonus payment was to be a bounty, donation or gift for service in defense of country, free of liability or seizure by process of any kind, legal or equitable, receivable by the veteran for his or her personal use and enjoyment.

It is completely different from money earned or inherited which constitutes an asset or resource under the Public Assistance Law but is untouchable except by the veteran himself or those dependents expressly named in the act.

To treat the bonus as an asset or resource and to discontinue assistance to a veteran would be in effect an equitable seizure forbidden by the Veterans' Compensation Act, *supra*. The result would be a circumvention of the clear legislative intent. The words "attachment, levy or seizure" are not to be construed so narrowly as to embrace only process in the hands of an officer for service: See *Mahar v. McIntyre*, 16 F. Supp. 961 (1936) (Mass.).

Moreover, we do not find any authority given to the Department of Public Assistance or any other department or agency to direct the manner in which the money received under the Veterans' Compensation Act should be expended. To the contrary, the language of the act shows a clear intention to aid and reward the veteran or his relatives within a limited class. Because the bonus is obviously a gratuity, do-

nation, or bounty for services rendered in defense of country, the Commonwealth should not award the gift with one hand and take it away with the other. Under the law this should not and in our opinion cannot be done. Such action would offend accepted ideas of what is right and just in human relations. In *Busser v. Snyder*, 282 Pa. 440 (1925), the Supreme Court of Pennsylvania at page 449, said:

* * * Pensions or gratuities * * * are in the nature of compensation for a special and highly honored service to the State, implying the idea of a *moral obligation* on the part of the government; * * * (Italics ours)

Such moral obligation should not be violated by the sovereign through indirection.

The courts of other states hold that a bonus payment is to be treated as different from compensation in the ordinary sense. In *People v. Westchester Nat'l Bank*, 231 N. Y. 465, 15 A. L. R. 1344, the court says:

The payment of a pension or a bonus for past services, showing the gratitude of the people, showing that the state is mindful of those who have made sacrifices for it, is an incitement to patriotism, and an encouragement to defend the country in future conflicts. * * *

In *State ex rel. Atwood v. Johnson*, 176 N. W. 224, the Supreme Court of Wisconsin in upholding the constitutionality of the State's Educational Bonus Law says at page 225 of its opinion:

Nor is the gift here made an extra compensation for services rendered, though it must be admitted that a pure gratuity is sometimes called extra compensation. But such compensation, strictly speaking, is given to reimburse the recipient financially for service rendered so that the total money consideration will equal the money value of such service. Its whole sanction lies in the fact that inadequate financial compensation was given in the first instance, and that in order to make it adequate additional compensation must be made. It is granted purely on a money basis without regard to its effect upon the donor, the recipient, or the general public. *A gift like this rests upon no such foundation. Its purpose is not to make the soldier financially whole, but to express gratitude and stimulate love of country in those that give, in those that receive, and in the public at large, to the end that an impressive object lesson in patriotism may be engraved in the hearts of all.* (Italics ours)

and at page 227:

If, as held in the cash bonus case, the giving of money to soldiers, *which they may spend as they choose, is a public*

purpose, much more so must be the giving to them of an education. * * * (Italics ours.)

See other cases in accord cited in the Annotation found at page 1644 of 7 American Law Reports.

In Schmuckli's Estate, 341 Pa. 36, 41-42, 17 A. 2d 876 (1941), Mr. Justice Drew, speaking for our Supreme Court, in construing language similar to that contained in the above cited section 8 of the World War II Veterans' Compensation Act, held that the Adjusted Service Bonds were not an asset of the estate of the veteran and hence were not subject to transfer inheritance tax. The following language used by Mr. Justice Drew is appropriate to our problem:

* * * Congress has endowed these bonds with special characteristics which show a clear intent, particularly since the veteran did not exercise his right to redeem the bonds during his lifetime, that the estate was used as a mere conduit through which the gratuity was to pass to the ultimate donees thereof. The bonds, therefore, were not such part of the veteran's estate as would make them subject to a transfer inheritance tax. What this Court said in Fisher's Estate, 302 Pa. 516, with reference to the commuted value of war risk insurance, is equally applicable to the unredeemed bonds in the instant case. There, it was said (pp. 522-523): "If we keep in mind the purpose and cause for the creation of war risk insurance we will better understand the subject. *The primary object was to aid the soldier and his relatives within a limited class; it was given . . . in recognition of services the soldiers were giving for their country. It might be called a bounty, donation, or a gift. . . . The fund arising from war risks insurance is an earmarked fund that has impressed on it the quality given to it by the United States Government [here the Pennsylvania Legislature]—the quality of a national donation, bounty, or gift for services in defense of the nation. The fund may be traced through the various agencies until it reaches its final destination in consummation of the original purpose for its creation. The badge of national obligation to a soldier protects it from liability for taxes, debts and the like; these attributes control the instant case. . . . Congress was not interested in setting up a fund for creditors and excisors.*" (Italics ours.)

If the World War I Adjusted Compensation Bonds, irrespective of whether they are expressly exempted by the statute from taxation cannot be considered as an asset on which taxes can be collected, certainly we cannot treat the bonus as an asset or resource to declare an applicant or recipient of public assistance ineligible until the asset or resource has been exhausted. This would be contrary to the Act of Assembly and serve to defeat the purpose of the bonus legislation.

Because the bonus given under the 1947 Act is a gratuity free of equitable seizure, the veteran or enumerated dependents receiving the bonus should not be subject to a discontinuance of public assistance; to rule otherwise would mean that these veterans would not in reality be receiving the bonus and this would make the veterans' bonus act, providing for the payment of the bonus, as to them, meaningless. This is contrary to Section 52 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 552, which reads in part as follows:

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

- (1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;
- (2) That the Legislature intends the entire statute to be effective and certain;

The foregoing requires the question submitted to be answered in the negative. However, we add further considerations that militate against a contrary conclusion.

To make bonus payments enjoyable only by veterans gainfully employed or possessed of independent means, and who thus have their own source of subsistence, and deny enjoyment thereof to those who are unemployed, or without financial means and therefore compelled to resort to public assistance, would inequitably favor those who have against those who have not, and subjects bonus payments to a condition neither expressed nor implied in the bonus act.

Article III, Section 18 of the Pennsylvania Constitution prohibits appropriations for charitable, educational or benevolent purposes, with certain exceptions, e. g., "gratuities for military services". This provision was construed in *Kurtz v. Pittsburgh*, 346 Pa. 362 (1943), wherein an act was declared unconstitutional insofar as it provided for the payment to certain dependents of a portion of the salaries of public employes in the armed forces. The court said (pp. 373, 381, 382):

Article 3, section 18, of the constitution permits appropriations for pensions or gratuities for military services, but when such appropriations are made, *they cannot arbitrarily be made to favored individuals*. If, for example, the legislature should grant pensions or gratuities for military services to those who in this war serve in the nation's armed forces in the Pacific-Asia area of combat operations and deny such pensions or gratuities to those who serve in the nation's armed

forces in the Atlantic-Europe-Africa area of combat operations, no court would hesitate to pronounce such a classification unreasonable and unconstitutional.

* * * * *

*The people of Pennsylvania never authorized the creation by the legislature of a class of persons to receive gratuities from the public treasury and consisting only of those soldiers, sailors and marines who before becoming such were public employees. To authorize "pensions or gratuities for military services" to all who render such services is one thing; to interpret such a provision as authorizing gratuities to that small percentage of persons now in war service but who were public employees is so obviously a different thing that it should require no argument to point it out. The legislature has no more warrant under the constitution of this Commonwealth to grant pensions and gratuities only to its former employees now in the national service than it would have to grant pensions and gratuities only to college graduates or former carpenters now in the national service. * * * (Italics ours)*

The court then concluded (p. 385) that the legislation challenged is class legislation, contrary to Article III, Section 7 of the Constitution of Pennsylvania, which prohibits any local or special law "Granting to any * * * individual any special or exclusive privilege or immunity".

It can be fairly contended that the gratuities (bonus payments) provided by the World War II Veterans' Compensation Act will be available only to a favored class of self-sustaining veterans, if public assistance payments to indigent veterans are halted upon receipt by the latter of the bonus, and that such difference in treatment would result in granting a special privilege based on economic status. Such was clearly not the intention of our legislature.

It would seem incompatible with the moral obligation of our State Government to discriminate against the needy veteran by requiring him to use his veteran's bonus for subsistence, when the self-sustaining veteran may use his bonus at his own will and discretion.

Turning to Article IX, Section 5 of the Pennsylvania Constitution, we find:

All laws, authorizing the borrowing of money by and on behalf of the State, shall specify the purpose for which the money is to be used, and the money so borrowed shall be used for the purpose specified and no other. (Italics ours)

The funds borrowed under the constitutional amendment and the Act of May 18, 1949, P. L. 1451 authorizing the issue and sale of bonds pursuant thereto are for the sole purpose of the payment of

bonus to veterans. However, if it is ruled that an indigent veteran becomes ineligible for public assistance upon receipt of his bonus, the effect will be to require such indigent veteran to use his bonus for subsistence, i. e., substitute this money for the money he would have received from public assistance. This is tantamount to using the veteran's bonus for public assistance purposes—a purpose for which the money was not borrowed.

The Commonwealth has created two obligations in favor of an indigent veteran: (1) to reward him for service to his country, and (2) to provide public assistance. Both of these obligations should not be discharged with the same money. If they were, the Commonwealth would be extending the bonus in one hand, and withdrawing the assistance being furnished by the other hand. This would force the indigent veteran to use his bonus for subsistence.

Thus, while the various acts providing for veterans' bonus, standing alone, are constitutional, the blending of those acts with the public assistance laws and the administrative interpretation of the functions thereof, may possibly effect an unconstitutional result, if the veterans' bonus is regarded as a resource by the Department of Public Assistance. Where there are two constructions which can be placed upon an Act of Assembly, one of which will make it constitutional and the other unconstitutional, the former will always be preferred: *Fidelity-Philadelphia Trust Co. v. Hines*, 337 Pa. 48 (1940).

It is our opinion that under the Act of June 11, 1947, P. L. 565, 51 P. S. § 455.1 et seq., the bonus payment should not be treated as an asset or resource, and assistance should not be discontinued because of the bonus payment.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 607

State Housing Projects—Restriction covenant in deed—Monaca, Beaver County:

A restrictive covenant in a deed, or a condition of alienation based upon discrimination as to race, creed or color is enforceable in our courts. The provision

in a basic deed for property to be used as a site for a State subsidized housing project, which forbids occupancy of any dwelling unit built on the land by members of any race other than Caucasians, is inoperative and may be ignored.

Harrisburg, Pa., March 8, 1950.

Honorable Theodore Roosevelt, III, Chairman, State Planning Board,
Department of Commerce, Harrisburg, Pennsylvania.

Sir: You have asked for an opinion concerning a restrictive covenant in a deed which appears as a cloud on the title to a proposed site for a State subsidized housing project. It appears that when the option for a proposed site was delivered to the Housing Authority of the County of Beaver for a tentative State subsidized housing project at Monaca, it developed a basic deed contained a provision denying occupancy of any dwelling unit built on the land by members of any race other than Caucasian. Your specific question then, pertains to the enforceability of this provision.

There are two cases in Pennsylvania bearing upon the subject: *J. Elmer Ellsworth, et al. v. Joseph W. Stewart, et al.*, 9 Erie Co. L. J. 305 (1928), in which it was held that a condition in a deed forbidding the sale of land to any person of Polish, Italian, Austrian, Russian, Hungarian, Slavish or Negro descent is an unreasonable restraint of alienation and is against public policy and void; and *Yoshida et al. v. Gelbert Improvement Co., et al.*, 58 D. & C. 321 (Del. Co. 1946), in which a similar conclusion was reached with regard to a limitation to the white race. This latter case is favorably discussed in 9 U. of Pitts. L. R. 51, and both cases are referred to at some length in 3 A. L. R. 2d 466, 490.

Up until only a few years ago, the Pennsylvania view, as above set forth appears to have been a minority one as indicated at the A. L. R. citation. However, a recent decision of the Supreme Court of the United States has taken this subject out of the controversial class. In *Shelley et ux. v. Kraemer et ux.*, 334 U. S. 1 (1948), 92 L. Ed. 1161, 68 S. Ct. 836, the court passed upon writs of certiorari to the Supreme Courts of Missouri and Michigan and reversed 355 Mo. 814, 198 S. W. 2d 679, and 316 Mich. 614, 25 N. W. 2d 638.

There, Mr. Chief Justice Vinson, in delivering the opinion of the court, stated at pages 20 and 21 as follows:

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted

that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Strauder v. West Virginia*, supra at 307. Only recently this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. *Oyama v. California*, 332 U. S. 633 (1948). Nor may the discrimination imposed by the state courts in these cases be justified as proper exertion of state police power. * * *

The cogency of this reasoning is not to be denied nor is the conclusion of the highest court in the land to be avoided.

We are of the opinion that a restrictive covenant in a deed, or a condition of alienation based upon discrimination as to race, creed or color is unenforceable in our courts, and that the provision in a basic deed for property to be used as a site for a State subsidized housing project, which forbids occupancy of any dwelling unit built on the land by members of any race other than Caucasian, is inoperative and may be ignored.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 608

Veterans Compensation Act—Payment on behalf of minors:

Bonus compensation payable on behalf of minors should be paid to such guardians or persons approved by the Orphan courts in the manner set out under Art. X, Act of May 26, 1949, P. L. 512.

Harrisburg, Pa., March 31, 1950.

Major General F. A. Weber, The Adjutant General, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: You request advice on the proper procedure to be followed in making payment on behalf of minors of monies due under the World War II Veterans' Compensation Act.

Specifically you are interested in knowing if, under Section 6 of the Act of June 11, 1947, P. L. 565, 51 P. S. 455.1, where a widow has remarried and has a child or children of a deceased veteran and applies for said money on behalf of the child or children, any court approval or guardianship proceedings are necessary to obtain the money for use of the child or children.

Section 6 of the Act provides in part, to whom payment shall be made in case of death, as follows:

(b) In the case of death to the following persons in the order named:—Surviving unremarried widow, if such widow was living with the veteran at the time of his death, * * * or surviving minor child, or surviving minor children, share and share alike, or * * *.

Section 7 of the Act reads in part as follows:

* * * Application for compensation made in behalf of minor children shall be made by the duly appointed guardian of such children, or by any person who stands in loco parentis to such minor children, and payments shall be made to such guardians or persons.

It is quite obvious that if the widow has remarried the law specifically, in section 6, excludes her as a recipient of any bonus compensation and the next class of statutory beneficiary, namely, surviving minor child or children, are entitled to said money.

It is an elementary principle of law that money cannot be legally paid to minors without the approval or discretion of a court.

In the case of *Brill v. Brill*, 282 Pa. 276, 127 A. 840, the court at page 843 states the following:

In order that a minor, without experience and unaccustomed to business transactions, may not be deceived and imposed upon, the law has thrown around him a disability, * * * The father, as the natural guardian of the person of his child, during infancy, has, by virtue of such relationship, no authority whatever to exercise any control over the es-

tate of the minor. * * * Natural guardianship confers no right to intermeddle with the property of the infant, but is a mere personal right in the father or other ancestor to the custody of the person of his heir apparent * * *.

In *Daniels, Appellant, v. Metropolitan Life Insurance Company*, 135 Pa. Superior Ct. 450, the court at page 457 said:

* * * The orphans' court is the proper tribunal to exercise jurisdiction of estates of minors, and of the settlement of the accounts of their guardians, * * * A guardian of the person or of the estate of a minor is an officer of the orphans' court; the minor is a ward of that court. "Those who deal with either guardian or minor must deal subject to the approval or disapproval of this one tribunal, else there will be an end of intelligent administration and a beginning of the evils * * *."

Section 7 of the Act is ambiguous when it provides "payments shall be made to such guardians or persons". The term "guardian" is defined in Section 101 of the Statutory Construction Act, being the act of May 28, 1937, P. L. 1019, 46 P. S. 503, as follows:

(47) Guardian. A Fiduciary who legally has the care and management of the person, or estate, or both of another under legal disability.

However, the term "person" must be interpreted in light of the language contained in the previous portion of the sentence wherein it states:

* * * Application for compensation * * * shall be made by the duly appointed guardian of such children, or by any person who stands in loco parentis * * *.

Does a remarried widow stand in loco parentis to her minor children? In *Black's Law Dictionary* on page 934 the following definition of "loco parentis" is given:

In the place of a parent; instead of a parent; * * *

The Pennsylvania Superior Court in *Robinson's Estate*, 35 Pa. Superior Ct. 192, at page 195 said:

The proper definition of a person in loco parentis to a child, is a person who means to put himself in the situation of a lawful father of the child with reference to the father's office and duty of making provision for the child: * * *.

