Commonwealth of Pennsylvania

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

1961-1962

ANNE X. ALPERN
(Resigned August 28, 1961)

DAVID STAHL
(Commissioned August 29, 1961)

Attorneys General

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OFFICIAL OPINIONS

1961-1962

OFFICIAL OPINION No. 232

Beneficial societies—Liquidation proceedings—Insurance Department Act of 1921, as amended—Beneficial Societies Act—Section 63 of the Statutory Construction Act.

In instituting liquidation proceedings relating to insolvent domestic beneficial societies, the provisions of §502 of the Insurance Department Act of 1921, the Act of May 17, 1921, P. L. 789, as last amended by the Act of March 22, 1956, P. L. (1955) 1328, should be followed rather than the provisions of §8 of the Beneficial Societies Act of June 4, 1937, P. L. 1643. The amendment to the 1921 act, being later in date, supersedes the 1937 act under the rule of statutory construction as provided in §63 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019.

Harrisburg, Pa., January 13, 1961.

Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked our opinion as to what statutory procedure should be followed in obtaining an order of liquidation for a domestic beneficial society.

Specifically, you ask whether the liquidation proceedings should be instituted by the Attorney General under Section 8 of the Beneficial Societies Act of June 4, 1937, P. L. 1643, 40 P. S. Section 1108[1], or by the Insurance Commissioner under Section 502 of the Insurance Department Act of 1921, Act of May 17, 1921, P. L. 789, as last amended by the Act of March 22, 1956, P. L. (1955) 1328, 40 P. S. Section 202.[2]

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[1] "* * * Whenever, after examination, the Insurance Commissioner is satisfied that any beneficial society is exceeding its powers, or is transacting business fraudulently, or is in such condition that its further transaction of business will be hazardous to its members or to the public, or shall determine to discontinue business, the Insurance Commissioner may present the facts relating thereto to the Attorney General who shall, if he deem the circumstances warrant, proceed against such society in the method prescribed by the laws of this State providing for the liquidation of insolvent or delinquent companies, orders or associations transacting any class of insurance.

"No such proceeding shall be commenced by the Attorney General against any such society until after notice has been duly served on the chief executive officers of the society, * * *"

[2] "Whenever any domestic insurance company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, or order, including all corporations, associations, societies, and orders which are subject to examination by the Insurance Commissioner or which are doing, or attempting to do, or representing that they are doing, the business of insurance in this Commonwealth, or which are in process of organization intending to do such business therein—(a) is insolvent; * * * the Insurance Commissioner, after examination, shall suspend the entire business of any such domestic insurance company, association, exchange, title insurance company, fraternal benefit society, or beneficial society, * * * Upon suspension of any such organization by the Insurance Commissioner upon any of the grounds set forth in any one of provisions (a) to (h) inclusive of this section, he shall after approval of the Attorney General apply to the court of common pleas * * *."

It is our opinion that the proper procedure is under the Act of 1921 as amended.

Originally, suspension of the business of insurance companies, associations, exchanges, fraternal or beneficial societies was initiated by the Attorney General under Section 502 of the Insurance Department Act of 1921, who, after receiving the facts from the Insurance Commissioner, and following a hearing before the Attorney General, applied to the common pleas court for an order to show cause why the business should not be closed and the Insurance Commissioner should not take possession of its property, etc. This was brought about by the 1935 amendment to the Act of 1921 which expanded the power of the Attorney General to include not only domestic insurance companies, associations and exchanges but also title insurance companies, fraternal benefit societies or beneficial societies.

In 1937, the Beneficial Societies Act was enacted into law and substantially the same procedure was authorized in Section 8 of that act with regard to liquidating insolvent or delinquent beneficial societies, as was authorized by Section 502 of the Insurance Department Act of 1921.

Section 502 of the Insurance Department Act of 1921 was amended again in 1956, supra. This amendment changed the law to omit the requirement that the Insurance Commissioner shall communicate the facts to the Attorney General relating to suspension or liquidation of an insurance company, etc., and the hearing requirement before the Attorney General. Instead, the amendment requires that the Insurance Commissioner, after hearing, take this action himself with the prior approval of the Attorney General.

This amendment did not specifically change or repeal the provisions found in Section 8 of the Beneficial Societies Act of 1937.

It is our opinion that the amendment to Section 502 of the Insurance Department Act of 1921 supersedes the provisions of Section 8 of the Beneficial Societies Act of 1937. This amendment, being later in date, had as its obvious intention the elimination of the hearing before the Attorney General. This intention is emphasized by the fact that Section 502 specifically refers to beneficial societies, and, further, is a part of Article 5 of the Insurance Department Law which deals with the suspension of business and involuntary dissolutions of all companies

and relates to the general powers of the Insurance Department and Insurance Commissioner.

This interpretation is wholly consistent with principles of statutory interpretation. Section 63 of the Statutory Construction Act, Act of May 28, 1937, P. L. 1019, 46 P. S. Section 563, states:

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

Accordingly, it is our opinion and you are advised that the provisions of Section 502 of the Insurance Department Act of 1921 are to be followed in the liquidation of beneficial societies and that the provisions found in Section 8 of the Beneficial Societies Act of 1937 do not apply.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 233

Fraternal benefit societies—Constitution—Authority to issue benefit certificates—Individual reserve board—Quadrennial convention as legislative body of society—The Fraternal Benefit Societies Act of 1935.

The rules of a fraternal benefit society do not violate the provisions of §6 of The Fraternal Benefit Societies Act of 1935, the Act of July 17, 1935, P. L. 1092, where the governing body of the society is its quadrennial convention, but where its constitution authorizes an individual reserve board to make rules and regulations regarding the issuance of its benefit certificates.

Harrisburg, Pa., January 18, 1961.

Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked our advice as to whether certain rules of a fraternal benefit society violate the provisions of Section 6

of the Act of July 17, 1935, P. L. 1092, popularly known as "The Fraternal Benefit Societies Act of 1935". The society, the Brotherhood of Railroad Trainmen Insurance Department, Inc., seeks to do business in the Commonwealth of Pennsylvania. The question arises out of a review of its Constitution and Rules offered in support of its application for admission.[1]

The Brotherhood of Railroad Trainmen Insurance Department, Inc., is a nonprofit Ohio corporation formed by the Brotherhood of Railroad Trainmen, an unincorporated association, as a fraternal benefit society under the laws of Ohio. As stated in the Rules of the Brotherhood of Railroad Trainmen Insurance Department, Inc., the object of the Insurance Department is to provide for its members insurance benefits based upon adequate rates. The Brotherhood of Railroad Trainmen and the Brotherhood of Railroad Trainmen Insurance Department, Inc., have only one Constitution and this Constitution requires that the Brotherhood maintain an insurance department. The officers of the Brotherhood of Railroad Trainmen solely by reason of their election in the Brotherhood of Railroad Trainmen hold comparable offices in the Brotherhood of Railroad Trainmen Insurance Department, Inc.

The affairs of the Insurance Department are managed by an Individual Reserve Board which consists of the President, Assistant to the President, General Secretary and Treasurer. Its duties consist in considering claims referred to it by the General Secretary and Treasurer, the making of rules and regulations, issuing additional classes of insurance, including health and accident insurance, arranging for reinsurance and promulgating such orders as are not inconsistent with the Constitution of the Brotherhood and of the Insurance Department, Inc., and of the Insurance Laws of the state and provinces as may be by it deemed expedient and proper for the transaction of the Brotherhood's insurance business.

The Rules which you have questioned are two in number. Rule No. 3 of the Constitution provides, in part, as follows:

> "* * * The Individual Reserve Board shall have the power and authority to make such rules and regula-

[1] Official Opinion No. 181, rendered to you on May 7, 1959, by Attorney General Anne X. Alpern, advised you that this society was not exempt from regulation under The Fraternal Benefit Societies Act of 1935. The conclusion of this opinion was confirmed by the Dauphin County Court: *Brotherhood of Railroad Trainmen Insurance Department, Inc. v. Smith, Insurance Commissioner,* 74 Dauph. 346 (1960).

tions, to issue additional classes of insurance, including accident and health insurance, to arrange for reinsurance and to promulgate such orders not inconsistent with the Constitution of the Brotherhood and of the Insurance Department and the insurance laws of the states and provinces as may be by it deemed expedient and proper for the transaction of the Brotherhood's insurance business."

Rule No. 10(a) provides, in part, as follows:

"The Individual Reserve Board is authorized to issue certificates of insurance to members granting death; disability; endowment; accident and health; or other benefits as may by them be deemed suitable for the membership of the Brotherhood of Railroad Trainmen. They may issue additional classes or plans or discontinue issuing existing classes or plans of insurance certificates as experience may justify. Each class or plan shall be evidenced by an insurance certificate to be issued under the hands of the President and the General Secretary and Treasurer in the name of the Brotherhood of Railroad Trainmen Insurance Department, and under the seal of the Insurance Department."

The critical section of the Fraternal Benefit Societies Act of 1935, to which you have directed our attention, is Section 6, which provides:

"Every such society, by its supreme governing or legislative body, shall have power to make, alter and amend its constitution and laws for the government of the society, the management of its affairs, the admission and classification of its members, the control and regulation of the terms and conditions governing the issue of its benefit certificates and the character or kind of benefits or privileges payable or allowable thereunder, the fixing and adjustment of the rates of contribution, fees, or dues payable by its members, and the allotment of the same to the different funds of the society. Such constitution and laws when made and altered and amended, shall be the law governing the society and its officers, boards of directors, or managers, subordinate or constituent lodges, councils, or branches, and all members and beneficiaries in their relation thereto. * * *"

The Brotherhood of Railroad Trainmen Insurance Department, Inc., takes the position that its "supreme governing or

legislative body" is its quadrennial convention.[2] Your question may then be restated for purposes of clarity as, may the Constitution authorize the Individual Reserve Board to exercise jurisdiction in the area specified in Rules 3 and 10 when The Fraternal Benefit Societies Act of 1935 apparently vests this power in the supreme governing or legislative body? Our answer is in the affirmative.

Before giving our reasons it would be helpful if some additional information was mentioned. The Brotherhood of Railroad Trainmen Insurance Department, Inc., has assets in excess of $50,000,000.00. It issues certificates in all states and in Canada. Its activities encompass accident and health insurance, disability and life insurance. The total insurance in force exceeds $125,000,000.00. Approximately 8,900 certificates are in force in Pennsylvania.[3]

We turn now to a consideration of the factors supporting our conclusion. Changes in the Constitution can be effected only as

[2] More specifically it is the Grand Lodge. See Sections 6 and 7 of the Constitution:

"Sec. 6. The Grand Lodge has exclusive jurisdiction over all subjects pertaining to the Brotherhood, and its enactments and decisions upon all questions are the supreme law of the Brotherhood. The Grand Lodge may hear and determine all matters of controversy which may be brought before it by appeal or otherwise; issue all charters, reprove and punish the misconduct of subordinate lodges; adopt laws and regulations of general application for the government of the Brotherhood, and alter, amend, or repeal the same; control, and regulate the unwritten work of the Brotherhood; establish, print, and supply all charters, constitutions, official receipts, rituals, dispensations, withdrawals, transfer and traveling cards of the Brotherhood, make such assessments for revenues as may be necessary to defray the expenses of the Grand Lodge, and do all things necessary to promote the welfare of the Brotherhood.

"Sec. 7. The Grand Lodge officers shall be elected at each regular convention and shall hold office until the 31st day of December after the adjournment of the next regular convention. Their term of office shall date from the first day of January after the adjournment of the convention at which elected; except in the case of filling an unexpired term, when the officer shall take charge of his office, immediately upon being appointed and approved, and he shall serve for the remainder of the term. They shall be installed during the session of the Grand Lodge at which they were elected.

"Note: The Thirtieth Convention, on September 14, 1954, adopted the following motion:

" 'During nomination of Grand Lodge officers and of the respective boards all withdrawals made by candidates declining to accept nominations shall be made before nominations are closed. The presiding officer shall call twice for withdrawals before proceeding to accept a motion to close nominations.' "

[3] Statistics of Fraternal Society, 1956, The Fraternal Monitor (62nd Edition).

provided in Section 72 of the Constitution. This section requires advance notice to the entire membership of contemplated changes in the Constitution. It further provides that after following the proper procedure the changes in the Constitution are presented to the convention wherein a majority vote of the delegates present is necessary to effect a change. Delegates are the representatives of the membership and are elected by the procedure set forth in the Constitution. See Section 85(a) of the Constitution. In adopting Rules 3 and 10 as part of their Constitution the membership of the Brotherhood expressly delegated this power to the Individual Reserve Board.[4]

If we were to hold that the convention is the only body which may absolutely determine questions with regard to the control and regulation of the terms and conditions governing the issue of its benefit certificates and the character or kind of benefits or provisions payable or allowable thereunder, or the contents of the reinsurance contracts, the result would be grossly unrealistic. Particularly is this so when we consider that the convention meets but once in every four years. In view of the volume of activity, as evidenced by the statistics set forth above, such a holding would result in pure chaos.

There can be no question that the convention, as composed of the elected delegates of the membership, possesses the power to establish a specific body to exercise this function which it possesses. See generally 19 Appleman, Insurance Law and Practice, Section 10171 (1945 edition). In the absence of an allegation of wrong-doing, regulatory bodies should be hesitant to inquire closely into the internal affairs of such associations. Cf. *Bogadek v. Butkovic,* 336 Pa. 284, 9 A. 2d 388 (1939); *Bodrog v. Sekerak,* 90 P. L. J. 455 (1941).

Accordingly, it is our opinion and you are so advised that the Brotherhood of Railroad Trainmen Insurance Department, Inc., does not violate Section 6 of The Fraternal Benefit Societies

[4] Section 6 of the Fraternal Benefit Societies Act of 1935, 40 P. S. Section 1056, requires each society to file with the Insurance Commissioner a duly certified copy of its Constitution and laws as enacted and as changed, added to or amended within ninety days after enactment.

The section further provides:

> "* * * Printed copies of the same, duly certified by the secretary or corresponding officer thereof, shall be prima facie evidence of the legal adoption thereof."

A certified copy of same was supplied to the Department of Insurance on February 9, 1960. We would hesitate, in view of this presumption, to question the authenticity of the Constitution and Rules of the Brotherhood and of the Insurance Department.

Act of 1935 in so far as the activities of the Individual Reserve Board are involved.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 234

State Harness Racing Commission—Departmental administrative commission—Department of Agriculture—Appointment and compensation of employees—Expenditures—Act of December 22, 1959, P. L. 1978—The Administrative Code of 1929—The Fiscal Code.

The Act of December 22, 1959, P. L. 1978, creates the State Harness Racing Commission as a departmental administrative commission within the Department of Agriculture; however, the Commission may appoint its own employees and fix their compensation, subject to the provisions of §709 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177. All other expenditures of the Commission such as traveling expenses are subject to the control of the Department of Agriculture or the Executive Board, in accordance with §§216 and 503 of The Administrative Code of 1929 and §1501 of The Fiscal Code, the Act of April 9, 1929, P. L. 343.

Harrisburg, Pa., January 30, 1961.

Honorable William L. Henning, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: You ask whether the State Harness Racing Commission is an independent administrative agency, and whether it is required that your Department approve expenditures and appointments made by the Commission.

Section 1 of the Act of December 22, 1959, P. L. 1978, 4 P. S. Section 301, creates the State Harness Racing Commission as a departmental administrative commission within the Department of Argiculture. Section 1 provides that the Commission shall appoint such employees as it may deem necessary who shall serve during its pleasure, that the duties of such employees shall be prescribed by the Commission, and that the compensation of such employees shall be fixed by the Commission within the appropriations available therefor. The Act further provides

in Section 16, 4 P. S. Section 316, for the creation of a Special Fund from which the costs of administering the Act, including salaries, are payable by the Commission.

Section 214 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 74, provides that the department head shall have the power to appoint and fix compensation of employees of departmental administrative commissions, and Section 503 thereof, 71 P. S. Section 183, makes such commissions subject to fiscal control by the department head. Section 1501 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, as amended, 72 P. S. Section 1501, provides that no requisition of a departmental administrative commission will be valid without the approval in writing of the head of the department with which such commission is connected.

It is our opinion that the Commission is a departmental administrative commission in all respects, except those in which the Legislature has provided a specific exception. The exception in the case of the Commission is that it appoint its employees and fix their compensation. Attorneys, of course, may only be appointed by the Commission with the written approval of the Attorney General. See Section 512 of the Administrative Code of 1929, 71 P. S. Section 192. This power of the Commission to select its own personnel and fix their compensation, being more specific and of later date, prevails over the provisions of either The Fiscal Code or The Administrative Code of 1929; however, the other relevant provisions of those Codes are fully applicable to the Commission. It follows that the department head has no duty or authority to approve payrolls or otherwise limit or restrict the power given to the Commission to appoint and fix the compensation of its own personnel. As to expenditures other than for personnel, such as traveling expenses, etc., all Fiscal Code, Administrative Code (see Section 216, 71 P. S. Section 76) and and Executive Board provisions relating to departmental administrative commissions continue to apply.

Although the Commission may select its own personnel and approve its own payrolls, it is nevertheless subject to the provisions of The Administrative Code of 1929 with respect to approval by the Governor and standards of compensation fixed by the Executive Board. Section 16 of the Harness Racing Law, 4 P. S. Section 316 specifically provides:

> "(a) All moneys paid into the State Treasury under the provisions of this act shall be paid into a

special fund hereby created and to be known as the State Harness Racing Fund.

"(b) As much as may be necessary of such moneys is hereby appropriated to pay:

"(1) The salaries of employes of the Commission employed by or for it in accordance with the provisions of the act of April 9, 1929 (P. L. 177), known as 'The Administrative Code of 1929,' and its amendments * * *."

This provision means that the salaries of Commission employees must be paid in accordance with the provisions of Section 709 of The Administrative Code of 1929, 71 P. S. Section 249, particularly that provision which reads as follows:

"Subject to the provisions of this act, the Executive Board shall have the power:

(a) To standardize the qualifications for employment, and all titles, salaries, and wages of persons employed by the administrative departments, boards, and commissions, except the Department of the Auditor General, the Treasury Department and the Department of Internal Affairs. * * *"

It is our opinion, therefore, and you are accordingly advised, (1) that the State Harness Racing Commission is not an independent administrative agency, but is a departmental administrative commission within the Department of Agriculture; (2) that the Commission may, nevertheless, appoint its own employees and fix their compensation, subject, however, to the provisions of Section 709 of The Administrative Code of 1929; and (3) that all other expenditures of the Commission such as traveling expenses are subject to the control of your department or the Executive Board, in accordance with Sections 216 and 503 of The Administrative Code of 1929 and Section 1501 of The Fiscal Code.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,
Deputy Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 235

Counties—Liquid fuels tax fund—Purchase of road building equipment—Construction of highway approaches to county bridges—Viewers' costs in land damage cases—Liquid Fuels Tax Act.

Under The Liquid Fuels Tax Act, the Act of May 21, 1931, P. L. 149, county liquid fuels tax funds may be utilized for the purpose of purchasing road building equipment, including trucks used primarily in the construction of county roads; such funds may also be used for construction, reconstruction, maintenance and repair of highway approaches to county bridges when the approaches are owned and maintained either by the Commonwealth or a political subdivision of the county. Costs and fees of viewers incurred in land damage proceedings involving county roads may not be paid from county liquid fuels tax funds.

Harrisburg, Pa., February 16, 1961.

Honorable Park H. Martin, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked our opinion as to whether certain items may be properly charged against the county liquid fuels tax funds held by the several counties of the Commonwealth under the provisions of the Act of May 21, 1931, P. L. 149, as amended, 72 P. S. Sections 2611a—2611z, popularly known as The Liquid Fuels Tax Act. Specifically, you ask, may a county use the funds for the following purposes:

1. To satisfy the county's obligation to pay the costs and fees of viewers who assess the damages sustained by owners of land taken for county road purposes.

2. To purchase equipment such as trucks to be used primarily in the construction and maintenance of county roads, but also to be used in other activities.

3. To construct, reconstruct, maintain and repair highway approaches to county bridges when such approaches are owned and maintained either by the Commonwealth or a political subdivision within the county.

The Liquid Fuels Tax Act imposes a permanent State tax upon all liquid fuels used or sold and delivered by distributors within the Commonwealth. The statute provides that approximately one-sixth of the revenues from this tax is to be paid to the counties of the Commonwealth. Thereafter, each county is to maintain the proceeds in a special fund designated as the "County Liquid

Fuels Tax Fund." The counties may draw upon the fund to pay for, *inter alia*:

> "* * * construction, reconstruction, maintenance and repair of county-owned roads, highways and bridges, property damages, * * * *." 72 P. S. Section 2611j(a).

