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OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

FOR THE YEARS

1953 and 1954

ATTORNEYS GENERAL

ROBERT E. WOODSIDE
Resigned October 1, 1953

FRANK F. TRUSCOTT
Commissioned October 13, 1953

OFFICIAL OPINIONS

1953-1954

OPINION No. 637

Counties—Philadelphia County—Abolition of county offices—Constitutional amendment of November 1951, adding article XIV, sec. 8—Effect.

The constitutional amendment of November 1951, adding article XIV, sec. 8, to the Constitution, and abolishing all county offices in Philadelphia, did not abolish Philadelphia County as an entity, but it still exists for a number of purposes including article V, secs. 6, 10 and 22, and article VIII, sec. 16, of the Constitution.

Harrisburg, Pa., April 1, 1953.

Honorable Andrew J. Sordoni, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: You have inquired whether, under the recent Consolidation Amendment relating to Philadelphia and known as Article XIV, Section 8, of the Constitution, it is now correct to say that Pennsylvania contains only 66 counties, whereas prior to the effective date of the amendment, there were 67.

By reference to Article XIV, Section 8, it will be observed that in Philadelphia all county offices were abolished on the effective date of the amendment and that since then all laws applicable to the County of Philadelphia apply to the City of Philadelphia, that the City has assumed and taken over all powers, property, obligations and indebtedness of the County of Philadelphia, and that local and special legislation may now be enacted relating to Philadelphia, notwithstanding the provisions of Article III, Section 7, of the Constitution.

The language of the amendment is, in part, as follows:

> In Philadelphia all county offices are hereby abolished, and the city shall henceforth perform all functions of county government within its area through officers selected in such manner as may be provided by law.

The amendment does not purport to abolish the County of Philadelphia as a geographic unit of the Commonwealth nor does it expressly abolish it as a governmental unit. It does abolish the county offices but the county government is continued with its functions being performed by the city government of Philadelphia.

The title to the Joint Resolution proposing the amendment would seem to make this clear. It is as follows:

> A Joint Resolution proposing an amendment to article fourteen of the Constitution of the Commonwealth of Pennsylvania, by adding thereto a section abolishing county offices in Philadelphia and providing for the performance of county functions by the city of Philadelphia.

In the light of this title an interpretation that the amendment abolished the County of Philadelphia as an entity might well be held unconstitutional as going beyond the subject clearly expressed in the title: Constitution of Pennsylvania, Article III, Section 3.

Furthermore, to continue effective a number of the provisions of the Constitution it is necessary to conclude that the County of Philadelphia still exists.

A few examples will suffice.

Article V, Section 6, of the Constitution provides that:

> In the county of Philadelphia all the jurisdiction and powers now vested in the district courts and courts of common pleas * * * shall be * * * vested in five distinct and separate courts of equal and coordinate jurisdiction, composed of three judges each. * * *

Article V, Section 10, provides that:

> The judges of the courts of common pleas, within their respective counties, shall have power to issue writs of certiorari * * *

Article V, Section 22, provides that:

> In every county wherein the population shall exceed one hundred and fifty thousand, the General Assembly shall * * * establish a separate orphans' court * * *

Article VIII, Section 16, provides that:

> The courts of common pleas of the several counties of the Commonwealth shall have power, within their respective jurisdictions, to appoint overseers of election to supervise the proceedings of election officers * * *

The courts are still State courts, and the districts within which they sit are composed of counties. See Article V, Sections 4 and 5 of the Constitution.

Then too, Sections 16 and 17 of Article II setting up, respectively, Senatorial and Representative districts require the continuation of Philadelphia County as a geographic subdivision of the State or the apportionment of seats which presupposes that the State will continue to be completely divided into counties would be made ineffective.

It might be contended that the foregoing examples do not compel the interpretation we have made because Paragraph 3 of the amendment provides that "All laws applicable to the County of Philadelphia shall apply to the city of Philadelphia," and this would include provisions of the Constitution applicable to Philadelphia County.

While it is true that the term "laws" is sometimes used in a broad sense to include both constitutional and statutory law, we are of the opinion that it was used in the amendment in its general sense to mean legislative enactments and not to include the organic law of the Constitution: 16 C. J. S., Constitutional Law, Section 1, page 20. This interpretation is in keeping with the use of the word "law" or "laws" throughout our Constitution.

A final reason for holding that the County of Philadelphia continues to exist is found in Section 21 of The General County Law of May 2, 1929, P. L. 1278, 16 P. S. Section 21, which provides that the State shall be divided into counties, naming them, "as now by law established." The Act of April 15, 1834, P. L. 537 made a similar provision. Philadelphia is one of the three original counties established at the first settlement of the province in 1682. To disestablish it as a county would seem to require an express act to that effect and cannot be inferred from the amendment here under discussion.

Article XIV, Section 8, of the Constitution did not change the word "county" to "city" throughout the Constitution whenever Philadelphia was involved. It expressly abolished county offices in Philadelphia and made them city offices. It expressly provided that the functions of the county government in Philadelphia should be performed by the city government. It expressly provided that special and local legislation can be enacted relating to Philadelphia.

These are the only changes which the so-called Consolidation Amendment made. It did not wipe out Philadelphia County as a geographical

area of the State, and to give proper meaning and effect to other provisions of the Constitution which are applicable throughout the State, Philadelphia County must still be recognized as existing.

It is our opinion that it is incorrect to say that Pennsylvania now has only 66 counties. It has 67 counties today as it had before the Philadelphia Consolidation Amendment to the Constitution was adopted in November, 1951.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

ROBERT L. RUBENDALL,
Deputy Attorney General.

OPINION No. 638

Insurance—Insurance Company Law of May 17, 1921, sec. 202(f)—Multiple Line Amendment of April 20, 1949—Privileges and obligations of domestic mutual fire insurance and casualty insurance companies—Maintenance of unearned premium reserves—Filing of rates—Submission of policy forms for approval—Licensing of agents—Casualty and Surety Rate Regulatory Act of June 11, 1947—The Fire Marine and Inland Marine Rate Regulatory Act of June 11, 1947.

Harrisburg, Pa., June 22, 1953.

Honorable Artemis C. Leslie, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning certain questions which have arisen under the provisions of the so-called Multiple Line Amendment to Section 202 of The Insurance Company Law of May 17, 1921, P. L. 682, being the Act of April 20, 1949, P. L. 620, 40 P. S. §382, which added new subdivision (f) which reads 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.

You have stated your questions as follows:

1. What unearned premium reserves shall be maintained by
   (1) domestic mutual *fire*, marine and fire and marine insurance companies upon
      (a) fire and marine business?
      (b) casualty business?
   (2) domestic mutual *casualty* insurance companies upon
      (a) fire and marine business?
      (b) casualty business?

2. What rate filings must be made with and approved by the Insurance Commissioner by domestic mutual *fire* and marine and domestic mutual *casualty* insurance companies upon
   (a) fire and marine business, including motor vehicle fire, theft and collision insurance?
   (b) casualty business?

3. What policy forms must be filed with and approved by the Insurance Commissioner by domestic mutual fire and marine and domestic mutual *casualty* insurance companies
   (a) fire and marine business?
   (b) casualty business?

4. Must domestic mutual *fire* and marine and domestic mutual *casualty* insurance companies license their agents upon
   (a) fire and marine business?
   (b) casualty business?

Before taking up each of these questions in detail, it would seem to be helpful to examine the background of the Multiple Line Amendment of 1949, supra.

For many years prior to the 1949 amendment the theory behind the organization and regulation of insurance companies was that these companies should be limited to writing insurance in certain particular fields rather than be permitted to write insurance in all fields. These fields were, in general: (1) life, (2) fire and marine, and (3) casualty and surety.

This principle was adopted in this Commonwealth and the basic law governing the organization and regulation of fire and casualty

insurance companies in Pennsylvania has been written on the theory that fire companies would write only fire and marine business and casualty companies would write only casualty and surety business.[1] See Formal Opinion No. 594 of this department sent to you under date of July 5, 1949, where it was stated:

> "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, * * *"

In keeping with this theory, the legislature saw fit to grant certain exemptions from the requirements of the law to domestic mutual fire insurance companies. For example, such companies were not required to:

1. Maintain reserves for unearned premiums on policies subject to limited or unlimited assessment: Insurance Company Law, supra, Section 807, 40 P. S. Section 917.

2. File a schedule of rates or become a member of any rating bureau: Act of June 11, 1947, P. L. 551, Section 2, 40 P. S. Section 1222.

3. Submit their policy forms for approval by the Insurance Commissioner: Insurance Company Law, supra, Section 354, 40 P. S. Section 477(b).

4. License their agents: The Insurance Department Law, the Act of May 17, 1921, P. L. 789, Section 603, 40 P. S. Section 233.

Since, as we have seen, the writing of insurance was divided into different fields with different structural organizations in the companies, these differences in requirements between fire and casualty companies were never successfully challenged as being improper and unfair classification in violation of Article III, Section 7 of the Pennsylvania Constitution or of the Fourteenth Amendment of the Constitution of the United States.

However, with the adoption of the Multiple Line Amendment, the theory underlying the classification of insurance companies has been

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[1] In addition to fire companies, which may write fire and inland marine insurance, the law provides for and there are fire and marine companies, which may write fire, inland marine, and ocean marine, and marine companies, which may write inland marine and ocean marine insurance. However, for the purposes of this opinion we shall only refer to fire insurance companies authorized to write fire and marine insurance.

to a great extent wiped away, for under it fire insurance companies are now permitted, after amending their charters, to write casualty insurance and casualty insurance companies similarly are permitted to write fire and marine insurance.

The questions you have posed have arisen because the domestic mutual fire insurance companies have contended that the exemptions granted to them by the legislature in the past, which exemptions we have summarized heretofore in this opinion, apply not only to the writing of fire or marine insurance, but also to casualty insurance written by those domestic mutual fire insurance companies which have amended their charters to write casualty insurance in accordance with section 202 (f) of The Insurance Company Law, supra. The domestic mutual casualty companies, on the other hand, resist this contention, for it is obvious that it places them in an unfavorable competitive position in the writing of casualty insurance. Furthermore, they contend that in the writing of fire insurance by those of their companies that have amended their charters the exemptions granted to domestic mutual fire insurance companies should apply.

In adopting the Multiple Line Amendment the legislature apparently foresaw that this change in the accepted classification of insurance companies would raise many questions and sought to answer them by providing that additional lines of insurance could be written only "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."

By Formal Opinion No. 599 of this department, dated July 29, 1949, as amplified by the letter of Deputy Attorney General Keitel dated December 7, 1950, you were advised that this provision required a domestic mutual company engaged in writing fire or casualty insurance to comply with the financial requirements for the initial organization of mutual companies before being authorized to write multiple lines of insurance. (This requirement was somewhat lessened by the amendment to section 322 of the Insurance Company Law, supra, made by the Act of July 19, 1951, P. L. 1100, 40 P. S. § 445).

It is a basic principle of statutory construction that where the words of a statute are clear, there is no need to go further to determine legislative intention: Statutory Construction Act of May 28, 1937, P. L. 1019, Section 51, 46 P. S. §551; Rich *v.* Meadville Park Theatre Corp., et al., 360 Pa. 338, 340 (1948); Appeal of Liberty Firemen's Social Club, 168 Pa. Superior Ct. 500, 504 (1951).

Therefore, when a fire insurance company amends its charter to write casualty insurance it must comply with *all* of the financial and other requirements prescribed by law for companies transacting casualty business and any exemptions from the requirements which a domestic mutual fire insurance company may have been given do not apply to insurance which it relates other than fire and marine unless the legislature has expressly indicated that it is entitled to such exemption as to all of the classes of insurance which it may write.

We should at this time point out that the legislature did expressly provide in the Multiple Line Amendment that one of the exemptions from the requirements of the insurance law granted to domestic mutual fire insurance companies should apply to the writing of all lines of insurance such companies may now write. The following proviso is contained in section 202 (f).

> * * * 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. (Emphasis supplied)

We deem the inclusion of this proviso very significant. Had the legislature intended that domestic mutual fire insurance companies should enjoy all of the exemptions from the requirements of the insurance laws previously granted to them when they write additional lines of insurance, such a provision would have been unnecessary. It is a principal of statutory construction that "The legislature cannot * * * be deemed to intend that language used in a statute shall be superfluous and without import." Commonwealth *v.* Mack Bros. Motor Car Co., 359 Pa. 636, 640 (1948).

The inclusion of this proviso indicates that the legislature was of the opinion that domestic mutual fire insurance company agents who write casualty business would be required to be licensed unless specifically exempt for "* * * it is generally regarded that the matter contained in the proviso would have been within the language of the main provisions, had the proviso not been included:" 50 Am. Jur. Section 435, page 457.