A more recent Pennsylvania case on the subject is *Flinn v. Sonman Shaft Coal Company*, 153 Pa. Superior Ct. 76. At page 79 it is said:

The accepted definition of one "in loco parentis" is, "one who means to put himself in the situation of a lawful father to the child, with reference to the office and duty of making provision for the child": * * * "A person assuming the parental character, or discharging parental duties"; * * *.

Since a mother is a natural parent and upon the death of the father the duty devolves upon her to provide support and maintenance for her minor child or children, it is difficult to see how the mother can be interpreted to mean a person "in loco parentis". Hence, our conclusion is that the term "in loco parentis" does not include the natural mother within its meaning as used in this act.

The legislature in their wisdom, no doubt, wanted to prevent a situation where a remarried mother might be given an opportunity to squander money which should be used for the benefit of the child or children.

In *Daniels, Appellant v. Metropolitan Life Insurance Company*, supra, at pages 455 and 456 the court discusses the nature of guardianship of surviving parents with reference to the child as follows:

* * * Guardian by nature is the father, and on his death the mother; and the authority of a guardian of the person is derived out of that of the parent, such guardian being only a temporary parent, that is, so long a time as the ward is an infant, or under age, * * * Guardian of the person is invested with the care of the person of the minor; while guardian of the estate is entrusted with the control of the property of the minor. Of course, the same person may be appointed as guardian both of the person and of the estate of the minor. The guardian of the person of a minor in this state has no authority to demand, or power to receive, hold, or manage the minor's property, and payment itself to him does not discharge a debtor's liability to the minor. * * *

The Fiduciary Act of 1949, approved May 26, 1949, P. L. 512, is the existing law which deals with procedure in paying money to minors. Article X, section 1001, paragraph 3, sets out a procedure that may be used when the amount of money owing to the minor is under \$1,000.00. Section 1002 permits the court to direct the parent or "other person maintaining the minor" to execute, as natural guardian, an appropriate instrument to effectuate the transmittal of money on behalf of the minor.

In all instances where there is an existing duly appointed guardian of the estate of a minor, no new guardian need be appointed, and payment may be made to such guardian.

It is our opinion that bonus compensation payable on behalf of minors should be paid to such guardians or persons as are approved by the Orphans' Courts in the manner set out under Article X of the Act approved May 26, 1949, P. L. 512, the Fiduciary Act of 1949.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. ALBERT LEHRMAN,

Deputy Attorney General.

OPINION No. 609

Taxation—Admission or amusement tax—Function sponsored by State Teachers' College—Tax imposed by subdivision of Commonwealth—Federal tax.

1. A State teachers' college is under no legal duty or obligation to pay an admission or amusement tax imposed by a local political subdivision of the Commonwealth upon the promotor of an athletic contest or other activity, nor is it under any obligation to undertake the collection of such a tax imposed on persons attending an event sponsored by it.

2. A State teachers' college is under no legal duty or obligation to permit a representative of a local political subdivision to come upon its campus for the purpose of collecting any admissions or amusement tax imposed by such subdivision, although there is no objection to its acceding to a request for the collection of such taxes by an agent of the college or of the municipality, if, in the opinion of the college authorities, such a course would be to the best interests of the college.

3. A State teachers' college is required to collect the Federal admissions tax from the person who pays the admission to an event sponsored by it and to transmit Federal taxes thus collected to the United States.

Harrisburg, Pa., April 10, 1950.

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

Sir: We have your request for advice concerning the duties of a State Teachers' College with respect to the assessment and collection of amusement taxes levied by local municipalities and by the Federal Government.

You first ask whether a State Teachers' College is required to assess and collect an amusement tax established by a local municipal ordinance on tickets of admission to student activities, where such are held on a campus of a State Teachers' College within the boundaries of the taxing municipalities.

The Act of June 25, 1947, P. L. 1145, as amended by the Act of May 9, 1949, P. L. 898, 53 P. S. § 2015.1 et seq. empowers certain political subdivisions to levy, assess and collect taxes on all "persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions", provided that such taxable privileges, etc., are not subject to a State tax or license fee. The 1949 amendment limited the authority of the political subdivision to levy a tax on admissions to places of amusement, athletic events and the like to a maximum tax of 10%.

Eleven of the fourteen State Teachers' Colleges in Pennsylvania are located in boroughs; one in a third class city (Lock Haven); one in a town (Bloomsburg); and one, the Cheyney Training School for Teachers, in a second class township (Thornbury). All fourteen are located within the limits of a third or fourth class school district. The act of 1947, *supra*, empowers, *inter alia*, boroughs, townships, third class cities, and school districts of the third and fourth classes to levy such a tax, but does not apply to second class townships.

Under Section 2003 of the School Code of 1949, Act of May 10, 1949, P. L. 30, 24 P. S. § 20-2003, State Teachers' Colleges are a part of the public school system of the Commonwealth. In Formal Opinion No. 324, 1939-1940 Op. Atty. Gen. 211, 213, we ruled that a State Teachers' College "is a part of the Commonwealth's administrative department and that as such is a State instrumentality or a governmental agency."

As a part of the public school system a State Teachers' College may provide for athletic contests as part of its curriculum. In Formal Opinion No. 144, 1933-1934 Op. Atty. Gen. 251, we held that there was no legal objection to placing athletic contests and other student activities into the hands of student organizations, subject to conditions prescribed by the trustees. However, irrespective of the manner in which the admissions to athletic contests and other student activities are handled, such contests and activities are conducted by the State Teachers' College as one of its functions.

It is clear that a State Teachers' College as an agency of the Commonwealth is not a "person" within the meaning of the act of 1937,

supra, authorizing the imposition of admissions taxes by municipal subdivisions, because the Commonwealth is not specifically named therein.

The Act of 1947 does not define "person". The Statutory Construction Act of May 28, 1937, P. L. 1019, Section 101 (84), 46 P. S. § 601 (84), defines person as "including a corporation, partnership and association, as well as a natural person".

In Formal Opinion No. 340, 1939-1940 Op. Atty. Gen. 122, we said:

Furthermore, it is a well established principle of law that statutes enacted by the legislature are not applicable to the Commonwealth unless it is specifically named. See for example *Baker v. Kirschnek*, 317 Pa. 225 (1935), wherein the court decided that *the Commonwealth was not a "person" within the meaning of that word* as used in an act prohibiting the sale of liquor. In *Jones v. Tatham*, 20 Pa. 398, 411 (1833), the court said:

* * * The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the Commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily applied. * * *

Under this principle, it has been held that a municipality may not tax the property of the Commonwealth, irrespective of its use in a proprietary or governmental function: *Commonwealth v. Dauphin Co.*, 354 Pa. 556 (1946) aff'g. 57 Dauph. 215; *Commonwealth State Employees' Retirement System v. Dauphin Co.*, 335 Pa. 177 (1939), aff'g. 46 Dauph. 175. Since a State Teachers' College is not a "person" within the meaning of the act of 1947, supra, the local municipal subdivisions do not have any power or authority to levy an admissions tax on the college as the *promotor* of the athletic contest or other activity.

However, we understand that in most instances, local admissions taxes are imposed not upon the promotor of the event, but upon the persons seeking admission thereto. Since the immunity of the sovereign would not extend to such persons, an admissions tax levied against them might be valid, even though the event in question was conducted by a State Teachers' College. Since the validity of such a tax would be of primary concern to the taxpayer, and not to the Commonwealth, we shall assume for the purpose of this opinion, without so deciding, that a local admissions tax on persons attending an event sponsored by a State Teachers' College is valid.

This brings us to the second question, in which you ask whether a local taxing agency may send its representative to the campus of the

State Teachers' College, collect such local amusement tax, and remove the monies so collected forthwith without processing them through the students' activities fund account.

In Formal Opinion No. 313, 1939-1940 Op. Atty. Gen. 163, this department ruled that the City of Philadelphia could not impose upon the Commonwealth any duty to collect the Philadelphia wage tax levied upon the salaries of officers and employees of the Commonwealth, saying:

It is thus quite clear that a municipal corporation cannot impose upon the sovereign, the Commonwealth, any duties or obligations unless the Commonwealth consents thereto. The creature of the state cannot dictate to its creator. The City of Philadelphia cannot compel the Commonwealth, or any of its political subdivisions, administrative departments, boards or commissions, to submit any data to the city relating to names and salaries of their employees; or to deduct from such employees' pay and tax levied by Philadelphia.

In *Marson v. Philadelphia*, 342 Pa. 369 (1941), the court decided that the City of Philadelphia had the power to levy a wage tax upon salaries of certain officers and employees of the Commonwealth, but also held that the city could not impose any duty on the Commonwealth to collect the tax, saying:

It must be conceded that when any power issues a "command" to a superior power, that "command" has only the force of a request. The State of Pennsylvania can, *if it chooses*, ignore the command of this ordinance that it collect from its employees, residing in Philadelphia, this tax. The State can also refuse *if it chooses to do so*, the demand for a list of its employees residing in Philadelphia. * * * (Italics supplied)

Under these rulings, a State Teachers' College may, "if it chooses", ignore or refuse the demand of a local municipal subdivision to collect the local admissions tax, or to permit a representative of the municipality to collect such admissions tax on the college campus. On the other hand, we see no legal objection to acceding to the request of the municipal subdivision for the collection of admissions taxes by an agent of either the college or the municipality, if in the opinion of the college authorities such a course of procedure would be to the best interests of the college.

Finally, you raise the same questions as to the assessment and collection of the federal admissions tax.

The federal tax on admissions is imposed by Section 1700 of the Internal Revenue Code, as amended, 26 U. S. C. A. § 1700. Section

1715 of the Internal Revenue Code, 26 U. S. C. A. § 1715, provides that "every person receiving any payment for admission" subject to the federal tax "shall collect the amount thereof from the persons making such payments". As originally enacted, the act contained an exemption in favor of religious, educational or charitable entertainments, except athletic games or exhibitions, the profits of which inured wholly or partly to the benefit of any college or university: 26 U. S. C. A. § 1701. These exemptions were eliminated by Section 541 (b) of the 1941 Revenue Act. See Treasury Regulation 43, Sections 101.15 and 101.16, the latter of which reads as follows:

The fact that the authority charging admissions or receiving the proceeds thereof is the United States or an agency thereof, or a State or Territory or political subdivision thereof, such as a county, city, town, or other municipality, does not make such admissions exempt. * * *.

In *Allen v. Regents of University System of Georgia*, 304 U. S. 439 (1938), the court held that football games conducted by the University of Georgia and Georgia Tech were subject to federal admissions tax, and that the State authorities were required to collect and pay over such tax to the United States. A similar ruling was recently made with respect to admissions to a public bathing beach in *Wilmette Park District v. Campbell*, 338 U. S. 411, 419, 420 (1949), where the court said:

* * * the State "is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons." * * *

* * * "The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. * * *"

Therefore, we are of the opinion that the federal admissions tax applies to athletic contests or other activities conducted by a State Teachers' College, and that the college has the obligation under the federal laws to collect the amount of the tax from the person who pays the admissions charged, and to transmit the taxes thus collected to the proper official of the United States.

Accordingly, you are advised that:

1. A State Teachers' College is under no legal duty or obligation to undertake the collection of an admissions or amusement tax imposed by a local political subdivision of the Commonwealth.

2. A State Teachers' College is under no legal duty or obligation to permit a representative of a local political subdivision to use the campus for the purpose of collecting any admissions or amusement tax imposed by such subdivision.

3. A State Teachers' College is required to collect the federal admissions tax from the person who pays the admission, and to transmit the federal taxes thus collected to the United States.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

ELMER T. BOLLA,

Deputy Attorney General.

OPINION No. 610

Public officers—Coroners—Issuance of death certificates—Limitations on powers—Uniform Vital Statistics Act of May 21, 1943, sec. 10.

1. No coroner holding office within this Commonwealth has authority to issue a death certificate in any form other than to the Department of Health through its local registrar or other duly authorized agent in accordance with section 10 of the Uniform Vital Statistics Act of May 21, 1943, P. L. 414.

2. Issuance of Death Certificates, 35 D. & C. 706, approved.

Harrisburg, Pa., June 21, 1950.

Honorable Norris W. Vaux, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion as to whether a coroner has the authority to issue and collect a fee for a certificate of death.

You refer to a specific situation in which a coroner has been following the practice of issuing, in certificate form, record data concerning the deaths of certain persons occurring within his county. The form is entitled "Record of Death". It contains data as to the name, residence, marital status, occupation, age, sex, color, date of death, place of death, cause of death and place of interment of the decedent. At the end of the form the coroner writes his signature above his printed name,

affixes his seal and charges a fee therefor. This certificate, except for being slightly less detailed in content, is substantially the same as a death certificate issued by the State Department of Health through its Bureau of Vital Statistics.

You specifically inquire whether our Formal Opinion No. 295, dated August 17, 1939, addressed to a former Secretary of Health,¹ is presently applicable to this situation.

That opinion dealt with the precise question which you now raise. It made a searching inquiry to determine whether authority for the issuance of death certificates by a coroner existed under the common law of England or this Commonwealth, or whether such authority had been conferred by any existing legislative enactment of this State. It concluded by holding that:

* * * no coroner holding office within this Commonwealth has the authority to issue a death certificate other than to the Department of Health as provided for in section 8 of the Act of June 7, 1915, P. L. 900.

Before enunciating this holding, however, our opinion carefully considered the nature and purpose of the Act of June 7, 1915, P. L. 900, pertaining to the registration of vital statistics, and concluded that the statute was "intended to devise a uniform system for the registration and certification of births and deaths in this Commonwealth and to give the Department of Health, through the Bureau of Vital Statistics, the exclusive right to issue the certificates provided for therein." It pointed out:

(1) That under Section 21 of the statute, as amended, it was provided that

The Department of Health shall, upon request and the payment of the fee as hereinafter provided, furnish any applicant a certified copy of the record of any birth, death, or marriage registered under (the) provisions of this act * * *

(2) That under Section 8 of the act it was provided that

* * * if the circumstances of the case render it probable that the death was caused by unlawful or suspicious means, the (local) registrar shall then refer the case to the coroner for his investigation and certification * * *

The section further provides that where a coroner has the duty to hold an inquest and to make the certificate of death required for a burial permit, he shall "furnish such informa-

¹ 1939-1940 Op. Atty. Gen. 84; 35 D. & C. 706.

tion as may be required by the State Registrar to properly classify the death."

(3) That under Section 24 of the statute, municipal registration of vital statistics was discontinued and that the only system for such registration was the one established by the act.

After reviewing the foregoing statutory provisions, we made the following observation in our former opinion:

* * * It will be noted that the only power conferred upon any coroner is that of issuing a certificate to the registrar in cases of death by violence, etc., as set forth in section 8. Had the legislature intended that the power to issue such certificates was to be vested in any other person or agency, it would have so provided.²

Subsequent to the issuance of our former opinion there was passed the Pennsylvania enactment of the Uniform Vital Statistics Act, the Act of May 21, 1943, P. L. 414, and its amendments, 35 P. S. § 505.1 et seq. As we have previously stated, this statute, like the Act of June 7, 1915, P. L. 900, supra, is intended to establish an "all-inclusive system" for the registration, transcription and preservation of data relating to vital statistics,³ is a general revision of the laws relating thereto, and sets up a general and exclusive system covering this subject.⁴

Section 4 of the present uniform act⁵ provides that the State Department of Health "shall have charge of vital statistics and be the custodian of all vital statistics, files and records."

Section 10 of the uniform act⁶ corresponds to Section 8 of the Act of June 7, 1915, P. L. 900. It covers two classes of death cases: (a) where the death occurs without medical attendance, or where the physician last in attendance fails to sign the death certificate, then the local registrar is required to refer the case to the coroner, instead of to

² It is of interest, in this connection, to note that although a copy of a certificate of death issued and certified by the State Registrar was, by virtue of the Act of June 7, 1915, P. L. 900, made admissible in all courts of the Commonwealth as prima facie evidence of the facts therein stated, it was, nevertheless, held that a "coroner's death certificate" was not within the contemplation of the statute and was inadmissible for any purpose: *Barsby v. Merck & Company et al.*, 14 D. & C. 277 (1930).

³ 35 P. S. § 505.1.

⁴ Formal Opinion No. 485—1943-1944 Op. Atty. Gen. 181, 183, 184; 49 D. & C. 432, 434, 435, 436; Formal Opinion No. 579—1947-1948 Op. Atty. Gen. 110, 112, 113; 62 D. & C. 537, 541.