Within the scope of this authority, a county may properly charge against the fund its purchases of road building equipment and its expenditures for the construction and maintenance of non-county highway approaches to county bridges.

A county may not, however, utilize the fund in order to defray the expenses of viewers' proceedings.

Viewers' Fees and Costs

The compensation of viewers is, indeed, an expense necessarily incurred in connection with the taking of land for county public road purposes. However, the Act does not permit all costs of condemnation proceedings to be paid out of the fuels tax fund. The fund is available only for the payment of such expenses as would qualify as "property damages".

In the law of eminent domain, this phrase, "property damages", refers to extent of the interest in land taken by the condemning authority. *E.g. Pennsylvania Co. v. Philadelphia,* 351 *Pa.* 214, 40 A. 2d 461 (1945); *Eldred Drainage and Levee District v. Wilcoxen,* 365 Ill. 249, 6 N.E. 2d 149, 151 (1936).

In fact, neither the Commonwealth nor any political subdivision has any liability to reimburse the condemnee for condemnation proceedings costs absent specific legislation to the contrary. *State v. Miller Home Development, Inc.,* 243 Minn. 1, 65 N.W. 2d 900 (1954); *Deneen v. Unverzagt,* 225 Ill. 378, 80 N.E. 321 (1907); *State v. Hawk,* 105 Ore. 319, 209 Pac. 607 (1922).

While the Act of August 9, 1955, P. L. 323, 16 P. S. §2409(b) (The County Code), is such a statute declaring that a county is to bear the cost of a view to assess the damages sustained by the owner of land taken for a public road (see also Act of June 13, 1836, P. L. 551, 36 P. S. §1852), nevertheless, it is also clear that under The County Code the members of boards of view are, in effect, public officers whose salaries are to be paid out of the county treasury: 16 P. S. §§1101-1106, and §§1623-1624 (see, even under prior law, *Lewis v. Adamson,* 10 D. & C. 706 (1927)). Apparently, therefore, compensation of viewers can no

longer be considered as even a "cost" of condemnation proceedings: Drum, Law of Viewers in Pennsylvania, §254 at 334 (1940). It follows that the Liquid Fuels Tax Fund may not be used to pay the costs and fees of county viewers.

Road Building Equipment

A second permitted use of the County Liquid Fuels Tax Fund is for the purpose of "construction, reconstruction, maintenance and repair of county-owned roads". This authorization is broad and inclusive. Reimbursement is not limited to expenditures made for materials and labor directly involved in road building and, therefore, the cost of equipment used in transporting and fixing construction materials in place may be properly charged to the Fund. Similar language in the highway construction statutes of other states have been interpreted in like manner. Thus, the term "construction and maintenance", said the Supreme Court of Kentucky, has a meaning broad enough to include all matters connected with and incidental to the construction and maintenance of an efficient road system, *Grauman v. Department of Highways,* 286 Ky. 850, 151 S.W. 2d 1061 (1941).

In *Grauman,* the purchase by the Department of Highways of warning signals to promote the safety of the traveling public was held to be a legitimate expense "properly chargeable to construction and maintenance of the highway". 151 S.W. 2d at 1063. *Cf. Opinion of the Justices,* 101 N.H. 527, 132 A. 2d 613, 616 (1957).

That any road building equipment so purchased may not be devoted exclusively to county road purposes is of no moment. There is no requirement that such equipment must stand idle during periods when it is not needed. It is sufficient that the equipment is purchased for use in county road construction and maintenance activities and available whenever necessary in connection therewith.

Construction and Repair of Highway Approaches to County Bridges

The Liquid Fuels Tax Act, as we have seen, permits use of funds held by the counties to pay for the "construction, reconstruction, maintenance and repair of county-owned * * * bridges."

The highway approach to a bridge is such a wholly inseparable and indispensable adjunct to the physical structure that

the approach and the bridge may for most purposes be considered as one and the same.

Their unitary nature was recognized by our Superior Court in concluding that the Public Utility Commission's jurisdiction over bridges implies similar control over the highway approaches thereto:

> "It has been expressly recognized both by statute and in our decisions that approaches to an overhead bridge are a necessary part thereof as they afford the only means of access; without them this bridge is incomplete and useless." *(Pittsburgh and Shawmut R.R. Co., v. Public Utility Commission,* 141 Pa. Super. 233, 235, 14 A.2d 903 (1940))

Cf. Luzerne County v. Department of Highways, 77 D. & C. 52 (1950). (Bridge connecting a borough street with township road, both of which terminated in a State highway, was an integral part of the State highway system, and, therefore, the Department of Highways was responsible for its maintenance.)

So also, for purposes of construction and repair, the interrelationship of a county owned bridge and its non-county owned highway approaches, impels the conclusion that both are embraced within the purview of the statutory provision here under consideration.

We are, therefore, of the opinion, and you are accordingly advised, that the County Liquid Fuels Tax Fund may be utilized (1) for the purpose of purchasing road building equipment, including trucks used primarily in the construction of county roads, and (2) for the construction, reconstruction, maintenance and repair of highway approaches to county bridges when the approaches are owned and maintained either by the Commonwealth or a political subdivision of the county. The County Liquid Fuels Tax Fund may not, however, be charged with the payment of viewers' costs and fees incurred in land damage proceedings involving county roads.

Very truly yours,

DEPARTMENT OF JUSTICE,

ALAN MILES RUBEN,
Deputy Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 236

Insurance corporations—Issuance of variable annuity insurance contracts—Compliance with the Act of July 11, 1917, P. L. 804, and The Pennsylvania Securities Act.

A company which sells variable annuity insurance contracts is an insurance corporation within the meaning of the Act of July 11, 1917, P. L. 804, regulating the sale of securities of insurance corporations, and must comply with the provisions of that act as well as the provisions of The Pennsylvania Securities Act, the Act of July 10, 1941, P. L. 317, as amended, and such other acts as are pertinent thereto, before it may offer its stock (whether it be an original or subsequent issue) or variable annuities for sale in Pennsylvania.

Harrisburg, Pa., March 2, 1961.

Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked our advice as to whether a company engaged in the business of issuing variable annuities life insurance and disability insurance in combination is an insurance corporation within the meaning of the Act of July 11, 1917, P. L. 804, 40 P. S. Section 390. In the event this answer is "Yes", you further ask whether the provisions of the act apply to a corporation making a second offering of stock or a new issue several years after it has commenced doing business.

Our answer to both questions is "Yes".

The Act of 1917 is one which was passed under the police power of the State. It antedates the regulatory acts known as the Blue Skies Laws by several years. It, apparently, was passed to protect Pennsylvania investors from being overreached by the promotors of insurance companies. It places limitations upon the offering of securities of insurance corporations and imposes criminal penalties for failure to comply with its provisions.

Variable annuities are a comparatively new development. A standard annuity traditionally and customarily has offered the annuitant a definite amount beginning with a certain year of his or her life. The variable annuity introduces two new features: premiums collected are invested to a greater degree in common stocks and other equities, and, second, benefit payments vary with the success of the investment policy. The main distinction is that there is no fixed amount payable. The benefit, obviously, will vary upward or downward, depending on the state of the economy and the wisdom of the investment policies.

Section 1 of the Act of July 11, 1917, supra, reads as follows:

> "The term 'insurance corporation' includes corporations organized to transact the business of insurance, * * *."

The question of whether the business of selling variable annuities is insurance has been exhaustively treated in a recent case involving the very company whose request to sell its securities in Pennsylvania gives rise to this opinion. In the case of *Securities and Exchange Commission v. Variable Annuity Life Insurance Co. of America,* 359 U. S. 65, 79 S. Ct. 618, 3 L. Ed. 2d 640 (1959), the question before the court was whether the business of selling variable annuities was insurance within the meaning of the Securities Act and Investment Company Act of the United States which granted exemption from the disclosure requirements of these two acts to insurance companies. In a five to four decision the Court held that for the purposes of regulation under these two acts the business of selling variable annuities was not insurance and thus not entitled to the exemption. It is our opinion, however, that this was a decision based upon the public policy requiring disclosure advanced by the Securities Act of 1953 and the Investment Company Act. The position of the four dissenting justices appears to be the one best calculated to favor the interests of the citizens of this Commonwealth.

Preliminarily, it should be noted that if we were to hold that this was not insurance business, then the company would not be required to meet the provisions of the Act of 1917.[1]

The Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, Section 202, as amended, 40 P. S. Section 382, provides:

> "(a) Stock or mutual life insurance companies may be incorporated for any or all of the following purposes:
>
> > "(1) To insure the lives of persons, and every insurance appertaining thereto; to grant and dispose of annuities; * * *."

No limitation is placed upon the word "annuities" and we should not for the purposes of the Act of 1917, supra, read any into it.

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[1] This company has been admitted to do business by the governmental insurance regulatory bodies of the District of Columbia and of the States of Arkansas, Kentucky, West Virginia, Alabama, New Mexico and could qualify in North Dakota. See *Securities and Exchange Commission v. Variable Annuity Life Insurance Co. of America,* supra, at 94.

Moreover, these contracts are sold in combination with disability insurance.

It is significant to note that the Court in the United States Supreme Court case cited herein recognized the fact that the regulation of insurance has traditionally been under control of states, and that courts should be reluctant to disturb state regulatory schemes that were in actual effect, either by displacing them or by imposing federal requirements on insurance transactions tailored to meet state requirements.

Life insurance is an evolving institution and the Court should not undertake to freeze concepts of insurance or annuities into molds they had fit when Federal acts utilizing these claims were prepared.

We conclude that a company which among other things offers variable annuities contracts to the public is an insurance corporation within the meaning of the Act of July 11, 1917.

Returning now to a consideration of your second question, namely, whether the regulatory features of the Act of July 11, 1917, supra, apply to subsequent issues, Section 2 of the act provides:

> "No person shall as principal or agent, directly or indirectly, for the purpose of promoting or organizing any insurance corporation, proposed to be or being organized within or without this State, or of promoting the sale of stock of such corporation by it *after organization,* sell, or agree or attempt to sell, or secure subscriptions or applications for, any stock in such insurance corporation, without complying in all respects with this act."
>
> (Emphasis supplied)

Manifestly, the provisions of this act relate to not only original issues of stock but also those subsequent to the initial organization of the company.

We are therefore of the opinion and you are accordingly advised that a company which sells variable annuity insurance contracts is an insurance corporation within the meaning of the Act of July 11, 1917, and must comply with the provisions of that act and such other acts of the Commonwealth of Pennsylvania (The Pennsylvania Securities Act of July 10, 1941, P. L. 317, as amended) as are pertinent thereto, before it may offer its stock (whether it be original issue or subsequent issue) or variable annuities for sale in Pennsylvania. We do not intend that this opinion be construed to give authority to any com-

pany to offer for sale securities, whether they be its stock or variable annuity contracts, in the Commonwealth of Pennsylvania without prerequisite compliance with the provisions of The Pennsylvania Securities Act, as amended, supra.

Very truly yours,

DEPARTMENT OF JUSTICE,

MICHAEL J. STACK, JR.,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 237

School districts—Additional payments—Equalization guarantee in General Appropriation Act of 1961—Constitution of Pennsylvania.

The provisions in the General Appropriation Act of May 25, 1961, Act No. 5-A, for additional payments to school districts in cases where a school district suffers a loss in total State subsidies by virtue of increased market valuations, is in violation of Article III, §15 of the Pennsylvania Constitution prohibiting the inclusion in a general appropriation bill of anything other than appropriations.

Harrisburg, Pa., June 7, 1961.

Honorable David L. Lawrence, Governor, Harrisburg, Pennsylvania.

Sir: Reference is made to your request with regard to certain provisions in Act No. 5-A (House Bill No. 808), known as "The General Appropriation Act of 1961", which read as follows:

> "* * * and for payments to school districts on account of the equalization guarantee provided in the following paragraph $272,300,000
>
> "The Superintendent of Public Instruction shall calculate reimbursement payments for each school district on account of instruction and on all other accounts which under the provisions of the Public School Code of 1949 require the use of market valuations on the basis of the market valuations certified to the superintendent of public instruction by the State Tax Equalization Board in the year 1960: Provided, however, That if the sum total of payments so calculated is less than the sum total paid to a school district on all ac-

> counts requiring the use of market valuations for the school year 1959-1960, the total amount paid for the school year 1959-1960 shall constitute the amount due and payable to such school district for the school year 1960-1961, unless the number of teaching units upon which reimbursement for instruction and tuition is based is lower in 1960-1961 than in 1959-1960, in which case, the amount due and payable for 1960-1961 shall be reduced by an amount equal to the difference in the number of teaching units multiplied by the reimbursement for the school year 1959-1960 on account of instruction plus tuition divided by the number of teaching units for 1959-1960."

This language amends Article XXV of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, by providing additional payments in those cases where a school district suffers a loss in total State subsidies by virtue of increased market valuations. The language, in effect, freezes the market valuations of the State Tax Equalization Board in such manner as to guarantee that for the year 1960-1961 no district will get less than it received in the school year 1959-1960, unless the number of teaching units upon which reimbursement is based is lower in 1960-1961 than in 1959-1960. Where the number of teaching units is lower, the act provides that the amount due and payable for 1960-1961 shall be reduced by an amount equal to the difference in number of teaching units multiplied by the reimbursement for the school year 1959-1960.

It is clear that these provisions constitute an amendment or supplement to the Public School Code of 1949. The effect of the language used is to provide additional payments to certain school districts contrary to the present provisions of the Public School Code of 1949.

The same purpose was accomplished by the General Assembly in the 1959 Session of the Legislature by an amendment to the School Code effectuated through the Act of November 21, 1959, P. L. 1589 (Act No. 569).

The amendatory and regulatory provisions in The General Appropriation Act of 1961 raise the question of constitutionality. Article III, Section 15 of the Constitution of Pennsylvania reads as follows:

> "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the

> Commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject."

This section of the Constitution was designed to prevent "riders" in the general appropriation bill.

It is the opinion of this department that the insertion of these provisions violates Article III, Section 15 of the Constitution. If the Legislature desires to amend the School Code, it can accomplish that objective by a bill amending the Public School Code of 1949. This was the method used in 1959.

Attorney General William A. Schnader, 1933-34 Op. Atty. Gen. 11 (Opinion No. 81), and Attorney General Thomas D. McBride, 1957 Op. Atty. Gen. 90 (Official Opinion No. 16), both reached similar conclusions on the subject of "riders". Attorney General Schnader held that Article III, Section 15 of the Constitution expressly prohibits the inclusion in the general appropriation bill of anything other than appropriations. He concluded that *salary regulations and limitations are not appropriations.*

We quote from the opinion of Attorney General McBride on this issue:

> "* * * If the legislature wants to impose special requirements on the Department of Military Affairs and the Pennsylvania Aeronautics Commission in the handling of these funds, it *must do so by a bill apart from the general appropriation bill.*" (Emphasis supplied)

We are of the opinion, therefore, and you are accordingly advised that the "rider" in The General Appropriation Act of 1961 is unconstitutional and ineffective. The approval of the general appropriation bill will not breathe life into an unconstitutional "rider".

Very truly yours,

DEPARTMENT OF JUSTICE,

HARRINGTON ADAMS,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 238

Counties—Liquid fuels tax funds—Contribution to Commonwealth for costs incurred in relocating State highways—Salary of traffic engineer—Liquid Fuels Tax Act.

County liquid fuels tax funds received pursuant to §10 of the Liquid Fuels Tax Act, the Act of May 21, 1931, P. L. 149, may be used to partially reimburse the Commonwealth for the costs of property damages incurred in relocating State highways located within the county. The salary of a traffic engineer may also be paid from such funds, where it appears the county itself has no highways and contemplates the employment of such engineer to advise local municipalities within the county on traffic flow problems and the elimination thereof.

Harrisburg, Pa., June 8, 1961.

Honorable Park H. Martin, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have requested our advice regarding the propriety of certain expenditures of liquid fuels tax funds received by counties pursuant to the provisions of Section 10 of the Liquid Fuels Tax Act of May 21, 1931, P. L. 149, as amended, 72 P. S. Section 2611(j). The specific uses you question are the expenditure of such funds by the county as a contribution to the Commonwealth toward property damages necessarily arising from contemplated changes in existing widths, lines and locations of State highways and the payment by a county from liquid fuels tax funds of the salary of a traffic and highway engineer. In the latter case the county itself has no highways and contemplates the employment of such engineer in advising local municipalities within the county on traffic flow problems and the elimination thereof.

Section 10(a) of the Liquid Fuels Tax provides that:

> "* * * Moneys so received and deposited shall be used only for the purpose of construction, reconstruction, maintenance, and repair of roads, highways and bridges, including the payment of property damage, now due or hereafter to become due, occasioned by the relocation or construction of highways and bridges, and for the payment of interest and sinking fund charges on bonds issued or used for highways and bridge purposes, or on so much of any bonds as have been used for such purposes, and all payments made by any county, either directly or indirectly, prior to the first day of January, one thousand nine hundred and forty-six, for any or all such purposes are hereby validated. * * *"

Subsection (b) of this section further provides:

> "The county commissioners may allocate and apportion moneys from the county liquid fuels tax fund to political subdivisions within the county. * * *"

The sole issue raised by your first question, regarding contribution to the State for property damages, is whether or not there is any provision of law which bars expenditures by the county on road costs other than its own. That is, whether the above language is to be read so as to restrict the county to use liquid fuels tax funds for construction, reconstruction, maintenance and repair of only *county* roads, highways and bridges. Section 10 does not limit expenditures *only* to county roads; it limits the expenditure to certain road purposes, including payment of property damages. There is no warrant in the law, nor, in principle, for a limitation on county use of liquid fuel funds which would prohibit such contributions to the State Highway Department. Since the county, necessarily, could use the funds to construct the road by itself or to assist political subdivisions within the county to construct such roads it would seem, logically, to follow that the funds can be used to assist the parent Commonwealth to construct or reconstruct roads *located within the county.*

Whether or not a county may spend liquid fuels tax funds to pay the salary of a highway and traffic engineer depends upon the interpretation given the words "construction, reconstruction, maintenance or repair of roads". A narrow and literal reading of such words would limit the use of the funds, virtually, to the purchase and pouring of concrete. Such construction was rejected by the then Attorney General, Thomas D. McBride, in Official Opinion No. 45, 1957 Op. Atty. Gen. 184. In that opinion Attorney General McBride advised that expenditures of such funds to defray the cost of a transportation study preliminary to the determination of when, where and what type of new highways are to be constructed in and near the county was proper. That opinion noted:

> "* * * It would be wholly unrealistic to say that the construction of a highway means nothing more than the pouring of concrete. Roads cannot be constructed haphazardly. Modern highway construction requires careful long range planning; highway construction must be well conceived to be of enduring usefulness. Casual, chance or uncoordinated expansion of facilities is wasteful because such expansion cannot adequately keep pace with or provide for future requirements."

By the same token, it would be unrealistic to suggest that once constructed, save for maintenance by way of repairs, highways could be safely ignored. Proper utilization of modern highways to obtain the maximum benefits to the travelling public under often congested conditions requires careful study by trained personnel. Such continuing study is as necessary to the maintenance of the highways in first class operating condition as the repairing of breaks on the surface and, of course, is a necessary preliminary to any decision to construct additional roads to relieve congestion.

Whether or not new roads need be constructed will also depend upon what additional burden existing highways can be made to bear by efficient traffic engineering. Thus, both construction and maintenance of highways can and does require traffic engineering services.

In this connection, it should be noted that the Federal-aid Highway Act, 23 U.S.C.A. Section 110, 72 Stat. 894, provides that federal approval of plans, and concomitant federal aid to states cannot be obtained unless such projects provide facilities:

> "* * * (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.
>
> "(b) The geometric and construction standards to be adopted for the Interstate System shall be those approved by the Secretary in cooperation with the State highway departments. Such standards shall be adequate to accommodate the types and volumes of traffic forecast for the year 1975. The right-of-way width of the Interstate System shall be adequate to permit construction of projects on the Interstate System up to such standards.
>
> * * * * * * *
>
> "(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways."

Obviously, these conditions cannot be met without traffic engineering studies. Since Highway Department expenditures of liquid fuels tax funds are subject, by constitutional limitation, Article 9, Section 18, to the same restrictions as are imposed by the Act of 1931 the Commonwealth would be unable to qualify for federal aid were a narrowly rigid construction given to the words construction and maintenance.

Nor can it properly be objected that an engineer might be employed to deal only with county roads and bridges even though the county in question has none. It is at once apparent that many municipal subdivisions within the county might be in need of such engineering services, but on less than a full-time basis. The obvious solution is for the county to provide such services. The Liquid Fuels Tax Act, as noted, permits the county to allocate funds to the municipalities. There is no provision in the act which would prohibit making available service to these municipal subdivisions, rather than the funds to purchase them, at least in the case of services which, as a practical matter, cannot be purchased individually by the municipalities.