Furthermore, as stated in Commonwealth ex rel. Maurer *v.* Witkin, 344 Pa. 191, 196 (1942):

> * * * it is a principle of interpretation that the mention of one thing in a law implies the exclusion of the things not mentioned ("expressio unius est exclusio alterius")

By expressly stating that the exemption as to the licensing of agents should apply to domestic mutual fire insurance companies taking advantage of the Multiple Line Amendment, the legislature impliedly stated that the other exemptions granted to these companies should not apply to the writing of additional lines of insurance by them.

Still another reason for holding that the exemptions granted to domestic mutual fire insurance companies should not be construed as applying to all classes of insurance which they may now write is found in the principle stated as follows in 50 Am. Jur., Statutes, Section 437:

> * * * it is a general rule of statutory construction that a proviso which operates to limit the application of the provisions of a statute general in terms, should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms, of the proviso.

See also 2 Sutherland Statutory Construction, 471, 472; Commonwealth ex rel. Margiotti *v.* Lawrence et al., 326 Pa. 526, 531 (1937); Lancaster *v.* Public Service Commission et al., 120 Pa. Superior Ct. 597, 602 (1936).

The various exemptions in favor of domestic mutual fire insurance companies are in the form of provisos to general law and were granted at a time when such companies could under the law write only fire and marine insurance. Obviously the intention of the legislature was that these exemptions should only apply to the types of insurance these companies were then able to write. In keeping with the foregoing principle of law, when the Multiple Line Amendment broadened the types of insurance which these companies may write, it did not, in the absence of an express intention to do so, have the effect of expanding these exceptions to include the new lines of insurance which such companies could now write.

We have seen that the Multiple Line Amendment did expressly expand the exception as to the licensing of agents to include any of the agents of a domestic mutual fire insurance company.

Since the enactment into law of the Multiple Line Amendment on April 20, 1949, two amendatory acts have been passed which relate to the exemptions from the insurance laws granted to domestic mutual fire insurance companies. We must examine these acts to determine what effect they have had on the situation that existed at the time the Multiple Line Amendment was adopted.

The first of these was passed at the same Session of the legislature, the Act of May 11, 1949, P. L. 1087, 40 P. S. 917. It amended section 807 of the Insurance Company Law, supra, which section sets forth the reserves that must be maintained by a mutual company upon unearned premiums. Prior to the amendment the section contained an exception in favor of domestic mutual fire insurance companies which was broad enough to apply to all policies issued if such a company issued any policies with liability to assessment. The 1949 amendment to this section limited the exception to policies setting forth a liability to assessment.

It has been contended that since this act was enacted subsequent to the Multiple Line Amendment, the legislature in referring to domestic mutual fire insurance companies must be deemed to have known that such a company could then write casualty insurance and therefore the exemption from maintaining reserves for unearned premiums was meant to apply to casualty policies of these companies if they provided for assessment for as stated in Kingston Borough *v.* Kolansky, 155 Pa. Superior Ct. 424, 427 (1944):

> It will be presumed that the legislature, in enacting a statute, acted with full knowledge of existing statutes relating to the same subject * * *

However, the fallacy in this contention lies in the fact that the Multiple Line Amendment though enacted into law on April 20, 1949, did not specify an effective date and therefore did not go into operation until September 1, 1949: Statutory Construction Act of May 28, 1937, P. L. 1019, Section 4, 46 P. S. Section 504.

> As a general rule a statute speaks as of the time when it takes effect and not as of the time it was passed (Farmers National Bank and Trust Co. of Reading *v.* Berks County Real Estate Company et al., 333 Pa. 390, 395 (1939)).

Consequently when the amendment of May 11, 1949, P. L. 1087, was adopted the law did not permit domestic mutual fire insurance companies to write casualty business and therefore, in keeping with the principle that a proviso or exception which limits the application of a statute general in terms shall be strictly construed (see ante), when the legislature referred to domestic mutual fire insurance companies it must be concluded that it intended the exception to apply only to the policies that they could then write which did not include policies of casualty insurance.

By the act of July 19, 1951, P. L. 1100, 40 P. S. 477(b), the legislature amended section 354 of the Insurance Company Law, supra, which section requires the approval of policy forms by the Insurance Commissioner. Prior to this amendment domestic mutual fire insurance companies "not heretofore subject to the provisions hereof" were exempt from such requirements. The 1951 amendment changed this exemption to read as follows:

> This section shall not be construed as extending the provisions of this section to domestic mutual fire insurance companies.

By thus deleting the words "not heretofore subject to the provisions hereof" the legislature clearly expressed its intention to broaden the exemption. Furthermore, in making said amendment it must be presumed that the legislature knew that domestic mutual fire insurance companies were permitted by the Multiple Line Amendment to write casualty insurance and therefore intended that the exemption should apply to all types of policies that such a company could write including those of casualty insurance.

We are not unmindful that the extension of this exemption from policy filing to casualty insurance policies written by domestic mutual fire insurance companies might be held to be improper classification and discrimination and therefore violative of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution or Article III, Section 7 of the Pennsylvania Constitution which forbids special or class legislation. Had this been the only special privilege that these companies were permitted to retain when they write casualty insurance we might have been constrained to conclude that the legislature did not intend a result which might be unconstitutional. However, as we have seen, the Multiple Line Amendment itself expressly extends to domestic mutual fire insurance companies writing casualty insurance the exemption from having their agents licensed. In the face of this clear expression of intention we do not deem it within our province to conclude otherwise than that the 1951 Session of the legislature intended that these companies need not file any of the policies issued in connection with fire or casualty insurance. Nor do we feel that it is within the scope of this opinion to comment further on the constitutionality of the exceptions to the insurance laws which domestic mutual insurance companies are given.

Passing now to the contention of the domestic mutual casualty companies that when they broaden the classes of insurance which they may

write to include fire insurance they are entitled to all the exceptions given by law to domestic mutual fire insurance companies on the fire insurance business they write, it is sufficient again to point out that all such exemptions are in the nature of provisos to statutes general in terms and therefore are to be strictly limited to those companies coming within the letter of the law, i. e., "domestic mutual fire insurance companies". Domestic mutual casualty insurance companies though they may now, under certain circumstances, write fire insurance are not, strictly speaking, domestic mutual fire insurance companies and the exemptions of Section 354 and 807 of the Insurance Company Law, supra, Section 2 of The Fire Marine and Inland Marine Regulatory Act of June 11, 1947, P. L. 551, 40 P. S. § 1222, and Section 354 of the Insurance Department Act, supra, 40 P. S. § 4776, do not apply to them.

In view of the foregoing it is our opinion that:

1. Domestic mutual fire insurance companies writing casualty insurance by virtue of subdivision (f) of Section 202 of the Insurance Company Law of May 17, 1921, as amended by the Act of April 20, 1949, P. L. 620, 40 P. S. § 382, the Multiple Line Amendment, must maintain the unearned premium reserves required by Section 807 of the Insurance Company Law, supra, 40 P. S. § 917, in connection with all of their casualty business, but in connection with the fire and marine insurance policies which they write, which policies set forth a limited or unlimited liability to assessment, they do not have to maintain such reserves.

Domestic mutual casualty insurance companies which write fire and marine insurance by virtue of the Multiple Line Amendment must maintain the unearned premium reserves required by section 807 on both their casualty and fire and marine business and they are not entitled to the specific exemption given to domestic mutual fire insurance companies even though their fire and marine insurance policies set forth a limited or unlimited liability to assessment.

2. Domestic mutual fire insurance companies writing casualty insurance by virtue of the Multiple Line Amendment must file rates for approval by the Insurance Commissioner under The Casualty and Surety Rate Regulatory Act of June 11, 1947, P. L. 538, 40 P. S. § 1181, in connection with all their casualty business which comes within the scope of said act as set forth in section 2 thereof including fire, theft and collision coverage on motor vehicles, but due to the specific exemption granted to them in section 2 of The Fire Marine

and Inland Marine Rate Regulatory Act of June 11, 1947, P. L. 551, 40 P. S. § 1222, they need not file rates in connection with their fire and marine business, except motor vehicle insurance.

Domestic mutual casualty insurance companies must file rates for approval by the Insurance Commissioner under both the Casualty and Fire and Marine Rate Regulatory Acts when they write fire and marine insurance in addition to casualty insurance by virtue of the Multiple Line Amendment.

3. Since the exemption granted to domestic mutual fire insurance companies in Section 354 of the Insurance Company Law, supra, was amended and restated subsequent to the effective date of the Multiple Line Amendment such companies need not file for approval of the Insurance Commissioner any of their policy forms covering either fire and marine or casualty insurance.

Domestic mutual casualty insurance companies which write fire and marine insurance by virtue of the Multiple Line Amendment must file for approval both their fire and marine and casualty insurance policy forms.

4. Since the Multiple Line Amendment expressly provides that any domestic mutual fire insurance company which takes advantage of its provisions shall not be required to license *any* of its agents, agents of such a company need not be licensed whether they solicit fire and marine or casualty business.

Agents of a domestic mutual casualty insurance company which company writes fire and marine insurance by virtue of the Multiple Line Amendment must be licensed to solicit either casualty or fire and marine business.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

ROBERT L. RUBENDALL,
Deputy Attorney General.

OPINION No. 639

Taxation—State income tax—Constitutionality—Tax imposed upon Federal income tax liability.

No act imposing a State tax upon the Federal income tax liability of persons who are residents of Pennsylvania can constitutionally be adopted in view of the provisions of article IX, secs. 1 and 2, of the Pennsylvania Constitution requiring uniformity in taxes and prohibiting exemptions other than as specifically provided therein.

Harrisburg, Pa., July 2, 1953.

Honorable John S. Fine, Governor, Harrisburg, Pennsylvania.

Sir: We have your request to advise you whether we can draft an Act imposing a State tax at a fixed percentage upon the Federal income tax liability of persons who are residents of this Commonwealth which would be constitutional. It is our opinion that any act attempting to impose such a tax would be unconstitutional.

Article IX of the Constitution of Pennsylvania relating to "Taxation and Finance" provides in Sections 1 and 2 as follows:

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

To be constitutional, the proposed tax would have to satisfy the uniformity requirements quoted above as interpreted by the Supreme Court of Pennsylvania.

The Federal income tax liability of individuals is determined not only by the gross income, with certain adjustments, but also by deductions, exemptions, and a graduated rate of tax applicable to various brackets. For example, in 1952 a person having an income of $3,000 would be using the short form to pay a Federal tax of either $474, $338, $205, $72 or 0, depending upon whether he had 1, 2, 3, 4 or 5 exemptions respectively. The application of a fixed percentage

against these five varying amounts of Federal tax liability for the same income would result in five different tax payments to Pennsylvania under the proposed bill. Such variations and many others which might be cited create a manifest lack of uniformity which the court decisions strongly corroborate.

In Kelley *v.* Kalodner, 320 Pa. 180 (1935), the Supreme Court of Pennsylvania considered the constitutionality of the Act of July 12, 1935, P. L. 970, which imposed a graduated income tax for school purposes on residents of Pennsylvania and on certain income of nonresidents. The statute provided a comprehensive system for the levy and collection of an annual income tax. Numerous exemptions were permitted by the act for the computation of "gross income" as well as deductions for the determination of "net income". Taxpayers were allowed a deduction for living expenses in the amount of $1,000 in the case of a single person and $1,500 for the head of a family or a married person. In addition, a deduction of $400 was authorized for each dependent under 18 years of age. The tax was imposed at rates varying from 2% to 8%.

In considering the exemption provisions, the court said (p. 188):

> * * * There can be no doubt that these exemptions were inserted for the purpose of putting the burden of the tax upon those most able to bear it, but it results in taxing those whose incomes arise above a stated figure merely because the legislature believes their incomes are sufficiently great to be taxed. *It is obvious that the application of the tax is not uniform.* * * * (Emphasis supplied.)

As to the graduated rates of taxation, the court further said (p. 189):

> *Moreover, the tax is in violation of the uniformity clause in its application to the persons whose incomes fall within the various brackets designated in the act.* We have previously ruled that a tax which is imposed at different rates upon the same kind of property, solely on the basis of the quantity involved, offends the uniformity clause. * * * [Citing Cope's Estate, 191 Pa. 1, 22 (1899)] (Emphasis supplied.)