⁵ 35 P. S. § 505.4.

⁶ 35 P. S. § 505.10.

the local health officer, for immediate investigation and certification of the cause of death prior to issuing a burial permit; and (b) where the death occurs other than from natural causes, it provides:

* * * If the circumstances suggest that the death * * * was caused by other than natural causes, the local registrar shall refer the case to the coroner for investigation and certification.

This provision is almost identical in wording and is identical in meaning with the above-quoted provision from Section 8 of the Act of June 7, 1915, P. L. 900.

Section 14 of the uniform act,⁷ and section 15 thereof pertaining to fees,⁸ correspond to section 21 of the Act of June 7, 1915, P. L. 900, above quoted. Subject to certain provisions relating to delayed or altered certificates and the disclosure of certain record data, Section 14 provides, in pertinent part, as follows:

* * * the department (of Health) shall upon request, furnish to any applicant a certified copy of any certificate or any part thereof * * *

The similarity in nature, purpose and content of the above-mentioned provisions of the two statutes, makes it manifest that the legislature, by enacting the Uniform Vital Statistics Act, wrought no different result, with respect to whom coroners are authorized to issue death certificates, than that provided in the earlier enactment of June 7, 1915, P. L. 900, and its amendments, as interpreted in our former opinion.

Accordingly, it is our opinion, that no coroner holding office within this Commonwealth has the authority to issue a death certificate in any form other than to the Department of Health through its local registrar or other duly authorized agent in accordance with Section 10 of the Uniform Vital Statistics Act, the Act of May 21, 1943, P. L. 414, 35 P. S. § 505.10.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

FRANCIS J. GAFFORD,
Deputy Attorney General.

⁷ 35 P. S. § 505.14.

⁸ 35 P. S. § 505.15.

OPINION No. 611

Taxation—Foreign Casualty Insurance Companies—Municipalities:

State Employees Retirement Fund for State Police pension and retirement purposes. Acts of May 27, 1949, P. L. 1901; May 12, 1943, P. L. 259, construed.

Harrisburg, Pa., June 23, 1950.

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

Sir: Under date of June 20, 1950, you ask this department for an interpretation of the Act of May 27, 1949, P. L. 1901, which amends the Act of May 12, 1943, P. L. 259, 72 P. S. § 2263.1, and specifically you seek advice upon the following questions:

1. Of the amount of the tax upon premiums paid by Foreign Casualty Insurance Companies and received in the calendar year 1949, one percent of the tax was distributed to municipalities and to the State Employees' Retirement Fund for State Police pension and retirement purposes. The amount representing the other one percent of tax has not been distributed. Under the provisions of Act No. 567, 1949 Session, should or should not such amount be distributed?

2. Of the amount of tax collected in the calendar year 1950, an amount representing one cent of the tax has been certified to the Auditor General for distribution to the municipalities and to the State Employees' Retirement Fund. This was done on June 9, 1950. The remainder of the amount representing one cent of the tax has not been certified to the Auditor General for distribution. Under the provisions of Act No. 567, 1949 Session, should or should not this amount be certified for distribution?

We have ascertained from your office that there was collected by the Department of Revenue as tax on premiums on insurance written in Pennsylvania by foreign casualty companies in the year 1949, the sum of \$3,186,044.73 and to date in 1950, the sum of \$3,476,077.67; that one-half of the tax collected in 1949 has been distributed to Police Pension Funds under the Act of 1943, and that approximately one-half of the amount of the tax collected to date in 1950 is about to be distributed.

The amendatory provisions of the Act of May 27, 1949, P. L. 1901, read as follows:

Section 1. On and after the first day of January, one thousand nine hundred and forty-nine 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, the entire amount received from the two per centum tax paid upon premiums by foreign casualty insurance companies. The amounts to be distributed shall be allocated in accordance with the following formulae:

* * * * *

Section 2. The provisions of this amendment shall apply to all moneys received from aforesaid tax in the year one thousand nine hundred forty-nine and thereafter.

Section 3. The additional moneys required to be paid out of the State Treasury in compliance with this amendment on account of said tax moneys received during the year one thousand nine hundred forty-nine shall be paid as herein provided only if there are unexpended and unencumbered moneys in the General Fund at the end of the fiscal year of one thousand nine hundred forty-nine sufficient to make such payments. The Governor shall, with the advice of his fiscal officers, make the final determination as to the availability of such moneys.

Section 4. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Section 1, quoted above, expresses in unequivocal term the intention of the legislature that the entire amount received from the 2% tax paid on premiums by foreign casualty insurance companies, shall be distributed to the State Employees' Retirement Fund for State Police pension and retirement purposes and to municipal treasurers for police retirement funds under the formula set forth in the Act of 1943, as amended by the Act of April 6, 1945, P. L. 160. Section 2 of the 1949 amendment reaffirms that purpose.

Section 3, however, places a limitation upon the distribution of one-half of the entire amount received from the said 2% tax during the year 1949, but does not extend that limitation to any portion of the amounts received from it in the years subsequent to 1949.

In these circumstances, it is abundantly clear that the distribution of the entire fund realized from the 2% tax upon premiums paid by foreign casualty insurance companies, during the year 1950 and in subsequent years, shall be paid in the proportions provided, and to the beneficiaries designated by the act of 1943, as amended by the act of April 6, 1945.

In this connection, it is to be noted that the State Treasurer has prepared to distribute from funds of the foregoing character collected in the year 1950, about one-half or \$1,699,187.36 and retain a like amount which will, in all probability, be increased during the year.

This action on his part is undoubtedly justified by his fair and reasonable desire to disburse as soon as possible for the benefit of police pension funds, sums which otherwise would remain dormant in the State Treasury allocated to that purpose.

It is certainly not incumbent upon the State Treasurer to make any distribution of the funds collected during 1950 until that calendar year has expired. The amendatory act clearly states:—"On and after the first day of January, one thousand nine hundred and forty-nine and annually thereafter, there shall be paid by the State Treasurer, etc."

The State Treasurer may not be compelled to make any, or any more partial distribution of the 1950 collections this year. On the other hand, if he is so disposed, he may, at this time, or at any time during this calendar year, make one or more partial distributions, from the 1950 funds on deposit. Obviously, he cannot distribute all of the 2% tax collected in 1950 until after his books are closed for that year.

If there has been an intimation that the State Treasurer, either on his own initiative or upon other advice, has withheld foreign casualty premium tax moneys collected in 1950 from their ultimate destination, it is entirely erroneous. The fact is, the State Treasurer, although not legally obligated so to do, has undertaken to make partial distribution where with less labor and at less expense to the Commonwealth he could wait to make but one full distribution of the funds on hand at the termination of the year.

In so far as the amount received in 1949 from the 2% tax paid upon premiums by foreign casualty insurance companies is concerned, it is apparent that the legislature intended that only one-half, and not all of this should be distributed under the 1943 act, as amended, unless "unexpended and unencumbered moneys in the General Fund at the end of the fiscal year of one thousand nine hundred forty-nine [are] sufficient to make such payments". This brings us to the question of what is meant by the use of the words "end of the fiscal year of one thousand nine hundred forty-nine". For an answer we must look back to section 1 of the 1949 amendment, which provides that the tax collected in 1949 is to be distributed *annually*. If all rather than one-half of the 1949 tax is to be distributed, the fact of whether there is sufficient unexpended and unencumbered moneys in the General Fund is impossible of ascertainment during the calendar year 1949 while collections are still in process. Consequently, it must be concluded that

the legislature did not intend by the use of the words "at the end of the fiscal year of one thousand nine hundred forty-nine", to mean the fiscal year ending May 31, 1949, which incidentally was the end of a fiscal biennium.

Commonwealth commitments extend over the entire biennium for which the legislature makes general appropriations. Revenues are only estimated for the same period. To ascertain then, whether there are unexpended or unencumbered moneys in the General Fund before *actual receipts* can be balanced against *actual expenditures*, is impossible. The first day on which actual figures of receipts and disbursements are available, is the last day of any biennium. Since the legislature in the language it used, as demonstrated above, did not fix May 31, 1949 as the date for determining the sufficiency of unexpended and unencumbered funds as a criterion for the payment of the whole tax, and since May 31, 1950, the end of a fiscal year, but not the end of a biennium cannot, therefore, be used, we must conclude the legislature could only have intended the words "fiscal year" in the sense of "fiscal biennium". Thus, the question of whether the police pension funds are to receive all of the said tax moneys collected in 1949, or only one-half of them, must await until the fiscal condition of the Commonwealth is established at the end of the biennium, commencing June 1, 1949 and ending May 31, 1951.

It is our opinion that: 1. Only one-half of the amount received from the 2% tax paid on premiums by foreign casualty insurance companies, during the calendar year 1949, may be paid to the treasurers of the several municipalities and to the State Employees' Retirement Fund for the State Police pension and retirement purposes, in accordance with the Act of May 12, 1943, P. L. 259, as amended, until after May 31, 1951, when it can be ascertained whether there are unexpended or unencumbered moneys in the General Fund. If so, the balance of the said tax moneys remaining in the General Fund, may be paid. If not, they may not.

2. The State Treasurer is required to pay the entire amount received from the 2% tax paid upon premiums by foreign casualty insurance companies, during the calendar year 1950, to the State Employees' Retirement Fund for State Police pension and retirement purposes and to the treasurers of the several municipalities for police pension fund purposes, in accordance with the provisions of the Act of May 12, 1943, P. L. 259, as amended, after all of those taxes have been collected, that

is, immediately after January 1, 1951. He may, however, if he is so disposed and during the year 1950, make partial distributions.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

RALPH B. UMSTED,

Deputy Attorney General.

OPINION No. 612

Insurance—Group life insurance—Pennsylvania Bar Association members and their employes—Validity—Eligibility of participants.

1. Lawyers and judges regularly attending the normal duties of their profession at their established place of business are engaged in an industry within the meaning of section 415(b) (5) of the Insurance Company Law of May 17, 1921, P. L. 682, as added by the Act of July 5, 1947, P. L. 1305.

2. A lawyer or a judge, being a member of the Pennsylvania Bar Association, is eligible to join in the plan established by that association for group life insurance if, in the practice of his profession, he is personally or jointly with other lawyers or judges the employer of one or more secretaries, stenographers, clerks or assistants, all of whom having been thus employed by him for two years or more, have enrolled in the plan for insurance under the group insurance policy at the time he subscribes.

3. Lawyers employed by governmental agencies, corporations or businesses as counsel or in other capacities and law professors, who do not conduct private office practice, employing all or part of the services of one or more secretaries, stenographers, clerks or assistants, are not eligible for group life insurance under the Pennsylvania Bar Association plan.

4. Where lawyers in partnership or associated in practice jointly employ secretaries, stenographers, clerks, or assistants, all such aides with two years' service must be enrolled in the group life insurance plan before any of the lawyers become eligible to join; but all lawyers in the partnership or association of lawyers need not become insured under the group policy.

5. A part-time aide or a full-time aide to a lawyer or a judge in the practice of his profession may or may not occupy to his superior an employer-employee status; this will depend upon the particular circumstances in each case and be determined by the factors of the right to hire and dismiss, to direct what work shall be done, how it shall be done and the source from which compensation is paid for the services; where an employer-employee relationship exists all aides of each lawyer or partnership or association of lawyers, or of each judge or associ-

ation of judges, must, if employed in such work for two years or more, join in the group life insurance policy before the employer or employers, in any instance, may obtain the benefits of group insurance under section 415(b) (5) of the Insurance Company Law of 1921.

6. Tipstaves, court criers and court clerks do not stand in an employer-employee relationship to judges and are ineligible for group life insurance under the Pennsylvania Bar Association plan.

7. The restriction in the Pennsylvania Bar Association plan of group insurance to members and their employees is a valid limitation, which must not be construed to expand the group of insureds beyond those persons who occupy with practicing lawyers and judges, who are members of the association, an employer-employee status: The existence of the association plan, however, does not inhibit practicing lawyers and judges, who are not members of the association, from forming another group or other groups for employer-employee life insurance.

Harrisburg, Pa., June 27, 1950.

Honorable Artemas C. Leslie, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked this department for an opinion concerning the authority of a life insurance company, doing business in Pennsylvania, to write policies providing for death and permanent total disability benefits and for accidental death and dismemberment insuring a group comprising certain members of the Pennsylvania Bar Association and their employees. You set forth the general outlines of the plan which specifies the eligibility requirements for participation, as follows:

All members of Pennsylvania Bar Association in good standing and regularly attending to the normal duties of their profession at their established place of business and all employees of such members with two or more years of full time active service, are eligible to join the plan. When a member of the Association subscribes to the plan, it is necessary that he enroll those of his employees who have been with him two or more years. Those employees who have been employed for a shorter period of time may be included in the plan at the option of the employer.

You also indicate that three trustees appointed by the Bar Association applied on August 9, 1949, for policies of insurance under the proposed plan and that policies accordingly written were delivered prior to, and effective August 31, 1949. You, therefore, assume the policies were not written under the provisions of the Group Life Insurance Act, the Act of May 11, 1949, P. L. 1210, 40 P. S. § 532.1 et seq., but under Section 415 (b) (5) of the Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, as amended by the Act of July 5, 1947, P. L. 1305, 40 P. S. § 531 (b) (5).

Your primary assumption, based upon the effective date of the Pennsylvania Bar Association plan of August 31, 1949, and the delivery of the insurance policies before then, that legality is governed by Section 415 (b) (5) of the Insurance Company Law of May 17, 1921, P. L. 682, as amended by the Act of July 5, 1947, P. L. 1305, 40 P. S. Section 531 (b) (5) is correct. The Act of May 11, 1949, P. L. 1210, 40 P. S. §§ 532.1 et seq., which repeals Section 415 of the Insurance Company Law of 1921, as amended, did not specify any effective date and, therefore, did not become effective until September first of that year: Section 4 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 504.

Section 415 (b) of the act of 1921, as amended by the act of 1947, reads as follows:

(5) Life insurance, covering the employes of two or more employers in the same industry for the benefit of persons other than the employers, written under a policy issued to the trustees of a fund, established by such employers, which trustees shall be appointed by the employers and shall be deemed the employer for the purposes of this act. Such insurance shall be subject to the following requirements,—(i) The persons eligible for insurance shall be all of the employes of the contributing employers, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term “employes” shall include the individual proprietor or partners, if any employer is an individual proprietor or a partnership. The policy may provide that the term “employes” shall include the trustees, or their employees, or both, if their duties are principally connected with such trusteeship. The policy may provide that the term “employes” shall include retired employes; (ii) The premium for the policy shall be paid by the trustees wholly from funds contributed by the employers of the insured persons. The policy shall insure all eligible persons or all except any as to whom evidence of individual insurability is not satisfactory to the insurer; (iii) The amounts of insurance under the policy must be based upon some plan, precluding individual selection, either by the insured persons, or by the trustees, or employers.

Sound construction of the foregoing subsection of the act of 1921, as added in 1947, calls for a discussion of its historical background.

Before July 5, 1947, group life insurance for employes was permitted to not less than twenty-five employes of one employer and its benefits denied employes in comparatively small industries unless those industries were affiliates under common control or subsidiaries of a controlling employer: Section 415 (a) of the Act of May 17, 1921, P. L. 682, as added by the Act of April 26, 1929, P. L. 785, and as amended by the Act of June 21, 1947, P. L. 355, 40 P. S. § 531.

The law thus apparently discriminated against a great mass of employees in this State working in the same type industries, whose employers were not affiliated or controlled in the sense of being legally bound together under a common industrial business leadership, and none of whom employed twenty-five or more persons. The disability, in this regard, of bank clerks in unaffiliated country banks serves as a good example of this situation. Without doubt, remedial legislation was indicated. At the same time, the actuarial soundness of the law had to be preserved. To this end several important factors required consideration.

The number of employees in each group guaranteed quantity coverage to permit the issuance of a low cost policy, and the confinement of the members of each group to employment in the same type of industry, assured a reasonable uniformity of risk. In groups of twenty-five or more employees, age, health and living conditions tend to average, and each industry has comparative working risks to the life and health of those employed in it.

But the same may not be said of the employers whose employees are insured under a group policy. Being executives, in the broad sense of the word, they do meet comparative working risks to life and health. They do not, however, number as they must but a few, average in age, health and living conditions.

Now, reading Sections 531 (a) and 531 (b) (5) together, we find no difficulty in determining the legislative inspiration for the addition of Section 531 (b) (5) in 1947. It was to allow group life insurance *to employees* working in like industries provided they would combine in groups of twenty-five, or more, under a common policyholder. Such insurance for their employers was a secondary consideration and made optional. The Pennsylvania Bar Association plan for group insurance must be scrutinized from this angle.