It should be noted that this opinion in no way conflicts with Official Opinion No. 235, 1961-62 Op. Atty. Gen. 11, which held that counties might not spend liquid fuel tax funds to pay viewers' costs and fees incurred in assessing damages to owners of land taken for county road purposes. That holding was based upon the provision of the County Code, 16 P. S. Sections 1101-1106 and Sections 1623-1624, making viewers, in effect, public officers whose salaries are to be paid out of the county treasury.

We are of the opinion, and you are therefore advised, that the expenditure, by a county, of liquid fuels tax funds obtained pursuant to Section 10 of the Act of 1931, P. L. 149, for the salary of a traffic engineer, or to partially reimburse the Commonwealth for the costs to the Commonwealth of property damages incurred in relocating State highways located within the county is proper.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID E. ABRAHAMSEN,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 239

Girard College—Children's institution—Supervision by Department of Public Welfare—Administrative Code of 1929.

Girard College is a "children's institution" within the meaning of §2302(b) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, and is subject to supervision and visitation by the Department of Public Welfare.

Harrisburg, Pa., July 13, 1961.

Honorable Ruth Grigg Horting, Secretary of Public Welfare, Harrisburg, Pennsylvania.

Madam: You have requested our advice on the powers of your department to visit, inspect and otherwise supervise Girard College.

Girard College is a secondary school at which orphan and half orphan boys are boarded and educated. The history of this school and its benefactor, Stephen Girard, are set forth in the opinions of our Supreme Court in *Girard Will Case,* 386 Pa. 548, 127 A. 2d 287 (1956), and *Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844 (1958). The trustees under the will of Stephen Girard are charged with the responsibility of admitting orphan boys, of feeding, clothing and lodging them, and of giving due attention to their health, exercise and education.

The Department of Public Welfare is given supervisory power over:

> "All children's institutions within this Commonwealth." (Section 2303(c) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 593).

"Children's Institutions" are defined by Section 2302(b) of The Administrative Code of 1929, 71 P. S. Section 592(b), as including "any incorporated or unincorporated organization, society, corporation or agency, public or private, which may receive or care for children * * * either at board, wages or free * * *." Section 2302 of The Administrative Code of 1929, 71 P. S. Section 592(d), includes within the definition of "supervised institution" all children's institutions within the Commonwealth.

Under Section 2304(b) of The Administrative Code of 1929, 71 P. S. Section 594(b), the Department of Public Welfare is empowered and given the duty to:

> "(b) To visit and inspect, at least once in each year, all State and supervised institutions; to inquire

> and examine into their methods of instruction, discipline * * * care or treatment, the care, treatment, government or management of their inmates or those * * * residing therein, the official conduct of their inspectors, trustees, managers, directors or other officer or officers charged with their management by law or otherwise, or having the management, care, custody or control thereof, the buildings, grounds, premises, and equipment thereof, or connected therewith, and all and every matter and thing relating to their usefulness, administration, and management, and to the welfare of the inmates thereof, or those * * * residing therein;
>
> "For these purposes, the Secretary of Public Welfare, or other officer, inspector or agent of the department, shall have free and full access to the grounds, premises, and buildings, of and to all the records, books or papers of or relating to any such state or supervised institution, and full opportunity to interrogate or interview any inmate thereof, or any person * * * residing therein, and all persons connected with any such State or supervised institution as officers, or charged with the management thereof, by law or otherwise, or in any way having the care, custody, control, or management thereof, or connected therewith as employes, are hereby directed and required to give to the Secretary of Public Welfare, or to such officer, inspector or agent of the department, such means, facilities, and opportunity for such visitation, examination, inquiry, and interrogation, as is hereby provided and required, or as the department, by its duly ordained rules or regulations, may require."

It is quite obvious that these statutory provisions are applicable to all children's institutions, and it is equally obvious that Girard College is a children's institution. A somewhat comparable result was reached by this department (see 1911-12 Op. Atty. Gen. 329, 15 Dauph. 211 (1912)) where the issue was the right of the State Board of Public Charities to inquire into the management of homes maintained by religious denominations and fraternal societies. This department concluded that this right of visitation and inquiry did exist (citing an earlier departmental opinion by this department of June 19, 1890, 1889-1890 Op. Atty. Gen. 78, as well as *Burd Orphan Asylum v. School District,* 90 Pa. 21, 35 (1879)). It follows that the right of your department to visit and supervise Girard College under the above cited provisions of The Administrative Code of 1929 cannot be denied.

It is our opinion and you are, therefore, accordingly advised that Girard College is a children's institution as that term is defined by The Administrative Code of 1929. As such, it is subject to supervision and visitation by the Department of Public Welfare.

Yours very truly,

DEPARTMENT OF JUSTICE,

JEROME H. GERBER,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 240

Soil conservation districts—Land acquisition—Liability for negligence—Liability for taxes—State Soil Conservation Commission—Soil Conservation Law.

1. A soil conservation district which acquires land under the State Soil Conservation Law, the Act of May 15, 1945, P. L. 547, is engaged in a governmental function, and as an agency of the State government it partakes of the State's sovereign immunity against suits for negligence.

2. The exemption of governmental property from local taxation applies to property held for flood purposes by a soil conservation district.

3. The directors of a soil conservation district have only such liabilities as they assume by contract and as are within the limits of authority provided for in the statutory recital of their powers and duties.

4. Since the State Soil Conservation Commission would not be a party to the contract of conveyance or have any control over the property when conveyed, its limited right of approval would not create any liability beyond that of supervision now required by the statute.

Harrisburg, Pa., July 26, 1961.

Honorable W. L. Henning, Secretary of Agriculture, Harrisburg, Pennsylvania.

Sir: You have asked to be advised concerning the legal effect of land acquisition by a Soil Conservation District under the authority of Section 9(5) of the Soil Conservation Law, the Act of May 15, 1945, P. L. 547, 3 P. S. 857(5), with particular respect to the following questions:

1. What liability does the district have for negligence?
2. What liability is involved in regard to local taxes?

3. What liability is involved regarding the governing body of the district, the directors?

4. What liability, if any, might devolve upon the State Soil Conservation Commission?

Since this is the first time, as you indicate, that the question of real estate ownership by a Pennsylvania soil conservation district has arisen, we have no judicial interpretations to guide us and must relate your questions to general statutory and common law.

Section 5(2) of the Act provides that a soil conservation district, "upon its creation, shall constitute a public body corporate and politic exercising public powers of the Commonwealth as an agency thereof."

1. Even without this recital, it is clear that the Soil Conservation District is a creation of the General Assembly engaged in a governmental function. It is, therefore, in our opinion, an agency of the State Government and, as such, partakes of the State's sovereign immunity against suit for negligence. The immunity could be waived by Act of the General Assembly but this has not been done up to the present time, although we strongly recommend it in the interest of justice. We would, therefore, consider the district as immune from liability for negligence in this matter as it is in its other official undertakings.

2. The exemption of governmental property from local taxation would, in our opinion, apply to property held for flood purposes by a soil conservation district.

3. The directors of the district would have only such liabilities as they assumed by contract, and as are within the limits of authority provided for in the statutory recital of their powers and duties.

4. Since the State Soil Conservation Commission would not be a party to the contract of conveyance or have any control over the property when conveyed, its limited right of approval would not, in our opinion, create any liability beyond that of supervision now required by the statute.

In general, it would appear that the close identification of the conservation district with the Board of County Commissioners, including a reversion of all district property to the county in event of dissolution as provided in Section 12(3)(4), indicates a legislative intention that district property be con-

sidered in the same legal status as county-owned property, subject to the same limitations and the same privileges.

We direct attention to the fact that this opinion is general in nature, because of the broad questions we are called upon to answer, and that any broad statements must necessarily be carefully reviewed in the light of specific circumstances affecting their applicability. As such specific cases arise we will review each on its merits.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 241

Banks and banking—Savings clubs—Issuance of stamps—Validity—Section 901 of the Banking Code.

A bank and trust company or a savings bank may operate a Christmas Club, vacation club or other similar savings plan on a stamp basis whereby the bank issues a folder to the individual, records the maximum amount which he will save in the plan and sells stamps which the depositor then affixes to the folder. This is not in violation of §901 of the Banking Code, the Act of May 15, 1933, P. L. 624, since the stamp in such case is a receipt and, when properly affixed to the folder, all of the stamps represent receipts in full for all deposits made, and since the bank keeps a complete record of its total liabilities and deposits, although under the plan it does not have a record of each individual to whom it is obligated by reason of stamp purchases.

Harrisburg, Pa., August 24, 1961.

Honorable Robert L. Myers, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested the advice of this Department as to whether a bank, a bank and trust company or a savings bank may operate a Christmas Club, a Vacation Club or other similar savings plans by issuing stamps in various denominations to the individual saver. The operation of the plan involves the opening of an account by an individual in a particular amount. The

bank issues a folder to the individual and records the maximum amount which the individual will save in the particular plan. Thereafter, each time the depositor desires to add to his savings, he will purchase a stamp from the bank or a duly authorized branch and affix the stamp to the folder.

You have informed this Department that the question was raised in 1942. In a letter written by Deputy Attorney General Orville Brown to the Western Savings Fund Society it was held that the banking institution could not adopt the plan on the ground that the escheat laws could not properly operate under this procedure because the bank would not have a complete record of its deposits. We do not reach this informal conclusion.

The applicable section of the Banking Code, Act of May 15, 1933, P. L. 624, §901, reads as follows:

> "A. Every institution shall keep complete records of all deposits made in it. Such deposits shall constitute liabilities of the institution and shall be so carried upon its books or other records."
>
> "B. Every institution shall furnish to each depositor a receipt in full, by pass book or otherwise, for all deposits made by him."

The first paragraph of this section requires a complete record of the deposits and liabilities of the banking institution. There is nothing in the plan as submitted which would indicate that the banking institution would not at all times have a complete record of its deposits and liabilities. While under the stamp plan the bank does not have a record of each individual to whom it is obligated because of stamp purchases, the banking institution does have a complete record of its total liabilities and deposits. The Federal Government has engaged in the stamp plan sale with regard to savings bonds on a much larger scale over a period of 20 years without any difficulties.

Subsection B of the law requires that the individual be given a receipt in full by passbook or otherwise. The stamp given to the individual to affix to his folder or booklet is a receipt. Taken individually, each stamp is a receipt in full for each separate deposit. Taken collectively, when properly affixed to the booklet or folder, all of the stamps represent a receipt in full for all deposits made by an individual depositor.

A bank can operate a stamp Christmas Club, a stamp Vacation Club or other similar savings plans on a stamp basis without violating Section 901 of the Banking Code as long as the bank

is at all times aware of its total deposits and liabilities and issues a receipt at each time a deposit is made.

We do not believe any substantial difficulties with regard to the operation of the escheat laws will arise. From the operation described we see no difficulty in the operation of the escheat laws. Each individual Christmas fund saver must apply for a Christmas account in a particular amount and a record must be kept of all stamp purchasers. The bank would escheat the total amount of funds unclaimed in the names of the individuals who did not receive payment. The individual, by presenting his stamp book, can then claim the return of the money from the Commonwealth after escheat.

We believe the plan is workable and fully protects the depositors, the Commonwealth and the bank.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERICK G. ANTOUN,
Deputy Attorney General.

ANNE X. ALPERN,
Attorney General.

OFFICIAL OPINION No. 242

Life and endowment insurance policies—Industrial life and industrial endowment insurance policies—Nonforfeiture benefits—Act of June 1, 1911, P. L. 581—The Insurance Company Law of 1921—Standard Non-forfeiture Law.

1. Life and endowment policies, except term life insurance and term endowment insurance of 20 years or less, issued and delivered in the Commonwealth of Pennsylvania subsequent to January 1, 1912, and prior to the effective date of The Insurance Company Law of 1921, the Act of May 17, 1921, P. L. 682, have the full statutory nonforfeiture benefits as provided in §25 Ninth of the Act of June 1, 1911, P. L. 581. Such policies issued and delivered subsequent to the effective date of The Insurance Company Law of 1921 and prior to the operative date of the Standard Non-forfeiture Law of May 1, 1945, P. L. 334, have the full statutory nonforfeiture benefits provided in §410(i)(1) of The Insurance Company Law of 1921.

2. Industrial life and industrial endowment policies, except industrial life insurance and industrial endowment insurance policies where premiums were payable monthly or oftener and term policies of 20 years or less, issued and delivered in the Commonwealth subsequent to January 1, 1912, and prior to

the effective date of The Insurance Company Law of 1921, have the full statutory nonforfeiture benefits as provided in §25 Ninth of the Act of June 1, 1911, P. L. 582. Such policies issued or delivered subsequent to the effective date of The Insurance Company Law of 1921 and prior to January 1, 1938, have the full statutory nonforfeiture benefits as provided in §410(i)(1) of The Insurance Company Law of 1921. Policies issued or delivered subsequent to January 1, 1938 and prior to the operative date of the Standard Non-forfeiture Law of 1945 have the full statutory nonforfeiture benefits as provided in §420C of The Insurance Company Law of 1921.

Harrisburg, Pa., September 13, 1961.

Honorable Francis R. Smith, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested our advice as to whether life or endowment insurance policies, and industrial life or industrial endowment insurance policies, issued or delivered in the Commonwealth of Pennsylvania prior to the operative date[1] of the Act of May 1, 1945, P. L. 334, Section 2, 40 P. S. Section 510.1, known as the Standard Non-forfeiture Law, have any statutory nonforfeiture values[2] or benefits on default in premium payments when premiums have been paid for a period of at least three years. It is our opinion that such policies do have certain statutory nonforfeiture values or benefits.

Life and Endowment Insurance

Historically, it is significant that one of the earliest voluntary steps taken by the insurance industry in the liberalization of life insurance contracts was the granting of some form of nonforfeiture benefits, even though not provided by the policy.[3]

[1] "After the effective date of this act, any company may file with the Insurance Commissioner a written notice of its election to comply with the provisions of this section after a specified date. After the filing of such notice, then upon such specified date (which shall be the operative date for such company), this section shall become operative with respect to the policies and contracts thereafter issued by such company: Provided, however, That the operative date for every life insurance company, except a limited life insurance company, shall not in any event be later than January first, nineteen hundred and forty-eight." (Section 410A(6)(g) of The Insurance Company Law of 1921, as added by the Act of May 1, 1945, P. L. 334, Section 2, 40 P. S. Section 510.1(g)).

[2] "Nonforfeiture values" deal with policy contract values, that is, the contractual rights of policyholders to values under their policies in event of premium default or surrender of the policy. Policy contract values are established by "reserve" valuation.

[3] Prior to 1831, the Rules of the Pennsylvania Company for Insurance on Lives and Granting Annuities provided for repurchase of its insurance policies at a "fair price". First Annual Report of Mutual Life of New York in 1844 stated that "Equitable consideration will be given on surrender of its policies."

Once introduced, this voluntary action by insurance companies led to the inclusion by some companies of a policy provision specifying certain rights of the policyholder in default of premium payments. In 1861, Elizur Wright, First Insurance Commissioner of Massachusetts, succeeded in enacting a law[4] requiring nonforfeiture provisions in certain cases and set the legislative pattern that was to echo throughout the United States. Following this early Massachusetts statute, practically all companies, whether or not subject to that law, adopted definite forms of nonforfeiture benefits.

In 1879, New York enacted its first nonforfeiture statute,[5] and around the turn of the century the concept of a "cash surrender value", payable on default, emerged. Pennsylvania first took statutory action in 1911[6] and it was then that the policyholders received substantial statutory nonforfeiture protection.

The nonforfeiture concept in life insurance law grew proportionately as the insurance companies developed by experience.

Modern life insurance commenced with the British Equitable Company in 1762, when that company started to vary the premium by age at issue under the influence of Halley's first scientific mortality tables. Until 1901, the insurance industry in this country used the mortality basis of the Actuaries' Table, derived from the experience of life insurance companies in Great Britain. In 1901, America placed its mortality structure on the basis of the experience derived on this continent by adopting the American Experience Table of Mortality. As the scientific know-

[4] Acts and Resolutions of Massachusetts, 1861, Chapter 186, approved April 10, 1861, Section 1:

> "No policy of insurance on life, hereafter issued by any company chartered by authority of this Commonwealth, shall be forfeited or become void by the nonpayment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to wit: the net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the 'combined experience' or 'actuaries' rate of mortality with interest at 4% per annum after deducting from such net value any indebtedness to the company or notes held by the company against the assurer, which notes if given for premium shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumption of mortality and interest aforesaid."

[5] Laws of New York, 1879, Chapter 347, approved May 21, 1879; This act provided that in the event of default in premium payments, if the policy had been in effect for three full years the policyholder would be entitled to a paid-up insurance policy equivalent to the reserve on such policy.

[6] The Act of June 1, 1911, P. L. 581, Section 25, Ninth.

ledge of the actuaries[7] became more precise and exact in this gradual process of development, and as sound theoretical standards were evolved it became clear that the policyholder was establishing an equity in his policy by his level premium payments.[8]

Pennsylvania then, by 1911, had recognized the vital need to protect policyholders with regard to nonforfeiture benefits. The General Assembly in that year enacted legislation[9] making it mandatory for life insurance policies[10] issued or delivered in the Commonwealth of Pennsylvania after the effective date of

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[7] Actuarial advances in 1901, 1941 and 1958 were especially significant since "reserve" valuations were radically altered, thus effecting equivalent changes in "policy contract values" or nonforfeiture benefits.

[8] In the level insurance premium system of life insurance the net level premium must be higher than the monetary value of annual risk during the early policy years and the excess must be accumulated with interest to provide funds for payment of claims after the age is reached where the value of the annual risk exceeds the net level premium in the annual premium being paid. It was the accumulation of these funds that made the nonforfeiture concepts a reality. On surrender of a policy, the insurer, being relieved of the obligation to provide death benefits during future years where the annual value of the risk exceeds the annual net level premium, no longer needed to retain the surrendering policyholder's contributions through the funds previously accumulated for such purposes. Since the surrendering policyholder made a contribution to these funds during the period from date of issue to the date of surrender, he was equitably entitled to the pro rata share of the funds actually accumulated from the premiums paid by his group of policyholders and no longer needed to assure solvency of the company for the protection of continuing policyholders.

[9] The Act of June 1, 1911, P. L. 581, Section 25, Ninth:

> "A provision which, in event of default in premium payments after premiums shall have been paid for three years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of default on the policy and on any dividend additions thereto, specifying the mortality table and rate of interest adopted for computing such reserves, less a sum not more than two and one-half per centum of the amount insured by the policy and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy. Such provision shall stipulate that the policy may be surrendered to the company at its home office, within one month from date of default, for a specified cash value at least equal to the sum which would otherwise be available for the purchase of insurance as aforesaid, and may stipulate that the company may defer payment for not more than six (6) months after the application therefor is made. This provision shall not be required in term insurance of twenty years or less."

[10] Art. 1, Section 103 of the Act of May 17, 1921, P. L. 682, 40 P. S. Section 363, entitled "Scope of Act", establishes the type or class of insurer to whom "The Insurance Company Law of 1921" applies. It is clear that stock life companies, mutual life companies, limited stock life companies, and limited mutual life companies are required to comply with the nonforfeiture provisions of The Insurance Company Law of 1921.

the act to contain a provision[11] which, in the event of default in premium payments (after premiums had been paid for three years), granted to the insured "a stipulated form of insurance" or "a specified cash value" equivalent in value to the reserve at the date of default less certain authorized deductions. Consequently, this act established statutory nonforfeiture protection for the policyholders in Pennsylvania, assuring them of two specific nonforfeiture benefits: "stipulated form of insurance" and "specified cash value". Pennsylvania's early statutory language, although not the standard nonforfeiture terminology later adopted by the insurance industry, was equated to the standard industry phrases of "paidup insurance" and "cash surrender value" by the Supreme Court of Pennsylvania.[12]

In *Felderman v. Inter-Southern Life Insurance Company,* 25 D. & C. 187 (1935), the court held that under this act a policy of life insurance issued in Pennsylvania had to contain these nonforfeiture provisions.

In 1921 this same statutory nonforfeiture provision (that was contained in the Act of June 1, 1911, P. L. 581), was reenacted by the General Assembly in identical language in The Insurance Company Law of 1921.[13] Consequently, Pennsylvania has had specific statutory nonforfeiture requirements from 1911 to the present time.

With regard to nonforfeiture benefits in the case of policies of life and endowment insurance issued or delivered before the operative date of the Pennsylvania Standard Nonforfeiture Law, the General Assembly directed by specific language that the nonforfeiture provisions of The Insurance Company Law of 1921,[14] would apply.