The court also decided that a tax on income from real estate or securities was a property tax subject to the constitutional requirement of uniformity. The court subsequently held that an excise tax was likewise subject to the requirements of Article IX, Section 1 of the Pennsylvania Constitution. In American Stores Co. *v.* Boardman, 336 Pa. 36, 40, 41 (1939), in discussing a State tax on chain stores, the court said:

> * * * However, it requires but a glance at its provisions to see that the act now before us for consideration is capable of but one interpretation and that is that *it is a plain and palpable attempt at graduated taxation which obviously violates the provisions of our constitution.* * * *
>
> This court has long held and it is now well established in this Commonwealth that a progressively graduated tax is lacking in uniformity and violates article IX, section 1, of our Constitution. From Banger's Appeal, 109 Pa. 79 (1885)—the first instance such a tax came before this court for consideration after the adoption of our present Constitution—down to Butcher *v.* Philadelphia, 333 Pa. 497 (1938), *we have consistently and unalterably held that a graded tax cannot be sustained.* * * * (Emphasis supplied.)

The tax now being proposed on Federal income tax liability would be "a plain and palpable attempt at graduated taxation" which would obviously violate the provisions of our Constitution. It would be an attempt to do indirectly what cannot be done directly, i. e., incorporate into the laws of Pennsylvania the progressively graduated tax system of the Federal Government, with its deductions, exemptions and variations. Such a tax could not be sustained even though the proceeds were earmarked for public schools: Kelley *v.* Kalodner, supra.

Not only would the proposed tax be invalid as lacking uniformity, but it would also be an unconstitutional delegation of legislative authority.

The amount of revenue received by Pennsylvania under such a tax would be subject to all changes in rates, deductions and exemptions enacted by Congress or effected by administrative action or judicial interpretation. By reducing Federal taxes in the middle of a Pennsylvania biennium Congress could unbalance the budget of Pennsylvania. The Pennsylvania General Assembly would thus be delegating to the Federal Government one of its most important functions.

In Commonwealth *v.* Warner Bros. Theatres, Inc., 345 Pa. 270 (1942), the constitutionality of the corporate net income tax was attacked on the ground that it had been an unlawful delegation of legislative power, because the tax was based upon net income as returned to and ascertained by the Federal Government. In rejecting the appellant's argument as to unlawful delegation, the court said (p. 272):

> * * * Net income as ascertained is the base upon which the tax is measured, *not the tax itself.*

> * * * If the legislature had the constitutional right to levy a graduated income tax and *should provide that it should be the same as fixed from time to time by the Federal Government,* then we would have a situation such as appellant contends against. * * * That case [Holgate Bros. Co. *v.* Bashore, 331 Pa. 255] would be an analogue, if an income tax statute had been passed, similar to such as the Federal Legislature might enact, which, as before pointed out, is not the case. * * * (Emphasis supplied.)

From these comments, it is clearly inferrable that the court would hold the proposed act unconstitutional as an invalid delegation of legislative power. The Federal "tax itself" would be the base which would be "the same as fixed from time to time by the Federal Government."

We have examined the cases of Featherstone *v.* Norman, 170 Ga. 370, 153 S. E. 58 (1930), and Santee Mills *v.* Query, 122 S. C. 158, 115 S. E. 202 (1922), which have been cited in support of the constitutionality of the proposed tax. However, neither of these decisions can modify the construction which has been placed upon the Pennsylvania Constitution.

In the Georgia case, the legislature had adopted "an income tax similar to that of the United States, but at the rate and according to the scale hereinafter set forth". A sudy of this decision indicates that the Georgia statute adopted the Federal tax act as its own, and thus avoided an unconstitutional delegation of authority to Congress.

In the South Carolina case, the court upheld a statute imposing an income tax equal to one-third of the Federal income tax for which the taxpayer was liable. Nevertheless, it should be noted that the Constitution of South Carolina permitted a graduated income tax. Since the Constitution of Pennsylvania has been so construed as to prohibit any graduated income tax, the decisions of the Georgia and South Carolina Courts could not be regarded as apropos here.

Similarly, if the base of the tax were frozen so as to preclude subsequent alterations thereof by the Federal Government, as for example by adopting the taxpayer's Federal tax liability for 1952 as the base for the Pennsylvania tax during 1953 and 1954, a further question might arise under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, since the base would bear no relation to the income being taxed during those years. A comprehensive Pennsylvania statute might be drafted

so as to expressly copy and enact as its own the voluminous Federal income tax laws and regulations in effect in 1952, but no conceivable plan of that nature, however intricate, could satisfy the uniformity requirements of the Pennsylvania Constitution.

Accordingly, you are advised that an Act imposing a tax upon the Federal income tax liability of persons who are residents of this Commonwealth cannot be drafted in a form that would be constitutional.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

GEORGE W. KEITEL,
Deputy Attorney General.

OPINION No. 640

State Board of Chiropractic Examiners—Right to request advice directly from the Department of Justice or through the Superintendent of Public Instruction.

Any decision rendered by the Department of Justice on request of the head of the department will be binding upon the department administrative board irrespective of whether or not the request for advice originated with the board.

Harrisburg, Pa., August 21, 1953.

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

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

1. May a departmental administrative board within the Department of Public Instruction seek advice directly from the Department of Justice, or must such advice be requested through the Superintendent of Public Instruction?

2. Is an opinion rendered by the Department of Justice at the request of the Superintendent of Public Instruction binding upon a departmental administrative board which has not requested such an opinion?

These questions have been raised through you by the State Board of Chiropractic Examiners, which is a departmental administrative board in the Department of Public Instruction: Section 202 of The Administrative Code of 1929, 71 P. S. § 62.

Section 902 of The Administrative Code, 71 P. S. § 292, imposes upon the Department of Justice the duty to furnish legal advice to "all administrative departments, boards and commissions * * * of the State Government". Section 512 of The Administrative Code, 71 P. S. § 192, makes it the duty of any "department, board or commission" which requires "legal advice concerning its conduct or operation * * * to refer the same to the Department of Justice".

Sections 902 and 512 do not distinguish between the two kinds of administrative boards, i. e., departmental and independent, and thus would permit the Department of Justice to render advice to a departmental board on an appropriate query. This would depend upon whether the query concerned an activity which the departmental board might exercise independently of the head of the department.

Unlike the independent administrative boards, departmental administrative boards are subject to the supervision of the head of the department in which they are located in certain matters, e. g.:

(1) Finances—departmental boards are subject to the department in "all matters involving the expenditure of money"; the department "has the right to make such examinations of the books, records and accounts" of the board "as may be necessary to enable them to pass upon the necessity and propriety of any expenditure or proposed expenditure": Section 503 of The Administrative Code, 71 P. S. § 183. All requisitions must be approved by the department with which the board is connected: Section 1501 of The Fiscal Code, 72 P. S. § 1501.

(2) Employes—The department head must "appoint and fix the compensation of such clerks, stenographers, and other assistants, as may be required for the proper conduct of the work of any departmental administrative * * * board", with certain exceptions not relevant here: Section 214 of The Administrative Code, 71 P. S. § 74.

(3) License Certificates and fees, etc.—Specifically as to professional examining boards established in the Department of Public Instruction, the department keeps the records, issues certificates, assists the boards when requested, cooperates with the professions in establishing standards of professional education, fixes fees charged by the

examining boards and determines when licenses or registration certificates shall be renewed: Sections 1304 and 1310 of The Administrative Code, 71 P. S. §§ 354, 360; Act of May 25, 1937, P. L. 800, 71 P. S. § 1027.

Subject to the exceptions noted above, the departmental administrative boards may "exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected": Section 503 of The Administrative Code, 71 P. S. § 183.

The boundary between the functions of a departmental board which are exercised independently of the department, and those functions which are subject to the supervision and control of the department, cannot be drawn with absolute precision. Nevertheless, when any function of the board falls within any of the three categories enumerated above as being subject to the supervision and control of the department, legal advice regarding such function may only be requested by the department head. Where the function being construed may be exercised independently by the board, its request for advice as to such function in the interest of orderly administrative procedure should be made through the department head in the first instance. Where the department head refuses to forward such request to this department, the board may then apply directly to the Department of Justice, bringing to our attention such refusal. At that time, the Department of Justice will also consider the request to determine whether it is one that the board could make directly. When the request is a proper one for the board to make, the Department of Justice will reply directly to the board, with a copy thereof to the department head. In cases where the request is not one which the board can make, the Department of Justice will return the request to the board with a statement that legal advice cannot properly be furnished to the board on the question.

Any opinion rendered by this department on a question of law is binding on all departments wherein the same problem has arisen: See Commonwealth ex rel. Attorney General *v.* Ross, et al., 53 Dauph. 329, 334 (1942). Similarly, a departmental board within your department would be bound by an opinion given by this department on the same legal question, whether or not the board made the original request for advice.

Accordingly, you are advised that the Superintendent of Public Instruction should make all requests for legal opinions involving those

affairs of a departmental administrative board over which the Department of Public Instruction has supervision and control, e. g., finances and disbursements, appointment and salaries of employes, renewal dates of licenses, etc., In other matters, the request for advice may come directly to this department from the departmental administrative board if the Superintendent of Public Instruction refuses to forward such request to this department. In all cases of doubt as to whether the departmental board has the right to request such advice, notwithstanding the refusal of the department head to forward the request for same, that point will be determined preliminarily by this department before any opinion will be rendered.

Any decision rendered by this department on request of the head of the department will be binding upon the departmental administrative board, irrespective of whether or not the request for advice originated with the board.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

OPINION No. 641

Public officers—Member of Pennsylvania Turnpike Commission—Eligibility—Member of State legislature—Constitution, art. II, sec. 6.

1. The office of member of the Pennsylvania Turnpike Commission constitutes a civil office under the Commonwealth within the meaning of article II, sec. 6, of the Pennsylvania Constitution providing that no senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under the Commonwealth, and his resignation as a member of the legislature does not render him eligible for such appointment.

2. A member of the State legislature may be appointed as an employe of the Commonwealth during the term for which he has been elected.

Harrisburg, Pa., August 24, 1953.

Honorable John S. Fine, Governor, Harrisburg, Pennsylvania.

Sir: You have requested to be advised whether a member of the General Assembly is eligible at this time for appointment as a member of the Pennsylvania Turnpike Commission.

This question was passed upon by Formal Opinion No. 267, dated November 29, 1938, rendered to Governor George H. Earle and written by Attorney General Guy K. Bard and Assistant Deputy Attorney General George W. Keitel. That opinion held that "a member of the present General Assembly may not be appointed as a member of the Pennsylvania Turnpike Commission until his term of office as Senator or Representative shall have expired."

This opinion was based on Article II, Section 6 of the Pennsylvania Constitution which provides that:

> No Senator or Representative shall, during the time for which he shall have been elected, be appointed to any civil office under this Commonwealth, * * *

This opinion was in accord with numerous opinions holding the office of member of the General Assembly incompatible with other civil offices under the Commonwealth. Some of these opinions and the offices in question are as follows:

Opinion	*Office*
Official Opinions, 1935-36, p. 153	County Superintendent of Schools
Official Opinions, 1917-18, p. 527	Fish Warden
Official Opinions, 1923-24, p. 173	Judge, Court of Common Pleas
Official Opinions, 1921-22, p. 34	Notary Public
Official Opinions, 1909-10, p. 247	Superintendent of Construction
Informal Opinion No. 1287	Member, Building and Loan Board
Informal Opinion No. 889	Member, County Board of Assistance
Informal Opinion No. 611	Member, State Veterans' Commission
Informal Opinion No. 570	Deputy Athletic Commissioner
Informal. Wl. F. F. 36	Treasurer, Board of Trustees. State Industrial Home for Women

The determining question in every case is whether the office is a "civil office under this Commonwealth". The word "office" connotes a function charged with some degree of executive responsibility, and involves the exercise of discretion in the performance of the holder's duties.

In Commonwealth ex rel. *v.* Murphy, 25 Pa. C. C. 637, 639 (1901), it is stated:

> The thought running through every definition of an officer is that he shall perform some service or owe some duty to the government, state or municipal corporation, and not merely to those who appoint or elect him. His tenure must be defined, fixed and certain, and not arise out of mere contract of employment.

In an opinion found in Official Opinions, 1903-1904, p. 226, Attorney General Hampton L. Carson stated (at p. 229):

> * * * an office consists of a right to exercise a public function or employment, and to take the fees and emoluments belonging to it. It involves the idea of tenure, duration, fees, the emoluments and powers, as well as that of duty, and it implies an authority to exercise some portion of the sovereign power of the State either in making, administering or executing the laws.

There can be little question that a Turnpike Commissioner fits this definition of an officer. He serves for a definite term at a salary fixed by law. He administers the law relating to the operation of the Turnpike, and his appointment is subject to confirmation by the Senate.