We must first determine if the members of that Association "in good standing and regularly attending to the normal duties of their profession at their established place of business", are engaged "in the same industry". If that answer be in the affirmative, we must then determine who are the employees of such members. For under the law it is only where all of the employees of contributing employers, or all of any class or classes thereof determined by conditions pertaining to their employment have combined in a group life insurance plan that their employers may join in. The plan itself contemplates this disability of employers and meets it with the proviso that, "it is necessary that he (a member joining the plan) enroll those of his employees who have been with him two or more years".

The Pennsylvania Bar Association was incorporated July 1, 1895, in the Court of Common Pleas of Dauphin County as of No. 153 September Term, 1895, as a first class corporation without capital stock, "to advance the science of jurisprudence; to promote the administration of justice; to secure proper legislation; to encourage a thorough legal education; to uphold the honor and dignity of the bar; to cultivate cordial intercourse among the lawyers of Pennsylvania; and to perpetuate the history of the profession and the memory of its members, and such kindred purposes as the Association may from time to time determine."

This purpose is philanthropic, educational and historical, but it is not for profit or financial gain and is not industrial: *Western Pennsylvania Hospital et al. v. Lichliter, et al.*, Appellant, 340 Pa. 382 (1941), and definitions of "Industry" *infra*. It follows that membership alone in the Pennsylvania Bar Association cannot be said to be engagement in an industry. However, members "in good standing and regularly attending to the normal duties of their profession at their established place of business", as the plan describes those qualified for group life insurance, may even so be engaged in an "industry" within the meaning of Section 415 (b) (5) of the Act of 1921, if their profession may be defined as an industry.

Article II, Section 4 of the By-Laws of the Association, Vol. 1, Report of Pennsylvania Bar Association 413 (1895), provides as follows:

Any member of the Bar of the Supreme Court of Pennsylvania, residing and practicing in this State; any State or Federal Judge residing in this State; and any professor in a regularly organized law school in this State, who shall comply with the requirements hereinafter set forth, may become an active member upon approval by the Committee on Admissions, ratified by a three-fourths ballot of the members present and voting at the next annual or adjourned meeting of the Association.

Practicing lawyers, judges and law school professors, as a class, are engaged in a common remunerative pursuit identified as "jurisprudence," and defined in *Black's Law Dictionary* as, "The philosophy of law, or the science which treats of the principles of positive law and legal relations." Is this an industry? We think, in the accepted usage of the word, it is.

Black's Law Dictionary contains this definition for "industry":

Any department or branch of art, occupation, or business conducted as a means of livelihood or for profit; especially, one which employs much labor and capital and is a distinct branch of trade. * * *

(p. 956)

Webster's New International Dictionary this:

Any department or branch of art, occupation, or business; esp., one which employs much labor and capital and is a distinct branch of trade; * * * (p. 1271)

43 *C. J. S.*, furnishes this:

* * * any department or branch of art, occupation or business, especially one which employs much labor and capital and is a distinct branch of trade, * * * (p. 39)

From the many cases cited in *21 Words and Phrases*, it appears, however, that the majority legal view would require the element of profit or means of livelihood to be present in order for a branch of art, occupation or business properly to be classified as an industry. But this element of work for profit or means of livelihood need only be considered briefly here, because the Association plan confines eligibility for subscription to members "regularly attending to the normal duties of their profession".

Perhaps, practicing lawyers, judges and law professors do not conduct their businesses on the plane of commercial competition and calculated gain accepted as the standard for tradesmen, but they are nevertheless required to find subsistence through their labors and profit from their work. They must meet financial obligations to their families and their communities. True, their code of ethics is high, but so is the position in society they must maintain. Daniel Webster very tersely emphasized this when he said of lawyers, "They work hard, live well and die poor."

We come now to the question of employer-employee relationship, the existence of which we reiterate is the foundation of the industrial employer's right, as such, to participate in a group life insurance policy. This is largely a matter of fact in each case and must be determined by the peculiar attendant circumstances presented by each situation: *Rodgers, Appellant, v. Washington County Institution District*, 349 Pa. 357, 360 (1944); and *McGrath v. Budd Manufacturing Co.*, Appellant, 348 Pa. 619 (1944). And the rules of law to which the facts must be applied are precisely cumulated in *Blum Unemployment Compensation Case*, 163 Pa. Superior Ct. 271, 276 (1948), as follows:

* * * It has been said that the master and servant, or employer and employee, relationship exists where the employer has the right to select the employee, the power to remove and discharge him, and the right to direct what work shall be done, and the way and manner in which it shall be done. *McColligan v. Pennsylvania Railroad Co.*, 214 Pa. 229, 232, 63 A. 792; *Walters v. Kaufmann Department Stores, Inc.*,

334 Pa. 233, 235, 5 A. 2d 559. The method of payment is not a determining factor in establishing the relationship of the parties. See *Sechrist v. Kurtz Brothers et al.*, 147 Pa. Superior Ct. 214, 219, 24 A. 2d 128. But the power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered as a strong circumstance tending to show the subserviency of the employee. *American Writing Machine Co. v. Unemployment Compensation Board of Review*, 148 Pa. Superior Ct. 299, 304, 25 A. 2d 85.

Obviously here, we cannot attempt to pass upon each office force engagement which may arise out of the myriad circumstances of a lawyer's practice and say which does or which does not constitute an employer-employee status. We have pointed to the rules by which these cases may be determined as they present themselves. There are, however, prevalent situations where the facts are a matter of such common knowledge the conclusions appear to be inescapable.

The practicing lawyer who conducts his own office and who hires and pays his own secretaries, stenographers, clerks and assistants is unquestionably an employer and those employed by him in his office, employees within the meaning of Section 531 (b) (5) of the Act of 1921.

Where a lawyer, being a member of a group of practicing lawyers in association or comprising a partnership engages the services of secretaries, stenographers, clerks or assistants, ordinarily he does so on behalf of himself and his associates or partners and has in concert with them the right to direct what work shall be done and the way and manner in which it shall be done, and with them has the power of removal and discharge. Part of the compensation for the services is attributable to him. Here is another classical case where all of the elements of an employer-employee status are present. All of the associates or partners are the employer of all those working for them.

But a partnership agreement or a contract of association between lawyers may contain provisions antipathetic to an employer-employee status between some members of the partnership or association and one or more of the employees in the office. For example, each partner in a law firm may employ his own secretary, direct his or her business activities and pay compensation from his own pocket. In that case, each secretary who has insured under the group life insurance policy would only qualify his or her own employer, and all such secretaries in one law office would not be required to join the plan since they cannot all be said to be employees of the same employer. However, com-

mon employes to partnership members would all be required, subject to the plan's two-year limitation, to join in the group to be insured before any of the partners, as employer, could qualify.

A judge exercises the requisite authority over the business activities of his secretaries and law clerks to establish an employer-employee status though he does not usually pay them. Those persons are compensated by the Commonwealth, or the county as the case may be, but are hired by the judge, may be dismissed by him and work under his direction and control. The payment of salary here is of minor consequence in determining the relationship of employer-employee, and negligible in the presence of all the other more important factors determinative of the question. It must be concluded that his secretaries and law clerks are employes of each judge and, subject to the plan's two-year limitation, must all be included in the life insurance policy group before the judge becomes eligible to join.

On the other hand, court clerks, tipstaves and criers are appointed as officers of the court and function in that capacity. They are, therefore, subject to dismissal not by the judge himself but by the court which may comprise one or more judges, acting in an official capacity as distinguished from a personal capacity. These persons perform the duties which the law or the court itself imposes upon them in the manner in which the law or the court directs. They are, therefore, employes or officers of the court and not the employes of any particular judge or judges sitting on the court. They are not eligible for group insurance under the Pennsylvania Bar Association plan nor do the judges derive any right to that insurance coverage through them.

Lawyers who are engaged as counsel or in other capacities for governmental agencies, corporations or businesses and who do not conduct private office practice, employing all or part of the services of secretaries, stenographers, clerks or assistants, are not the employers of the secretaries, stenographers, clerks or assistants who aid them in the performance of the duties of their own employment. Those employes are the employes of the governmental agency itself, or of the corporation, or of the business proprietor. The lawyer, in such circumstances, may even have the right to employ or dismiss, or to direct the work to be done, or the manner in which it should be done. But his authority, in these circumstances, is as agent for, or by leave of his employer: the governmental agency, corporation or business proprietor he serves.

The business relationship between a law school professor and the secretaries, stenographers, clerks or assistants, who aid him in such

work, is similar to that of counsel for a corporation and his aides. For the same reasons we conclude the status is not that of employer-employee. It follows that unless they are also engaged in the private practice of law, employing either individually or in cooperation with other lawyers, persons to assist in their legal work, that law professors and lawyers employed as counsel or in other capacities, for governmental agencies, corporations or businesses, are not eligible for group life insurance under Section 531 (b) (5) of the Insurance Company Law of 1921, as amended.

The restriction in the Pennsylvania Bar Association plan of group life insurance to its members in good standing and regularly attending to the normal duties of their profession and their employees is a valid limitation, since under section 415 (b) (5) of the act of 1921 only the employers in an industry who care to do so, are authorized to formulate a group employees' life insurance plan and select a trustee to hold in his name the policy coverage. This simply means that any number out of the employers in any one industry may combine for this purpose. Hence any number of practicing lawyers and judges out of the whole number engaged in their industry may elect to form for their employees and themselves a group for life insurance. That the number elects to limit the coverage in this case to a group restricted to certain members of the Association and their employees in no way invalidates the plan for insurance which it has set up.

We are, therefore, of the opinion that: 1. Lawyers and judges regularly attending the normal duties of their profession at their established place of business are engaged in an industry within the meaning of Section 415 (b) (5) of the Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, as added by the Act of July 5, 1947, P. L. 1305, 40 P. S. § 531 (b) (5).

2. A lawyer or a judge, being a member of the Pennsylvania Bar Association, is eligible to join in the plan established by that Association for group life insurance if, in the practice of his profession, he is personally or jointly with other lawyers or judges the employer of one or more secretaries, stenographers, clerks or assistants, all of whom having been thus employed by him for two years or more, have enrolled in the plan for insurance under the group insurance policy at the time he subscribes.

3. Lawyers employed by governmental agencies, corporations or businesses as counsel or in other capacities and law professors, who do not conduct private office practice, employing all or part of the services of one or more secretaries, stenographers, clerks or assistants,

are not eligible for group life insurance under the Pennsylvania Bar Association plan.

4. Where lawyers in partnership or associated in practice jointly employ secretaries, stenographers, clerks or assistants, all such aides with two years' service must be enrolled in the group life insurance plan before any of the lawyers become eligible to join. But all lawyers in the partnership or association of lawyers need not become insured under the group policy.

5. A part time aide or a full time aide to a lawyer or a judge in the practice of his profession may or may not occupy to his superior an employer-employee status. This will depend upon the particular circumstances in each case and be determined by the factors of the right to hire and dismiss, to direct what work shall be done, how it shall be done and the source from which compensation is paid for the services. Where an employer-employee relationship exists all aides of each lawyer or partnership or association of lawyers, or of each judge or association of judges, must, if employed in such work for two years or more, join in the group life insurance policy before the employer or employers, in any instance, may obtain the benefits of group insurance under Section 415 (b) (5) of the Act of 1921.

6. Tipstaves, court criers and court clerks do not stand in an employer-employee relationship to judges and are ineligible for group life insurance under the Pennsylvania Bar Association plan.

7. The restriction in the Pennsylvania Bar Association plan of group insurance to members and their employes is a valid limitation, which must not be construed to expand the group of insureds beyond those persons who occupy with practicing lawyers and judges, who are members of the Association, an employer-employee status. The existence of the Association plan, however, does not inhibit practicing lawyers and judges, who are not members of the Association, from forming another group or other groups for employer-employee life insurance.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

RALPH B. UMSTED,

Deputy Attorney General.

OPINION No. 613

Notaries—Federal employe—Eligibility for office—Constitution, article XII, sec. 2.

Whether an employe of the Federal government is disqualified from holding the office of notary public by article XII, sec. 2, of the Constitution, depends upon whether his duties as a Federal officer will interfere with his duties as a notary public.

Harrisburg, Pa., June 30, 1950.

Honorable N. L. Wymard, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: This office is in receipt of your request for an opinion as to whether Federal employes are eligible to hold the office of Notary Public in Pennsylvania.

You mention the opinion of former Deputy Attorney General Fred C. Morgan, dated February 26, 1941. This opinion was based upon the conclusion that the phrase "any person holding or exercising any office" and the phrase "or appointment of trust or profit under the United States" are synonymous terms. This opinion, and two prior opinions in 1921 and 1926, of this department, held, in substance, that if the applicant for a commission as Notary Public was a Federal employe he was eligible for said appointment; if a Federal office holder, he was ineligible. This interpretation of the law continued to be followed and then the question involved in Formal Opinion No. 597, date July 13, 1949, arose.

Prior to the request for Formal Opinion No. 597, *supra*, the Supreme Court of Pennsylvania had rendered decisions in *Commonwealth ex rel. Crow, Appellant, v. Smith*, 343 Pa. 446 (1942) and *Commonwealth ex rel. Adams v. Holleran, Appellant*, 350 Pa. 461 (1944).

The effect of these two decisions is that regardless of whether a person is commissioned or not, any member of the armed forces on actual duty is the holder of an office of trust or profit under United States, within the meaning of Article XII, Section 2, of our Constitution. This section reads as follows:

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

It is to be noted that in the case of *Commonwealth ex rel. Adams v. Holleran, Appellant, supra*, the Court said, at page 465:

We see no reason why there should be a line of demarcation between a commissioned and a non-commissioned member of our armed forces. We think the constitutional prohibition was intended to apply with the same force and equality to both. It was the intention of the makers of the Constitution to promote, as far as possible, a sound public policy. And certainly it is in the public interest to require that an elected or appointed officer be confined to the performance of the duties of his office, and prevented from leaving it without resigning to take office or employment elsewhere. In good public service a man cannot serve two masters or perform the duties of different offices—one in the State and the other in the United States, maybe under our flag in the Philippines. It is manifest that absurdities and chaos might result if it were otherwise. Civil government must be maintained. It is possible that a majority, or even the whole membership, of the Board of Commissioners of Stowe Township could have been drafted into the armed service of the United States and sent abroad for the duration of World War II. If this happened, and the places were not filled, civil government in that township would cease to exist and for an indefinite time. Carried to the extreme, such a condition, happening in many places, could result in the breakdown of civil government generally.

It is absurd to say that some high official in the public life of Pennsylvania can leave his office and duties, enlist as a private soldier, go away to war, and retain his office and salary, but that if he enters the service as a commissioned officer and does the very same thing he cannot retain his civil office and salary. One-half of this situation was resolved by our decision in *Com. ex rel. Crow v. Smith*, supra, and the other one-half is now resolved by our decision in this case. There is no separation or distinction, the constitutional prohibition applies alike to all persons in our armed forces, whether commissioned or not.

At the time of his ouster from the office of township commissioner, Lubic was holding two incompatible offices. It is clear that he could not serve his country in the Navy and perform the duties of township commissioner at the same time. For his naval duties would not only require him to be absent from the township, but in all probability from the country itself. Since he has no choice as to the continuance of his naval duties, his civil office must be declared vacant, as of the time of his induction. The reason that one cannot hold two incompatible offices is one of public policy, with the view of attaining the best possible government.

Since each person in the armed forces of the United States holds an office which would bring him within the prohibition of Article XII, Sec. 2, of the Pennsylvania Constitution, it follows that upon Lubic's induction into the Navy his office of township commissioner was automatically vacated. * * *

As a result of the above decision that each person in the armed forces of the United States holds an office, it seems reasonable to conclude that every Federal employe would likewise be held to be the holder of a Federal office. The courts, in reaching their decisions, have interpreted Article XII, Section 2, of the Constitution as evidence of the intention of the makers of the Constitution to promote a sound public interest requiring an elected or appointed officer to be confined to the performance of the duties of his office and prevented from leaving it without resigning it to take office or employment elsewhere.

We touched upon this in Formal Opinion No. 597, dated July 13, 1949, *supra*, wherein we advised that persons otherwise qualified to hold the office of Notary Public in Pennsylvania are not disqualified solely by reason of their holding reserve commissions in the armed forces of the United States or in the Federally recognized National Guard. Formal Opinion No. 597 was based upon the decision of the Supreme Court in *Commonwealth ex rel. Crow, Appellant, v. Smith*, 343 Pa. 446 (1942) where, at pages 449-450, the Court said.