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[11] All life and endowment insurance except policies of industrial insurance where the premiums were payable monthly or oftener and term policies of 20 years or less were required to contain these statutory nonforfeiture provisions: Section 25, Act of June 1, 1911, P. L. 581; Section 410, Act of May 17, 1921, P. L. 682, 40 P. S. Section 510. Annuities and pure endowment contracts are required to contain the statutory nonforfeiture provisions set forth in Section 410B of the Act of May 17, 1921, P. L. 682, 40 P. S. Section 510A(f). Group life insurance policies, other than term policies, are required to contain the statutory nonforfeiture benefit as provided in Section 6 of the Act of May 11, 1949, P. L. 1210, 40 P. S. Section 532.6.

[12] *Steuernagel v. Metropolitan Life Insurance Co.,* 322 Pa. 289, 185 Atl. 208 (1936).

[13] The Act of May 17, 1921, P. L. 682, Article IV, Section 410(i). See Footnote 9, supra.

[14] Act of May 1, 1945, P. L. 334, Section 1, 40 P. S. Section 510(i)(l):
"In the case of any policy issued prior to the operative date of section four hundred and ten A of this act (the Standard Non-forfeiture Law), * * * " a nonforfeiture benefit shall be provided (as under existing law pursuant to Act of May 17, 1921, P. L. 682, Section 410 (i)(l)). (Emphasis supplied.)

In 1945, Pennsylvania, following the national trend, promulgated the Standard Non-forfeiture Law.[15] The statutory changes with regard to nonforfeiture were substantial and were brought about by the study and report of the Guertin Committee of Actuaries appointed by the State Insurance Commissioners in 1937. Coincidentally, the actuarial basis of the insurance industry was radically altered by the promulgation of the new Commissioners 1941 Standard Ordinary Mortality Table. These changes reached the mathematical foundations of the insurance industry, and necessitated the use of voluminous actuarial tables containing over two million calculated values, completely revised policy form, new manuals of rates and values, and new scales of gross premiums, dividends and guaranteed values. The objectives[16] of the new standard nonforfeiture laws had been crystallized by National Association of Insurance Commissioners, and over the years the new laws provided greater equity, a sound theoretical approach and clarification of the true basis of nonforfeiture benefits.

It is perfectly clear, therefore, that Section 410(i)(1) of The Insurance Company Law of 1921, granting specific statutory nonforfeiture benefits, applies to all contracts of life and endowment insurance issued and delivered in the Commonwealth of Pennsylvania subsequent to January 1, 1912 but prior to the operative date of the Standard Non-forfeiture Law of 1945.

Industrial Life and Industrial Endowment Insurance

Until 1937 in Pennsylvania there was no distinction between life insurance and industrial life insurance, or endowment insurance and industrial endowment insurance. In that year the General Assembly amended[17] the Act of May 17, 1921, P. L. 682, The Insurance Company Law of 1921, 40 P. S. Section 341 et seq., and defined industrial life and industrial endowment insurance and prescribed certain requisite provisions for such industrial insurance issued after January 1, 1938. This amending act added a new section, Section 420C, entitled Uniform Industrial Policy Provisions, and set forth in subparagraph (f) certain new mandatory provisions concerning default in premium payments in industrial life or industrial endowment insurance.

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[15] Act of May 1, 1945, P. L. 334, Section 2.

[16] (a) To bring into use the new Commissioners 1941 Standard Ordinary Mortality Table known as the CSO Table.
(b) To distinguish policy equities from company valuation liabilities.
(c) To abolish the concept of surrender charge.
(d) To provide an improved modified net premium valuation method.

[17] Act of May 21, 1937, P. L. 769.

Prior to January 1, 1938, all industrial life and industrial endowment insurance policies were governed by the general provisions of the Act of May 17, 1921, P. L. 682,[18] The Insurance Company Law of 1921, and in particular were governed by the nonforfeiture provisions of Section 410(i) (1) of that act. After January 1, 1938, industrial life and industrial endowment policies had statutory nonforfeiture benefits, as provided in Section 420C(f) of The Insurance Company Law (which was added by the Act of May 21, 1937, P. L. 769).

Conclusion

Accordingly, it is our opinion, and you are advised:

(1) That all life and endowment policies[19] issued and delivered in the Commonwealth of Pennsylvania subsequent to January 1, 1912 and prior to the effective date of the Act of May 17, 1921, P. L. 682, have the full statutory nonforfeiture benefits as provided in Section 25 Ninth of the Act of June 1, 1911, P. L. 581.

(2) That all life and endowment policies[20] issued and delivered in the Commonwealth of Pennsylvania subsequent to the effective date of the Act of May 17, 1921, P. L. 682, and prior to the operative date of the Standard Non-forfeiture Law of 1945 have the full statutory nonforfeiture benefits provided in Section 410(i) (1) of The Insurance Company Law of 1921.

(3) That all industrial life and industrial endowment policies[21] issued and delivered in the Commonwealth of Pennsylvania subsequent to January 1, 1912 and prior to the effective date of The Insurance Company Law of 1921 have the full statutory nonforfeiture benefits as provided in Section 25 Ninth of the Act of June 1, 1911, P. L. 582.

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[18] "The Act of May 21, 1937, P. L. 769, amended The Insurance Company Law of 1921 so as to define industrial insurance and to prescribe uniform and prohibited industrial policy provisions. This statute, however, merely imposes certain additional restrictions upon the issuance of industrial insurance policies and may not be taken as an indication that the other provisions of the Insurance Company Law are not applicable to industrial insurance companies. We think the fact that these restrictions were imposed by an amendment to the Insurance Company Law, rather than by a separate statute, indicates that the Insurance Company Law, in general, was deemed to be applicable to industrial insurance companies." *(Commonwealth of Pennsylvania ex rel. Margiotti v. Cosmopolitan Industrial Insurance Company,* 46 Dauph. 93 (1939), at page 99).

[19] Except term life insurance and term endowment insurance of 20 years or less.

[20] See Footnote 19 supra.

[21] Except industrial life insurance and industrial endowment insurance policies where premiums were payable monthly or oftener and term policies of 20 years or less.

(4) That all industrial life and industrial endowment policies[22] issued or delivered in the Commonwealth of Pennsylvania subsequent to the effective date of The Insurance Company Law of 1921 and prior to January 1, 1938 have the full statutory nonforfeiture benefits as provided in Section 410(i) (1) of The Insurance Company Law of 1921.

(5) That all industrial life and industrial endowment policies[23] issued or delivered in the Commonwealth of Pennsylvania subsequent to January 1, 1938 and prior to the operative date of the Standard Non-forfeiture Law of 1945 have the full statutory nonforfeiture benefits as provided in Section 420C of The Insurance Company Law of 1921.

Very truly yours,

DEPARTMENT OF JUSTICE,

J. SHANE CREAMER,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 243

Physicians and surgeons—Medical partnership associations—Corporate characteristics—Partnership Association Act—Medical Practice Act—Professional Association Act.

1. A group of physicians may associate for the practice of medicine in a partnership association under the provisions of the Partnership Association Act, the Act of June 2, 1874, P. L. 271, as amended, and the fact that such an association would have continuity of life, free transferability of interest, limited liability of members and centralization of management will not constitute a violation of the Medical Practice Act, the Act of June 3, 1911, P. L. 639, as amended.

2. Such persons may also form an association under the Professional Association Act, the Act of August 7, 1961, P. L. 941, subject, however, to the provisions of that act making the associates liable jointly and severally for the torts of any agent or employee of the association committed in the ordinary course of operation of the association, or for the misapplication of money or property by an associate, and subject to the joint liability of all associates for other debts of the association.

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[22] See Footnote 21 supra.

[23] Such policies as are defined in Section 420B of The Insurance Company Law of 1921, 40 P. S. Section 573.

Harrisburg, Pa., September 27, 1961.

Honorable Charles H. Boehm, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether a group of physicians may associate in the practice of medicine in a partnership association under the Act of June 2, 1874, P. L. 271, as amended, 59 P. S. §§341 et seq., and thus be able to qualify for Federal corporate income tax treatment. This inquiry is pertinent because of certain Federal court decisions[1] holding that an association of physicians having various corporate characteristics may be considered a corporation for Federal income tax purposes.[2]

The relevant facts are as follows:

The Internal Revenue Code of 1954 accords different tax treatment to corporations, partnerships and trusts. However, the Code defines the "corporation" classification to include not only the artificial entities known under State law as corporations but also the broader categories of "association and joint stock companies."[3]

The Code does not provide any express definition of the term "association". Nevertheless, it was obvious to the courts and the Internal Revenue Service that if the basic threefold classification of the Code was to be preserved, this term could not be deemed to embrace organizations which were clearly of a partnership or trust nature. Consequently, the test that evolved for determining association status was whether or not the organization in

[1] *United States v. Kintner,* 216 F. 2d 418 (9th Cir. 1954); *Galt v. United States,* 175 F. Supp. 360 (N.D. Tex. 1959).

[2] The practice of medicine has become increasingly complex and specialized and its tools increasingly expensive. In the face of such changes, it is apparent that in order to assure patients of adequate modern medical treatment many physicians will deem it desirable to pool their specialized talents and funds by forming medical groups. Time Magazine, July 1, 1961, pages 56-60. Despite the public value of group practice, its sporadic development in the Eastern part of our country contrasts sharply with its rapid growth elsewhere.

Recent federal tax decisions and interpretive Internal Revenue Service regulations may persuade Eastern practitioners to adopt the prevailing pattern. Combinations of not more than 10 practitioners are in a position to gain the greatest tax advantage. Such a combination would find in these decisions the authority to be treated as a corporation for purposes of deducting certain items of expense. In addition, under Subchapter S of the Internal Revenue Code, such an organization might then elect to have its income taxed on a partnership rather than corporate basis so as to avoid the customary double taxation of corporate income—first at the corporate and then at the stockholder level.

[3] Section 7701(a)3, I.R.C.

question resembled the corporation more than it did either of the other business forms.[4]

Regulations recently adopted by the Internal Revenue Service[5] have greatly simplified this resemblance rule by reducing it to a more quantitative test. These regulations provide that an unincorporated organization may be classified as an association if such organization has a majority of those characteristics which are normally possessed by a pure corporation but not by a partnership.[6] The regulations enumerate these distinguishing corporate characteristics as: continuity of life, free transferability of interest, limited liability of members, and centralization of management.

We are informed that a number of associations of physicians have recently been organized under the Partnership Association Act of 1874. Subsequent to your request for an opinion, the Legislature enacted the Professional Association Act, the Act of August 7, 1961, P. L. 941, Act No. 416, also providing for the formation of professional associations for purposes similar to those contemplated in your inquiry.

The basic questions to which this opinion directs itself are:

1. In addition to the availability of the 1961 statute, may a number of physicians join together in the practice of their profession and utilize for this purpose the provisions of the Partnership Association Act of 1874?

2. If so, does the Medical Practice Act, the Act of June 3, 1911, P. L. 639, as amended, 63 P. S. §§401 et seq., prohibit the existence of such an association having a majority of the following corporate characteristics: continuity of life, free transferability of interest, limited liability of members, and centralization of management?

It should be noted that Act No. 416 of 1961 was specially designed to permit the formation of professional associations. This act permits professional persons to associate in a special form of organization, having certain corporate characteristics, for the practice of their professions. The act specifically pro-

[4] *Morrissey et al v. Commissioner of Internal Revenue,* 296 U. S. 344, 56 S. Ct. 289, 80 L. Ed. 262 (1935).

[5] These regulations were published as Treasury Decision 6503, 26 C.F.R. §§301.7701-1 to 301.7701-11, Vol. 6, *C C H Standard Federal Tax Reports,* par. 5942. They have become known as the "Kintner" regulations, the name of the leading case in the field.

[6] 26 C.F.R. §301.7701-2(a) (3).

vides that such an association may have continuity of life, centralized management and limited transferability of interest. However, Section 17 of the act makes professional associates liable, jointly and severally, for the torts of any agent or employee of the association committed in the ordinary course of operation of the association, or for the misapplication of money or property by an associate. All associates are jointly liable for other debts of the association. Thus, the limited liability characteristic available under the 1874 law is completely absent in associations organized under Act No. 416.

I. *May a Number of Physicians Join Together in the Practice of Their Profession, and Utilize for this Purpose the Provisions of the Partnership Association Act of 1874?*

The Partnership Association Act of June 2, 1874, was preceded by the enactment of the Corporations Act of April 29, 1874, P. L. 73. The Corporations Act of 1874 enumerated twenty purposes for which second class corporations, or corporations for profit, could be formed. By necessary implication, it excluded all businesses and occupations not specifically listed.

In contrast, Section 1[7] of the Partnership Association Act of 1874 authorized the formation of associations "for the purpose of conducting *any* lawful business or occupation . . ." (Emphasis supplied). It does not make specific inclusions and implied exclusions by an enumeration of the purposes for which such associations may be formed. To determine the scope of this provision, therefore, it is necessary to examine the meaning of the language "business or occupation".

It cannot be assumed that the term "occupation", as used in the act is mere surplusage. On the contrary, it must have been intended to include those fields of endeavor not generally considered or classified as business. Historically, "business" connotes ". . . mercantile pursuit or transactions; trade; commerce; as he prefers *business* to law . . . . . a commercial or industrial enterprise . . ."[8]

"Occupation" is defined as "That which principally takes up one's time, thought and energies; especially, one's regular business or employment; also whatever one follows as the means of making a livelihood . . . Particular business, *profession*, trade,

[7] 59 P. S. §341.

[8] Webster's New Collegiate Dictionary (1959).

or calling which engages individual's time and efforts, employment in which one regularly engages or vocation of his life . . ." (Emphasis supplied).[9]

Under an act which is substantially similar to the Partnership Association Act of 1874, the Ohio Attorney General has used this same definitional approach in construing the term "occupation" as including the practice of a profession.[10]

Accordingly, the Partnership Association Act would authorize physicians to practice their profession through the medium of an association organized under its provisions.

II. *Does the Medical Practice Act prohibit the Existence of such an Association having a Majority of the following Corporate Characteristics: Continuity of Life, Free Transferability of Interest, Limited Liability of Members, and Centralization of Management?*

Before considering this question, it is necessary to inquire whether an association of physicians under the 1874 act, having all or a majority of the essentially corporate characteristics of continuous life, centralized management, limited liability and free transferability of interest, could itself be considered engaged in the practice of medicine for the purposes of the Medical Practice Act. Obviously, an entity which cannot comply with the necessary educational and character requirements cannot itself be licensed to practice medicine.

A partnership association formed under the 1874 act may, in its own name, hold and convey real estate, and sue and be sued (59 P. S. §361) ; exist for perpetually renewable 20-year periods (59 P. S. §441) ; has centralized management (59 P. S. §401) ; its members have limited liability (59 P. S. §381); and the interests of its members may be transferred (59 P. S. §383). Such an association is clearly a separate juridical entity, similar to a corporation.[11]

It is an established doctrine that a corporation cannot practice medicine. *People ex rel State Board of Medical Examiners v. Pacific Health Corporation, Inc.*, 12 Cal. 2d 156, 82 P. 2d 429 (1938), and cases there cited; see *Neill et al v. Gimbel Bros.*,

[9] Black, Law Dictionary (4th ed. 1951).

[10] See Opinion, Ohio Attorney General, No. 2050 (March 10, 1961).

[11] *Whitney et al v. Backus*, 149 Pa. 29, 34, 24 Atl. 51 (1893): ". . . Unlike an ordinary partnership, and like a corporation, it (a partnership association) is an artificial person, and survives the death of a member or a sale of his interest . . ."

Inc., 330 Pa. 213, 199 Atl. 178 (1938). But the cases in which a corporation has been held to be practicing a profession illegally involved corporations formed for profit and controlled by laymen. The courts emphasize the divided loyalty and impairment of professional confidence in such cases. Thus, in the Pacific Health Corporation case, where a private corporation contracted with members of the public to furnish medical services in return for a premium, the California Supreme Court held the corporation was practicing medicine, saying (89 P. 2d at 430):

> "We are unable to agree that the policy of the law may be circumvented by technical distinctions in the manner in which the doctors are engaged, designated or compensated by the corporation. The evils of divided loyalty and impaired confidence would seem to be equally present whether the doctor received benefits from the corporation in the form of salary or fees. Any freedom of choice is destroyed, and the elements of solicitation of medical business and lay control of the profession are present whenever the corporation seeks such business from the general public and turns it over to a special group of doctors . . ."

In *Gimbel,* a department store leased space to an optometrist. The lease provided that only the name of the department store be used for advertising, required the lessee to spend a certain amount for advertising under the lessor's direction, and provided for the lessor to share ½ of gross annual business over $50,000. The Pennsylvania Supreme Court, after finding optometry to be a profession, concluded that the optometrist, under these circumstances, was the department store's agent; and as the department store could not practice optometry, it could not do so through an agent.

An association of physicians under the 1874 act, in order to be in accord with the Medical Practice Act, necessarily has to be limited in membership to licensed physicians[12] who alone would direct the enterprise and share in the profits. The element of lay control would thus be completely absent, and there would be no impairment of the personal physician-patient relationship. The physician in such an association, as in the case of an individual practitioner, would be solely responsible for his own conduct, although the association may be responsible, to the extent of its assets, for the malpractice of any of its members. The as-

[12] It is our opinion that such an association should be limited in membership to physicians who actively practice their profession as association members, and that physicians should not be permitted to invest in such an association merely for business reasons.

sociation itself would not in any sense be engaged in professional activity and merely would be the vehicle utilized by the individual physicians for the practice of their profession.

Under these circumstances, we are of the opinion that the association could not be considered engaged in the practice of medicine.[13]

We turn then to the question of whether a partnership association having any of the so-called "corporate characteristics", or a majority of them, would be in violation of the Medical Practice Act. That act provides that the license of a physician may be revoked or suspended on various grounds, such as conviction of certain crimes, most of which are not relevant to our problem. The pertinent provision is found in Section 12, 63 P. S. §410, which states that the Board of Medical Education and Licensure may

> ". . . refuse, revoke, or suspend the right to practice medicine . . . upon satisfactory proof of grossly unethical practice, or of any form of pretense which might induce citizens to become a prey to professional exploitation."

It is against this standard that the various "corporate characteristics" must be judged.

1. *Continuity of Life*

The Internal Revenue Service has by regulation provided that, for Federal tax purposes:

> "An organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization . . ."[14]

A partnership association under the 1874 act may have a duration of 20 years (59 P. S. §341), a period which is perpetually renewable (59 P. S. §441). Although the act does not in so many words say that the death, etc. of a member shall not dissolve the association, this is the unmistakable import of its provisions.[15] A partnership interest is termed personalty which may be ". . . transferred, given, bequeathed, distributed, sold or assigned . . ." under such rules and regulations

[13] See Restatement on Agency (2d), Section 19, comment: ". . . If a statute requires the doer of an act to be licensed, ordinarily an unlicensed principal can properly employ a licensed agent to do it."

[14] 26 C.F.R. §301.7701-2(b)(1).

[15] See *Whitney et al v. Backus, supra,* where the Supreme Court states this proposition categorically (149 Pa. at 34).

as the association may prescribe (59 P. S. §383). In the absence of such rules, a transferee may not participate in subsequent association business unless properly elected to membership (Id.) ". . . And any change of ownership, whether by sale, death, bankruptcy or otherwise . . .", in the absence of rules regulating transfer and not followed by election to membership, entitles the owner or transferee only to the value of the interest on the date of acquisition (Id.). Finally, the section on dissolution (59 P. S. §421), provides for only two methods thereof, viz. expiration of the fixed period, or upon a proper vote.

It is clear, therefore, that the partnership association may have, certainly with the adoption of proper rules and regulations, that continuity of life contemplated by the Federal tax authorities.

Does this continuous life feature violate any provision of the Medical Practice Act? There is no specific inhibition in that act against it, and we are aware of no ethical consideration which would proscribe it. We have seen that such an association of physicians may validly be organized under the 1874 act; there is no reason why the association cannot continue indefinitely. It is assumed that the rules and regulations of the association would provide for the proper licensure of new members.

2. *Free Transferability of Interest*

The Federal regulations provide that this element is only present if a member has the power to substitute for himself a person who is not a member of the organization (1) without the consent of the other members and (2) confer on such other person all the attributes of his interest in the organization, including sharing of profits and participation in management. (26 C.F.R. §301.7701-2(e)(1)).

This characteristic exists under the 1874 law in modified form, for, as indicated above, a transferee or devisee of a member's interest can only succeed to full membership upon being properly elected by the other members (59 P. S. §383).[16]

As long as the rules and regulations of the physician's association provide that the transferee or devisee of the member's interest must be properly licensed,[17] the presence of this char-

[16] This restricted type of transferability is termed a "modified corporate characteristic" by the Federal regulations, entitled to some weight in classifying the organization as a corporation. See 26 C.F.R. §301.7701-2(e)(g).