However, since the Pennsylvania Turnpike Commission is in certain respects separate and apart from the State government generally in that its finances are independent of those of the State government and its obligations are not a debt of the Commonwealth, it may be contended that its Commissioners, although clearly officers, are not officers of the Commonwealth.

The answer to this contention is found in the act creating the Turnpike Commission, the Act of May 21, 1937, P. L. 774. Section 4 thereof provides that "The Commission is hereby constituted an instrumentality of the Commonwealth", exercising powers which "shall be deemed and held to be an essential governmental function of the Commonwealth." Our courts have upheld this description of the nature of this body. In House et al. *v.* Pennsylvania Turnpike Commission, 45 D. & C. 677, 681 (1942) it is stated:

> We conclude that the Pennsylvania Turnpike Commission is a quasi-public corporation and, as such, is an instrumentality of the Commonwealth engaged in the performance of a particular governmental function. In this respect it resembles a school district * * *

The Pennsylvania Turnpike Commission is a body of the type commonly referred to and frequently called an authority. In Commonwealth ex rel. McCreary *v.* Major, 343 Pa. 355 (1941) the Pennsylvania Supreme Court held that the members of an authority are public officers saying (at p. 358):

> That a member of the Board of the Authority is a public officer cannot seriously be questioned. "To constitute a public office, it is essential that certain independent public duties, a part of the sovereignty of the State, should be appointed to it by law, to be exercised by the incumbent in virtue of his election or appointment to the office thus created and defined ....": Kosek *v.* Wilkes-Barre Twp. Sch. Dist., 110 Pa. Supe-

> rior Ct. 295, 301. Thus, since the Authority is an agency of the Commonwealth (Tranter *v.* Allegheny Co. Authority, 316 Pa. 65, 78), and the members of the Board of the Authority, who, by virtue of their appointment, independently perform essential governmental functions, they are public officers.

From the foregoing it is clear that a member of the Pennsylvania Turnpike Commission is a civil officer under the Commonwealth and a member of the present General Assembly may not be appointed to that office "during the time for which he shall be elected." The language of Article II, Section 6 of the Constitution leaves no doubt that the prohibition of that section applies whether or not a member of the General Assembly should resign. As stated in the Formal Opinion of Deputy Attorney General J. W. Brown to Governor Gifford Pinchot, Official Opinions, 1923-1924, p. 173, 177:

> Resignation of a Senator or Representative can make no difference, for neither can by any act of his own nullify the plain wording and intent of the Constitution and change and shorten the time fixed by that instrument in which he shall be ineligible for appointment to civil office.

It should be pointed out that the interdiction of Article II, Section 6 is against appointments of members of the General Assembly to civil offices under the Commonwealth and does not apply to positions where the appointee is a mere employe. This distinction was early recognized in a Formal Opinion by Attorney General Hampton L. Carson, Official Opinions, 1903-1904, p. 226, 230 wherein it is stated:

> An employe is one who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited by them, and this, too, although the person so employing him is a public officer, and his employment is in and about a public work or business.

Subsequent opinions of this department have reiterated this distinction and have held that a member of the General Assembly could be appointed as a public employe during the time for which he shall be elected. Some of these are as follows:

Opinion	*Office*
Official Opinions, 1911-12, p. 195	Watershed Inspector
Official Opinions, 1919-20, p. 358	Clerk, Game Commission
Informal Opinion No. 914	Administrative Officer, Unemployment Compensation Division

Based upon the foregoing, it is our opinion, and you are accordingly advised that:

(a) A member of the present General Assembly may not be appointed as a member of the Pennsylvania Turnpike Commission until his term of office as Senator or Representative shall have expired.

(b) The resignation of a member of the General Assembly will not make him eligible for appointment to a civil office under the Commonwealth during the time for which he has been elected.

(c) A member of the General Assembly may be appointed as an employe of the Commonwealth during the time for which he has been elected.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

ROBERT L. RUBENDALL,
Deputy Attorney General.

OPINION No. 642

(Cancelled)

OPINION No. 643

Tax Anticipation Notes, Series LT—Legal status.

The allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Harrisburg, Pa., October 29, 1953.

Honorable John S. Fine
Honorable Weldon B. Heyburn
Honorable Charles R. Barber

Sirs: We have your request for an opinion as to the legal status of seventy-five million dollars ($75,000,000) Tax Anticipation Notes, Series LT, dated October 28, 1953, maturing May 28, 1954.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, Series LT, to the amount of seventy-five million dollars ($75,000,000).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646. As stated in Formal Opinion No. 626, dated November 29, 1951, we are satisfied that the Act of September 29, 1951, supra, was duly and properly enacted. We have examined the journals of both Houses and the original records on file in the office of the Secretary of the Commonwealth as to certain appropriation acts aggregating in excess of $900,000,000.

The constitutionality of the issuance of tax anticipation notes was upheld by the Supreme Court of Pennsylvania in the case of Kelly *v.* Baldwin, et al., 319 Pa. 53 (1935). Since the Act of September 29, 1951, supra, is similar to the act held to be constitutional in Kelly *v.* Baldwin, supra, we believe it to be constitutional.

The act provides, inter alia, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest on the notes during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31 of the second fiscal year of any current biennium, and shall not bear interest in excess of 4½% per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the act and are in due legal form, and that all necessary action has been duly taken.

We have examined notes number one of the following denominations: five thousand dollars ($5,000), ten thousand dollars ($10,000) and one hundred thousand dollars ($100,000), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the seventy-five million dollars ($75,000,000) notes of the Commonwealth

of Pennsylvania, Series LT, dated October 28, 1953, maturing May 28, 1954, constitute legal obligations payable by the Commonwealth of Pennsylvania, from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1955, and are secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said General Fund during said biennial period.

The appropriation acts are appropriations made for the current biennium by the General Assembly for the general purposes of the fiscal biennium and are appropriations of amounts that exceed the amount of the notes by more than three times. No other tax anticipation notes have been issued in this biennium.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 644

Notaries—Retroactivity of Notary Public Act of August 21, 1953—Notary Public Act of May 18, 1949—Seals—Fees.

1. Notaries appointed under the Act of May 18, 1949, P. L. 1440, may continue to use notarial seals engraved in accordance with section 16 of said act for the duration of their present terms of office; notaries appointed under the Act of August 21, 1953 (No. 373) are to use notarial seals engraved in accordance with section 12 of said act.

2. The legislature, having intended the Act of August 21, 1953, (No. 373), to have a prospective application, did not intend it to be applicable to notaries

appointed under the Act of May 18, 1949, P. L. 1440; such notaries must adhere to the provisions of the 1949 Act, under which they were appointed, for the duration of their present terms of office.

3. Since the legislature intended the Act of August 21, 1953 (No. 373), to be construed prospectively, section 21 of the act, relating to fees, is not applicable to notaries appointed under the Act of May 18, 1949, P. L. 1440.

Harrisburg, Pa., November 16, 1953.

Honorable Gene D. Smith, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We have your communication of August 25, 1953, wherein you request to be formally advised on the following questions relating to "The Notary Public Law", the Act of August 21, 1953, Act No. 373:

1. Does Section 12 of the Act of August 21, 1953, Act No. 373, preclude presently commissioned notaries from using notarial seals that are engraved in accordance with Section 16 of the Act of May 18, 1949, P. L. 1440?

2. Do the provisions of Sections 7 and 10 of the Act of August 21, 1953, Act No. 373, relating to the moving of office and changing of name, apply to notaries now in commission or are they subject to the corresponding provisions of the Act of May 18, 1949, P. L. 1440, until the expiration of their present terms?

3. Is Section 21 of the Act of August 21, 1953, Act No. 373, relating to fees, applicable to presently commissioned notaries or does Section 13 of Article III of the Constitution of Pennsylvania prohibit such application until a reappointment is made?

The legislature, by enacting "The Notary Public Law", the Act of August 21, 1953, Act No. 373, substantially changed the prior law pertaining to notaries public. Therefore, since your questions relate to a number of such changes, it would be well to have in mind the particular differences that are involved.

Section 12 of the Act of 1953, supra, eliminates the necessity of engraving the location of the office of the notary on the notarial seal but adds the words "Commonwealth of Pennsylvania". All other directions as to the engraving to be placed on the seal are identical. Accordingly, notarial seals engraved in accordance with the directions provided by Section 16 of the Act of May 18, 1949, P. L. 1440 (prior law), only differ in the above respect with seals engraved in accordance with Section 12 of the Act of 1953, supra.

Section 7 of the Act of 1953, supra, provides that a notary may change his office address to any location within the Commonwealth, if the required notice as provided therein is given, while Section 14 of the Act of 1949, supra, requires a notary to maintain an office in the city, borough, town or township of the county named in his commission.

As to the procedure to be followed if the name of a notary is changed, Section 10 of the Act of 1953, supra, permits a notary to continue to act under the name stated in his commission until the expiration of his or her term, again, provided the required notice set forth therein is given. Section 12 of the Act of 1949, supra, however, requires a new commission to be issued for the remainder of the original term when the name of the female notary is changed. No provision is made if a male notary secures a change of name by court order.

The fee schedule for notaries to follow is provided by Section 21 of the Act of 1953, supra. This schedule would allow a certain amount of flexibility and naturally permit the specified fees set forth in Section 26 of the Act of 1949, supra, to be increased.

However, whether the provisions of "The Notary Public Law", the Act of August 21, 1953, Act No. 373, are to be applicable to presently commissioned notaries necessarily depends on the intention of the legislature, as expressed in said act. Furthermore, to subject these notaries to said provisions, it must appear that the legislature intended said act to have a retroactive affect. An act that is construed as being retroactive relates back and affects actions or facts occurring before the act came into force.

An act will not be construed as being retroactive, unless it is clear the legislature intended it to be so construed. In this regard, it is provided in Section 56 of the "Statutory Construction Act", the Act of May 28, 1937, P. L. 1019, 46 P. S. Section 556, that:

> No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

This rule of statutory construction has been enunciated many times. In Commonwealth, Appellant, *v.* Repplier Coal Company, 348 Pa. 372, at 381, the Supreme Court of Pennsylvania affirmed the opinion of the court below which held:

> (A) It is well settled that a statute will not be construed as retrospective unless there is a clear legislative intention that it is to have that effect. While there is no constitutional

> inhibition against a statute having a retrospective operation (Welch *v.* Henry, 305 U. S. 134), both the statute law and the courts are emphatic that it shall not have such operation unless the intention clearly and manifestly appears.
>
> * * * * * *
>
> In Farmers National Bank & Trust Co. *v.* Berks County Real Estate Co., 333 Pa. 390, 393, the court said:
>
> "The general rule of construction is that statutes . . . must be construed prospectively except where the legislative intent that they shall act retrospectively is so clear as to preclude all questions as to the intention of the legislature." Commonwealth *v.* Chester County Light & Power Co., supra; Wettengel *v.* Robinson, 300 Pa. 355.
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> * * * * * *
>
> * * * There is no single sentence in it which indicates any retroactive effect. and such legislative intention must be drawn, if drawable at all, from the whole Act.

In addition, the Supreme Court of Pennsylvania in Horn & Brannen Co. *v.* Steelman, 215 Pa. 187, at 191, has also held that:

> * * * "We always construe statutes as prospective and not retrospective, unless constrained to the contrary course by the rigor of the phraseology:" Price *v.* Mott, 52 Pa. 315. * * *

An examination of the Act of 1953, supra, does not disclose, in our opinion, any indication that the legislature intended the act to have a retroactive effect. Therefore, said act may only be construed as being applicable prospectively. Accordingly, only notaries appointed under the act are subject to its provisions.

Since we have determined that the Act of 1953, supra, must be construed prospectively, we must next consider the effect of the repeal of prior legislation contained therein. In this respect, we conclude that such repeal does not affect any notary appointed under the prior law.

In the absence of any indication of intention to the contrary, the repeal of a law by an act which substantially reenacts the repealed law continues the repealed law in effect. This rule of construction is provided by Section 82 of the "Statutory Construction Act", supra, 46 P. S. Section 582, which reads:

> Whenever a law is repealed and its provisions are at the same time re-enacted in the same or substantially the same terms by the repealing law, the earlier law shall be construed

> as continued in active operation. All rights and liabilities incurred under such earlier law are preserved and may be enforced.

Consequently, the Act of May 18, 1949, P. L. 1440, under which presently commissioned notaries were appointed and authorized to act, although repealed by the Act of 1953, supra, must still be considered in effect for the duration of the terms of office of notaries appointed thereunder.