* * * Indeed, the Act of Congress of July 1, 1930, c. 784, 46 Stat. 841, as amended by the Act of June 15, 1933, c. 87, § 3, 48 Stat. 154, U. S. C. A. Title 10, § 372, in providing that "Members of the Officers' Reserve Corps, *while not on active duty*, shall not, by reason solely of their appointments, oaths, commissions, or status as such, or any duties or functions performed or pay or allowances received as such, be held or deemed to be officers or employees of the United States, or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States," suggests, by *inuendo*, that officers of the Reserve Corps, when they are on active duty, must be deemed to be persons holding an office of trust or profit under the United States. (Italics ours.)

We have been able to find no similar provision with regard to Federal employes generally, as appears in U. S. C. A. Title 10, Section 372.

It follows that each application by a Federal employe for appointment as a Notary Public must be decided upon its facts, and a determination must be made as to whether or not the Federal employe can perform the duties of a Notary Public while also performing the duties of his Federal office. When the determination is made that, by reason of his duties as a Federal officer, he cannot perform the duties of a Notary Public, the application should be denied. When a finding is made that he can perform his duties as a Federal officer and at the same time those as a Notary Public, the application should be granted.

We are of the opinion that each application for appointment as a Notary Public by a Federal employe must be decided upon its facts, and when a determination is made that by reason of his duties as a Federal officer, an applicant cannot perform the duties of a Notary Public, the application should be denied. When a determination is made that his duties as a Federal officer will not interfere with his duties as a Notary Public, the application should be granted.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

HARRINGTON ADAMS,

Deputy Attorney General.

OPINION No. 614

Food and drugs—Sale of hypnotic, analgesic and bodyweight reduction drugs—Necessity for prescription—Form and manner of execution—Dangerous Drug Act of July 18, 1935, as amended.

Before a pharmacist may lawfully sell or dispose of any analgesic, hypnotic or bodyweight reduction drug as defined in the Dangerous Drug Act of July 18, 1935, P. L. 1303, as amended, whether it be by original prescription or by renewal, he must be in actual possession of a written prescription, personally prepared and signed by a duly licensed physician, dentist or veterinarian, although the prescription may be written by an assistant provided it is verified by the practitioner's signature.

Harrisburg, Pa., July 3, 1950.

Honorable Norris W. Vaux, Secretary of Health, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you as to the interpretation of Section 2 of the Act of July 18, 1935, P. L. 1303, as amended, 35 P. S. § 941, commonly known as the Dangerous Drug Act, and regulations promulgated thereunder, relating to the sale of hypnotic, analgesic and bodyweight reduction drugs. This section reads, in part, as follows:

No hypnotic drug or analgesic or bodyweight reduction drug as defined herein, shall be sold at retail or dispensed to any person except upon the written prescription of a duly licensed physician, dentist, or veterinarian, * * *

You make the following inquiries regarding this provision:

- (1) May such prescriptions be written and signed by a physician's secretary or other person authorized by him to do so?
- (2) May such prescriptions be telephoned by a physician to a pharmacist, then written and signed by the pharmacist?
- (3) May a physician authorize a pharmacist, by telephone, to refill such prescriptions?

It will be desirable to state at the outset the purpose of this legislation. In requiring that the enumerated drugs be sold or dispensed only upon the written prescription of a duly licensed practitioner, the legislature sought to remedy the mischief of the sale or dispensation of these drugs to improper persons or in harmful quantities, in order to protect the public from addiction thereto.¹ This purpose must be borne in mind when interpreting the act. As set forth in Section 51 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 551:

When the words of a law are not explicit, the intention of the Legislature may be ascertained by considering among other matters—(1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be attained; * * *

Consequently, we are impelled to construe this act so as to minimize the possibilities of unauthorized use of these drugs.

Section 2, *supra*, clearly provides that prescriptions for the drugs controlled by the act shall be written by a duly licensed physician, dentist or veterinarian. Could such a person, then, delegate this duty to a lay assistant?

It is a well settled rule of law that a statutory duty requiring the knowledge or judgment of particular individuals must be exercised by the persons upon whom the duty is conferred. In this regard, the Restatement of Agency, Section 17, Comment (b) reads:

Duties or privileges created by statute may be imposed or conferred upon a person to be performed or exercised personally only. Whether a statute is to be so interpreted

¹"It is clearly the intent of Act 407, P. L. 1935, to regulate the dispensing of barbitol and other hypnotic drugs in such a manner as to prevent their harmful effects. The medical profession appears to be convinced that these drugs have a tendency to become habit-forming and that their continued use results in an addiction which is difficult to overcome. Acute and chronic intoxication frequently results from the lay use of the drugs incorporated in the Act." (Page 22, Rules and Regulations of the Division of Narcotic Control, Department of Health).

depends upon whether or not in view of the purposes of the statute, the knowledge, consent, or judgment of the particular individual is required. * * *

The duty to prepare such prescriptions is imposed by the statute upon persons specially trained and qualified so to do. The duty is one requiring the professional knowledge or judgment of the persons so qualified, and consequently, cannot be delegated to, or exercised by, a layman.

Moreover, the preparing of a prescription by anyone other than licensed practitioner would constitute the unauthorized practice of medicine. In the case of *Commonwealth v. Murry*, 57 Montg. 376, 379 (1941), it was said:

* * * the courts held that though a man may manufacture and compound his own medicines, *yet if he prescribes them he is practicing medicine*: *Com. v. Read*, 76 Pa. Super. 202, 205 (1921); *Com. v. Byrd*, 64 Pa. Super. 108, 114 (1916). * * * (Italics ours.)

Such conduct would be squarely within the prohibition of the Medical Practice Act, the Act of June 3, 1911, P. L. 639, as amended, 63 P. S. § 401 et seq., making unlawful the practice of medicine by persons other than those therein designated. These prescriptions, then, must be prepared personally by the physician.

As far as the purely mechanical phase of signing and writing the prescription is concerned, it would at first blush appear that this duty, like any other ministerial duty, could be delegated to an assistant. However, the purpose of the physical signature on the prescription is to assure the pharmacist of its authenticity. To allow an assistant to sign the prescription would increase the risk of filling spurious prescriptions. Bearing in mind the purpose of the legislature to protect the public, the act must be construed in such a manner as to minimize this hazard. Consequently, the signing of the prescription should be done by the physician himself.

On the other hand, there would seem to be no objection to an assistant's typing or writing the prescription order as dictated by the practitioner, provided the prescription as written is verified by the signature of the physician.

With reference to transmitting the prescription by telephone, the act speaks for itself. The unequivocal statutory requirement that the prescription be written would seem absolutely to prohibit a pharmacist's selling one of the controlled drugs on the sole authority

of a telephone conversation. The word "written" cannot be ignored. As said in *Commonwealth v. Mack Bros. Motor Car Company*, Appellant, 359 Pa. 636, 640 (1948):

* * * The legislature cannot, * * * be deemed to intend that language in a statute shall be superfluous and without import. * * *

Such a conclusion would likewise bar the practice of telephoning a prescription, then, after the drug has been delivered, confirming the prescription in writing. It is manifest that the legislature believed mere telephonic transmission to be insufficient to assure the authenticity of a prescription; hence the requirement that it be in writing. But if the confirmatory writing were not in the hands of the pharmacist until after the delivery of the drug to the buyer; it would be too late to correct any discrepancies between the prescription as filled and the confirmation. Indeed, in cases of illicit procurement of the drug, the confirmation would never be forthcoming. To allow token compliance with the act by a technical expedient such as this would defeat the object which the legislature sought to achieve.

We are not unmindful of the fact that certain exigencies may arise in which the convenience of telephonic transmission would be highly desirable. Nevertheless, only the legislature can make exceptions, and it did not see fit so to do. On the other hand, this conclusion should not be construed to prohibit a pharmacist's compounding a prescription on the authority of a telephone call provided he has the opportunity to examine the written confirmation prior to delivering the drug to the buyer.

As regards telephonic transmission, the same reasoning applies to renewing or refilling a prescription as to filling it initially. Many of the so-called dangerous drugs are habit-forming,² and consequently, repeated dosages, such as well might arise out of unauthorized renewals, present a particular problem. Accordingly, Regulation No. 1 promulgated under the Dangerous Drug Act requires a new prescription for each refill in excess of the number of refills specifically authorized by the original prescription.³

² See footnote 1, supra.

³ "Prescriptions under Act 407, P. L. 1935, cannot be renewed by a pharmacist unless the prescriber, a duly licensed physician, dentist, or veterinarian, endorses on the face of the prescription blank the specific number of times to be renewed, as defined by the opinion of the Attorney General's Office, viz.: 'If a prescription calls for a renewal or refill, the pharmacist may refill or renew it the number of times and according to the stipulation specified on the prescription of the practitioner. Otherwise, the pharmacist is limited to filling the prescription once only on presentation.'"

Again, mere telephonic transmission of a renewal would, as in the case of an original prescription, contravene both the language and the intent of the legislature. Reason demands that the same precaution be taken in the case of refills as in the case of original prescriptions. Consequently, whenever Regulation No. 1 forbids refills except on a new prescription, such prescription must meet all the requirements of the original, i. e., it must be in writing and in the possession of the pharmacist before he dispenses the drug.

We are, therefore, of the opinion that before a pharmacist may lawfully sell or dispense any analgesic, hypnotic or bodyweight reduction drug, as defined in the Dangerous Drug Act, the Act of July 18, 1935, P. L. 1303, as amended, 35 P. S. § 940 et seq., whether it be by original prescription or by renewal, he must be in actual possession of a written prescription personally prepared and signed by a duly licensed physician, dentist or veterinarian. Such prescription may be written by an assistant provided that it is verified by the signature of the practitioner.

Yours very truly,

DEPARTMENT OF JUSTICE,
T. McKEEN CHIDSEY,
Attorney General.

ROBERT M. MOUNTENAY,
Assistant Deputy Attorney General.

OPINION No. 615

Weights and measures—Package marking—Commodities Act of July 24, 1913, sec. 7, as amended—Necessity for marking “net” weight.

The word “net” must be included in all quantity declarations required under section 4 of the Commodities Act of July 24, 1913, P. L. 965 as amended.

Harrisburg, Pa., September 19, 1950.

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

Sir: This department is in receipt of your letter in which you ask if the word “net” should be included in the content declaration on commodities put up in package form under the provisions of Section 7 of the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. § 247, sometimes referred to as the “Commodities Act.”

You also state that some manufacturers and processors take exception to the requirement that the word "net" is included in all quantity declarations of commodities put up by them in package form. They insist the Commodity Act is being complied with when a statement of contents is placed on the package, such as, "8 oz." on a package sold on a weight basis.

Section 7 of the Commodities Act, 76 P. S. § 247, as amended, provides as follows:

No person shall distribute or sell or have in his possession with intent to distribute or 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 tolerances may be established by rules and regulations made by the department. Before any tolerances are granted, producers and manufacturers of commodities must make written application for a tolerance to the department, and must furnish proof that the use value of the commodity will not be affected by the granting of the tolerance. Exempt from marking as to net content contained shall be:

(a) All packages sold as liquid commodities containing less than one ounce liquid measure and selling for five cents or less.

(b) All packages sold as dry commodities containing less than one ounce avoirdupois and selling for five cents or less." (Italics ours.)

In Formal Opinion No. 565 of this department, dated July 29, 1947, and addressed to the Secretary of Internal Affairs, 1947-1948 Op. Atty. Gen. 30, it is held that it is a violation of section 7 of the Commodities Act for a retail merchant to sell or distribute a commodity, as defined in the act, wrapped in package form and not marked as to net quantity of its contents, and further, it is held in the same opinion that it is a violation of section 7 of the Commodities Act for a retail merchant to have in his possession, with intent to sell or distribute a commodity, as defined in the act, wrapped in package form and unmarked as to the net quantity of its contents.

The meaning of the word "net" when used in conjunction with the word "weight" in describing the quantity of a particular commodity has been clearly resolved by judicial determination.

In *State of Washington ex rel. Washington Mill Company v. Great Northern Railway Company*, 86 Pac. 1056 (Wash. 1906), 6 L. R. A.,

N. S. 908, it is held that the "net weight" of a cargo of lumber means the weight of the lumber only, exclusive of standard supports, etc., used in piling the lumber in the car.

In *Scott et al. v. Hartley*, 25 N. E. 826 (Ind. 1890), it is held that "net" means clear of all tare, tret, and other deductions, as "net weight."

It is held in *Kiessig et al. v. San Diego County et al.*, 124 P. 2d 163 (Cal. 1942), that the cubic contents of the interior of a vessel, when the space occupied by the crew and by propelling machinery are deducted therefrom numbered in tons, is called the "net tonnage."

A manufacturer of a commodity who was prosecuted under an ordinance requiring the net weight of the contents to be stamped on containers made the defense that he had complied sufficiently with the act by stamping the weight of the contents when packed. The Court, in *City of Seattle v. Goldsmith*, 131 Pac. 456 (Wash. 1913), at pp. 458, 459, held, *inter alia*, as follows:

* * * Many other like rulings might be cited to the effect that what the law will imply as a necessary incident is as much within a legislative enactment, whether state or municipal, as though specifically set forth in terms. And it is not a departure from such a rule to say that a requirement to stamp the net weight on a container is implied from the power to regulate weights. It is a regulation and one of the most effective in so regulating weights and measures as to reduce the opportunities for fraud and deception to the consumer to a minimum.

* * * * *

* * * It is not unreasonable to require that the packer and manufacturer shall ascertain this loss by evaporation as he is best in position to do, and overcome the loss by increasing the size of the package or the weight of the commodity packed therein, or withhold his goods from the market until it is possible to ascertain the true net weight. Whatever may be the necessary course to adopt to enable the container to correctly indicate the weight of the commodity it contains, it is not unreasonable to place that burden upon the one who puts the article before the public as a sale commodity, and compel him, if he wishes to retain his trade, to so pack his commodities that the consumer may know the true quantity of the thing he buys, and thus protect himself in paying the value of the thing he buys. * * *

In this Commonwealth, objections of producers or manufacturers of commodities which lose weight after packaging are met by section 7 of the Commodities Act, *supra*, which expressly authorizes the Department of Internal Affairs, upon written application, to grant

tolerances to producers and manufacturers of commodities, so that reasonable shrinkage encountered after packaging, can be permitted, as agreed to by the Department, upon proof being furnished to the Department that the value of the commodity will not be affected by the granting of the tolerance.

Black's Law Dictionary, De Luxe 3rd Edition (1944) 1240, also defines the term as follows:

Net weight. The weight of an article or collection of articles, after deducting from the gross weight the weight of the boxes, coverings, casks, etc., containing the same. The weight of an animal dressed for sale, after rejecting hide, offal, etc.

If the word "net" is omitted from the description of the quantity of a commodity enclosed in a container, confusion would arise in the mind of the buyer as to the actual volume or weight of the commodity in the package, and give rise to possibilities for fraud.

The statute directs in no uncertain terms that the *net* quantity of the contents is marked on the outside of the package, and it follows to mark the package as to the quantity of the commodity contained therein, without including the word "net" would amount to a failure to comply with the mandatory direction of the statute.

It is our opinion that the word "net" must be included in all quantity declarations required under Section 7 of the Act of July 24, 1913, P. L. 965, as amended.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

RAYMOND C. MILLER,
Deputy Attorney General.

OPINION No. 616

Poor—Medical assistance—Eye care—Responsibility therefor—Department of Public Assistance—State Council for the Blind—State Board for Vocational Rehabilitation—Public Assistance Law of June 24, 1937, sec. 2 as amended—Administrative Code of April 9, 1929, secs. 501 and 2320, as amended—Vocational Rehabilitation Act of May 22, 1945, sec. 4.

1. The term "medical care" included in the definition of "assistance, in section 2 of the Public Assistance Law of June 24, 1937, P. L. 2051, as amended, includes eye care, but the Department of Public Assistance may only furnish eye care when it is not fully furnished by other departments or the department may supplement eye care furnished by the State Council for the Blind or by the State Board of Vocational Rehabilitation.

2. Since the duty of remedial eye care rests upon several units of government, such units should, under section 501 of the Administrative Code, confer with each other to develop a program of remedial eye care and thus prevent duplicate services.

Harrisburg, Pa., October 16, 1950.

Honorable Frank A. Robbins, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: You ask to be advised concerning your responsibility for the payment of remedial eye care to recipients of public assistance.