[17] See footnote 12, *supra.*

acteristic in no way transgresses the Medical Practice Act. The same factors prevail here as in the case of the continuous life of the association.

3. *Limited Liability*

In this respect, the Federal regulations provide:

> "An organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization . . ."[18]

The 1874 act specifically includes this limited liability characteristic (59 P. S. §381):

> "The members of any such partnership association shall not be liable under any judgment, decree or order which shall be obtained against such association, or for any debt or engagement of such company . . ."

An exception is made to the extent of subscriptions to capital not paid up; this is purely a matter of contract law and does not affect the limited liability feature.

Furthermore, our courts have made it clear that members of a partnership association are not liable for tortious acts of the association or of other members in which they did not participate. *Whitney et al. v. Backus, supra.*

The limited liability of a member in a partnership association of physicians presents no problem under the Medical Practice Act. The physician-member is liable to the patient he treats for malpractice just as if he were engaged in practice individually. The member is subject to the same legal and ethical standards as a private practitioner, and the personal nature of the physician-patient relationship is in no way altered. The fact that the member does not incur *additional* liability as a partnership associate is of no moment as far as the Medical Practice Act is concerned.

4. *Centralization of Management*

The Federal regulations provide:

> "An organization has centralized management if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed . . ."[19]

[18] 26 C.F.R. §301.7701-2(d)(1).
[19] 26 C.F.R. §301.7701-2(c)(1).

Subsequent sections provide that the managers need not be members, and that the characteristic of centralized management does not exist if the authority of the managers is merely ministerial in nature.[20]

The 1874 Act is adequate in this regard. It provides for the election by the members of the partnership association of a board of managers of not less than 3 nor more than 9 (59 P. S. §§401, 402). The association shall not be liable for any debt unless contracted for by one or more managers; any liability over $500 must be in writing and signed by at least two managers (59 P. S. §401).

Such managers would clearly have the power, in the case of an association of physicians, to make all necessary *business* decisions, including the purchase and sale of real estate or office equipment, and the hiring of employees. In order to satisfy the requirements of the Medical Practice Act, the by-laws of the association should explicitly provide that the managers have no authority to interfere with the professional relationship between any member and his patient or to influence the course of treatment. The managers could and perhaps should have authority, however, to require members to adhere to recognized professional and ethical standards.

The 1874 Act does not require that the managers be selected exclusively from the membership. However, we are of the opinion that in an association of physicians a majority of the managers must be member-physicians; and careful provision should be made that a lay manager have no authority in professional matters.

This type of centralized management, with authority limited to purely business matters and, perhaps, to enforcement of recognized professional and ethical standards, would not present any problem under the Medical Practice Act, and would satisfy the Federal tax regulations.

As has been indicated, it is this department's opinion that the presence of any of the above four "corporate characteristics" in a partnership association of physicians does not in any way contravene the provisions of the Medical Practice Act. Nor do we see how the existence of all or a majority of such characteristics would have such a result. The essential relationship between physician and patient remains unchanged; the "char-

[20] *Ibid.*, (2) and (3).

acteristics" only have to do with the business method by which the services are rendered. In no way can this method be held, under Section 12 of the Medical Practice Act, to constitute "grossly unethical practice" or "induce citizens to become a prey to professional exploitation."[21]

We are of the opinion, therefore, and you are accordingly advised, that (1) a group of physicians may associate for the practice of medicine in a partnership association under the provisions of the Act of June 2, 1874, P. L. 271, as amended, 59 P. S. §§341 et seq., and (2) the fact that such an association would have continuity of life, free transferability of interest, limited liability of members, and centralization of management would not constitute a violation of the Medical Practice Act. Furthermore, with the limitations expressed in this opinion, the Professional Association Act, Act No. 416 of 1961, may also be used for the purpose indicated in your request.

Very truly yours,

DEPARTMENT OF JUSTICE,

MORRIS J. DEAN,
Deputy Attorney General.

HERBERT N. SHENKIN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

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[21] The passage of the Professional Association Act (Act No. 416 of 1961) is clear evidence that the Legislature does not consider it ethically improper for physicians to practice in this form of "corporate" organization. Furthermore, on December 5, 1957, the American Medical Association House of Delegates adopted the following resolution:

> "Whereas, it has been found by experience that physicians practicing as a partnership, association or as members of other lawful group arrangements can preserve the physician-patient relationship, insuring that medical responsibility lies in the hands of the patient's own doctor and not in the hands of an unlicensed person or entity; and
>
> "Whereas the ethical principles of the A.M.A. apply to the individual physician whether he practices alone or with a group;
>
> "Now therefore be it
>
> "Resolved that the House of Delegates affirm that it is within the limits of ethical propriety for physicians to join together as partnerships, associations or other lawful groups provided that the ownership and management of the affairs thereof remain in the hands of licensed physicians."

OFFICIAL OPINION No. 244

Malpractice insurance—Professional employees—State institutions—Section 6 of Appropriation Act No. 5-A of 1961.

The Department of Public Welfare, subject to the approval of the Executive Board, has authority under the provisions of §6 of Appropriation Act No. 5-A, approved May 25, 1961, to purchase malpractice insurance for such professional employees under its supervision as it may deem desirable.

Harrisburg, Pa., October 25, 1961.

Honorable Ruth Grigg Horting, Secretary of Public Welfare, Harrisburg, Pennsylvania.

Madam: You have requested our opinion as to whether your department has authority to purchase malpractice insurance under the provisions of Appropriation Act No. 5-A of 1961, approved by the Governor on May 25, 1961.

Section 6 of this act provides that: "The terms 'expenses' and 'maintenance' shall include * * * premiums on malpractice insurance and medical payment insurance for volunteer workers in State institutions. * * *" Identical language was also included in Appropriation Act No. 38-A of 1959.

It appears that the administrative directors of the mental and general hospitals under your jurisdiction have been unable to purchase malpractice insurance to protect themselves against liability for the acts of physicians and other professional personnel under their supervision. We understand that such a suit is now pending against the superintendent of a hospital, and that similar claims are being made. We also understand that the morale of these administrative officials has been seriously undermined because of the possible personal liability in such situations (See *Rockwell v. Stone,* 404 Pa. 561, 173 A. 2d 48 (1961), and *Rockwell v. Kaplan,* 404 Pa. 574, 173 A. 2d 54 (1961)), and that there have been several threatened resignations for this reason. We also understand that the professional personnel other than the administrative directors are able to purchase malpractice insurance to cover liability for their own acts.

In 1957, the Department of Health asked our opinion as to whether it could buy malpractice insurance, and we informed the department that The Administration Code of 1929 permitted such purchase only if an appropriation has been made for that purpose (1957 Official Opinion 219). It was as a direct result of this opinion that the language in the 1959 and 1961 Appropriation

Acts, quoted above, was inserted; in fact, this office participated in the preparation of the amendment.

The answer to your inquiry must, therefore, be in the affirmative.

Some doubt has been cast on this conclusion by the presence of the medical payment provision for volunteers in the same amendatory clause as the provision for malpractice insurance. This fact presents no problem. It so happened that various departments were also troubled about injuries to volunteer workers in State institutions, and the provision for medical payment insurance to cover injuries to such volunteers was included in the 1959 and 1961 Appropriation Acts. The two subjects are completely unconnected. The statutory clause quoted above *cannot* properly be read to mean that malpractice insurance may only be purchased for volunteers. Volunteer workers have no need for such insurance and no such insurance may be secured for them. Malpractice insurance is strictly for professional personnel, and the language of Section 6 clearly so provides.

There is one additional observation that must be made. The furnishing of malpractice insurance by your department to certain professional employees is a form of compensation or emolument and must be approved by the Executive Board under Section 214 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. §74.

It is our opinion, therefore, and you are accordingly advised, that the Department of Public Welfare, subject to the approval of the Executive Board and in accordance with the provisions of law, may purchase malpractice insurance to cover such professional employees under your supervision as you may deem advisable.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 245

State boards and commissions—Salary increases of members—Application to existing office holders—"Public officers"—Act of September 2, 1961, P. L. 1177—Act of September 29, 1961, P. L. 1738—Pennsylvania Constitution, Article III, Section 13.

1. Members of the Milk Control Commission, the Pennsylvania Liquor Control Board and the State Tax Equalization Board are not "public officers" with the meaning of Article III, Section 13 of the Pennsylvania Constitution, and are therefore entitled to the salary increases provided by the Act of September 2, 1961, P. L. 1177.

2. Members of the Pennsylvania Board of Parole, the Pennsylvania Turnpike Commission, the Pennsylvania Labor Relations Board, the Pennsylvania Securities Commission, the Workmen's Compensation Board and the Unemployment Compensation Board of Review, and Workmen's Compensation Referees are "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution, and are not entitled to salary increases granted after their appointment by the provisions of the Act of September 2, 1961, P. L. 1177.

3. Members of all the boards and commissions granted increases in per diem compensation under the Act of September 2, 1961, P. L. 1177, are "public officers", and are not entitled to such increases in per diem compensation granted after their appointment.

4. Members of the Board of Arbitration of Claims are not entitled to receive a fixed salary in lieu of per diem compensation subsequent to their appointment, as provided by the Act of September 29, 1961, P. L. 1738.

5. The appointment of members of the various boards and commissions is complete when confirmed by the Senate.

6. The prohibition of Article III, Section 13 of the Pennsylvania Constitution is also applicable to "public officers" whose fixed terms have expired and who are holding over under the authority of law. The period of holding over is considered to be a continuation of the original appointment.

Harrisburg, Pa., October 25, 1961.

Honorable Thomas Z. Minehart, Auditor General, Harrisburg, Pennsylvania.

Honorable Grace M. Sloan, State Treasurer, Harrisburg, Pennsylvania.

Sir and Madam: This office is in receipt of requests for advice concerning the eligibility of members of certain boards and commissions who were appointed before the effective date of Act No. 525, approved September 2, 1961, P. L. 1177, to receive the increased compensation provided therein. Act No. 705, approved September 29, 1961, P. L. 1738, also changes the compensation

of members of the Board of Arbitration of Claims from a per diem to a salary basis.

In view of the broad impact of this legislation, we direct our opinion to your offices rather than submit a separate opinion to each affected agency.

Section 13 of Article III of the Pennsylvania Constitution provides that:

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

In the passage of Act No. 525, the General Assembly recognized the constitutional bar implicit in statutory increases in compensation. Section 4 states:

> "This act shall take effect as soon as permissible under the provisions of the Constitution of Pennsylvania."

The applicability of the above constitutional prohibition raises the following questions:

I. Which of the officers granted salary increases by the above acts are "public officers" whose salaries may not be increased after their appointment?

II. Does Article III, Section 13 of the Constitution of Pennsylvania apply to "public officers" paid on a per diem basis?

III. When does the "appointment" of a board or commission member become effective?

IV. Does the constitutional prohibition apply to "public officers" whose fixed terms have expired and who are holding over under authority of law?

I. "Public officers" included within Article III, Section 13 of the Pennsylvania Constitution.

The Supreme Court of Pennsylvania has concluded that State officials whose functions are predominantly legislative are not "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution, and within Article VI, Section 4 of the Pennsylvania Constitution dealing with the removal of "public officers".

For example, in *Commonwealth ex rel. Attorney General v. Benn*, 284 Pa. 421, 131 Atl. 253 (1925), a removal case, the Court held that the Public Service Commission (now the Public Utility

Commission) was in effect a committee created by the Legislature to carry out a certain part of its work, that the commissioners were deputies of the General Assembly to perform legislative duties, and hence they were not "public officers". In 1950, the then Attorney General, under the authority of the *Benn* case, held that the members of the Public Utility Commission were not "public officers" under Article III, Section 13 of the Pennsylvania Constitution. (1949-50 Op. Atty. Gen. 135, 73 D. & C. 447 (1950)).

In *Snyder v. Barber,* 378 Pa. 377, 106 A. 2d 410 (1954), which involved the identical question herein considered, it was held that the members of the Milk Control Commission were not "public officers" because of the complete similarity between that commission and the Public Utility Commission. Both the *Benn* and *Snyder* cases hold that rate-making is a legislative prerogative existing under the police power and its exercise is a legislative function. The import of these cases is that where the functions of an agency are primarily legislative, its members are not "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution.

In determining the applicability of Article III, Section 13 of the Pennsylvania Constitution, we will discuss the boards and commissions individually in the order in which they appear in the above acts.

Pennsylvania Board of Parole

In *Commonwealth ex rel. Banks v. Cain,* 345 Pa. 581, 587, 28 A. 2d 897, 901 (1942), the Supreme Court stated that:

> "* * * The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to non-judicial agencies. * * *"

By letter dated January 4, 1955, the then Attorney General advised the Auditor General that Article III, Section 13 of the Pennsylvania Constitution applies to members of the Board of Parole and that they are not entitled to salary increases granted after their appointment.

We conclude that the Board of Parole is an administrative tribunal which does not perform essentially legislative functions and that its members are "public officers" within the inhibition of Article III, Section 13 of the Pennsylvania Constitution.

Milk Control Commission

The members of the Milk Control Commission are not "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution, on the authority of *Snyder v. Barber, supra.*

Pennsylvania Liquor Control Board

By letter dated January 4, 1955, the then Attorney General advised the Auditor General that the members of the Liquor Control Board were *not* "public officers" within Article III, Section 13 of the Pennsylvania Constitution. The Attorney General reviewed the duties of the Liquor Control Board in terms of its statutory functions and the authority granted to the state legislature by the Twenty-first Amendment to the Federal Constitution. He concluded that the duty of the board to fix the prices at which it bought and sold liquor brought it within the scope of *Snyder v. Barber, supra,* (decided June 28, 1954), which held that the Milk Control Commission members were agents or deputies of the Legislature and, therefore, not "public officers".

The price fixing powers of the Pennsylvania Liquor Control Board were further broadened and extended by the enactment of Act No. 495, approved August 23, 1961, P. L. 1115. This act declares that the offer or sale of malt or brewed beverages in the Commonwealth of Pennsylvania by distributors or importing distributors at less than cost shall be unfair competition. The Liquor Control Board is empowered to determine a mark-up to cover the cost of doing business in any geographical marketing area to effectuate the purposes of the 1961 Act.

In *Horn's Motor Express, Inc. v. Pennsylvania Public Utility Commission,* 148 Pa. Super. 485, 26 A. 2d 346 (1942), the Superior Court held that in granting certificates of public convenience, the Public Utility Commission performs a purely legislative function.

Section 501 of the Liquor Code, the Act of April 12, 1951, P. L. 90, 47 P. S. Section 5-501, confers similar authority on the Liquor Control Board in providing that no person may transport for hire any alcohol or liquor, within the Commonwealth of Pennsylvania, unless licensed by the Board. The granting of such license appears to be a legislative function similar to the issuance of a certificate of public convenience by the Public Utility Commission.

By virtue of the Twenty-first Amendment to the Federal Constitution, the power of the General Assembly actually is greater with respect to the liquor industry than in regard to the public utility business or the milk industry. The Legislature could, under that

authority, prohibit entirely the use and traffic of alcoholic beverages within the Commonwealth. It could not declare it unlawful to engage in the public utility business or milk production.

Control of the liquor monopoly being under the absolute dominance of the Legislature, liquor pricing and determination of minimum retail charges being comparable to the price fixing function of the Milk Control Commission, and licensing for transportation of liquor being analogous to the issuance of a certificate of public convenience, we conclude that Liquor Control Board members are performing essentially legislative functions, and thus are not "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution.

Pennsylvania Turnpike Commission

In *Watson v. Pennsylvania Turnpike Commission,* 386 Pa. 117, 125 A. 2d 354 (1956), the Supreme Court refused to accept the contention that members of the Pennsylvania Turnpike Commission were not "public officers". The *Watson* case involved the power of the Governor to remove a "public officer" under Article VI, Section 4 of the Pennsylvania Constitution rather than any question under Article III, Section 13 of the Pennsylvania Constitution. The Court determined that the Turnpike Commission did not exercise such legislative functions as to bring it within the ruling of the *Benn* and *Snyder* cases.[1] On this basis we have determined that members of the Turnpike Commission are "public officers" under the constitutional provision in issue.

State Tax Equalization Board

In *Glen Alden Coal Company v. State Tax Equalization Board,* 367 Pa. 63, 67, 79 A. 2d 645, 647 (1951), the Supreme Court held "* * * that the Board is a legislative device used to bring about uniformity in valuations used in determining State subsidies to school districts * * *". The function of the board is purely one of fact-finding and its purpose is solely to assist the Legislature in computing school subsidies.

On January 5, 1955, the then Attorney General advised the Auditor General that the State Tax Equalization Board acts as a legislative agency and the members of the board are not "public officers" and are entitled to salary increases granted after their appointment.

[1] See *Delaware River Joint Toll Bridge Commission v. Carver,* 399 Pa. 545, 160 A. 2d 425 (1960), where the Court held that members of that agency were "public officers".

We conclude that the members of the State Tax Equalization Board are not "public officers" and consequently are not within the prohibition of Article III, Section 13 of the Pennsylvania Constitution.

Pennsylvania Labor Relations Board

In *Smiley v. Heyburn et al.*, 389 Pa. 594, 133 A. 2d 806 (1957), members of the Pennsylvania Labor Relations Board were expressly held to be "public officers" under Article III, Section 13 of the Pennsylvania Constitution. The Court said that "* * * in view of the predominant quasi-judicial functions of the Pennsylvania Labor Relations Board, it cannot be said that it functions merely as an adjunct of the Legislature * * *". (389 Pa. at 598, 133 A. 2d at 808)

Pennsylvania Securities Commission

Section 202 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 62, establishes the Pennsylvania Securities Commission as a departmental commission within the Department of Banking. Since it operates as an administrative arm of the Department of Banking (an administrative department of the State government), we conclude that the members of this Commission are "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution.

Workmen's Compensation Board

In *Schwing v. Barber*, 71 Dauph. 299 (1958), (hereinafter discussed in connection with Workmen's Compensation Referees), the Workmen's Compensation Board was held to perform quasi-judicial duties in reviewing decisions of Workmen's Compensation Referees. Based on this decision, and on the authority of *Smiley v. Heyburn, et al., supra,* we conclude that members of the Workmen's Compensation Board are "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution.

Unemployment Compensation Board of Review

The Unemployment Compensation Board of Review is designated as a departmental administrative board by Section 202 of The Administrative Code of 1929, as amended, *supra.* Its functions are similar to those of the Workmen's Compensation Board, and therefore, we conclude that its members are "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution.

Workmen's Compensation Referees

In *Schwing v. Barber, et al., supra,* it was held specifically that Workmen's Compensation Referees are "public officers" and are not entitled to salary increases granted after their apointment.

Other Boards and Commissions

We have reviewed the powers and duties of all of the other agencies included in Acts Nos. 525 and 705, not heretofore considered in this opinion, and have determined that the functions performed are principally administrative and quasi-judicial. We conclude, therefore, that the members of the following boards and commissions are "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution:

State Civil Service Commission
State Board of Funeral Directors
Mine Inspectors' Examining Board for the Bituminous Coal Mines of Pennsylvania
Anthracite Mine Inspectors Examining Board
Sanitary Water Board
Industrial Board
Advisory Health Board
Advisory Council on Affairs of the Handicapped
Wage Boards Established by Secretary of Labor and Industry
Pennsylvania Fair Employment Practices Commission (now Human Relations Commission)
The Anthracite Miners' Examining Board
The Bituminous Miners' Examining Board
State Board of Medical Education and Licensure
State Board of Pharmacy
State Dental Council and Examining Board
State Board of Optometrical Examiners
State Board of Osteopathic Examiners
State Board of Nurse Examiners
State Board of Veterinary Medical Examiners
State Board of Examiners of Public Accountants
State Board of Examiners of Architects
State Registration Board for Professional Engineers
State Real Estate Commission
State Board of Private Academic Schools
State Board of Private Business Schools
State Board of Private Trade Schools
State Board of Private Correspondence Schools
State Board of Cosmetology
State Board of Chiropractic Examiners
State Board of Barber Examiners
State Board of Chiropody Examiners
Board of Arbitration of Claims (Act No. 705)

II. Per Diem Compensation

Article III, Section 13 of the Constitution prohibits increases in "salaries or emoluments". The case of *Commonwealth ex rel. Wolfe v. Butler,* 99 Pa. 535 (1882), declared the term "salary" to include per diem compensation. In *Johnson v. Delaware County,* 34 D. & C. 23 (1938), "per diem" was held to be included within the meaning of the term "emoluments".

Consequently, an increase in per diem compensation, or a change from per diem compensation to an annual salary as in the case of Act No. 705 dealing with the Board of Arbitration of Claims, is prohibited by Article III, Section 13 of the Pennsylvania Constitution.