We are therefore of the opinion, and you are accordingly advised, the Act of 1953, supra, is not applicable to presently commissioned notaries. This act was intended by the legislature to have a prospective application not a retroactive application. All presently commissioned notaries are obliged, therefore, to adhere to the provisions of the Act of 1949, supra, for the duration of their present terms of office.

In answer to your questions, you are specifically advised as follows:

1. Notaries appointed under the Act of May 18, 1949, P. L. 1440, may continue to use notarial seals engraved in accordance with Section 16 of said act for the duration of their present terms of office. Notaries appointed under the Act of August 21, 1953, Act No. 373, are to use notarial seals engraved in accordance with Section 12 of said act.

2. The legislature, having intended the Act of August 21, 1953, Act No. 373, to have a prospective application, did not intend the Act of 1953, supra, to be applicable to notaries appointed under the Act of May 18, 1949, P. L. 1440. Such notaries must adhere to the provisions of the Act of 1949, supra, under which they were appointed, for the duration of their present terms of office.

3. Since the legislature intended the Act of August 21, 1953, Act No. 373, to be construed prospectively, Section 21 of the act is not applicable to notaries appointed under the Act of May 18, 1949, P. L. 1440.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

ROBERT H. MAURER,
Assistant Deputy Attorney General.

OPINION No. 645

Death warrants—Warden of the Western Penitentiary at Rockview.

Future warrants, respites or other communications, concerning electrocutions, should be addressed to the Warden of the State Penitentiary at Rockview. As to those cases where a warrant or respite has been issued heretofore, a new warrant is not necessary. However, for administrative reasons, a new warrant or respite may be issued and directed to the Warden of the State Penitentiary at Rockview.

Harrisburg, Pa., January 13, 1954.

Honorable John S. Fine, Governor, Harrisburg, Pennsylvania

Sir: We are in receipt of your communication requesting advice relative to the infliction of the death penalty by electrocution under the Act of June 19, 1913, P. L. 528, 19 P. S. Sections 1121 et seq., after January 15, 1954. You ask whether further warrants, respites or other communications issued by the Governor should be addressed to the Acting Warden of the Western Penitentiary[1] at Pittsburgh, or to the Warden of the State Penitentiary at Rockview.

Your inquiry is occasioned by the following facts: (1) Section 3 of the Act of 1913, supra, 19 P. S. Section 1123, provides that the Governor shall issue his warrant "directed to the warden of the Western Penitentiary, commanding said warden to cause such convict to be executed in said penitentiary"; (2) Section 1 of the same act, 19 P. S. Section 1121, provides that such punishment "shall be inflicted in a building to be erected on the land owned by the Commonwealth in Centre County, whereon the buildings of the new Western Penitentiary are to be built"; (3) On January 15, 1954, the penitentiary in Centre County (Rockview), will become an institution separate and apart from the Western Penitentiary, will be known as "the State Penitentiary at Rockview", and will have its own warden. See Sections 2 and 5 of the Act of July 29, 1953, P. L. 1433 (Act No. 410); Act of July 29, 1953, P. L. 1424 (Act No. 406); Act of July 29, 1953, P. L. 1428 (Act No. 408). Also, see Proclamation of Governor, dated December 28, 1953.

The question for determination is "Who, in fact, is the person given the responsibility for inflicting the death penalty. In other words, who is the specific person referred to in the Act of 1913, supra, as the warden of the Western Penitentiary"?

[1] This institution is also referred to in some statutes as the "Western State Penitentiary," but the difference is not important to this opinion.

It is significant that Section 1 of the Act of 1913, supra, refers to the *new* Western Penitentiary. In 1911, legislation was passed authorizing the purchase of land in "the Western part of the State" for the construction of a new Western Penitentiary. See the Act of March 30, 1911, P. L. 32. A site in Centre County was chosen and construction begun. The Act of 1911, supra, contemplated that upon completion of the new institution, the inmates of the Western Penitentiary, located at Pittsburgh, were to be transferred to it, the buildings at Pittsburgh were to be sold (see Section 7 of the Act of 1911, supra) and thereafter the new institution was to be *the* Western Penitentiary, i. e., the *only* Western Penitentiary.

If we keep in mind that Section 1 of the Act of 1913, supra, requires that executions take place at Rockview,[2] and that under the Act of 1911, supra, the new Western Penitentiary was to replace the institution located at Pittsburgh, we conclude that the warden referred to in the Act of 1913, supra, is the warden of the penal institution located at Rockview, Centre County.

For a number of years the institution at Pittsburgh was known, administratively, as the Western Penitentiary in the sense of "main" institution, and Rockview was a "branch".[3] The same man held the position of warden at both institutions. In this connection, Section 2 of the Act of July 29, 1953, P. L. 1433 (Act No. 410) provides, in part:

> "* * * The Eastern and Western State Penitentiaries shall be maximum security institutions and the State Penitentiaries at Rockview, Graterford and Huntingdon shall be used for maximum, medium and minimum security institutions, * * * Provided, however, That each institution shall have a *separate warden* or superintendent, *and the practice of having branch institutions shall be abolished.*" (Emphasis supplied.)

Note that this section does not create the administrative position of warden at any of the institutions, but merely changes the administrative procedure of having one warden in charge of two institutions. Henceforth, each warden will be known as the warden of a particular penitentiary, i. e., "Warden of the State Penitentiary at Rockview". We are of the opinion that these changes in the name of the institution at Rockview and in the designation of the warden are of no moment; Woo Dak San *v.* State, 7 P. 2d 940, 942. The penalty re-

[2] See also Section 6, 19 P. S. Section 1126, and Section 12, 19 P. S. Section 1129.

[3] In contemplation of law, however, *the* Western Penitentiary was at Rockview. It was only because the buildings at Pittsburgh were never sold (under Section 7 of the Act of 1911, supra) that that institution continued in existence as "the Western Penitentiary."

mains as it was—death by electrocution. The same warden is required to inflict the penalty at the same place. Only the designation by which he is known has been changed. His duties remain the same. To this extent, we conclude that the Act of June 19, 1913, P. L. 528, has been amended by implication, so that all references to the "Western Penitentiary" mean "State Penitentiary at Rockview", and all references to "warden", or "deputy warden" of "the Western Penitentiary" mean "warden", or "deputy warden" of "the State Penitentiary at Rockview".

We are of the opinion and you are accordingly advised that:

1. You should address all future warrants, respites and other communications, concerning electrocutions, to the Warden of the State Penitentiary at Rockview, who is, at present, Dr. Frederick S. Baldi.

2. As to those cases where a warrant or respite has been issued heretofore, you are not required by law to issue a new warrant. However, for administrative reasons, we suggest that in each case you issue a new warrant or respite directed to the Warden of the State Penitentiary at Rockview.

Yours very truly,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

FRANK P. LAWLEY, JR.,
Deputy Attorney General.

OPINION No. 646

Liquor Control Board—Employes—Reinstatement—United States Naval Reserve —Act of June 7, 1917, P. L. 600.

The word "war" in the statute is used in its common or ordinary sense and those who participated in the Korean conflict were engaged in the armed services during "time of war or contemplated war" as that term is used in the statute and the former civil service employe discharged from military service on March 10, 1954, is entitled to reinstatement in his former position with the Liquor Control Board.

Harrisburg, Pa., April 9, 1954.

Honorable Frederick T. Gelder, Chairman, Liquor Control Board, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice, under date of March 22, 1954, as to whether under the Act of June 7, 1917, P. L. 600, a civil service employe of the Board, who was also a member of the United States Naval Reserve, and who was ordered to active duty on May 21, 1952, and served in such Naval service until March 10, 1954, is entitled to be reinstated to his former position with the Liquor Control Board.

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

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

In view of the phrase "shall in time of war or contemplated war" the following facts must be given consideration.

The state of war between the United States and Germany was terminated by a proclamation of the President on October 9, 1951, on which date a joint resolution of Congress was also passed declaring the war terminated. A treaty of peace was signed with Japan September 8, 1951, and ratified by the United States Senate on March 20, 1952. The said treaty came into force on April 28, 1952.

Since the civil service employe was called to active duty on May 21, 1952, the question arises as to whether or not he was called into service "in time of war or contemplated war". This resolves itself into the question as to whether or not the conflict in Korea was a war within the meaning of that term as used in the Act of 1917, supra.

In the case of Beley *v.* Pennsylvania Mutual Life Insurance Company, 373 Pa. 231 (1953), the Supreme Court of Pennsylvania had before it the following question: "Is the present struggle in Korea a 'war' within the meaning of that term as employed in a certain life insurance policy."

The Court said:

> Andrew Beley, serving with a United States Army Infantry division in the conflict in Korea, was killed in action on March 7, 1951 while serving with the United States contingent of the United Nations forces. On May 1, 1945, Pennsylvania Mutual Life Insurance Company, defendant, had issued a policy on his life in favor of his mother, Julia Beley, the present plaintiff. The policy was in the amount of $1,000 with a supplementary contract attached which provided for double indemnity in case of external, violent and accidental death. One of the provisions of the policy was that "In the event that the Insured engages in military or naval service in the time of war, the liability of the Company shall be limited to the return of the premiums paid hereunder, unless the Insured shall have previously secured from the Company a permit to engage in such service." (Admittedly, no such permit had been secured.)
>
> In connection with the additional accidental death benefit there were provisions as follows: "Risks Not Assumed:—The Company shall not be liable for the additional Accidental Death Benefit specified above if said death shall result by reason of any of the following: . . . (d) Military, air or naval service in time of war. (e) Any work in connection with actual warfare, riot, insurrection, police duties or any act incidental thereto, either on land or water. . . ."
>
> "Termination:—These provisions for the additional Accidental Death Benefit shall immediately terminate: . . . (b) if the Insured shall at any time, voluntarily or involuntarily, engage in military, air or naval service in time of war; . . ."
>
> The Company refused payment of the face amount of the policy on the ground that the insured was engaged in military service "in time of war" and refused payment of the accidental death benefit on the additional ground that the death of the insured had resulted by reason of such service. In our

opinion, the Superior Court properly entered judgment for plaintiff for the whole amount of her claim.

* * * * * *

Although Congress has, in certain enactments, recognized that military forces of the United States are operating in Korea and has appropriated funds for the support of the armed forces there, it is obvious from the above recital of events that there was not, nor ever has been, any declaration of war by Congress against any other country, state or nation, but merely a dispatch to Korea by Presidential order of military, naval and air forces of the United States in accordance with the provisions of the Charter of the United Nations and the recommendations of the Security Council. Since, therefore, it is Congress that has the power under the Constitution to declare war, and since that power is exclusive (Youngstown Sheet & Tube Co. *v.* Sawyer, 343 U. S. 579, 642), it is clear that the action being waged in Korea is not a "war" within what may be termed the "constitutional" or "legal" sense of that term. Defendant urges, however, that it is in fact a war, because what started apparently as a minor "police action" has developed by reason of its duration, its bitterness, and the number of its casualties, into a sanguinary struggle of grave proportions, and urges further that the connotation of the word "war" in the Company's insurance policies should not be limited to a formally declared war, but embraces any clash of arms in which the methods of war are pursued, and especially where the conflict is, as in Korea, of such extensive dimensions. The trouble with this argument is that if the word "war" in such policies were to be interpreted as other than one declared by Congress, courts would be utterly at sea whenever the question arose as to whether certain expeditions in which United States forces were engaged constituted a war. * * *

* * * A policy of life insurance is a highly technical instrument, drawn up presumably with meticulous care by legal experts on behalf of the Insurance Company, and who not only intend to use all terms in their legal sense but know how to accomplish that result; it may be assumed, therefore, that if defendant had here meant to invest the term "war" with a broader connotation than its "constitutional" or "legal" intendment, it would have effected this by the addition of words indicating such an intention as, for example, "declared or undeclared" war.

The existence or non-existence of a state of war is a political, not a judicial, question, and it is only if and when a formal declaration of war has been made by the political department of the government that judicial cognizance may be taken thereof; when so made it becomes binding upon the judiciary: Bishop *v.* Jones & Petty, 28 Texas 294, 319, 320; Perkins *v.* Rogers, 35 Indiana 124, 167; Hamilton *v.* M'Claughry, 136 Fed. 445, 449; Verano *v.* DeAngelis Coal

> Co., 41 F. Supp. 954. An exact question involving the application of this principle arose in connection with the Japanese surprise attack on Pearl Harbor on December 7, 1941, war with Japan not being officially declared by Congress until the day following, December 8. As we all know, an appalling number of lives were lost in that infamous attack, and yet, in a majority of the cases involving the interpretation of the word "war" as employed in life insurance policies similar to the one here in question, it was held that war did not exist on December 7, and therefore the beneficiaries of such policies were entitled to recover: West *v.* Palmetto State Life Insurance Co., 202 S. C. 422 (25 S. E. 2d 475); Rosenau *v.* Idaho Mutual Benefit Association, 65 Idaho 408, 145 P. 2d 227; Savage *v.* Sun Life Assur. Co. of Canada, 57 F. Supp. 620; Pang *v.* Sun Life Assur. Co. of Canada, 14 C. C. H. Life Cases 496 (37 Hawaiian Rep. 208).