Formal Opinion No. 588, dated December 13, 1948, has already ruled that under Section 1515.1, added to the School Code, the Act of May 18, 1911, P. L. 309, by the Act of July 5, 1947, P. L. 1301, 24 P. S. § 1512.2a (now Section 1438 of the School Code of 1949, the Act of March 10, 1949, P. L. 30), your department rather than the State Council for the Blind is responsible for payment of eye care for children of school age. Responsibility for eye care for recipients of public assistance above school age has not heretofore been passed upon.

Section 2 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. § 2502, provides:

As used in this act, unless otherwise indicated,

"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. The word, assistance, shall be construed to include pensions for those blind persons who are entitled to pensions, as provided in this act, and to include also burial for those indigent persons who were receiving assistance at the time of their death. (Italics ours.)

Section 4(b) of the Public Assistance Law, as amended, *supra*, 62 P. S. § 2504, provides:

The Department of Public Assistance shall have the power, and its duties shall be:

* * * * *

(b) To establish, with the approval of the State Board of Public Assistance, rules, regulations and standards, consistent with the law, *as to eligibility for assistance and as to its nature and extent.* (Italics ours.)

Section 4(k) of the Public Assistance Law, as amended by the Act of May 21, 1943, P. L. 434, 62 P. S. § 2504, provides:

The Department of Public Assistance shall have the power, and its duties shall be:

* * * * *

(k) To take measures not inconsistent with the purposes of this act and, with the approval of the State Board of Public Assistance *when other funds or facilities for such purposes are inadequate or unavailable*, to provide for special needs of individuals eligible for assistance, *to relieve suffering and distress arising from handicaps and infirmities, to promote their rehabilitation, to help them if possible to become self dependent and to cooperate to the fullest extent with other public agencies empowered by law to provide vocational training, rehabilitation or similar services.* (Italics ours.)

It is clear that the term "medical care" means medical care for any part of the body including the eye. Under the above cited definition and under section 4 of the Public Assistance Law, your department with the approval of the State Board of Public Assistance in establishing standards as to eligibility for assistance and as to its nature and extent may include eye care.

However, there is an express provision for eye care in Section 2320 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 610, which provides as follows:

The State Council for the Blind shall have the power, and its duties shall be:

(a) *To formulate a general policy and program for the prevention of blindness*, and for the improvement of the condition of the blind in this Commonwealth. Such policy and program shall be modified from time to time as may be found necessary or advisable in the light of improvements in method and practice;

(b) To make recommendations, in accordance with such policy and practice, to the several executive and administrative departments, boards, and commissions of this Commonwealth, and to any public or private agencies therein which may be in any way concerned with work with or for the blind;

(c) To cooperate with State and local agencies, both public and private, in taking steps to prevent the loss of sight, in alleviating the condition of blind persons, and persons of

impaired vision, in extending and improving the education, advisement, training, placement, and conservation of the blind, and in promoting their personal, economic, social and civic well-being;

(d) To act as a means for communicating with other State agencies, public or private, and with national agencies, and to cooperate in efforts to procure an enactment of legislation regarding the prevention of blindness, the improvement of the blind, or the regulation of private agencies for the care of the blind;

(e) To collect, systematize, and transmit to the Department of Property and Supplies for publication and distribution to other agencies, information in regard to blind persons and persons of impaired vision in this Commonwealth, including their present physical and mental condition, the causes of blindness, and the possibilities of improvement of vision, their financial status and earning capacity, their capacity for education and vocational training and any other relevant information looking toward the improvement of their condition;

(f) To refer cases of blind persons, or problems in relation to the blind, or prevention of blindness, to such agencies, public or private, as may be likely to deal most successfully with them;

(g) To encourage the cooperation of all agencies, public and private, doing work for the blind in this Commonwealth, and of the agencies whose work is related to the prevention of blindness;

(h) To supervise the expenditures of State appropriations made to such agencies, except in cases in which such supervision is by law within the powers or duties of some other administrative department, board or commission;

(i) *To furnish or make available medical treatment, surgical operations, eye glasses and other necessary aids or services, including transportation, to needy blind persons or persons with impaired vision for the purpose of improving, conserving or restoring their vision. These services and aids shall not be furnished unless they are otherwise unavailable, and in no case shall the total costs thereof exceed two hundred fifty dollars (\$250) per person;*

(j) To take any action and to adopt any regulations necessary to carry out the objectives of this section and, in furtherance of those objectives, to accept any grants or contributions from the Federal Government or any agency thereof.

Any such grants or contributions shall be held by the State Treasurer as custodian for the State Council for the Blind and shall be paid out on requisition of the State Council for the Blind without further appropriation;

(k) *To improve the condition of the blind* by supplying, where not otherwise available, home instruction and training for educable blind persons in the reading and writing of embossed types, in those handicrafts in which the blind can engage for remunerative or therapeutic value, or for improving their personal, civic and social well-being, and in such other fields of endeavor as may be considered appropriate and beneficial;

(l) *For the purpose of improving the economic conditions of the industrially blind; to furnish and make available medical and psychological examinations; medical and surgical treatment; hospitalization; prosthetic appliances and aids; vocational counseling and guidance; prevocational and vocational training; transportation for medical and training purposes; maintenance for medical and training purposes; placement in suitable employment with necessary occupational tools and equipment, and post-placement employment adjustment; these services to be made available to residents of the Commonwealth who have reached their sixteenth birthday, and who have a thirty percent or greater loss in visual functioning, and who are suffering from a static permanent employment handicap by reason of this loss of visual functioning.* (Italics ours.)

It is the duty and responsibility of the State Council for the Blind to carry out the provisions of this section. Under the power conferred, the State Council for the Blind extends:

1. Prevention of blindness service to needy persons when these persons possess an eye disorder which is amenable to treatment.
2. Medical treatment, surgical operations and other necessary aids or services to *needy blind adult persons with impaired vision* who have eye disorders which are amenable to treatment.
3. Physical restoration services to needy persons who have a thirty percent or greater loss in visual functioning and who are suffering from a static permanent employment handicap by reason of this loss of visual functioning when the rendering of this service will eliminate the handicap.

Under Section 4(k) of the Public Assistance Law, as amended by the Act of May 21, 1943, P. L. 434, supra, 62 P. S. § 2504, it would appear that the Department of Public Assistance should cooperate with the State Council for the Blind by referring to the Council for the Blind all applicants or recipients who are eligible for any one or more of the above mentioned medical services rendered by the Council. In other words, when it has been determined by the Department of Public Assistance that it has an applicant or recipient who is blind,

or who has impaired vision or has an eye disorder that is amenable to treatment, or who has a thirty percent or greater loss in visual functioning that constitutes an employment handicap, then the applicant or recipient should be the responsibility of the Council for the Blind.

Moreover, under Section 4 of the Vocational Rehabilitation Act of 1945, the Act of May 22, 1945, P. L. 849, 43 P. S. § 681.4, the State Board of Vocational Rehabilitation has certain responsibilities, as follows:

Except as otherwise provided by State law with respect to vocational rehabilitation of the blind, the State board shall provide vocational rehabilitation services to disabled individuals determined to be eligible therefor, and in carrying out the purposes of this act the State board is authorized among other things,

(1) *To cooperate with other departments, agencies and institutions, both public and private*, in providing for the vocational rehabilitation of disabled individuals in studying the problems involved therein, and in establishing, developing and providing, in conformity with the purposes of this act, such programs, facilities and services as may be necessary or desirable.

(2) To enter into reciprocal agreements with other states to provide for the vocational rehabilitation of residents of the states concerned,

(3) To conduct research and compile statistics relating to the vocational rehabilitation of disabled individuals,

(4) To administer the expenditure of funds made available by the government of the United States for vocational rehabilitation,

(5) To make surveys to ascertain the number and condition of physically handicapped persons within the Commonwealth, and

(6) To administer the laws of the Commonwealth providing for vocational rehabilitation.

* * * * *

(Italics ours.)

Section 2(7), 43 P. S. § 681.2, provides that "prosthetic appliance" means "any artificial device necessary to support or take the place of a part of the body, or to increase the acuity of a sense organ."

Under the powers conferred by these sections, the State Board of Vocational Rehabilitation, within prescribed limitations, furnishes

eye care and provides glasses for those who are employable after service is rendered.

The State Council for the Blind, under the above cited Section 2320 of The Administrative Code of 1929, is empowered to furnish or make available medical treatment, surgical operations, eye glasses and other necessary aids or services, including transportation, to needy blind persons or persons with impaired vision for the purpose of improving, conserving or restoring their vision, provided the services and aids are otherwise unavailable. This Council service is limited by The Administrative Code of 1929 to needy blind persons or persons with impaired vision. If necessary remedial eye care is otherwise unavailable, the Department of Public Assistance, under section 2, 4(b) and particularly 4(k) of the Public Assistance Law, *supra*, may furnish remedial eye care to those persons who establish eligibility for any of the included categories of public assistance.

As in other programs, including care of the tubercular and those suffering from venereal diseases, where care is given by the Department of Public Health, the Department of Public Assistance if and when necessary supplements such care; in the same manner your department may supplement remedial eye care given by other departments or agencies in accordance with sections 2, 4(b) and 4(k) of the Public Assistance Law, as amended, *supra*, 62 P. S. § 2502 and 2504.

The various departments having duties and responsibilities in connection with the needy blind and those requiring remedial eye care should be coordinated to formulate an adequate and complete program of remedial eye care at the lowest possible cost to the taxpayers of the Commonwealth.

See Section 501 of The Administrative Code of 1929, *supra*, 71 P. S. § 181, providing for such coordination, which reads as follows:

The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for cooperation and coordination of work, eliminating, duplicating, and overlapping of functions, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. The head of any administrative department, or any independent administrative or departmental administrative board or commission, may empower or require an employe of another such department, board, or commission, subject to the consent of the head of such department or of such board or commission, to perform any duty which he or it might require of the employes of his or its own department, board, or commission.

We are of the opinion, therefore, and you are accordingly advised that the term "medical care" included in the definition of "assistance" in section 2 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. § 2502, includes eye care, but the Department of Public Assistance may only furnish eye care when it is not fully furnished by other departments, or the department may supplement eye care furnished by the State Council for the Blind, Department of Welfare, under Section 2320 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 610, and the State Board of Vocational Rehabilitation under the Vocational Rehabilitation Act of 1945, the Act of May 22, 1945, P. L. 849, 43 P. S. § 681.1 et seq. Under the above quoted section 2320 of The Administrative Code of 1929, as amended, *supra*, as well as the several laws quoted above, the duty of remedial eye care rests upon several units of government; therefore, in accordance with Section 501 of The Administrative Code of 1929, *supra*, the various units or agencies of government that have such responsibility for remedial eye care should confer with each other to develop a coordinated program of remedial eye care and thus prevent overlapping and duplicate services. For example, an Interdepartmental Committee on Remedial Eye Care could be established as has been done in the case of Children's Services, to the end that there would be coordination and cooperation to effectuate a complete remedial eye care program in accordance with the several laws above cited.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 617

Fraternal Benefit Societies—Articles of incorporation—Amendment—Act of July 17, 1935.

A fraternal benefit society, incorporated under the Act of July 17, 1935, P. L. 1092, has no authority to amend its articles of incorporation.

Harrisburg, Pa., October 20, 1950.

Honorable Artemas C. Leslie, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested this department to furnish you an opinion as to whether articles of incorporation of a fraternal benefit society,

organized under the Act of July 17, 1935, P. L. 1092, 40 P. S. § 1051 et seq., may be amended.

The Act of July 17, 1935, P. L. 1092, 40 P. S. § 1051 et seq., does not specifically provide for authority to amend the articles of incorporation to change the charter of a fraternal benefit society formed thereunder. It does, under section 37, 40 P. S. § 1087, provide for change of principal office or place of business within the Commonwealth and, in section 6, 40 P. S. § 1056, for amendment of the constitution or by-laws.

These provisions are in themselves concrete evidence that the legislature intended by its exclusion from the powers granted to deny the right of such society to change its articles of incorporation by amendment.

Even were the legislative intent not so clearly discernible we would nevertheless be obliged to hold that, in the absence of express statutory authority, a corporation has no implied right to amend its articles of incorporation and thus change its charter. 10 C.J.S., p. 272, Section 30.

The rule of law is quoted in *In Re Doe Run Lead Co. et al v. Maynard et al.*, 283 Mo. 646, 223 S. W. 600, 610 (1920) from *Prairie Slough Fishing & Hunting Club v. Kessler*, 252 Mo. 424, 433, 159 S. W. 1080, 1082, as follows:

"It is a well-settled rule that, when the organic or statutory law specifies the powers a given corporation may exercise, or the property it may hold, such specification by implication excludes all other powers or rights, except such incidental or subordinate rights and powers as may be necessary to an exercise of the powers and rights expressly given."

This rule was the aegis of the opinion of our Supreme Court in *Greek Catholic Union Charter Amendment Case*, 332 Pa. 424 (1939), where it was held that the right of a corporation to amend its articles of incorporation is governed by the statutory provisions therefor.

The articles of association of an incorporated mutual benefit society may be changed only in accordance with the statute and methods previously assented to by the members. * * * (18 Appleman, Insurance Law & Practice, Ch. 347, Section 10148, p. 307).

The extent of the power to amend thus conferred upon the corporation, its officers or members depends upon the terms of the statute * * * (7 Fletcher Cyclopedia Corporations, Ch. 43, Section 3718, p. 882).

We are of the opinion, therefore, that a fraternal benefit society, incorporated under the Act of July 17, 1935, P. L. 1092, 40 P. S. § 1051 et seq., has no authority to amend its articles of incorporation.

Yours very truly,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 618

Public Officers—Lieutenant Governor, absence—Duties of his office to be performed by the President Pro Tem of the Senate—Constitution Art. 2, sec. 9 and Art. 4, sec. 14.

By virtue of the constitutional provisions of the Pennsylvania Constitution, as set forth in article 2, section 9 and article 4, section 14, the President Pro Tempore of the Senate has constitutional authority to perform all the duties of the Lieutenant Governor, when the Lieutenant Governor is absent or unable to perform the duties of his office. The Constitution mandates that he performs these duties.

Harrisburg, Pa., November 13, 1950.

Honorable James H. Duff, Governor, Harrisburg, Pennsylvania.

Sir: By your communication you state that Daniel B. Strickler is the Lieutenant-Governor, and is now serving in active United States military service as a Major General commanding the 28th Infantry Division of the Pennsylvania National Guard.

By virtue of the provisions of The Administrative Code of 1929, as amended, section 403, the Lieutenant-Governor is a member of the Board of Pardons.

The office of Lieutenant-Governor carries with it necessary duties that must be performed to carry on the government of the Commonwealth.

You request advice as to whether or not the President Pro Tempore of the Senate can, in the absence or disability of the Lieutenant-Governor, perform the duties of the office of Lieutenant-Governor.

The Administrative Code of 1929, as amended, the Act of April 9, 1929, P. L. 177, Section 403, 71 P. S. § 113, provides:

The Board of Pardons shall consist of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General, and Secretary of Internal Affairs.

The Pennsylvania Constitution, Article 2, Section 9, provides:

The Senate shall, at the beginning and close of each regular session and at such other times as may be necessary, elect one of its members President pro tempore, who shall perform the duties of the Lieutenant Governor, in any case of absence or disability of that officer, * * *

The Pennsylvania Constitution, supra Article 4, Section 14, provides:

In case * * * the Lieutenant Governor * * * shall be unable to exercise the duties of his office, the powers, duties * * * until the disability be removed, shall devolve upon the President pro tempore of the Senate; * * *

It is manifest that the present duties of the Lieutenant-Governor, as a member of the Pennsylvania National Guard, require his presence elsewhere than in the Commonwealth of Pennsylvania. Because of this absence, Strickler is unable to perform the duties of his office of Lieutenant-Governor.

There can be no office without responsive duties and functions to be performed. Civil government must be maintained.

The Pennsylvania Constitution, supra, article 2, section 9, and article 4, section 14, mandates that the President Pro Tempore of the Senate shall perform the duties of the Lieutenant-Governor in any case of absence, where the Lieutenant-Governor is unable to exercise the duties of his office.

The Pennsylvania Constitution, supra, providing that the President Pro Tempore of the Senate perform the duties of the office of Lieutenant-Governor is interpreted to mean perform all the duties of the office of Lieutenant-Governor.

The opinion requested is responsively limited to the specific question propounded.

We are not unmindful of other points of law that may arise which are not considered in this opinion.

It is our opinion, that by virtue of the constitutional provisions of the Pennsylvania Constitution, *supra*, as set forth in article 2, section 9, and article 4, section 14, the President Pro Tempore of the Senate has constitutional authority to perform all the duties of the office of Lieutenant-Governor, when the Lieutenant-Governor is absent or unable to perform the duties of his office. The Constitution mandates that he perform these duties.