III. Effective Date of Appointment

An appointment becomes effective when confirmed by the State Senate regardless of the date when the appointee qualifies for and enters upon the duties of his office. *Commonwealth v. D. J. Waller, Jr.,* 145 Pa. 235, 23 Atl. 382 (1892); 1949-50 Op. Atty. Gen. 16, 67 D. & C. 530 (1949).

IV. Public Officers Holding Over

In most instances a public officer whose fixed term of office has expired continues in office, or "holds over", until his successor has been appointed and qualified. It is our opinion that the holding over is a continuation of the original term, and that Article III, Section 13 of the Pennsylvania Constitution is applicable to bar an increase during such period. See 67 C.J.S., Section 48c.

Conclusion

It is our opinion that:

1. Members of the Milk Control Commission, the Pennsylvania Liquor Control Board and the State Tax Equalization Board are not "public officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution, and are entitled to the salary increases provided under Act No. 525 of the 1961 Session of the General Assembly.

2. Members of the Pennsylvania Board of Parole, the Pennsylvania Turnpike Commission, the Pennsylvania Labor Relations Board, the Pennsylvania Securities Commission, the Workmen's Compensation Board and the Unemployment Compensation Board of Review, and Workmen's Compensation Referees are "public

officers" within the meaning of Article III, Section 13 of the Pennsylvania Constitution, and are not entitled to salary increases granted after their appointment by the provisions of Act No. 525 of the 1961 Session of the General Assembly.

3. Members of all the boards and commissions granted increases in per diem compensation under Act No. 525 of the 1961 Session of the General Assembly are "public officers", and are not entitled to such increases in per diem compensation granted after their appointment.

4. Members of the Board of Arbitration of Claims are not entitled to receive a fixed salary in lieu of per diem compensation subsequent to their appointment, as provided by Act No. 705 of the 1961 Session of the General Assembly.

5. The appointment of members of the various boards and commissions is complete when confirmed by the Senate.

6. The prohibition in Article III, Section 13 of the Pennsylvania Constitution is also applicable to "public officers" whose fixed terms have expired and who are holding over under the authority of law. The period of holding over is considered to be a continuation of the original appointment.

We are transmitting a copy of this opinion to the chairman of each of the various boards and commissions mentioned herein.

Very truly yours,

DEPARTMENT OF JUSTICE,

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 246

Minimum wages—Nursing homes operated for profit—Applicability of the Minimum Wage Act of 1961.

Under §3(6) of the Minimum Wage Act of 1961, the Act of September 15, 1961, P. L. 1313, excluding certain institutions from the provisions of the act, the phrase "an institution engaged in the care of the mentally deficient, the aged or infirm" will be construed as referring to the same type of institution specifically excluded in the earlier part of the section, namely nonprofit institutions, so that nursing homes operated for profit are subject to the provisions of the act.

Harrisburg, Pa., November 6, 1961.

Honorable A. Allen Sulcowe, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether a nursing home, operated for profit, is subject to the provisions of Act No. 582, the Act of September 15, 1961, P. L. 1313, to be known and cited as the Minimum Wage Act of 1961. You particularly ask whether such a nursing home is exempted from coverage by Section 3(6)(j) of the Act which reads as follows:

> "As used in this act:
>
> * * * * * * *
>
> "(6) 'Employe' includes any individual employed by an employer, but shall not include any individual:
>
> * * * * * * *
>
> "(j) Employed by a non-profit hospital or non-profit nursing home, a religious or charitable organization or *an institution engaged in the care of the mentally deficient, the aged or infirm.*" [Emphasis supplied]

The exclusion of non-profit nursing homes from the coverage of the law in the first part of this subsection would seem clearly to indicate a legislative intent *not* to exclude nursing homes operated for profit. Some doubt, however, is raised by the general phrase at the end of the subsection, emphasized above.

Under these circumstances, we must ascertain and effectuate the intent of the legislature. In determining this intent, we are guided by the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. §501 et seq, which commands us that legislation should be liberally construed to effectuate its objects and to promote justice and that the legislature intends to favor the public interest as against any private interest. Article IV, Sections 52(5) and 58, 46 P. S. §§552(5) and 558.

In many instances it is difficult to ascertain the legislative intent. In this case the Legislature in Section 1 of the Act specifically declared the policy considerations which impelled it to enact this law:

> "Section 1. Factual Background. Employes are employed in some occupations in trade and industry in the Commonwealth of Pennsylvania for wages unreasonably low and not fairly commensurate with the value of the

services rendered. Such a condition is contrary to public interest and public policy commands its regulation. Employes employed in such industries are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards and 'freedom of contract' as applied to their relations with their employers is illusory. Judged by any reasonable standard, wages in such industries are often found to bear no relation to the fair value of the services rendered. In the absence of any effective minimum fair wage rates for employes, the depression of wages by some employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive unreasonable and unfair wages as they affect employes employed in the Commonwealth of Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employes employed therein and of the public interest of the community at large in their health and well being."

As the Bill which became Act No. 582 was originally passed by the House, nursing homes were subject to the coverage of the Minimum Wage Act of 1961 whether or not they were operated for profit. In the Senate, on second reading, that body specifically excluded non-profit nursing homes and by necessary implication included nursing homes operated for profit.

The present language of the Act was introduced on third reading in the Senate by adding to the above amended language "a religious or charitable organization, *or an institution engaged in the care of the mentally deficient, the aged or infirm*". Thus, the Legislature added the emphasized language to a section which already excluded non-profit hospitals and non-profit nursing homes, and now was to exclude religious and charitable organizations as well.

The phrase "an institution engaged in the care of the mentally deficient, the aged or infirm" must be interpreted in accordance with the familiar legal principle of *ejusdem generis,* as referring to the same type of institutions specifically excluded in the earlier part of the subsection, namely, non-profit institutions. It seems clear that the phrase in question was inserted, as is usual in legal draftmanship, as a catchall, to cover organizations or institutions in the same category as those previously enumerated.

Accordingly, we are of the opinion, and you are advised, that nursing homes, operated for profit, are not excluded from coverage under the Minimum Wage Act of 1961.

Very truly yours,

DEPARTMENT OF JUSTICE,

MARSHALL J. SEIDMAN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 247

Constitutional law—Cash refunds of taxes and similar charges—Enabling legislation—Amendment of November 7, 1961 to Article III, Section 16 of the Pennsylvania Constitution.

The amendment of November 7, 1961, to Article III, Section 16 of the Pennsylvania Constitution, providing for cash refunds of taxes, license fees and other charges paid or collected, without appropriation from the fund into which they were paid, on warrant of the proper officer, is not self-executing, and in order to permit the granting of such refunds without the necessity of an appropriation, enabling legislation will be required.

Harrisburg, Pa., February 1, 1962.

Honorable Charles M. Dougherty, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We have your request to be advised as to whether the Amendment of November 7, 1961 to Article III, Section 16 of the Pennsylvania Constitution is self-executing or requires enabling legislation.

As amended, Article III, Section 16 of the Pennsylvania Constitution now reads as follows:

> "No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; *but cash refunds of taxes, licenses, fees and other charges paid or collected, but not legally due, may be paid as provided by law, without appropriation from the fund into which they were paid, on warrant of the proper officer.*" (Emphasis Supplied)

The italicized portion represents the language added by the 1961 amendment.

The rule as to self-executing constitutional provisions is stated thus in *Davis v. Burke,* 179 U.S. 399, 403, 21 S. Ct. 210, 45 L. Ed. 249 (1900), quoted with approval in *O'Neil v. White,* 343 Pa. 96, 100, 22 A. 2d 25, 27 (1941):

> "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution."

The Supreme Court of Pennsylvania has determined whether a variety of constitutional provisions were self-executing. Those decisions are summarized in 7 P. L. E. 203, "Constitutional Law", §14, as follows:

> "In specific cases, various provisions of the Constitution relating to such matters as preservation of powers in the people, the removal of appointive officers, city sinking funds, prohibition of multiple office holding, and the abolition and transfer of county office functions in Philadelphia, have been held to be self-executing, while in other cases provisions relating to matters involving vacancies in elective office, judicial districts, magistrates' courts, vacancies in the Supreme Court, trial of civil cases without a jury, uniformity of taxation, payment of county officers' salaries, submission of charters to voters, methods of voting for corporate directors, issuance of corporate stocks or bonds, and the taking of private property for public use, have been held to be not self-executing."

The 1961 Amendment to Article III, Section 16, can be construed as self-executing only if no ancillary legislation is necessary to the enjoyment of the right to receive a cash refund without the appropriation of moneys therefor.

At present, Section 503 of The Fiscal Code, the Act of April 9, 1929, P. L. 343, 72 P. S. §503, authorizes the Board of Finance and Revenue to make such refunds "out of any appropriation or appropriations made for the purpose", or to credit the account of the party entitled to the refund. The constitutional amendment will now permit the Legislature to amend Section 503 of The Fiscal Code so as to permit cash refunds out of the fund into which the taxes, licenses, fees or other charges for which refund is being sought were originally paid.

There appear to be at least four reasons why the 1961 Amendment to Article III, Section 16 should be construed as not being self-executing without the need for further legislation:

1. *This Section Deals with Limitations on Legislative Power.*

The amendment is in effect an exception to a prohibition against the disbursement of funds without appropriations. This deprives the amendment of an initial positive effect. It merely describes one situation where it will not be unconstitutional to disburse State moneys without a specific appropriation.

In *Commonwealth v. Griest,* 196 Pa. 396, 408, 409, 46 Atl. 505, 507 (1900), the Court construed in detail the significance of Article III of the Pennsylvania Constitution, saying in part:

> "* * * The 3d article of the constitution is confined exclusively to the subject of legislation. It is entitled 'Of legislation' and only purports to be an authorization and limitation of the legislation of the commonwealth. *It prescribes the manner in which the business of making laws must be conducted,* and the subjects with reference to which it may, and may not, be exercised. * * * The remaining sections [from the 9th] down to the 26th, contain prohibitive limitations as to some subjects and directory provisions as to others, *but all of an exclusively legislative character.* * * * the entire article is confined exclusively to the subject of legislation, that is the actual exercise of the lawmaking power of the commonwealth in its usual and ordinary acceptation. * * * *" (Emphasis supplied)

Since the provisions in Article III are of an exclusively legislative character, it is presumed that Section 16 deals primarily with legislative power, and not with the creation of individual rights.

2. *The Language is Permissive Rather than Mandatory.*

The constitutional amendment uses the word "may" instead of "shall". This indicates a permissive rather than a mandatory provision. Unless the context requires otherwise, the word "may" is construed to be permissive rather than mandatory.

In *Commonwealth v. A. M. Byers Company,* 346 Pa. 555, 561, 31 A. 2d 530, 532 (1943), the Court said:

> "* * * The word 'may' clearly implies discretionary power. The language is permissive, rather than mandatory * * *."

In *Mikell v. Philadelphia School District,* 359 Pa. 113, 122, 58 A. 2d 339, 344 (1948), the Court said:

> "* * * The legal distinction between directory and mandatory laws is as applicable to fundamental as it is to statutory law: * * *."

Since, as noted supra, Article III of the Pennsylvania Constitution deals with limitations upon the Legislature, the use of the word "may" in the Amendment to Section 16 indicates that the Legislature has now been authorized to permit cash refunds without the necessity of making appropriations. The Legislature having obtained such permission is now free to adopt legislation that expands the rights to obtain cash refunds.

3. *Legislature has Plenary Power over Refunds.*

Refunds of taxes and license fees are matters of legislative grace, and not of constitutional right, and "the Commonwealth is not obliged to entertain claims against it at all": *Land Holding Corporation v. Board of Finance and Revenue,* 388 Pa. 61, 67, 130 A. 2d 700 (1957). Failure to comply with the express conditions on the right to obtain a refund results as an absolute bar to the right itself: *Federal Deposit Insurance Corporation v. Board of Finance and Revenue,* 368 Pa. 463, 470, 84 A. 2d 495 (1951). The statutory limitation upon any action by the State in consenting to be sued must be strictly construed: *Box Office Pictures, Inc. v. Board of Finance and Revenue,* 402 Pa. 511, 166 A. 2d 656 (1961).

These and other cases amply demonstrate that the Legislature has the complete power to determine under what conditions refunds for taxes, licenses and similar fees may be obtained. No language in the Amendment to Article III, Section 16 suggests that this legislative power is being modified or repealed. The amendment simply enlarges the power of the Legislature.

4. *The Language "As Provided by Law" Implies Legislative Action.*

The use of the phrase "as provided by law" further suggests that the specific details for granting refunds still remain in the hands of the Legislature.

When the Constitution of 1874 was adopted, it provided in Article III, Section 23 that the power to change venue in civil and criminal cases shall be vested in the courts "to be exercised

in such manner *as shall be provided by law*". In *Wattson v. The Cheser and Delaware River Railroad Company,* 83 Pa. 254, 256 (1877), the Court held that the new provision was not immediately operative so as to defeat existing law. The Court said:

> "* * * If the effect were held to be immediate, the consequence would be, that there would be no law whatever to regulate the power; for in this case the power of the court to change the venue is 'to be exercised in such manner as shall be provided by law.' Until the manner of its exercise is prescribed by a suitable law, it is evident the court can have no guide as to the cases, the grounds, or the mode of making the change. * * *"

In *Bell v. Farwell,* 52 N.E. 346, 348 (Ill. 1898), it was contended that a provision in the Kansas Constitution that "dues from corporations shall be secured by individual liability to stockholders to an additional amount equal to the stock owned by each stockholder, and such other means *as shall be provided by law*", was self-executing. The Court rejected this contention, stating:

> "* * * It is apparent from the reading of the provision itself that legislation was contemplated in order that it might be properly enforced; otherside the last clause, 'and such other means as shall be provided by law' * * * would never have been incorporated in it. * * *"

The analogous rule of statutory construction is stated thus in *Guenthoer's Estate,* 235 Pa. 67, 74, 83 Atl. 617 (1912):

> "* * * where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific act or part thereof designated in the adopting act the reference means the law at the time the exigency arises as to which the law is to be applied: * * *"

The phrase "as provided by law" in the 1961 Amendment to Article III, Section 16, will permit refunds to be obtained under the law in effect at the time the refund is sought.

Therefore, we are of the opinion that the 1961 Amendment to Article III, Section 16, is not self-executing, and that enabling legislation will be required in order to permit the granting of

cash refunds of taxes, licenses, fees or other charges without the necessity of an appropriation.

Very truly yours,

GEORGE W. KEITEL,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 248

School districts—Election of county superintendent—Third class school district reclassified as second class—Eligibility of members of board of directors to vote—Section 1022 of the Public School Code of 1949, as amended.

Members of a board of directors of a school district that was third class and under the supervision of a county superintendent of schools as of July, 1955 are eligible to vote in the election of the county superintendent when the school district thereafter is reclassified second class, as provided by §1022 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended.

Harrisburg, Pa., February 2, 1962.

Honorable Charles H. Boehm, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You request to be advised whether members of a board of directors of a school district that was third class and under the supervision of a county superintendent of schools as of July, 1955, would be eligible to vote in the election of the county superintendent when the school district thereafter is reclassified second class.

Under the original provisions of Section 1022 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, 24 P. S. Section 10-1022, the directors of school districts having district superintendents were not permitted to vote for county superintendents. The section, however, has been twice amended. As amended by the Act of May 24, 1956, P. L. (1955) 1665, and the Act of July 24, 1957, P. L. 523, those who may vote for a county superintendent include:

"* * * (1) the school directors of all of the school districts under the supervision of the county superin-

> tendent, (2) the school directors of all union and merged districts, (3) the school directors of all districts of the third and fourth class employing district superintendents to operate joint school systems, (4) except as otherwise provided in subsection (c) of section 901,[1] *the school directors of all school districts that were under the supervision of the county superintendent on the first Monday of July, 1955,* (5) the school directors of districts employing district superintendents who elect to become part of the county service system, and (6) the school directors of districts of other counties that have joined with one or more districts of the county in establishing joint schools which conform to approved county plans, * * *." (Emphasis supplied)

Third class school districts were under the supervision of county superintendents on the first Monday of July, 1955. Second class districts were not.

If a literal interpretation of the emphasized language of Section 1022 would suffice, there would be little difficulty in answering your question in the affirmative. However, complete consideration of the problem requires a review of Section 1027 of the Public School Code of 1949, *supra,* 24 P. S. Section 10-1027, as amended, which provides:

> "Section 1027. List of Directors Entitled to Vote; Method of Voting.—The county superintendent shall furnish to the president of such convention a correct duplicate list of all the school directors in said county in the districts over which said superintendent has supervision. In union and merged districts of the third class that employ district superintendents, and in districts of the third and fourth class employing district superintendents to operate joint school systems, such list shall be arranged alphabetically by districts. In taking the vote the president or secretary shall call in alphabetical order, by district, the list thus furnished, and each director present shall, when his name is called, rise and announce the name of the candidate for whom he desires to vote. The tellers shall keep correct tally of the vote as cast and report the same to the president, who shall announce the vote to the convention." (Amended August 19, 1953, P. L. 1136)

[1] In pertinent part the exception contained in Section 901(c) provides that "School directors in districts located in two or more counties which form a joint school system shall have full voting rights and the right to hold office on the county board only in the county containing the largest proportion of the population of the administrative unit as shown by the last United States census."

You will observe that Section 1027, in directing the county superintendent to furnish the president of the county convention of school directors with a list of those directors entitled to vote, makes no mention of "school directors of all school districts that were under the supervision of a county superintendent on the first Monday of July, 1955."

This omission requires statutory construction of Sections 1022 and 1027 to resolve the apparent ambiguity.

Section 62 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. Section 562, provides: "Laws or parts of laws are in *pari materia* when they relate to the same persons or things or to the same class of persons or things. Laws in *pari materia* shall be constructed together, if possible, as one law."

Sections 1022 and 1027 have been in *pari materia* from their very inception insofar as both relate to school directors voting for a county superintendent, and are one law. The legislature in enacting these sections obviously conceived the former section to be determinative of those who shall elect the county superintendent, and the latter section to provide an administrative procedure to facilitate balloting.[2] Supporting this view is the fact that the legislature in 1956 and 1957 amended only Section 1022 in broadening the list of those entitled to vote for county superintendent. Section 1027, not being so amended, remains a mere administrative counterpart.

The apparent ambiguity appearing in Section 1027 resulting from an omission therein of the language used in Section 1022 is clarified by reference to the latter section. The rule is well-founded that when two statutes are in *pari materia,* the ambiguity of one may be clarified by the other. This rule was spelled out in *Neff's Appeal,* 21 Pa. 243 (1853), when Justice Lewis said "that statutes in *pari materia,* or upon the same subject, must be construed with reference to each other; that is, that what is clear in one statute, shall be called in aid to explain what is obscure and ambiguous in another; 1 Bl. Com. 60, note 8."

We are, therefore, of the opinion and you are accordingly advised that members of a board of directors of a school district that was third class and under the supervision of a county superin-

[2] This same reasoning would dispose of any other similar apparent ambiguity or inconsistency between these two sections.

tendent of schools as of July, 1955, are eligible to vote in the election of a county superintendent when the school district thereafter is reclassified second class.

Very truly yours,

DEPARTMENT OF JUSTICE,

ALLEN H. SMITH,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 249

Disabled veterans—Exemption from real property taxes—Amendment to Article IX, Section 1 of the Pennsylvania Constitution—Self-executing nature of amendment.

The amendment of November 7, 1961, to Article IX, Section 1 of the Pennsylvania Constitution granting an exemption to certain disabled veterans from real estate taxation with respect to the residences occupied by them, is self-executing as the amendment grants a positive right to the tax exemption, subject only to conditions specified as to the elements of eligibility which are to be determined by the local taxing authorities and the State Veterans' Commission.

Harrisburg, Pa., February 6, 1962.

Major General Malcolm Hay, The Adjutant General, Harrisburg, Pennsylvania.

Sir: You have asked whether the amendment of November 7, 1961, to Article IX, Section 1 of the Constitution of Pennsylvania, granting an exemption to certain disabled veterans from real estate taxation, is self-executing, or whether it requires further legislative action to become effective. Article IX, Section 1, as amended, reads:

> "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; and the General Assembly may, by general laws, set up standards and qualifications for private forest reserves, and make special provision for the taxation thereof. *Citizens and residents of this Commonwealth, who served in any war or armed conflict in which the United States was engaged and were honorably discharged or released under honorable circumstances from active service, shall be exempt from the payment of all real property taxes upon the residence occupied by the said citizens and residents of this Commonwealth imposed by the Commonwealth of Pennsylvania or any of its political subdivisions if, as a result of military service, they are blind, paraplegic or double or quadruple amputees, and if the State Veterans' Commission determines that such persons are in need of the tax exemptions granted herein.*" (Emphasis supplied)

The emphasized sentence was added by the November, 1961 amendment.