In the case of Weissman *v.* Metropolitan Life Insurance Company, 112 F. Supp. 420 (1953), the Court held that within the strict interpretation of the word "war" there can be no war without formal declaration and the existence of war is determined solely by political departments of government, and such determination is conclusively binding on courts in all matters of State or public concern. The Court, however, went on to say that if language on the insurance policy is reasonably open to two constructions, that more favorable to the insured will be adopted.

At page 425 the Court said:

> From the authorities cited above we must come to the conclusion that there may be war (within the meaning of that term employed in an insurance policy) without an official declaration thereof, and that unless it is indicated in the contracts that the term "war" is to be used in its strict, legal sense the parties have a right to assume it is to be given its common understanding or meaning.
>
> We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war. Certainly those who have been called upon to suffer injury and maiming, or to sacrifice their lives, would be unanimous in their opinion that this is war—war in all of its horrible aspects. And the families deprived of the love and companionship of their sons, brothers, husbands and fathers—who meet each day with hope and fear for their boys and men in Korea—and the widows and orphans of the men who died there—certainly they are aware of the stark reality that the Korea conflict is war.
>
> It is the decision of this court that the insured in the case at bar died in the military service of the United States of

> America at a time when the United States was at war. Judgment is rendered in favor of the defendant.

In the case of Western Reserve Life Insurance Company *v.* Meadows, 261 S. S. 2d 554 (1953), which was a suit to recover under double indemnity provision of a life policy for death of an Army officer as a result of a crash of a military airplane in which he was a passenger, while traveling under military orders, the Court, at page 560, said:

> In summary: It is, as has been said, the settled law in this State that, unless a contrary intention is shown by the contract, the terms used in policies of insurance are to be given their plain, ordinary and generally accepted meaning. It is clear that nothing in the contract of insurance involved herein suggests that the word "war" is used in its "technical" or "legal" sense. It is clear that the plain, ordinary and generally accepted meaning of the word "war" is war in fact. It is clear that there was war in fact in Korea when the insured was killed and that he was killed "in time of war." It follows that there can be no recovery under the accidental death provisions of the policies.

In the case of Stanberry *v.* Aetna Life Insurance Company, 98 A. 2d 134 (1953), which involved an action by a beneficiary to recover double indemnity benefits under policy of life insurance the Court held that the accidental death of a United State Army captain from a mine explosion while he was on reconnaissance for a company camp site in Korea, resulted from military service in time of war within meaning of life policy double indemnity exclusionary clause to effect that double indemnity was payable if accidental death does not result from military or naval service in time of war.

> The conflict still raging in Korea is a war in the ordinary and usual meaning of the word, and it was such on March 27, 1952, when the insured met his untimely death. See Weissman *v.* Metropolitan Life Insurance Co., 112 F. Supp. 420 (D. C. S. D. Cal. 1953). To hold otherwise and rule the Korean war is not a war seems to me inexplainable and absurd. * * *

From the above it is obvious that the appellate courts of different states have made contrary findings and rulings with regard to whether or not the Korean conflict is a war insofar as the interpretation of clauses in insurance policies is concerned. Turning, however, to the opinion of our own Supreme Court in the case of Beley *v.* Pennsylvania Mutual Life Insurance Company, supra, a careful reading of the opinion suggests that the Court went to great lengths to point

out that it was interpreting a life insurance contract drawn by legal experts with meticulous care on behalf of the insurance company.

The Supreme Court made it clear that its opinion was based on a "constitutional" or "legal" definition of the word "war" which strict interpretation was necessitated by the rule that an instrument must be construed strictly as to the party drafting it (here the insurance company) and liberally as to the other party (the insured). This same consideration is not applicable to the use of the word "war" in a statute conferring benefits on veterans. The word in its general sense should be used and so liberally interpreted in the veteran's favor.

As a result of the study of this opinion, we are convinced that the interpretation placed upon the word "war" and the significance given to the Korean conflict in a contract of insurance should not be used as a guide when we interpret the word "war" as used in a statute passed by the General Assembly for the benefit of veterans.

We conclude that the word "war" in such statute is not used in its technical and legal sense and the statute was not drawn with the idea of protecting the rights of anyone other than the rights of a Commonwealth employe who leaves his employment either voluntarily or involuntarily to answer the call of his country. It has always been the policy of the Commonwealth of Pennsylvania to treat veterans with special consideration.

Attention is also directed to our discussion of the phrase "contemplated war" in Formal Opinion No. 377, dated December 9, 1940, 1939-1940 Op. Atty. Gen. 486, directed to all departments, boards and commissions. We believe this supports our view that the phrase "time of war or contemplated war" is to be used in its popular sense rather than in its technical or legalistic meaning.

Section 33 of the Act of May 28, 1937, P. L. 1019, 46 P. S. Section 533, known as the Statutory Construction Act reads:

> Words and phrases shall be construed according to rules of grammar and according to their common and approved usage * * *

In Commonwealth *v.* Bay State Milling Co., 312 Pa. 28 (1933), it was said "Statutes are presumed to employ words in their popular sense." We do not think "war" is a technical word nor has it acquired a peculiar meaning. We hear much today of the "cold war" or "war of nerves".

We therefore conclude that the word "war" in the statute is used in its common or ordinary sense and that those who participated in the Korean conflict were engaged in the armed services during "time of war or contemplated war" as that term is used in the statute under consideration and the former civil service employe discharged from military service on March 10, 1954, is entitled to reinstatement in his former position with the Liquor Control Board.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 647

Property & Supplies—Deeds—Approval of—Conveyance of land by the General State Authority to a municipality.

The Secretary of Property and Supplies should forbear from approving a conveyance of land by the General State Authority to a municipality.

Harrisburg, Pa., April 14, 1954.

Honorable Frank C. Hilton, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: You inquire if it is proper for you, as Secretary of Property and Supplies, on behalf of the Commonwealth, to approve a deed for the conveyance by the General State Authority to a municipality of a small parcel of land not needed for the present or foreseeable future requirements of the Commonwealth or of a project being erected by the General State Authority.

The small parcel in question is part of a larger acreage previously acquired by the Commonwealth, acting through the Water and Power Resources Board of the Department of Forests and Waters, and was conveyed by the Commonwealth to the General State Authority for the erection of an impounding basin thereon.

The larger parcel of land conveyed by the Commonwealth to the Authority, with the improvements erected thereon by the Authority,

has been leased back to the Commonwealth acting by and through the Secretary of Property and Supplies, at a rental which will amortize the Authority's investment in the project within a period of thirty (30) years.

The General State Authority is a body corporate and politic, constituting a public corporation and governmental instrumentality, functioning under the provisions of The General State Authority Act of one thousand nine hundred forty-nine, the Act of March 31, 1949, P. L. 372, as amended, 71 P. S. Section 1707.1 et seq.

The purposes and powers of the Authority are set out in Sections 4 and 5 of the act, as amended, 71 P. S. Sections 1707.4 and 1707.5.

Its authorized activities include constructing, improving, equipping, furnishing, maintaining, acquiring and operating a wide range of designated projects, as set out in Section 4, and provides, inter alia, for

> * * * improvements to river embankments, desilting dams, impounding basins, flood control projects, and the purchase of lands for rehabilitation purposes in connection with state institutions * * * and the Authority is hereby granted and shall have and may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes, including, but without limiting the generality of the foregoing, the following rights and powers:
>
> * * * * * *
>
> (d) To acquire, purchase, hold, and use any property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of the Authority, and (without limitation of the foregoing) to lease as lessee, with the approval of the Governor, any property, real, personal or mixed, or any interest therein, for a term not exceeding ninety-nine (99) years at a nominal rental or at such annual rental as may be determined and, with the approval of the Governor, to lease as lessor to the Commonwealth of Pennsylvania and any city, county, school district, or other political subdivision, or any agency, department, or public body of the Commonwealth, or land grant college, any project at any time constructed by the Authority, whether wholly or partially completed, and any property, real, personal or mixed, tangible or intangible, or any interest therein, at any time acquired by the Authority, whether wholly or partially completed, and with the approval of the Governor, to sell, transfer and convey to the Commonwealth of Pennsylvania, any project at any time constructed by the Authority, and any property, real, personal or mixed, tangible or intangible, or any interest therein, at any time acquired by the Authority.

> (n) To do all acts and things necessary or convenient to carry out the powers granted to it by this act or any other acts.

Section 12 of the act sets out in detail the procedure to be used in exercising its authority to acquire lands, or an interest therein, by purchase or eminent domain proceedings.

However, the act makes no provision for the conveyance of real estate, by the Authority, to any other person or entity than the Commonwealth, as set out in section 4, paragraph (d) recited above, unless such authority can be implied from the general power and authority language in the act, including the provisions of section 4, paragraph (n).

If the general power and authority clauses are interpreted as including authority for the General State Authority to make a conveyance of land acquired by it, to any other person or entity than the Commonwealth, it would be necessary to find the General Assembly delegated authority for the adoption of procedures and the exercise of prerogatives in the sale and conveyance of land by implication. Such implied power would be much broader than are vested in the several departments, boards and commissions of the Commonwealth which can only convey land when and in the manner expressly authorized by the General Assembly or under spelled out provisions established by The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 51.

Section 514 of The Administrative Code of 1929, as amended, 71 P. S. Section 194, provides in part as follows:

> (a) Except as otherwise in this act expressly provided, a department, board, or commission, shall not sell or exchange any real estate belonging to the Commonwealth, or grant any easement, right of way, or other interest over or in such real estate, without specific authority from the General Assembly so to do, * * *.

If the General Assembly intended to clothe the General State Authority with the right to convey real estate to other entities than the Commonwealth, it is our conclusion that the right would have been spelled out, at least by express reference, in the act as was provided for in the case of the acquisition of land.

In 73 C. J. S., Public Administrative Bodies and Procedure, Section 49 (p. 371), it is stated:

> The powers of administrative agencies, bodies or officials must affirmatively appear, from the enactment under which they claim to act. The grant of power and authority to be exercised must be clear and unmistakable, particularly where the authority is conferred not in the course of the common law, and it must be by language which confers the authority and power involved without being interpreted in a forced or strained sense, and which admits of no other reasonable construction. Any reasonable doubt as to the existence of any particular power should be resolved against it.

See also Green et al. *v.* Milk Control Commission et al., 340 Pa. 1, 16 Atl. 2d 9 (1940); Harrisburg Dairies, Inc., *v.* Milk Control Commission et al., 340 Pa. 9, 16 Atl. 2d 12 (1940).

It is our conclusion, therefore, and you are accordingly advised, that under the existing provisions of The General State Authority Act of one thousand nine hundred forty-nine, the Act of March 31, 1949, P. L. 372, as amended, 71 P. S. Section 1707.1, et seq., you as Secretary of Property and Supplies, and acting for the Commonwealth should forbear from approving a conveyance of land by the General State Authority to a municipality.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

RAYMOND C. MILLER,
Deputy Attorney General.

OPINION No. 648

Public Instruction—State Public School Building Authority—Building projects—Municipalities—Leases.

The Superintendent of Public Instruction, may approve, with the exception of the leases, additional projects to be constructed by the State Public School Building Authority, a municipal authority, or a non-profit corporation. He cannot approve for these additional projects the leases to be entered into by and between the school districts and the State Public School Building Authority, a municipality Authority, or non-profit corporation. The approval of such leases would constitute these additional projects "reimbursable projects" and would cause the $425,000,000 limit imposed by the legislature to be exceeded.

Harrisburg, Pa., May 6, 1954.

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

Sir: This department is in receipt of your communication requesting advice as to whether the Superintendent of Public Instruction may approve additional projects to be constructed by the State Public School Building Authority, a municipality authority, or a nonprofit corporation with the condition in the approval that no State reimbursement will be paid to the school district after the maximum of $425,000,000.00 has been reached, as provided in Act No. 431, the Act of August 26, 1953, P. L. 1471, 24 P. S. Section 7-790(6).

The pertinent part of Act No. 431, supra, provides as follows:

> The Superintendent of Public Instruction shall not give his approval to any phase of any project or any project to be undertaken by the State Public School Building Authority or by any municipality authority or nonprofit corporation that would cause the approved *reimbursable* projects for such purposes to exceed four hundred and twenty-five million dollars ($425,000,000) in the aggregate for all the authorities combined for projects already undertaken and to be undertaken. (Emphasis supplied.)