Very truly yours

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

ELMER T. BOLLA,
Deputy Attorney General

OPINION No. 619

Public Utility Commission—Salary Increases—Constitution.

Article III, section 13, does not apply to members of the Commission. Each member is entitled to receive a salary fixed by the Act of March 31, 1949, P. L. 369, from the date of its enactment.

Harrisburg, Pa., November 30, 1950.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg,
Pennsylvania.

Sir: You have asked us whether the increased salaries provided by the Act of March 31, 1949, P. L. 369, 66 P. S. 452 (Pocket Part), can be approved by you for the five present members of the Public Utility Commission.

The Public Utility Commission was created by the Act of March 31, 1937, P. L. 160, 66 P. S. 452, which provided that the commission should consist of five members. The membership was classified by providing that the commissioners first appointed should serve for two, four, six, eight and ten years respectively; and that thereafter each successor should be appointed for a term of ten years.

The terms of the five commissioners presently in office will expire on the thirty-first day of March of the years 1951, 1953, 1955, 1957 and 1959 respectively.

Section 1 of the Act of March 31, 1937, creating the commission provided that each commissioner should receive an annual salary of \$10,000, except the chairman who should receive an annual salary of \$10,500.

The Act of March 31, 1949, P. L. 369, increased the salary of the chairman to \$15,000 per year and the salary of each of the other members to \$14,000 per year.

The inquiry submitted by you requires a determination of the question whether a member is entitled to receive an increase of salary granted by the legislature after his appointment to office. If a member is not so entitled, it would follow that a member newly appointed after the increase would be entitled to receive the larger increased salary but the other members, each his senior in point of service, would be limited to the smaller salary provided prior to the amending act of 1949. Each of the five commissioners is charged with the same duties and responsibilities, but the members of longest experience in the office would receive the smaller salary.

As their terms expire at different two-year intervals, such inequality would be unavoidable, and might continue for nearly all of a term of ten years.

At the time when the Constitution of 1874 was adopted, no term of office, except those of the judges, was longer than four years.

Each of the present members is entitled to receive the larger salary unless the increase granted by the Act of 1949 is prohibited by Article III, Section 13 of the Pennsylvania Constitution of 1874, the language of which is as follows:

No law shall extend the term of any public Officer, or increase or diminish his salary or emoluments, after his election or appointment.

Our study of this clause, in connection with other clauses relating to compensation of judges (V-18) and members of the legislature (II-8) leads us to the conclusion that article III, section 13 does not apply to members of the Public Utility Commission.

In the distribution of the sovereign powers of the Commonwealth it is the function of the legislature to levy taxes and provide the necessary revenues for the operations of the government. The legislature also has the authority to appropriate and to control the expenditure

of funds and to fix the compensation of officers and employes of the Commonwealth. This power is unlimited except as restrictions may be contained in the Constitution of 1874.

Commonwealth ex rel. Schnader v. Liveright, 308 Pa. 35, 67-68 (1932);

Laehy v. Farrell, 362 Pa. 52, 57 (1949).

In addition to article III, section 13, such restrictions are found in (A) article V, section 18, relating to judges and (B) article II, section 8 relating to members of the legislature.

A.

Article V, Section 18 provides:

The judges of the Supreme Court and the judges of the several courts of common pleas, and all other judges required to be learned in the law, shall at stated times receive for their services an adequate compensation, which shall be fixed by law, and paid by the State. * * *

In *Commonwealth v. Mathues*, the Supreme Court of Pennsylvania discussed specifically the scope of the phrase "public officers" in Article III, Section 13 and held that judges were not "public officers" within the meaning of those words. The court reasoned that the requirement of "adequate compensation" negated any conclusion that a justice of the Supreme Court must serve for a term of twenty-one years without an increase in salary during such term. While the case before it applied to Justices of the Supreme Court, the court's language included judges generally.

In the opinion, Mr. Justice Thompson said:

* * * they [judges] are not public officers within the generic words used in the section in question. *Those words are not used as applicable to all public officers.* If it had been intended in the fundamental law to do so, doubtless exact words to accomplish that result would have been used, but when the constitution makes a distinctive provision prohibiting an increase of the compensation of certain public officers, such as members of the legislature, *it is manifest that these words were not used in a general sense and by no construction can they be generically applicable to the judiciary.* * * * (427) (Italics added)

Referring to article III, section 13, Mr. Justice Thompson further said:

* * * Because such is the scope of the section and because it was a limitation of legislative power in that regard, it was

placed in the heart of the article on legislation and its words indicate a restriction limited to a definite class of public officers only and cannot by construction be coupled with the judiciary article so as to make them applicable to judges. (428)

The decision in *Commonwealth v. Mathues* has been cited and followed as a precedent by the Supreme Court in fourteen subsequent decisions.

In *Bailey v. Waters*, Auditor General, 308 Pa. 309 (1932), the Supreme Court affirmed on the opinion of the late President Judge Hargest, in which the latter said:

It is conceded, as indeed it must be, since the decision of the case of *Com. v. Mathues*, 210 Pa. 372, that section 13 of article III of the Constitution which provides that "no law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment," does not apply to judges. * * * (311-312)

B.

Article II, Section 18, relating to members of the legislature, provides:

The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. *No member of either House shall during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term.* (Italics added)

This section of the Constitution differs from Article III, Section 13 in the following respects:

(1) The term "public officers" does not appear at all in article II, section 8. This section 8 applies to "The members of the General Assembly".

(2) Article II, section 8 prohibits an increase during the "term for which he may have been elected", whereas Article III, Section 13 prohibits an increase after "election or appointment". The general restriction in article III, section 13 cannot apply to members of the legislature because it is inconsistent with the particular provision in article II, section 8.

The effect of Article II, section 8 is to place "members of the General Assembly" in a different class from the "public officers" of article III, section 13; and to prescribe a different restriction on increases of salary from what is provided for "public officers" by article III, section 13 for such class.

These differences have been recognized by the Supreme Court.

Thus in *Commonwealth ex rel. Wolfe v. Butler*, 99 Pa. 535 (1882), in a dissenting opinion, Mr. Justice Trunkey, in discussing article II, section 8, makes this statement, which in no way conflicts with the majority opinion.

* * * The intention is to prevent any increase of the *member's* salary and mileage, after his election, as effectually as section 13 of art. III. prohibits the increase of the salary or emoluments of any *public officer* after his election. * * *
(Italics added)

In *Commonwealth v. Mathues*, 210 Pa. 372 (1904), speaking of the words "public officers" in article III, section 13, the Supreme Court said:

* * * but when the constitution makes a distinctive provision prohibiting an increase of the compensation of certain public officers, such as *members of the legislature*, it is manifest that these words were not used in a general sense * * *.
(427) (Italics added)

In numerous other provisions of the Pennsylvania Constitution, members of the legislature are treated as different from "public officials".

Thus section 31 of article III provides that the offense of corrupt solicitation "of members of the General Assembly or of public officers of the State" shall be defined by law and punished by fine and imprisonment. Here the distinction is made between members of the legislature and "public officers of the State".

Section 1 of Article VII provides:

Senators and Representatives and all judicial, State and county officers shall, before entering on the duties of their respective offices * * *

take a prescribed oath. In this section Senators and Representatives and judicial officers are named separately from all other officers,

To summarize, a distinction is clearly made between members of the legislature and "public officers" in regard to increases of compensation, and the two classes are designated separately in numerous other provisions of the Constitution which we have quoted.

See article II, sections 2, 5 and 7; article III, section 30; article VI, section 3.

It is clear, therefore, that the words "public officers" in article III, section 13 do not include all public officers of the Commonwealth, and particularly do not include members of the judiciary or members of the legislature.

Do these words include members of the Public Utility Commission?

The Act of March 31, 1937, P. L. 160, which created the Public Utility Commission, provides in section 1 that the members of the commission—

* * * shall be appointed by the Governor, by and with the advice and consent of two-thirds of all the members of the Senate. * * *

Section 4 provides that—

The Governor, by and with the consent of two-thirds of all of the members of the Senate, may remove any commissioner for inefficiency, neglect of duty or misconduct in office * * *

That the Public Utility Commission performs legislative functions and that its members are agents of the legislature, was squarely ruled by the Supreme Court in

Commonwealth ex rel. v. Benn, 284 Pa. 421 (1925).

This case arose under The Public Service Company Law of July 26, 1913, P. L. 1374, in which the provisions for the appointment and removal of members of the commission were substantially identical with those quoted above from the act creating the present Public Utility Commission. In the interest of exactness we quote the following provisions from the Act of 1913, article IV, section 2:

This commission shall consist of seven members, who shall be appointed by the Governor, by and with the advice and consent of the Senate. * * *

Article IV, Section 15:

The Governor, by and with the consent of the Senate, may remove any commissioner, or any of the counsel to the commission, for inefficiency, neglect of duty, or misconduct in office * * *.

The point decided in this case was that the Governor did not have authority to remove a member of the Commission without consent of the Senate.

The opinion was based upon the ground that the *commission was legislative* in character and that the legislature itself was the power appointing commissioners and that the *Governor* in nominating members merely *acted as agent for the legislature* and for practical convenience.

In the opinion, Chief Justice Von Moschzisker said:

If the duties performed by a public service commissioner, or any considerable part of such duties, are primarily and predominantly legislative in character, in the sense of being work which the general assembly itself, as distinguished from the executive or judicial branch of the government, may (either by direct action or through others named for the purpose) alone perform, then, should the lawmakers determine to execute those particular duties through the instrumentality of others, they can either designate the latter by direct action, or permit the Governor, or some one else, to do so on their behalf; but, in either event, *the general assembly would be none the less the appointing power*. Moreover, in providing for a practical method of selecting and dismissing its own appointees, *the general assembly could permit the Governor, or whatever agency it might select for the purpose, to act in removing the officials thus named, and it could dictate the exclusive manner in which the removal should be made*; * * * (431)

* * * * *

* * * *These commissions have been judicially compared to "committees created by the legislature" to do a certain part of its work* (see *State v. P. S. Com.*, 277 Mo. 175, 192, 210 S. W. 386, 391), and the comparison is fully warranted, for *the services performed by public service commissions is predominantly legislative in nature*. (435)

* * * * *

The above cases, to which a host of others, equally strong, might be added, demonstrate that public service commissioners must be viewed as *deputies of the general assembly* to

perform legislative work; and since, in the words of our Superior Court, the commissioners are the "representatives of the legislature and not of . . . the executive," *the legislature might, as before said, have named them directly*; * * * All of this delegation of authority, however, is simply for the purpose of setting up machinery by which the appointing power may practically operate, and *the legislature itself remains that power, the Governor acting only as its agent*. * * * (436-437) (Italics added)

The principle of the Benn Case was reasserted in *Suermann v. Hadley*, 327 Pa. 190 (1937), by Chief Justice Kephart, as follows:

Appellants further contend that the function of the Board of Revision of Taxes is legislative in character, and that the rule of *Commonwealth v. Benn*, *supra*, should apply; if so *the legislature is the real appointive power with power to remove*. * * * The Benn case held that as the General Assembly was *the actual appointive power of the Public Service Commission* it could, in delegating a share of this authority to another office, reserve the removal power to itself or limit removal by its appointive agent with its consent. The decision was based on the fact that rate-making is a *legislative matter existing under the police power*, and its exercise a legislative function. * * * (201) (Italics added)

Members of the Public Utility Commission were designated as "deputies of the General Assembly to perform legislative work" in *Commonwealth ex rel. v. Stewart*, 286 Pa. 511, 517 (1926); and as "deputies of the legislature" in *Wilkes-Barre v. Pennsylvania Public Utility Commission*, 164 Pa. Super. Ct. 210, 219 (1949).

The same principle was established by the Supreme Court of the United States in—

Humphrey's Executor v. United States, 295 U. S. 602 (1935).

The Federal Trade Commission Act provided that the members of the commission should be appointed by and with the advice and consent of the Senate; and that any commissioner might be removed by the President for inefficiency, neglect of duty or malfeasance in office.

The Supreme Court of the United States held that the President could not remove a commissioner for any other cause than those specified, because—

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, * * * In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. * * * (628)

These decisions establish clearly that the Public Utility Commission is a legislative agency and its members are deputies or agents of the legislature.

In view of these decisions of the Supreme Court defining the official character of a member of a public utility commission, we are of the opinion that article III, section 13 does not apply to increases in salary of the members of the commission, because—

(1) Article III, section 13 does not apply to members of the legislature or to deputies or agents employed by them in carrying on the work of the legislature.

Article II of the Constitution deals with the legislative branch of the government.

It expresses a clear intent to deal with the compensation of members independently of article III, section 13. The same intent, we believe, is evident as to the compensation of its deputies and agents.

Section 8 of article II provides only that "No member of either House" shall receive any increase of salary during his term. The intent obviously is to prevent the members of the legislature from increasing *their own* salaries. The restriction is limited entirely to members. There is no similar restriction as to the clerks or other officers or employes of the legislature.

The express imposition of a restriction placed upon compensation of members, by implication excludes the imposition of a similar restriction upon the compensation of agents or officers of the legislature.

Section 9 of article II directs the elections by the Senate of a President Pro Tempore and by the House of a Speaker and further provides that—

* * * Each House shall choose its other officers * * *.

While section 9 confers ample authority upon each House to choose officers or other subordinate agents to aid in the work of legislation, section 9 or indeed all of article II are completely silent as to the compensation of such officers or agents or any restriction thereon. The intention undoubtedly was to place the matter of compensation within the discretion of each house of the legislature.

(2) The reason underlying article III, section 2 does not apply to members of the Public Utility Commission.

This reason was authoritatively stated by Mr. Justice Drew in *Hadley's Estate*, 336 Pa. 100 (1939), as follows:

* * * The purpose of the framers of the Constitution in placing limitations upon legislative interference with the compensation received by a public officer for the duties normally incident to the office was to eliminate political or partisan pressure upon the incumbents of office after they had been elected or appointed: 8 Deb. Pa. Const. 332, 333. * * * (105)

As Mr. Justice Drew pointed out, the purpose of section 13 of article III was to prevent the legislature from putting political or other pressure upon officials of other departments of the Commonwealth. It was not intended to interfere with the control of the legislature over assistants or agencies created by it to carry out its legislative policies.

In increasing the salaries of the members of the Public Utility Commission, the legislature was not trying to control or to dominate officials of another co-ordinate branch of the government.

It was fixing the salaries of its own deputies or agents. It did not need to increase or decrease their salaries if it had had a purpose to control their action. The commissioners were its own creatures. The legislature had power to abolish the commission entirely or to amend the law so that the legislature had the sole power of appointment and removal of commissioners. The legislature had a much greater power over the commissioners than the power to change salaries could give to it.

In *Pennsylvania Official Opinions of the Attorney General 1911-1912*, page 41, under date of May 24, 1911, the late Judge William M. Hargest, then an Assistant Deputy Attorney General, rendered an opinion that the salaries of the Chief Clerks of the House and of the

Senate might be increased during their term of office without violating article III, section 13. The opinion states:

Even assuming that the positions of Chief Clerk of the House and Chief Clerk of the Senate are offices within the broad acceptation of that term, I am of opinion and so advise you, that they are not offices within the meaning of Article III, Section 13 of the Constitution, and that the salaries attaching thereto may be increased during the term of the incumbents of such positions. (42)

We are accordingly of the opinion that article III, section 13 does not apply to members of the Public Utility Commission and that each member is entitled to receive a salary fixed by the Act of March 31, 1949, P. L. 369, from the date of its enactment.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

HARRY F. STAMBAUGH,
Special Counsel.

OPINION No. 620

Insurance—Casualty and Surety Rate Regulatory Act—The Fire and Marine Rate Regulatory Act—Rate filings—Interpretation of certain sections.

1. Rate filings under Section 4 of the Acts of June 11, 1947, P. L. 538, 40 P. S. Section 1184, and June 11, 1947, P. L. 551, 40 P. S. Section 1224, become automatically effective at the expiration of 30 days after their filing or at the expiration of 60 days after their filing, if there has been a maximum extension of the waiting period, unless they have been previously disapproved by the Commissioner after a hearing as provided for in sections 5, or, of course, unless made effective before the expiration of the waiting period or any extension thereof by express authorization of the Insurance Commissioner pursuant to subsections (d).

(a) The calling of a hearing under sections 5 of either of those acts will not extend the waiting period beyond the expiration date fixed in sections 4 (d).

(b) Appeals under sections 8 of those acts will not effect an extension of the waiting periods prescribed in sections 4 (d), with regard to rate filings, or sections 7, with regard to deviations.