It should be noted that the preceding sentence states expressly that the General Assembly "may, by general laws" provide certain exemptions from taxation, whereas the recent amendment declares that certain persons "*shall* be exempt" from real property taxation upon specified conditions. Thus, the new language would appear to be mandatory and self-executing, as distinguished from the preceding grant of discretionary power to the General Assembly.

The rule as to self-executing constitutional provisions is stated thus in *Davis v. Burke,* 179 U. S. 399, 403, 21 S. Ct. 210, 45 L. Ed. 249 (1900), quoted with approval in *O'Neil v. White,* 343 Pa. 96, 100, 22 A. 2d 25, 27 (1941):

> "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution."

The question to be resolved, therefore, is whether the 1961 constitutional provision is "complete in itself" or whether it needs "more specific legislation to make it operative". The amendment grants a positive right to the tax exemption, subject only to the conditions specified. This exemption cannot be impaired by legislative action or inaction.

While legislation establishing more detailed eligibility criteria may be desirable, we believe it is possible to formulate reasonable administrative standards to implement the mandate of the amendment.

The language of the amendment indicates that responsibility for carrying out its provisions is divided between local and State authorities. All the factors of eligibility, except the "need" for the tax exemption, are for the determination by the local taxing authorities.

The elements of eligibility for local determination include:

1. Status of the applicant for the tax exemption as a citizen and resident of Pennsylvania;

2. His service in any war or armed conflict in which the United States was engaged;

3. The proper type of discharge or separation from service;

4. The occupancy of the residence for which the applicant seeks exemption from real estate taxes;

5. Whether the applicant is blind, or is a paraplegic or a double or quadruple amputee; and

6. Whether his physical disability is service-connected.

We believe there are ready means available for ascertaining the military aspects of eligibility, such as the nature of the applicant's service, his physical condition, etc. There exist well-established standards under which the United States Veterans Administration and, for some purposes, the State Veterans' Commission in Pennsylvania, can determine eligibility for certain benefits based upon military service and service-connected disability.

This review of the portion of the constitutional amendment dealing with local authorities is not intended to be an adjudication, but has been set forth simply for informational purposes. The elements listed above, as well as the extent of the exemption from real property taxes to be allowed, are to be determined by the local taxing authorities.

The final condition of the grant of the exemption, i.e., whether the applicants "are in need of the tax exemptions granted herein", should be determined by the State Veterans' Commission.

In carrying out its functions under the amendment, it would be appropriate for the State Veterans' Commission to design and

make available a form suggesting information which the applicant should furnish to the local tax authorities and to the commission to enable them to make their respective determinations.

In summary, it is our conclusion, and you are so advised, that the November, 1961 amendment is self-executing, and that it should be implemented in accordance with the foregoing discussion.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN SULLIVAN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 250

Oil and gas well operators—Duties as to plugging—Act of November 30, 1955, P. L. 756—Act of May 17, 1921, P. L. 912—Extent to which repealed.

The plugging requirements of oil and gas well operations, under the Act of November 30, 1955, P. L. 756, apply to wells started prior to the effective date of the act and still in operation, and also to wells started prior to the effective date of the act and not abandoned as of that date; however, the act does not apply to wells abandoned prior to its effective date.

The Act of May 17, 1921, P. L. 912, is repealed insofar as its provisions are inconsistent with or are covered by provisions of the Act of November 30, 1955, P. L. 756; however, all portions of the 1921 act apply to and can be enforced as to wells not covered by the Act of 1955.

Harrisburg, Pa., February 28, 1962.

Honorable Lewis E. Evans, Secretary of Mines and Mineral Industries, Harrisburg, Pennsylvania.

Sir: You have requested our interpretation of the provisions of Act No. 225 of 1955, the Act of November 30, 1955, P. L. 756, 52 P. S. §2101 et seq. In particular you have asked:

> "First, does Act No. 225 of 1955 apply to wells that were worked prior to the effective date of the Act of 1955 and not thereafter, to wells started prior to the effective date of that Act and still in operation and to

wells that were worked and abandoned prior to the date of the Act of 1955 and where plugging remains to be done.

"Secondly, does the Act of 1955 supersede the provisions and in particular Section 7 of the Act of 1921."

You state that your specific concern is with the interpretation of the statutes pertaining to plugging requirements and procedures.

The purpose of the act as it pertains to plugging is clearly defined in the title:

"An act relating to coal mining, well operations and the underground storage of gas, except in storage reservoirs excavated in rock formations specifically for storage purposes, and the safety of personnel and facilities employed therein; prescribing the rights and duties of well operators, before, during, and after the drilling of wells for the production, extraction or storage of any gas, petroleum or other liquid * * *."

The provisions of Act No. 225 governing plugging are found in Sections 205, 206 and 207. (Emphasis has been supplied)

Section 205 pertaining to the giving of notice of intention to plug a well provides that:

"Prior to the abandonment of *any well* in an area underlain by a workable coal seam, the well operator shall notify the coal operator and the owner of all known workable coal seams * * * of his intention to plug and abandon any such well * * *."

Section 206 pertaining to the method of plugging a well provides that:

"(a) Upon abandoning or ceasing to operate *any well* in an area not underlain by a workable coal seam, the owner or operator thereof shall plug the same in the following manner.

* * * * * * *

"(b) In an area not underlain by a workable coal seam when it is desired to pull the casing in *any well,* the well may be produced through tubing * * *.

"Upon the abandonment of *such well,* a plug or bridge shall be placed in the tubing * * *.

"(c) Upon abandoning or ceasing to operate *any well* which passes through a workable coal seam, the owner or operator of said well shall plug the same in the following manner.

* * * * * * *

"(d) Upon abandoning or ceasing to operate *any well* pursuant to this section where any of the strata bearing

> or having borne oil, gas or water in a well has been shot, thereby creating cavities which cannot be readily filled in the manner above described, the well operator shall use either of the following methods unless he has approval of the division pursuant to an application filed under section 207 to use an alternative method:"

Section 207 merely provides for securing approval of plugging by alternate methods.

As can be seen, the pertinent sections of the act deal with "any well". It would then seem clear that the provisions of the act would apply to wells started prior to the effective date of that act and still in operation since the acts of ceasing to operate or abandoning would occur after the effective date of the act.

Whether the act would apply to wells that were worked prior to the effective date of the Act of 1955 and not thereafter would depend on whether the well had been abandoned prior to the effective date of the act. If the well had been abandoned, then the provisions of the act would not apply since there was no activity to which the obligations of the act would attach.

Sections 205 and 206 also use the language "ceasing to operate". However, the context of the sections seem to indicate that both "abandonment" and "ceasing to operate" are to be considered somewhat close in point of time; in any event both of these conditions are factual situations, to be determined by a study of the status of a particular well, the activity of the operator and any conduct by him to show an intention not to operate or to abandon. If the well had in fact ceased to operate to a point of abandonment prior to the effective date of the act, then the provisions of the act would not apply; if not abandoned then the obligations set out in Sections 205, 206 and 207 would have to be met. We might state that the failure to comply with the provisions of the Act of May 17, 1921, as to plugging might well be considered one factor in determining whether a well had been abandoned. However, whether a well has or has not been abandoned is a question of fact, and the passage of a long period of time without any activity at the well, despite the failure to plug, could indicate abandonment.

The Act of May 17, 1921, P. L. 912, 58 P. S. §4 et seq., was a general act, covering all oil and gas wells. Sections 1 and 2

of that statute provide methods for plugging abandoned wells and for pulling casing of wells abandoned.

Act No. 225 of 1955, though it is replete with reference to coal seams and appears to have been concerned with the relationship of wells to coal mines, does refer to and provides for plugging of wells in an area not underlain by a workable coal seam.

Section 91 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Article VII, 46 P. S. §591, provides:

> "Whenever a law purports to be a revision of all laws upon a particular subject, or sets up a general or exclusive system covering the entire subject matter of a former law and is intended as a substitute for such former law, such law shall be construed to repeal all former laws upon the same subject.
>
> "Whenever a general law purports to extablish a uniform and mandatory system covering a class of subjects, such law shall be construed to repeal pre-existing local or special laws on the same class of subjects.
>
> "In all other cases, a later law shall not be construed to repeal an earlier law unless the two laws be irreconcilable."

It is necessary to determine whether Act No. 225 was intended to be a revision of all laws on this particular subject and whether it was intended to set up a general or exclusive system covering this entire subject matter. Reviewing the statute, one is impressed with the fact that a complete regulation seems to have been its objective. There is nothing in the act that specifically limits the applicability of the act, except that Section 103 does exclude certain storage reservoirs and Section 306 exempts certain mines. Since the legislature specifically excluded certain matters, the failure to exclude others would indicate an intention that everything else be included and covered by the act.

You are therefore advised as follows:

First, Act No. 225 of 1955

(a) would apply to wells started prior to the effective date of that statute and still in operation;

(b) would apply to wells started prior to the effective date of that legislation and not abandoned as of that date;

(c) would not apply to wells abandoned prior to the effective date of that legislation.

Secondly, the Act of May 17, 1921, P. L. 912, is repealed insofar as its provisions are inconsistent with or are covered by provisions of the Act of November 30, 1955, but all portions of it, including Section 7, would apply to and could be enforced as to wells not covered by Act No. 225 of 1955, such as wells abandoned prior to the effective date of that statute, but as to which the provisions of the 1921 statute had not been met.

Very truly yours,

DEPARTMENT OF JUSTICE,

LEON EHRLICH,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 251

Minimum wages—Local housing and redevelopment authorities—Applicability of the Pennsylvania Prevailing Wage Act.

The Pennsylvania Prevailing Wage Act, the Act of August 15, 1961, P. L. 987, does not apply to public works projects of local housing and local redevelopment authorities, since such public works projects are within the coverage of the Davis-Bacon Act, the Act of March 3, 1931, 40 U.S.C. 276(a), and are therefore excluded by §15 of the Pennsylvania Act.

Harrisburg, Pa., April 19, 1962.

Honorable A. Allen Sulcowe, Secretary of Labor and Industry, Harrisburg, Pennsylvania.

Sir: You have requested an opinion concerning the applicability of the Pennsylvania Prevailing Wage Act, the Act of August 15, 1961, P. L. 987, 43 P. S. §165-1 et seq. to contracts of local housing and local redevelopment authorities of the Commonwealth.

Sections 3, 4 and 5 of the Pennsylvania Prevailing Wage Act provide that any public body which is a party to a contract in excess of $2,000.00 for any public work must ascertain from the

Secretary of Labor and Industry the general prevailing minimum wage rate in the locality for each craft or classification of workmen. The contract must specify such rate and not less than the specified rate must be paid to all workmen employed on public work.

As defined in Section 2 of the Act, "public body" includes "any authority *created by the General Assembly*", and "public work" means "construction, reconstruction, demolition, alteration and/or repair work, maintenance work, done under contract and paid for in whole or in part out of the funds of a *public body.*" (emphasis added)

Section 15 of the Act states:

> "This act shall have no application to any public works subject to the Walsh-Healey Act, the act of June 30, 1936, chapter 881, 49 Stat. 2036, 41 USCA sections 35-45, or the Davis-Bacon Act, the act of March 3, 1931, 40 U. S. C. 276(a)."

The Walsh-Healey Act requires contracts for the manufacture or furnishing of materials, supplies, etc., entered into *by any executive department or agency of the United States,* or by the District of Columbia, to include a provision that the employees of the contractor will be paid not less than the minimum wages determined by the Secretary of Labor to be prevailing.

Section 276(a) of the Davis-Bacon Act reads:

> "The advertised specifications for every contract in excess of $2,000., to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair . . . of *public buildings or public works of the United States or the District of Columbia* . . . shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing . . . ." (emphasis added)

The Walsh-Healey and Davis-Bacon Acts are limited in their coverage to *public works of the Federal Government;* such projects were obviously not intended to be included among the exceptions covered by Section 15 of the Pennsylvania Prevailing Wage Act as *Federal* projects never came within the coverage of the Act in the first place. Projects of local housing and redevelopment authorities in Pennsylvania are clearly not Federal projects within the specific coverage of either Walsh-Healey or Davis-Bacon.

The real question presented is whether Section 16(1) and (2) of the United States Housing Act of 1937, 42 U.S.C.A. §1416, renders public works of local housing authorities "subject to the Davis-Bacon Act" within the contemplation of the exemption clause of the Pennsylvania Prevailing Wage Act; and also whether Section 109 of the Act of July 15, 1949, C. 338 Title I, as amended, 42 U.S.C.A. §1459 (slum clearance and urban renewal) renders public works of local redevelopment authorities "subject to the Davis-Bacon Act" within the meaning of the exemption section of the Pennsylvania Act.

Section 16(1) of the United States Housing Act of 1937 provides:

> "The provisions of sections 276(a) to 276a-5 . . . of Title 40 [Davis-Bacon], shall apply to contracts in connection with the development or administration of Federal projects and the furnishing of materials and labor for such projects . . . ."

The term "Federal project" is defined (42 U.S.C.A §1402) as any project *owned or administered* by the Federal public housing agency. The term "administration" in the statutory provision quoted above means any or all undertakings necessary for management, operation, maintenance, or financing, in connection with a low-rent housing or slum-clearance project, *subsequent to physical completion.*

Pennsylvania housing authority projects are not "Federal projects" as defined in the United States Housing Act, as the Public Housing Administration does not own such projects; and any "administration" of local projects by the Public Housing Administration does not make them "Federal projects" during this development because the term "administration" excludes the physical development of the project. Therefore, it cannot be contended that subsection (1) of Section 16 of the United States Housing Act renders public works of Pennsylvania housing authorities "subject to the Davis-Bacon Act."

However, subsection (2) of Section 16 of the United States Housing Act of 1937 provides:

> "Any contract for loans, annual contributions, capital grants, sale, or lease pursuant to this chapter shall contain a provision requiring that *not less than* the salaries or wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State or local law) by the Administration, shall be paid to all architects, technical engi-

> neers, draftsmen, and technicians, employed in the development and to all maintenance laborers and mechanics employed in the administration of the low-rent housing or slum-clearance project involved; and shall also contain a provision that *not less than* the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, shall be paid to all laborers and mechanics employed in the development of the project involved . . . ." (emphasis added)

With respect to local redevelopment projects, 42 U.S.C.A. §1459 (slum clearance and urban renewal) is virtually the same as Section 16(2) of the United States Housing Act:

> "(a) Any contract for loan or capital grant pursuant to this subchapter shall contain a provision requiring that not less than the salaries prevailing in the locality, as determined or adopted (subsequent to a determination under applicable State or local law) by the Administrator, shall be paid to all architects, technical engineers, draftsmen, and technicians employed in the development of the project involved and shall also contain a provision that not less than the wages prevailing in the locality, as predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, shall be paid to all laborers and mechanics . . . employed in the development of the project involved for work financed in whole or in part with funds made available pursuant to this subchapter . . . ."

The Pennsylvania "Housing Authorities Law", Act of May 28, 1937, P. L. 955, §11, as amended, 35 P. S. §1551(d), provides:

> "Notwithstanding anything to the contrary contained in this act or in any other provision of law, a housing authority may include, in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractors comply with requirements as to minimum wages and maximum hours of labor, and comply with any conditions which the Federal or State Government may have attached to its financial aid of the project."

Section 22 of the Act (35 P. S. §1562) empowers an Authority "to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal Government in the undertaking, construction, maintenance, or operation of any housing project by such Authority".

The Pennsylvania "Urban Redevelopment Law", Act of May 24, 1945, P. L. 991, §18, 35 P. S. 1718, provides:

> ". . . an Authority is empowered to borrow money or accept grants or other financial assistance from the Federal Government, for or in aid of any of its operations. It is the purpose and intent of this act to authorize every Authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the Federal Government in any of its operations."

The above cited Federal and State statutes make it perfectly clear that all labor used in the construction of local housing and redevelopment projects financed under the Federal acts must comply with the prevailing wage requirements of Davis-Bacon. It follows, and it is plain to us, that such projects are, therefore, "subject to . . . the Davis-Bacon Act", as provided in Section 15 of the Pennsylvania Prevailing Wage Act.

As a practical proposition, the Legislature was dealing with the establishment of a wage floor on public work projects, and it excluded, in Section 15, situations where such a wage floor had already been established for the project by the Davis-Bacon Act. As we have seen that local housing and redevelopment projects must pay Davis-Bacon wages, the provisions of the Pennsylvania Act do not apply to them.

We are of the opinion, and you are accordingly advised, that the Pennsylvania Prevailing Wage Act does not apply to public works projects of local housing and local redevelopment authorities, as such projects are "subject to the Davis-Bacon Act" within the contemplation of the Pennsylvania Act.

Very truly yours,

DEPARTMENT OF JUSTICE,

THOMAS A. DALEY,
Deputy Attorney General.

HERBERT N. SHENKIN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 252

Minimum wages—Pennsylvania Industrial Development Authority—Local industrial development agencies—Applicability of the Pennsylvania Prevailing Wage Act.

The Pennsylvania Prevailing Wage Act, the Act of August 15, 1961, P. L. 987, has no application to the operations of the Pennsylvania Industrial Development Authority, since it does not perform any public work and is not a party to a contract.

Private local non-profit industrial development agencies within the intendment of the Pennsylvania Industrial Development Authority Act, the Act of May 15, 1956, P. L. (1955) 1609, and the Industrial Development Assistance Law, the Act of May 31, 1956, P. L. (1955) 1911, and as such agencies are now functioning, are not "public bodies" within the meaning of §2 of the Pennsylvania Prevailing Wage Act and are not subject to the wage provisions of that act.

Harrisburg, Pa., July 25, 1962.

Honorable Thomas J. Monaghan, Secretary of Commerce, Harrisburg, Pennsylvania.

Sir: You have requested our opinion as to whether the Pennsylvania Industrial Development Authority, created under the Act of May 15, 1956, P. L. (1955) 1609, §1, *et seq.*, 73 P. S. §301, *et seq.*, and local industrial development agencies must comply with the wage requirements of the Pennsylvania Prevailing Wage Act of August 15, 1961, P. L. 987, 43 P. S. §165-1, *et seq.*

Sections 3, 4 and 5 of the Pennsylvania Prevailing Wage Act provide that any *public body* which is a party to a contract in excess of $2,000.00 for any *public work* must ascertain from the Secretary of Labor and Industry the general prevailing minimum wage rate in the locality for each craft or classification of workmen. The contract must specify such rate, and not less than the specified rate must be paid to all workmen employed in public work.

As defined in Section 2, "*public body* means the Commonwealth of Pennsylvania, any of its political subdivisions, any authority created by the General Assembly of the Commonwealth of Pennsylvania, and any instrumentality or agency of the Commonwealth of Pennsylvania"; and "*public work* means construction, reconstruction, demolition, alteration and/or repair work, maintenance work, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program".

It is clear that the Pennsylvania Prevailing Wage Act makes mandatory the payment to workmen of the prevailing wage rate

under contracts entered into by the Commonwealth, or its political subdivisions or other public agencies, for the construction, alteration or repair of any public work or improvement when the contract is in excess of $2,000.00.

Section 3 of the act creating the Pennsylvania Industrial Development Authority (PIDA), 73 P. S. §303, provides, in pertinent part, that:

> "(a) The term 'Authority' shall mean the public body corporate and politic created by this act. . . .
>
> . . . . . .
>
> "(g) The term 'industrial development agency' shall mean any incorporated organization, foundation, association or agency, regardless of the particular name, and to whose members or shareholders *no profit* shall enure, which shall have as its primary function the promotion, encouragement and development of *industrial and manufacturing* enterprises in a critical economic area." (Emphasis supplied)

The fundamental purpose of PIDA is expressed in the power granted by Section 5(h) of the act:

> "To make, upon proper application of industrial development agencies, loans to such industrial development agencies of moneys held in the Industrial Development Fund for industrial development projects in critical economic areas and to provide for the repayment and redeposit of such allocations and loans in the manner hereinafter provided. . . ."

The primary objective of PIDA is, therefore, to provide loans for the purpose of assisting critical economic areas in the industrial and manufacturing field. The loan application requirements extensively set forth in Section 7 of the act provide a firm basis for securing the loan when made, and Section 6 outlines the conditions under which the loan is granted.

PIDA does *not* undertake the construction, reconstruction, alteration or repair of any of the projects, and, therefore, does not perform any "public work" which might otherwise make it subject to the Pennsylvania Prevailing Wage Act. Furthermore, PIDA is not a "party to a contract" within the contemplation of the Pennsylvania Prevailing Wage Act. It follows that this act has no application to the operations of PIDA.