Hereinafter, for the purpose of brevity, when the words "municipality authority" are used, they are intended to include also the words "nonprofit corporations."

In arriving at an answer to your inquiry, it would be helpful to review briefly the development of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, 24 P. S. Section 1-101 et seq., and its allied statutes.

The provisions of the Municipality Authorities Act of 1945, P. L. 382, as amended, 53 P. S. Sections 2900z-1 to 2900z-20, permitted the construction of public school buildings by municipality authorities and the financing of such buildings by the issuance of revenue bonds of the authority. Buildings so constructed are leased to school districts and the rentals paid by the school districts are used for the retirement of the authority's revenue bonds. When the school buildings have been constructed and the bonds and interest thereon finally paid, the title to the project is conveyed to the school district.

The State Public School Building Authority Act, the Act of July 5, 1947, P. L. 1217, as amended, 24 P. S. Section 791.1 et seq., created

the State Public School Building Authority. This Authority was to have in general the same powers and functions as the municipality authorities referred to above.

In the 1949 Legislature, amendments were passed to the Public School Code of 1949, supra, expressly granting school districts the power, with the approval of the Department of Public Instruction, to convey lands to the State Public School Building Authority and to make appropriations to and enter into leases with the said Authority: Act of May 9, 1949, P. L. 1017, 24 P. S. Sections 7-781 to 7-786. By the Act of May 26, 1949, P. L. 1879, a new section, 2511.1, was added to the Public School Code of 1949, supra, providing for payments by the Commonwealth to school districts erecting school buildings under the provisions of the State Public School Building Authority Act, supra, according to a standard reimbursement fraction fixed therein.

The 1951 Legislature granted similar powers and advantages to municipality authority financing. The Act of January 21, 1952, 1951-52 P. L. 2195, amended the Public School Code of 1949, supra, by adding section 790, which expressly authorized school districts, with the written approval of the Department of Public Instruction, to convey lands, make appropriations to and enter into leases with municipality authorities, and by extending the provisions of section 2511.1, supra, to include payments according to a standard reimbursement fraction fixed therein by the Commonwealth to school districts which had paid rentals to said municipality authorities under leases approved by the Department of Public Instruction.

The 1953 Legislature, in Section 1 of Act No. 431, the Act of August 26, 1953, P. L. 1471, added to the Public School Code of 1949, supra, Section 790, 24 P. S. Section 7-790, the sentence quoted in paragraph two of this opinion.

Section 2 of the same act made extensive amendments to Section 2511.1 of the Public School Code of 1949, supra, 24 P. S. Section 25-2511.1. It changed the formula for reimbursements by the Commonwealth to school districts on account of rentals paid by the school districts to the State Public School Building Authority or to a municipality authority under leases approved by the Department of Public Instruction after the effective date of the amendment. This formula produces a definite saving for the Commonwealth when compared with the basis for computation of reimbursement to those school districts that had already undertaken projects prior to the effective date of the amendment.

Section 2 of Act No. 431, supra, added a new sentence to section 2511.1, supra, to the effect that if a school district desired to provide facilities in excess of or more expensive than those the department was willing to approve, the department might authorize the payment of only a proportionate part of the reimbursement.

One further change was made to section 2511.1, supra, by Act No. 431, supra. Prior to this amendment, it was mandatory that the Department of Public Instruction approve a State Public School Building Authority or municipality authority lease where the project in question met certain standards set forth in the section. The section formerly provided that "The Department of Public Instruction *shall* give its approval if it shall find" that certain conditions are met. (Emphasis supplied.) Act No. 431, supra, changed the word "shall" to "may."

From an analysis of these amendments, it can be seen that the legislature was quite obviously concerned about the mounting obligations of the Commonwealth of Pennsylvania to pay reimbursement to the school districts on account of rentals due under authority leases and desired to place a limit upon the obligation of the Commonwealth to pay such reimbursements under section 2511.1, supra. We do not believe that the legislature evidenced any intention to limit the entire authority program to $425,000,000.00. In our opinion, it merely meant to limit the Commonwealth's financial responsibility to such program by limiting approved reimbursable projects to $425,000,000.00. If the legislature had intended to stop the approval of all authority projects when the $425,000,000.00 limit was reached, the word "reimbursable" would not have been necessary.

The question arises as to what makes a project "reimbursable." Section 2511.1 of the Public School Code of 1949, supra, 24 P. S. Section 25-2511.1, provides that the Commonwealth shall pay annually to school districts that have entered into leases approved by the Department of Public Instruction with the State Public School Building Authority or any municipality authority reimbursements according to a standard reimbursement fraction set forth therein. It will be noted that these annual payments shall be made by the Commonwealth only to those school districts having leases approved by the Department of Public Instruction. Subsection (b.2) of Section 2511.1, supra, provides specifically that "No payment shall be made to any school district on account of any lease entered into with the State Public School Building Authority or any municipality authority or non-profit corporation unless such lease is approved by the Depart-

ment of Public Instruction." It seems clear that once the lease is approved, then the project becomes a reimbursable project by statutory mandate. The Commonwealth is obligated to pay even before an appropriation act is enacted by the legislature. Subsection (c) of Section 2511.1 provides in part that the amounts to be paid to school districts as determined and approved by the Department of Public Instruction shall be included in and be payable from any future appropriations made to the Department of Public Instruction.

Your inquiry cannot be answered in the affirmative or negative, but must be answered with some qualifications. We are advised by your Department that the estimated aggregate cost of the approved reimbursable projects already totals $425,000,000.00. We are further advised that there are some school districts which have sufficient resources and taxing power to finance the construction of needed school buildings through an authority without relying upon being reimbursed under section 2511.1, supra.

As previously noted, it is the approval of the lease by the Department of Public Instruction that makes the project reimbursable. If the Department of Public Instruction approves a lease, that project becomes reimbursable by the terms of section 2511.1, supra, and the Department of Public Instruction cannot change the mandate for payment contained in that section by attaching to its approval a condition that no State reimbursement will be paid to the school district after the maximum of $425,000,000.00 has been reached. The principle of law that a public officer has no power to vary or waive any statutory law is certainly applicable to the Superintendent of Public Instruction, and he cannot waive the requirement of the act by providing for no reimbursement. (See State Board of Medical Education and Licensure *v.* Simon, 62 Dauph. 215, 217 (1951); Commonwealth ex rel. Chidsey *v.* Black, 363 Pa. 231 (1949); Commonwealth *v.* Central R. R. of United States, 358 Pa. 326 (1948); Permanent A. L. R. Digest, Volume 9, page 117, Officers, 101.5).

The substitution of the word "may" for the word "shall" in that portion of Section 2511.1, supra, which now reads:

> * * * The Department of Public Instruction *may* give its approval if it shall find that the leased project is in conformance with general county and State plans for an orderly development of improved attendance areas and administrative units and for the improved housing of public schools in the Commonwealth, that the school building will conform with standards and regulations prescribed by the department with respect to educational design, location, usefulness and community activities, safety, comfort and convenience, and

> that the school district or school districts to which the project is to be leased will have the ability to meet from current revenues the rental or their respective shares of rental to be paid to the municipality authority or non-profit corporation under the proposed lease and to defray the cost of their respective shares of the cost of operation and maintenance of the project. (Emphasis supplied.)

implies that your Department has the discretion to refuse to approve a lease for a proper reason. A proper reason for the refusal to approve such a lease would be that such an approval would cause the $425,000,000.00 limit to be exceeded.

It has been stated previously that the $425,000,000.00 limit set forth in Act No. 431, supra, has been reached. The school districts may exercise the powers enumerated under Section 790 and Sections 781 to 786 of the Public School Code, supra, with the approval of the Department of Public Instruction. Your Department may approve the exercise of these powers, including the power to lease, without approving the lease itself. The approval at this time by your Department of any additional project without the approval of the lease renders the project non-reimbursable. A school district which has sufficient resources and taxing power to finance the construction of school buildings through an Authority, without relying upon being reimbursed under section 2511.1, supra, may undertake the project after your Department has given its approval of the project, with the exception of the lease. Such a project remains non-reimbursable unless and until the legislature at some time in the future specifically authorizes the Superintendent of Public Instruction to approve the lease of the project and specifically provides reimbursement for the project.

It is our conclusion, therefore, that you as Superintendent of Public Instruction may approve, with the exception of the leases, additional projects to be constructed by the State Public School Building Authority, a municipality authority, or a non-profit corporation. You cannot approve for these additional projects the leases to be entered into by and between the school districts and the State Public School Building Authority, a municipality authority, or non-profit corporation. The approval of such leases would constitute these additional projects "reimbursable projects" and would cause the $425,000,000.00 limit imposed by the legislature to be exceeded.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

OPINION No. 649

Public Assistance—State Mental Institutions—Inmates—Leave of absence—Application for assistance.

The Department of Public Assistance may grant assistance to persons on leave of absence or parole under the Act of June 12, 1951, P. L. 533. A person may make his own application unless and until he has been adjudicated incompetent and a guardian appointed, in which event the application should be made on the person's behalf by the appointed guardian.

Harrisburg, Pa., June 18, 1954.

Honorable Eleanor G. Evans, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Madam: This department is in receipt of your communication of January 14, 1954, requesting advice on the eligibility for public assistance of persons who are on leave of absence from a State mental institution.

Specifically, you present the following three questions:

1. Is a person on leave of absence or parole from a mental institution a patient in an institution as defined in the Social Security Act?

2. May the Department of Public Assistance grant assistance to persons on leave of absence or parole from a mental institution?

3. If the answer to 2 above is in the affirmative, may the person make application for assistance or must the application be made on his behalf by a guardian?

Section 6, Title I, of the Social Security Act, the Act of August 14, 1935, c. 531, 49 Stat. 622, as amended, 42 U. S. C. A. 306, defines "old-age assistance" as follows:

> For the purposes of this subchapter, the term "old-age assistance" means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, needy individuals who are sixty-five years of age or older, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof.

Section 1006, Title X, of the Social Security Act, as amended, supra, 42 U. S. C. A. 1206, defines "aid to the blind" as follows:

> For the purposes of this subchapter, the term "aid to the blind" means money payments to, or medical care in behalf of or any type of remedial care recognized under State law in behalf of, blind individuals who are needy, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof.

Section 1405, Title XIV, of the Social Security Act, as amended, supra, 42 U. S. C. A. 1355, defines "aid to the permanently and totally disabled" as follows:

> For the purposes of this subchapter, the term "aid to the permanently and totally disabled" means money payments to, or medical care in behalf of, or any type of remedial care recognized under State law in behalf of, needy individuals eighteen years of age or older who are permanently and totally disabled, but does not include any such payments to or care in behalf of any individual who is an inmate of a public institution (except as a patient in a medical institution) or any individual (a) who is a patient in an institution for tuberculosis or mental diseases, or (b) who has been diagnosed as having tuberculosis or psychosis and is a patient in a medical institution as a result thereof.

Under authority conferred in Section 1102 of the Social Security Act, as amended, supra, 42 U. S. C. A. 1302, rules and regulations were promulgated. See Handbook of Public Assistance Administration, Part IV, adopted August 7, 1953.

Section 3521.3 of the Handbook defines "inmate" as follows:

> An "inmate" of a "public institution" is a person who is living in a public institution and plans to continue to live there, or who is in a public institution on court commitment."

Under this definition:

> a. A person living in a public domiciliary institution is an inmate unless he has definite plans to leave the institution within the current or following month.
>
> b. A person attending a public educational or vocational training institution—for example, a State school for the blind—where living in the institution is incidental to the purpose of securing education or training, is not an inmate of a public institution.

c. A person in a public institution (which is not an institution for tuberculosis or mental diseases, or is not a medical institution) temporarily, usually not over 3 months—for medical care, is not an inmate of a public institution if he is not under court commitment.

d. A person on conditional release—for example, "on parole," "on trial visit," from a public mental hospital where he was an inmate—is not an inmate of a public institution if he is free of controls by the hospital, other than professional help or guidance relating to his mental condition."

On the basis of the Federal rule and regulation, the answer to your first question is obviously in the negative if the person is free of controls by the hospital, other than professional help or guidance relating to his mental condition.

Turning to your second question, we should note that the State Public Assistance Program is administered under and by virtue of the Pennsylvania Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. Section 2501 et seq.

Subsections (b), (c) and (c.1) of Section 9 of said act, as amended, supra, 62 P. S. Section 2509, provide, inter alia, for eligibility for aged persons, blind persons and disabled persons.