2. In the case of deviation filings under sections 7 of those acts, there is no authority for the Insurance Commissioner to extend the waiting period beyond the 30 days therein prescribed, and deviation filings will become effective, unless disapproved by the Commissioner, within 30 days from the date on which they are filed.

Harrisburg, Pa., December 27, 1950.

Honorable Artemas C. Leslie, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested this department to interpret certain sections of "The Casualty and Surety Rate Regulatory Act" of June 11, 1947, P. L. 538, 40 P. S. §§ 1181 et seq., and "The Fire Marine and Inland Marine Rate Regulatory Act" of June 11, 1947, P. L. 551, 40 P. S. §§ 1221 et seq. Specifically you pose the following questions:

1. Does a rate filing made under section 4 (a) become effective at the end of the waiting period of 30 or 60 days under section 4 (d), or is the effectiveness of the filing stayed until after a hearing and decision by the Commissioner?

(a) If the Commissioner under section 5 (a), prior to the expiration of said waiting period, issues a notice of hearing to be held on a date subsequent to said waiting period expiration date?

(b) If a rate filing be made by a rating organization after an appeal has been made to the Commissioner under section 8 by a member or subscriber to such rating organization from the action or decision of that organization approving a change in or addition to a filing of such organization, such change being the subject of the new rate filing and also of the appeal, and the Commissioner issues a notice of a hearing to be held on the appeal on a date subsequent to the waiting period expiration date on the rate filing?

2. If a deviation filing be made under section 7, may the Insurance Commissioner under section 4 (d) extend the waiting period beyond the original 30 days?

Except as they apply respectively to casualty insurance and to fire and marine insurance, sections 4, 5, 7 and 8 of the two acts are similar in phraseology. We, therefore, need only consider these sections as they appear in "The Casualty and Surety Rate Regulatory Act" of June 11, 1947, P. L. 538 (herein referred to as the "Rating Law"). Sections 4 and 5, 40 P. S. §§ 1184 and 1185, read as follows:

Section 1184. Rate filings.

(a) Every insurer shall file with the Commissioner every manual of classifications, rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use. Every such filing shall state the proposed effective date thereof and shall indicate the character and

extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of the Act, he may require such insurer to furnish the information upon which it supports such filing. Any filing may be supported by (1) the experience or judgment of the insurer or rating organization making the filing, (2) the experience of other insurers or rating organizations, or (3) any other factors which the insurer or rating organization deems relevant. A filing and any supporting information shall be open to public inspection after the filing becomes effective.

(b) An insurer may satisfy its obligations to make such filings by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings and by authorizing the Commissioner to accept such filings on its behalf; Provided, That nothing contained in this Act shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization.

(c) The Commissioner shall review such of the filings as it may be necessary to review in order to carry out the purposes of this Act.

(d) Subject to the exception specified in subsection (3) of this section, each filing shall be on file for a waiting period of thirty (30) days before it becomes effective, which period may be extended by the Commissioner for an additional period not to exceed thirty (30) days upon written notice within such waiting period to the insurer or rating organization which made the filing. Upon written application by such insurer or rating organization, the Commissioner may authorize a filing of a part thereof which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this Act and to become effective unless disapproved, as hereinafter provided, by the Commissioner within the waiting period or any extension thereof.

(e) Any filing with respect to a surety or guaranty bond required by law or by court or executive order or by order, rule or regulation of a public body, not covered by a previous filing, or any filing with respect to a contract or a policy covering any risk or kind of insurance or subdivision thereof for which classification rates do not generally exist in the industry, or which by reason of rarity or peculiar characteristics does not lend itself to normal classification or rating procedure, shall become effective when filed and shall be deemed to meet the requirements of this Act.

(f) Under such rules and regulations as he shall adopt the Commissioner may, by written order, suspend or modify the requirement of filing as to any kind of insurance, subdivision

or combination thereof, or as to classes of risks, the rates for which cannot practicably be filed before they are used. Such orders, rules and regulations shall be made known to insurers and rating organizations affected thereby. The Commissioner may make such examination as he may deem advisable to ascertain whether any rates affected by such order meet the standards set forth in subsection (d) of section three.

(g) Upon the written consent of the insured stating his reasons therefor, filed with and approved by the Commissioner, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk. The rate shall become effective when such consent is filed and shall be deemed to meet the requirements of this Act until such time as the Commissioner reviews the filing and so long thereafter as the filing remains in effect.

(h) Beginning ninety (90) days after the effective date of this Act no insurer shall make or issue a contract or policy except in accordance with filings or rates which are in effect for said insurer as provided in this Act or in accordance with subsections (f) or (g) of this section.

Section 1185. Disapproval of filings.

(a) Upon the review at any time by the Commissioner of a filing he shall, before issuing an order of disapproval, hold a hearing upon not less than ten (10) days written notice, specifying the matters to be considered at such hearing, to every insurer and rating organization which made such filing, and if, after such hearing, he finds that such filing or a part thereof does not meet the requirements of this Act he shall issue an order specifying in what respect he finds that it so fails, and stating when, within a reasonable period thereafter, such filing or a part thereof shall be deemed no longer effective if the filing or a part thereof has become effective under the provisions of section four: Provided, however, That an insurer or rating organization shall have the right at any time to withdraw a filing or a part thereof, subject to the provisions of section seven in the case of a deviation filing. Copies of said order shall be sent to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(b) Any person or organization aggrieved with respect to any filing which is in effect may make written application to the Commissioner for a hearing hereon: Provided, however, That the insurer or rating organization that made the filing shall not be authorized to proceed under this subsection. Such application shall specify the grounds to be relied upon by the applicant. If the Commissioner shall find that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall,

within thirty (30) days after receipt of such application, hold a hearing upon not less than ten (10) days written notice to the applicant and to every insurer and rating organization which made such filing.

If, after such hearing, the Commissioner finds that the filing or a part thereof does not meet the requirements of this Act, he shall issue an order specifying in what respects he finds that such filing or a part thereof fails to meet the requirements of this Act, and stating when, within a reasonable period thereafter, such filing or a part thereof shall be deemed no longer effective. Copies of said order shall be sent to the applicant and to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(c) No filing nor any modification thereof shall be disapproved if the rates in connection therewith meet the requirements of this Act.

Under the provisions of Section 4 (d) of the Rating Law, rate filings are to be on file for a waiting period of 30 days before becoming effective. This period may be extended by the Commissioner for an additional period not exceeding 30 days, provided that written notice of such extension shall be given by the Commissioner within the original 30 day waiting period. The Commissioner, upon written application, may authorize a filing to become effective prior to the termination of a waiting period; and the rate filing, if not formally disapproved, becomes automatically effective at the expiration of the waiting period in accordance with the final sentence of section 4 (d), which specifically provides that:

* * * A filing shall be deemed to meet the requirements of this Act and to become effective *unless disapproved*, as hereinafter provided, by the Commissioner *within the waiting period or any extension thereof.*" (Italics ours.)

Section 5 of the Rating Law designates the procedure for disapproval of filings, as referred to in the portion of section 4 (d) quoted above, and provides that before the Commissioner issues an order of disapproval he shall hold a hearing upon not less than 10 days' notice, and if, after hearing, he finds that the filing does not meet the requirements of the act, he shall issue an order specifying the deficiencies of the filing and "* * * when, within a reasonable period thereafter, such filing * * * shall be deemed no longer effective if the filing * * * has become effective under the provisions of section four: * * * "

These provisions stand in sharp contrast with the comparable provisions of the Model Fire and Casualty Rate Regulatory Bills prepared by the National All-Industry Committee in collaboration with a committee of the National Association of Insurance Commissioners, under the provisions of which rate filings *prior* to effectiveness, could be disapproved by an Insurance Commissioner without the necessity of a formal hearing, and *subsequent* to effectiveness, could be disapproved only following a formal hearing. This concept was rejected by The Pennsylvania Insurance Industry Conference Committee, which, under date of February 7, 1947, promulgated its "Memorandum for the Insurance Committees of the Pennsylvania General Assembly," together with its own proposed Rate Regulatory Bills, which served as the bases for the presently enacted Rating Laws here under discussion.

The following quotations from the Memorandum will serve to demonstrate this point:

In the opinion of the Pennsylvania Industry Conference Committee, the Model Bills are at variance with these premises in that they are not adapted to the facts of Pennsylvania experience, and in that they provide a higher degree of regulation than is consistent with the interest of the insuring public of this Commonwealth.

* * * * *

* * * Moreover, it is not necessary in order to provide regulation fulfilling the standard called for by Public Law 15 that a duty to formally analyze every filing be placed on the supervisory official. It is sufficient to confer on the Commissioner the power to disapprove as provided in Section 5, coupled with the duty to enforce and carry out the provisions of the Act as provided in Section 13, subsection (d), and in Section 4, subsection (c).

In subsection (d) the changes are directly connected with those in Section 5 and, therefore, are discussed below under the heading of the latter Section.

* * * * *

The greater duty of care and formality imposed upon the commissioner in regard to disapproving filings explains the longer period provided in Section 4, subsection (d), before they become effective. In that subsection the original waiting period and its extension are each increased from fifteen days to thirty days.

* * * * *

In Section 7, the revision made by the committee was felt to be necessary to be consistent with the revised provisions of Section 4, subsection (d), and of Section 5. No other

filing requires a hearing as a condition to its effectiveness, and there did not appear to be any reason why a deviation filing should be an exception to this rule.

We are obliged to conclude, in view of the unmistakable language of the final sentence of section 4 (d), coupled with the antecedent history of the enactment, that rate filings made pursuant to section 4 of the Rating Law (unless sooner and formally disapproved) become automatically effective at the expiration of the statutory waiting period: Section 51 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. §551.

You have pointed to the case of *Morrison, Appellant, v. Unemployment Compensation Board of Review*, 141 Pa. Superior Ct. 256, 258 (1940), where the Court held:

On the question of procedure, we are of opinion that the provision in the Unemployment Compensation Law (Act of December 5, 1936, P. L. of 1937, p. 2897), that the board shall hear appeals by employees engaged in the administration of the act from dismissal, suspension or furlough and render a final decision in not more than thirty days after the date of such appeals, (sec. 208 (p)), is directory and not mandatory, and that the action of the board in not entering its final decision on the appeal taken October 5, 1939, and heard on October 24, 1939, until November 15, 1939 did not require the reinstatement of the employee to the position from which he had been rightfully dismissed: *Pearlman v. Newburger*, 117 Pa. Superior Ct. 328, 337-8, 178 A. 402; *Com. ex rel. Fortney v. Wozney*, 326 Pa. 494, 497, 192 A. 648; *Coolbaugh v. Herman*, 221 Pa. 496, 70 A. 830; *Swick v. School Dist. of Tarentum*, 141 Pa. Superior Ct. 246, 14 A. 2d 898. It will be noted that the decision of the board was rendered within thirty days after the hearing on the appeal.

You indicate that this case might stand as authority for the proposition that the effectiveness of a rate could be postponed beyond the statutory waiting period where notice of hearing was given prior to the expiration date, but hearing is not held until after the expiration date of the statutory waiting period.

We do not so construe the *Morrison Case*. For in citing it, the Supreme Court in *Griffith Will*, 358 Pa. 474, 482 (1948) said:

* * * A decrees and judgment will not be set aside merely for a violation of a directory statutory provision.

This is far different from the proposition that *mandatory* language of a statute can be ignored in the administration of that law. For we think the phraseology in the final sentence of section 4 (d) un-

equivocally requires that *unless* the Commissioner's order of disapproval be issued prior to the expiration of the waiting period, the *filing shall* be deemed to meet the requirements of the act and to *become effective*.

This conclusion is further supported by a consideration of section 5 (a) which provides that upon the issuance of an order of disapproval, the Commissioner shall state “* * * when, within a reasonable period thereafter, such filing * * * shall be deemed no longer effective if the filing * * * has become effective under the provisions of section four: * * *” This is a recognition of the legislative intent that filings may become automatically effective upon the expiration of the waiting period and that if the order of disapproval is issued subsequent to such automatic effective date, a date for *future* noneffectiveness must be designated.

A contrast is presented between the Model Bills and the Rate Regulatory Acts themselves enacted substantially in the form proposed by the Pennsylvania All-Industry Conference Committee. The Model Bills provide for a 15 day waiting period and a permissible 15 day extension. The Pennsylvania All-Industry Conference Committee Bills and the Rating Laws provide for a 30 day waiting period and a permissible 30 day extension. This change was a deliberate one for the purpose of giving the Commissioner a greater period of time within which to disapprove filings before effectiveness. If the issuance of a call for a hearing had been intended to operate as a stay of effectiveness, the Pennsylvania All-Industry Conference would not have felt impelled to increase the waiting period for the purpose of granting additional time for revision, and possible disapproval, prior to the effectiveness of a filing.

In addition, where a supersedeas or stay is to operate, there must be a clear manifestation of such legislative intent. This we do not find here. For only in section 16 of the Rating Law do we find any reference to the concept of suspension or postponement of any effective date. But there, by its very language, such concept is explicitly related only to the action of the Commissioner. The absence of a comparable provision relating to rate filings makes it clear that their effectiveness cannot be stayed except in accordance with the precise language of section 4 (d).

What we have heretofore said concerning the mandatory provisions of the last sentence of section 4 (d) is equally applicable where there has been an appeal by a member or subscriber to a rating organization taken under the provisions of section 8. If the rating organi-

zation has filed rates which are the subject of an appeal, those rates will "become effective unless disapproved by the Commissioner within the waiting period or any extension thereof."

Deviation filings are made under the authority of Section 7 of the Rating Law, which reads as follows:

Section 1187. Deviations.

Every member of, or subscriber to, a rating organization shall adhere to the filings made on its behalf by such organization except that any such insurer may file with the Commissioner a uniform percentage decrease or increase to be applied to the premiums produced by the rating system so filed for a kind of insurance, or for a class of insurance which is found by the Commissioner to be a proper rating unit for the application of such uniform percentage decrease or increase, or for a subdivision of a kind of insurance (1) comprised of a group of manual classifications which is treated as a separate unit for rate making purposes, or (2) for which separate expense provisions are included in the filings of the rating organization. Such deviation filing shall specify the basis for the modification and shall be accompanied by the data upon which the applicant relies. A copy of the filing and data shall be sent simultaneously to such rating organization. Any such deviation filing *shall be on file for a waiting period of thirty (30) days before it becomes effective*, unless the Commissioner reviews and authorizes the filing to become effective before the expiration of such period, *and shall be subject to the provisions of section five*. Each deviation shall be effective for a period of not less than one (1) year from the date such deviation is filed unless terminated sooner with the approval of the Commissioner or in accordance with the provisions of section five. (Italics ours.)

The emphasized portion of section 7 represents a change from the philosophy of the Model Bill which provided for approval after hearing as a condition to effectiveness. The change was apparently made to conform with the underlying principle of automatic effectiveness. And although the waiting period prescribed for filings under section 4 may be extended for an additional period or periods not exceeding a second 30 days, there is no such provision for extension in section 7. Consequently, we must conclude that deviation filings under section 7 become effective automatically unless disapproved by the Commissioner within 30 days. There is no express or implied authority in this law which would permit the Insurance Commissioner, in the case of deviation filings, to extend the waiting period of 30 days. To the contrary, the permission to extend the waiting period provided for in section 4 of the Rating Law, indicates a clear legislative intent that such right is denied him under section 7.

We are of the opinion that

1. Rate filing under Section 4 of the Acts of June 11, 1947, P. L. 538, 40 P. S. §1184, and June 11, 1947, P. L. 551, 40 P. S. §1224, become automatically effective at the expiration of 30 days after their filing or at the expiration of 60 days after their filing, if there has been a maximum extension of the waiting period, unless they have been previously disapproved by the Commissioner after a hearing as provided for in section 5, or, of course, unless made effective before the expiration of the waiting period or any extension thereof by express authorization of the Insurance Commissioner pursuant to subsections (d).

(a) The calling of a hearing under sections 5 of either of these acts will not extend the waiting period beyond the expiration date fixed in sections 4 (d).

(b) Appeals under sections 8 of those acts will not effect an extension of the waiting periods prescribed in section 4 (d), with regard to rate filings, or section 7, with regard to deviations.

2. In the case of deviation filings under sections 7 of those acts, there is no authority for the Insurance Commissioner to extend the waiting period beyond the 30 days therein prescribed, and deviation filings will become effective, unless disapproved by the Commissioner, within 30 days from the date on which they are filed.

Yours very truly,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,

Attorney General.

RALPH B. UMSTED,

Deputy Attorney General.

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