Section 9(b) defines an aged person as one who:

* * * (1) is sixty-five years of age, or more, (2) is not, at the time of receiving assistance, an inmate of a public institution, and (3) has not conveyed or transferred his real or personal property of the value of five hundred dollars ($500.00), or upwards, without fair consideration, within two years preceding the date of making such application.

Section 9(c) defines a blind person as one who:

* * * (1) is twenty-one years of age or more, (2) has three-sixtieth or ten-two-hundredths, or less, normal vision, (3) is not receiving any other assistance during the period for which he is receiving assistance as a blind person, (4) is not an inmate of any prison, jail, insane asylum, or any other public reform or correctional institution. * * *

Section 9(c.1) defines a disabled person as one who:

* * * (1) is between the ages of eighteen and sixty-four, inclusive, (2) is permanently and totally disabled, and (3) is not at the time of receiving assistance an inmate of a public institution.

Under the above quoted provisions of the Public Assistance Law, as amended, supra, a person who is an inmate of a public institution is ineligible to receive public assistance. The question arises as to whether persons who are released on leave of absence under Section 611 of The Mental Health Act of 1951, the Act of June 12, 1951, P. L. 533, as amended, 50 P. S. Section 1321, are any longer inmates or residents of a mental institution.

Section 611 of The Mental Health Act of 1951, as amended, supra, 50 P. S. Section 1321, provides for leave of absence, as follows:

> (a) The superintendent of any institution, in his discretion, may allow a leave of absence to any patient whose condition is such as to warrant the action, for a period not exceeding twelve months, and upon such conditions as he may prescribe not inconsistent with the provisions for discharge of patients as provided in this act.
>
> (b) Leaves of absence may be terminated by the superintendent who may, if necessary, authorize the apprehension and return of the patient by any sheriff, constable or police officer, who shall apprehend and return the patient.
>
> (c) The superintendent of any institution, upon medical revaluation, may extend such leave of absence annually, not to exceed a total continuous absence of thirty-six months, if he finds, prior to the expiration of each allowance, that the welfare of the patient warrants such action.
>
> (d) The limitations of this section shall not apply to mental defectives or epileptics who may be allowed indefinite leave of absence."

Section 616 of The Mental Health Act of 1951, as amended, supra, 50 P. S. Section 1341, provides for boarding out of patients, as follows:

> (a) The superintendent and the board of trustees of any State institution may, by contract or otherwise, arrange for the *boarding out* of committed patients who have no criminal, suicidal or homicidal tendencies, who are not addicted to the use of alcohol or narcotics, and who, in the opinion of the superintendent and board of trustees, may be otherwise suitable. Such arrangements shall be made only with the approval of and subject to regulations prescribed by the department.
>
> (b) *Such patients shall be considered remaining inmates of the State institution and shall be considered as on leave of absence, subject to return should the condition of the patient or other circumstances, in the opinion of the superintendent and the trustees, make such return necessary.*

> (c) Subject to the approval of the department, patients, if physically and mentally able, may earn the cost of their maintenance or a portion thereof by engaging in suitable employment. (Italics ours.)

The Mental Health Act of 1951 thus provides two different methods of dealing with patients outside a mental institution:

1. The superintendent of the mental institution may, by contract or otherwise, board patients out (Section 616).

2. The superintendent may grant a leave of absence to a patient (Section 611).

The Mental Health Act of 1951 places responsibility for patients committed to State mental institutions on the Department of Welfare. The responsibility of the Department of Welfare extends to patients while within the mental institution except that patients themselves and legally responsible relatives, if financially able, or the county in some instances, must bear the cost of the care of patients.

Thus, the Department of Welfare has responsibility for those patients who are within the mental institution or are "boarding out" patients. Section 616 of The Mental Health Act of 1951, as amended, supra, expressly provides that these "boarding out" patients remain "inmates" of the State institution. There is no such provision in Section 611 of the Mental Health Act of 1951 for those patients who are outside the institution on leave of absence and, therefore, the responsibility of the Department of Welfare does not extend to such patients who are outside the mental institution on leaves of absence under section 611.

Under said section 611, the leave of absence of a patient may be for a period of twelve months which may be extended by the superintendent to thirty-six months. The superintendent may impose certain conditions or may terminate a leave of absence. These are the only restrictions on the freedom of the former patient.

Provisions for discharge are provided for in Sections 603, 604 and 605 of The Mental Health Act of 1951, supra.

"Inmate" is defined in Webster's New International Dictionary, Second Edition, Unabridged, as:

> 2. One of a family or community occupying a single dwelling or home; as, the inmates of a private house; * * *

> now esp., one confined or kept in an institution such as an asylum, prison, or poorhouse.

Black's Law Dictionary, Deluxe Edition, defines "inmate" as:

> A person who lodges or dwells in the same house with another, occupying different rooms, but using the same door for passing in and out of the house.

These definitions all stress that an inmate is physically within a dwelling, institution, etc.

Though the superintendent of a mental institution has certain limited controls over persons released on leave of absence, under the above definitions and in the words of the Federal regulation, a person on conditional release or leave of absence from a public mental institution is not an inmate of a public institution within the intent and meaning of the Public Assistance Law.

It should be further noted in this connection that under the Public Assistance Law, the Department of Public Assistance has responsibilities for rehabilitation of persons who need relief from suffering and distress arising from handicaps and infirmities.

Section 4(k) of the Public Assistance Law, as amended, supra, 62 P. S. Section 2504, provides for the relief of suffering and distress arising from handicaps and infirmities, as follows:

> (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, rehabilitative or similar services."

There is nothing in the Public Assistance Law prohibiting the giving of assistance to persons on leave of absence from mental institutions. The purpose of the leave of absence is to afford to the former inmate of a mental institution a continuation of the therapeutic treatment looking toward the complete rehabilitation and self-sufficiency of the former patient, who returns home. It is a progressive humanitarian movement to aid patients to resume normal and active lives with a consequent reduction in the high costs of public institutional care, and as such, in the absence of express prohibition, should have the full

support of those departments of the Commonwealth which by law have the responsibility of treatment, cure and rehabilitation of the mentally ill.

From the above, it is clear that the answer to your second question is in the affirmative, namely, that the Department of Public Assistance may grant assistance to persons on leave of absence or parole from a mental institution.

We turn now to a consideration of your third question. It should first be noted that commitment to a mental institution does not of itself constitute an adjudication of incompetency, and in the absence of an adjudication of incompetency, a person may make his own application for assistance. If a person has been adjudicated incompetent and a guardian appointed, then the application should be made on the person's behalf by the duly appointed guardian.

It is our opinion, therefore, that:

1. A person on leave of absence or parole from a mental institution is not a patient (inmate) of an institution as defined in the Social Security Act, the Act of August 14, 1935, c. 531, 49 Stat. 620, as amended, 42 U. S. C. A. 301 et seq.

2. The Department of Public Assistance, under the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. Section 2501 et seq., may grant assistance to persons on leave of absence or parole from a mental institution under Section 611 of The Mental Health Act of 1951, the Act of June 12, 1951, P. L. 533, as amended, 50 P. S. Section 1321.

3. A person may make his own application for assistance unless and until he has been adjudicated incompetent and a guardian appointed, in which event the application should be made on the person's behalf by the duly appointed guardian.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 650

Public Instruction—Constitutional law—Beauty Culture Law—Barber Law—Acts of May 3, 1933, P. L. 242 and Act of June 19, 1931, P. L. 589, as amended.

The opinion of the court in the case of Philadelphia School of Beauty Culture *v.* State Board of Cosmetology, 78 D. & C. 111, is applicable to paragraph (c) section 12 of the Barber Law. It should be understood, however, that the Attorney General is not hereby passing upon the constitutionality of this law or any part thereof, since that power is vested exclusively in the Judiciary.

Harrisburg, Pa., June 24, 1954.

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

Sir: You have requested us to advise you "whether the Opinion of the Court in the case of Philadelphia School of Beauty Culture *v.* State Board of Cosmetology, 78 D. & C. 111, 1951, which held that Section 7 of the Beauty Culture Law (Act of May 3, 1933, P. L. 242) was unconstitutional is likewise applicable to paragraph (c), Section 12 of the Barber Law (Act of June 19, 1931, P. L. 589, as amended)."

Permit us first to call your attention to the fact that the above case (also reported in 62 Dauphin 5) declared unconstitutional only that portion of Section 7 of the Beauty Culture Law applying to a charge, by a Beauty Culture School, for materials used in clinical treatments given by its students. Section 7 of the said act, as amended, 63 P. S. Section 513, provides:

> It shall be unlawful for any school of beauty culture to permit its students to practice beauty culture upon the public under any circumstances except by way of clinical work upon persons willing to submit themselves to such practice after having first been properly informed that the operator is a student. No school of beauty culture shall, directly or indirectly, charge any money whatsoever for treatment by its students *or for materials used in such treatment.* (Emphasis supplied.)

The issue before the court as to the constitutionality of this section was limited by stipulation to that portion of the section which we have italicized. No other provision of the Beauty Culture Law, supra, including the provision in section 7 thereof, prohibiting a school of beauty culture from charging any money whatsoever for treatment by its students, was in question.

The court was of the opinion that the provision of section 7 relating to the charge for materials used in free clinical treatment by the

students of the school was unconstitutional and void in that such provision bore no reasonable relation to the end sought to be attained in the public interest for the protection of public health and safety; that such provision was unduly oppressive; arbitrarily interfered with and imposed an unnecessary restriction upon private business; and, under the guise of police regulation, deprived plaintiff of its property without due process of law. The court held that the provision violated Article I, Section 1 of the Constitution of Pennsylvania by interfering with the school's freedom to use and enjoy its property and Article I, Section 9 of the Constitution of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States by depriving plaintiff of its property without due process of law and by denying to it equal protection of the laws.

The precise question involved does not appear to have been passed upon by the Pennsylvania appellate courts. There have been decisions on the subject in some of our Western States to the same effect as the Dauphin County Court decision: Brasier *v.* State Board of Barber Examiners, 141 P. 2d 563 (Okla. 1943); State *v.* Thompson's School of Beauty Culture, Inc., et al., 285 N. W. 133 (Iowa 1939); Schum *v.* Alexander, et al., U. S. District Court, District of North Dakota.

As you are aware, the title of the Beauty Culture Law is "An Act to promote the public health and safety by providing for examination and registration of those who desire to engage in the occupation of beauty culture; defining beauty culture, and regulating beauty culture shops, schools . . .".

The title of the Barber Law, supra, is "An Act to promote the public health and safety, by providing for the examination and licensure of those who desire to engage in the occupation of barbering; regulating barber shops and barber schools . . .".

It is to be noted that the purpose of both laws is identical—to promote public health and safety.

The particular relevant provision of the Barber Law, paragraph (c), Section 12, as amended (63 P. S. Section 562 (c)), provides as follows:

> No school of barbering shall permit its students to practice barbering on the public under any circumstances, except by way of clinical work upon persons willing to submit themselves to such practice, after first being properly informed

that the operator is a student. *No school of barbering shall directly or indirectly charge any money whatsoever for treatment by its students, or for materials used in such treatment.* (Emphasis supplied.)

It is further to be noted that the sentence underlined is identical in language with the equivalent sentence in section 7 of the Beauty Culture Law (aside from the substitution of the word "barbering" for the words "beauty culture") which was under consideration by the Dauphin County Court and declared unconstitutional as to that portion relating to a charge for materials used in treatments.

The purpose of the Beauty Culture Law and the Barber Law being the same, and the relevant prohibitory provision as to charges made for materials used by students in clinical work being identical in both acts, the reasoning in the decision of the Dauphin County Court would undoubtedly apply with like force and effect to the Barber Law. There being no appellate decision in Pennsylvania on the subject and this department concurring in the rationale and logic of the decision, we are of the opinion that the Dauphin County Court decision relating to Beauty Culture schools has full application to the Barber schools.

It is common knowledge that the vocations of Beauty Culture and Barbering are substantially similar, except that beauty shops are ordinarily patronized by women and barber shops by men.

We conclude, therefore, that the opinion of the Court in the case of Philadelphia School of Beauty Culture *v.* State Board of Cosmetology, 78 D. & C. 111, is applicable to paragraph (c), Section 12 of the Barber Law, Act of June 19, 1931, P. L. 589, as amended, 63 P. S. Section 562. It should be understood, however, that we are not hereby passing upon the constitutionality of this law or any part thereof, since that power is vested exclusively in the Judiciary.

Very truly yours,

DEPARTMENT OF JUSTICE,

FRANK F. TRUSCOTT,
Attorney General.

ARNOLD M. BLUMBERG,
Deputy Attorney General.

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