You have also asked us to determine the effect of the Pennsylvania Prevailing Wage Act on the various local industrial development agencies through which PIDA functions.

Under the statutory design of the Pennsylvania Industrial Development Authority Act, PIDA functions as a financing agency, and the public purposes of the act are accomplished through industrial development agencies. As quoted above, Section 3(g) of the act defines the term "industrial development agency" as an incorporated non-profit organization whose primary function is to promote, encourage and develop industrial and manufacturing enterprises in critical economic areas.

Shortly after PIDA was created, the General Assembly in the same session enacted a companion piece of legislation. This was the Industrial Development Assistance Law, the Act of May 31, 1956, P. L. (1955) 1911, 73 P. S. §351, *et seq.*, under which the Department of Commerce is authorized (§5, 73 P. L. §355) to make matching grants to properly designated "industrial development agencies" for the purpose of making studies, surveys and investigations, compiling data and statistics and carrying out planning and promotional programs.[1] Section 3 of this act, 73 P. S. §353, defines the term "industrial development agency" to mean "any non-profit corporation, organization, association or agency" which has been officially designated by a certain proportion of the political subdivisions within the county as the agency authorized to receive grants from the Department of Commerce under the act.

It is fairly obvious from the statutory provisions above that the industrial development agencies through which PIDA functions are essentially private local non-profit agencies. Our investigation as to the actual facts confirm this. These agencies have been privately organized and have obtained their initial funds by broad-based community drives. In no case brought to our attention has an industrial development agency, receiving funds under either of the 1956 acts, been organized by any political subdivision of the Commonwealth. We are aware of the fact that certain industrial development agencies have received funds, pursuant to the enabling legislation referred to in footnote 1 above, from the counties and municipalities in which they are located, and from the Commonwealth under the Industrial Development Assistance Law. This fact does not change the char-

[1] Counties of the third to the eighth class and other political subdivisions have recently been empowered to make grants to industrial development agencies for the purposes set forth in the Industrial Development Assistance Law. See Section 1985 of the County Code, 16 P. S. §1985; clause 64, §2403 of the Third Class City Code, 53 P. S. §37403.64; clause 69, §1202, of the Borough Code, 53 P. S. §46269; and clause 56, §702 of the Second Class Township Code, 53 P. S. §65756.

acter of the industrial development agencies from private non-profit corporations into "public bodies"; none of these agencies are instrumentalities of a municipal subdivision.

It is clear to us, therefore, that industrial development agencies, within the intendment of the Pennsylvania Industrial Development Authority Act and the Industrial Development Assistance Law, and as such agencies are now functioning, are not "public bodies" within the meaning of Section 2 of the Pennsylvania Prevailing Wage Act, and that these agencies are not subject to the wage provisions of such act. We do not mean to intimate, however, that an industrial development agency could not be organized by a political subdivision of the Commonwealth which would meet the definitions of both the Pennsylvania Industrial Development Authority Act and the Industrial Development Assistance Law and also be classified as a "public body" within the meaning of the Pennsylvania Prevailing Wage Act.[2] In the final analysis, this opinion is only intended for your general guidance, and a definitive answer as to whether a particular industrial development agency is subject to the Pennsylvania Prevailing Wage Act can only be given on a case-by-case basis.

We are of the opinion, therefore, and you are accordingly advised, that the Pennsylvania Industrial Development Authority is not subject to the provisions of the Pennsylvania Prevailing Wage Act, and that private local non-profit industrial development agencies, with the qualifications set forth above, are likewise not subject to the provisions of the Pennsylvania Prevailing Wage Act.

Very truly yours,

DEPARTMENT OF JUSTICE,

RAYMOND KLEIMAN,
Deputy Attorney General.

HERBERT N. SHENKIN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

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[2] For example, see the recent amendment to Section 4 of the Municipality Authorities Act of 1945, the Act of August 7, 1961, P. L. 936, 53 P. S. §306, giving municipalities the power to form an authority for industrial development purposes.

OFFICIAL OPINION No. 253

Budget and financial report forms—Preparation and distribution to counties —Statutory committees—Secretary of Internal Affairs—Section 1982 of the Second Class County Code—Section 1785 of The County Code—Section 312 of the County Institution District Law.

The duties with respect to preparation of budget forms by statutory committees and the issuance and distribution by the Secretary of Internal Affairs in all counties except those of the first class, pursuant to the provisions of §1982 of the Second Class County Code, the Act of July 28, 1953, P. L. 723, §1785 of The County Code, the Act of August 9, 1955, P. L. 323, as amended, and §312 of the County Institution District Law, the Act of June 24, 1937, P. L. 2017, are in no way affected by the provisions of the Act of September 19, 1961, P. L. 1495, and the committees acted in accordance with the statutory mandates in adopting the new 1962 budget forms.

The Secretary of Internal Affairs may permit county institution districts in second, third, seventh and eighth class counties, at their option, to file their own budget and financial reports, separate from the county reports.

Harrisburg, Pa., November 2, 1962.

Honorable Genevieve Blatt, Secretary of Internal Affairs, Harrisburg, Pennsylvania.

Madam: You have requested our opinion as to your authority to issue and distribute annually, as needed, budget and financial report forms, herein referred to as budget forms, to counties of the second through eighth classes and county institution districts in second, third, seventh and eighth class counties,[1] in accordance with the provisions of Section 1982 of the Second Class County Code, the Act of July 28, 1953, P. L. 723, 16 P. S. Section 4982, Section 1785 of The County Code, the Act of August 9, 1955, P. L. 323, as amended, 16 P. S. Section 1785, and Section 312 of the County Institution District Law, the Act of June 24, 1937, P. L. 2017, 62 P. S. Section 2262. In substance, these statutes provide for the preparation of budget forms by certain specified committees, and the issuance and distribution of the budget forms by the Secretary of Internal Affairs to the commissioners, controllers or auditors of the designated counties. The committees meet at the call of the Secretary of Internal Affairs.

Your basic question is whether the budget forms prepared by the committees in 1962, which you propose to distribute, are authorized for third class counties and institution districts in

[1] County institution districts in counties of the fourth, fifth and sixth classes were abolished by Section 6 of the Act of September 19, 1961, P. L. 1495, 16 P. S. Section 2161.

such counties.[2] You also raise questions as to the regularity and legality of the committee proceedings. Finally, you inquire as to your legal authority, in second, third, seventh and eighth class counties, to permit the filing of separate budget forms by the county and the institution district in such county. These problems will be dealt with in order.

(1) Third class county representatives have contended that the Act of September 19, 1961, P. L. 1495, 16 P. S. Section 2160 *et seq.*, has prohibited the committees from preparing new budget forms for use in their counties. As noted above, this act abolished institution districts in fourth, fifth and sixth class counties. The act transferred to the respective counties the property, powers, duties and obligations of these institution districts. The act also contained other provisions relating to foster homes and the care of children and youths.

The only possible provision in the 1961 act which touches our problem is Section 3 which adds a new subsection to Section 1785 of The County Code, *supra*:

> "(f) It shall be the duty of the Secretary of Internal Affairs to include within the budget and report forms specified in this article the changes necessitated by the provisions of this act in regard to property, powers, duties and obligations of institution districts transferred to counties and the committee established by this section shall not be responsible therefor."

Subsection (f) obviously applies only to the institution districts "transferred to counties", viz., fourth, fifth and sixth class counties. It has no significance for third class counties,[3] or, for that matter, second, seventh or eighth class counties. In this connection, it should be noted that the amendment relieves the committee of any responsibility for incorporating in the budget forms the changes necessitated by the 1961 act in regard to the property, powers, duties and obligations of the transferred institution districts; this is made the sole duty of the Secretary of Internal Affairs.[4] But even in fourth, fifth and

[2] It is clear, as will be seen below, that the answer to this question is equally applicable to all counties except those of the first class.

[3] In fact, although the Senate Bill which resulted in the 1961 act originally provided for the abolishment of institution districts in third class counties as well, the final act was restricted to fourth, fifth and sixth class counties.

[4] The budget forms have not been revised for more than 20 years, and there has been widespread recognition of the need for such revision and modernization. In view of this, the Secretary of Internal Affairs decided to fulfill her duty under the 1961 amendment and at the same time initiate the committee procedure for a general revision of the budget forms.

sixth class counties, we do not interpret the amendment as in any way modifying the committee procedure set up in Section 1785 for the preparation of *new* budget forms.[5]

We conclude, therefore, that the duties of the committees and the Secretary of Internal Affairs with respect to the preparation of budget forms, as set forth in the statutory provisions referred to at the beginning of this opinion, are in no way affected by the 1961 act.

(2) Your next question has to do with the legality of the committee proceedings leading up to the adoption of the new 1962 budget forms.

Were the forms produced by the committees or by your department? This department is satisfied that the new budget forms were properly prepared by the committees, and that all of the statutory provisions with respect to selection and appointment of committee members, notice of meetings, and committee action have been met. A final draft of the new budget form was unanimously adopted by all committees at a regularly scheduled meeting, the minutes of which were signed by all members of the committees.

Did the committees give consideration to the possible use of separate budget forms for certain counties and institution districts to meet special needs? Such consideration is provided for in Section 1982(c) of the Second Class County Code, *supra*, and Section 1785(d) of The County Code, *supra*; there is no comparable provision for institution districts. The short answer to this question is that the committees unanimously agreed on a standard budget form for all counties, and the final action speaks for itself. With separate committees for different classes of counties and institution districts meeting jointly, it is clear that the possibility of using separate forms would have had to receive consideration.

(3) May the Secretary of Internal Affairs permit second, third, seventh and eighth class counties, and institution districts in such counties, at their election, to file separate budgets instead of one budget for the county and institution district? There is no statutory provision on this subject and it is our

[5] Except for the 1961 act, the statutes dealing with the preparation and issuance of budget forms have not been amended or otherwise affected by the Legislature.

opinion that this is a purely administrative matter for your decision. You indicate that some counties would prefer separate filing. As all of the necessary information prescribed by the committees to be included in the budget forms would be readily available whichever method of filing was chosen, there is no reason not to permit such an election.

It is our opinion, therefore, and you are accordingly advised, that the duties and responsibilities of the committees and the Secretary of Internal Affairs to prepare and distribute budget forms in all counties except those of the first class, as provided for in Section 1982 of the Second Class County Code, Section 1785 of The County Code, and Section 312 of the County Institution District Law, all *supra,* have not in any way been affected by the provisions of the Act of September 19, 1961, P. L. 1495, 16 P. S. Section 2160 *et seq.,* or any other legislation; that the committees acted in accordance with the statutory mandates in adopting the new 1962 budget forms; and that in second, third, seventh and eighth class counties you may permit the counties and the institution districts therein, at their election, to file separate budgets.

Very truly yours,

DEPARTMENT OF JUSTICE,

HERBERT N. SHENKIN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 254

Rent collection—Property condemned for highway purposes—Department of Property and Supplies—Department of Highways—Sections 2402(a), (i), and 501 of The Administrative Code of 1929.

The Commonwealth of Pennsylvania is entitled to collect rent on properties which have been condemned for highway purposes, and the primary responsibility for the management of such properties and the collection of income therefrom is in the Department of Property and Supplies subject to coordination with the Department of Highways in accordance with §501 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended.

Harrisburg, Pa., November 21, 1962.

Honorable Park H. Martin, Secretary of Highways, Harrisburg, Pennsylvania.

Sir: You have asked our opinion whether the Commonwealth is entitled to collect rent on properties which have been condemned for highway purposes. In the event that our answer is in the affirmative, you further request advice whether your Department has any responsibility for the management of the properties and the collection of income therefrom.

Under the eminent domain provisions of the present Highway Code, land is taken and title passes to the Commonwealth when the right-of-way plans are approved by the Secretary of Highways and the Governor and filed as a public record.[1]

Frequently, however, a considerable period of time elapses between the time of condemnation and the time when the right-of-way is cleared for highway construction, and the former owner or his tenant often continues occupancy of the premises in the interim.

But since, as of the date of taking, the former owner and those claiming under his title cease to have rights in the property, *Dyer v. Commonwealth*, 396 Pa. 524, 152 A. 2d 760 (1959), such use creates a tenancy at sufferance for which the Commonwealth is entitled to collect a reasonable rent. *Cf. Philadelphia v. Miskey*, 68 Pa. 49 (1871). See also, *Dougherty's Estate*, 58 D. & C. 202 (1947); *Williams v. Ladew*, 171 Pa. 369, 33 Atl. 329 (1895); *Henwood v. Cheeseman*, 3 S. & R. 500 (1817).

Of course, in lieu of rent the Commonwealth may agree with the owner to a reduction in the price paid for the property or to a waiver of detention damages. The nature of the consideration to be obtained from the former owner for his tenancy is within the discretion of the representatives of the Commonwealth responsible for the condemnation negotiations.

Even if, upon condemnation, the former owner vacates the premises, the Commonwealth still has the duty to make the condemned property income-producing while occupancy is still practical so as to minimize the public expenditure.

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[1] Act of June 1, 1945, P. L. 1242, Sections 208, 210, 36 P. S. Sections 670.208, 670.210. See also Section 2003(h) of The Administrative Code of 1929, P. L. 177, as amended, 71 P. S. Section 513(h); Act of June 14, 1923, P. L. 754, Section 3, as amended, 36 P. S. Section 953. *Henry v. Allegheny County*, 403 Pa. 272, 277, 169 A. 2d 874 (1961).

The first question being answered in the affirmative, we consider the functions of the Department of Highways as they bear on property supervision and rental.

The Administrative Code of 1929 places upon the Department of Property and Supplies the duty to rent all real estate owned by the Commonwealth which is not being used in connection with State work. With this responsibility goes the power of custodial supervision over all buildings, land and property of the State. Section 2402 (i) and (a) of the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 632 (i), (a). It would therefore follow that the Department of Property and Supplies, rather than the Department of Highways, is the appropriate agency for collecting rent from property condemned by the Commonwealth for highway purposes.

However, while the Department of Highways has personnel employed throughout the State in twelve highway districts, the Department of Property and Supplies does not, and hence this function may well be more readily carried out by Highways than by Property and Supplies. Under these circumstances the provisions of Section 501 of The Administrative Code of 1929, Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 181, dealing with coordination of work may be invoked. This section provides that:

> "The several administrative departments * * * shall devise a practical and working basis for cooperation and coordination of work * * * and shall, so far as practical, cooperate with each other in the use of employes * * * * The head of any administrative department * * * may empower or require an employe of another such department * * * subject to the consent of the head of such department, * * * to perform any duty which he or it might require of the employes of his or its own department * * * *"

By virtue of this authority the two Departments may make such arrangements as will best assure the proper management of property condemned by the Commonwealth.

It is our opinion, therefore, and you are accordingly advised, that the Commonwealth is entitled to collect rent on properties which have been condemned for highway purposes, and that the primary responsibility for the management of such properties and the collection of income therefrom is in the Department of

Property and Supplies, subject to coordination with the Department of Highways in accordance with The Administrative Code of 1929.

Very truly yours,

DEPARTMENT OF JUSTICE,

ALAN MILES RUBEN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 255

Domestic stock and mutual insurance companies—Place for holding annual and special meetings of stockholders or members.

Annual and special meetings of stockholders or members of domestic stock and mutual insurance companies must be held within the boundaries of the Commonwealth of Pennsylvania. Such meetings are to be held in the city set forth in the insurance company's Articles of Agreement as the location of its principal office.

Harrisburg, Pa., December 5, 1962.

Honorable Theodore S. Gutowicz, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion as to whether insurance companies incorporated under the laws of the Commonwealth of Pennsylvania may, in the absence of specific statutory authority, hold meetings of stockholders in the case of stock companies, or members in the case of mutual companies, outside the physical boundaries of the Commonwealth of Pennsylvania. You specifically raise the following questions:

1. Must the annual and special meetings of stockholders or members of domestic stock and mutual insurance companies pursuant to Article III of the Insurance Company Law of 1921, 40 P. S. Section 421 et seq., be held within the boundaries of the Commonwealth of Pennsylvania?

2. Assuming that such meetings must be held within the boundaries of the Commonwealth of Pennsylvania, must they be

held in the city set forth in the insurance company's charter as the location of its principal office?

Section 304 of the Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, as amended, 40 P. S. Section 424, provides as follows:

> "The annual meeting for the election of directors or trustees of any insurance company shall be held at such time on or before the first day of May as the by-laws of the company may direct; of the time and place of which meeting at least thirty days' previous notice shall be given to the stockholders, or, in the case of a mutual company, to the members, by publication not less than three times in at least two daily or weekly newspapers, and in the legal periodical, if any, designated by the rules of court of the proper county for the publication of legal notices, published in the city or county wherein the company is domiciled."

You will note that Section 304 is completely silent as to the place where an annual meeting must be held. The various provisions in the Insurance Company Law of 1921 for special meetings are equally silent as to place of meeting.

At common law, meetings of shareholders of corporations had to be held within the boundaries of the state which created the corporation in the absence of express statutory authority permitting such meetings to be held elsewhere: Fletcher Cyclopedia Corporations, Vol. 5, Section 2002-3; 13 Am. Jur. Corporations, Section 474.

Pennsylvania appears to have accepted the general rule in *Derry Council, etc. v. State Council, etc.,* 197 Pa. 413, 416, 47 Atl. 208 (1900), where the Court said:

> " * * * It is true, as a general proposition, that a corporation can have no legal existence beyond the bounds of the sovereignty that gave it life, and must dwell within the place of its creation: Ohio & Miss. R.R. Co. v. Wheeler, 1 Black 286; County of Allegheny v. Cleveland & Pittsburgh R.R. Co., 51 Pa. 228; Commonwealth v. Standard Oil Co., 101 Pa. 119. It is equally true, as a general rule, that, as the corporation cannot exist beyond the limits of the sovereignty from which it springs, its strictly corporate acts must be performed within such limits: Miller v. Ewer, 27 Me. 509; Smith v. Silver Valley Mining Co., 64 Md. 85; Green's Brice's Ultra Vires, p. 442, note a; Thompson on Corporations, sec. 694. * * * "

The Court in discussing the policy of the rule stated that it was designed to protect shareholders from hardship and fraud.

Other jurisdictions have likewise adopted the rule that meetings of shareholders are to be held within the boundaries of the state of incorporation: *Harding v. American Glucose Company,* 182 Ill. 551, 55 N. E. 577 (1899); *Hening and Hagedorn v. Glanton,* 27 Ga. App. 339, 108 S.E. 256 (1921).

Turning to Pennsylvania corporate law, we find that Section 501, subsection A, of the Business Corporation Law of May 5, 1933, P. L. 364, as amended, 15 P. S. Section 2852-501, specifically permits the meetings of shareholders of a *business corporation* to be held outside the Commonwealth. However, this act does not apply to any corporation which is subject to the supervision of the Insurance Department: Act of May 5, 1933, P. L. 364, Section 4, subsection 3, as amended, 15 P. S. Section 2852-4(3).

Thus, although the Legislature has seen fit to depart from the general common law rule with regard to business corporations, it has not indicated an intention to do so with respect to insurance companies organized under the Insurance Company Law.

Section 304 of the Insurance Company Law of 1921, while not providing for the place where annual meetings must be held, does make provision for notice of such meetings. The section provides that notice of the place of the meeting is to be published in the county wherein the company is domiciled. As we are concerned with domestic insurance companies and as the notice of meeting must be published in the county wherein the company is domiciled, it could be maintained that this is some legislative indication that the place of the meeting should be the place of the notice.[1]

It is our opinion, therefore, that annual and special meetings of shareholders or members of domestic stock and mutual[2] insurance companies must be held within the Commonwealth of Pennsylvania.

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[1] Section 328 of the Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, Article 3, as amended, 40 P. S. Section 451, provides that a meeting of stockholders for the purpose of reducing capital stock shall be held "* * * at its chief office or place of business in this Commonwealth * * *", and that notice of such meeting shall be published in the county where the chief office or place of business is located. Thus, notice is given in the place where the meeting is to be held.

[2] Fraternal Benefit Societies are excluded under the Act of July 17, 1935, P. L. 1092, Section 17, 40 P. S. Section 1067, and the Act of June 4, 1937, P. L. 1643, Section 3, 40 P. S. Section 1103. These acts provide that Fraternal Societies may hold their meetings in any state where the society has branches.

With regard to the actual situs of meetings, Section 328 of the Insurance Company Law of 1921, footnote 1 *supra,* provides that meetings of shareholders for the purpose of reducing capital stock shall be held at the company's chief office or place of business. No provision is made with regard to the actual situs of annual or other special meetings of shareholders.

It would seem that the situs of such meetings should be the place set forth in the Articles of Agreement pursuant to Section 203 of the Insurance Company Law of 1921, Act of May 17, 1921, P. L. 682, as amended, 40 P. S. Section 383, which provides:

> " * * * agreement shall specify: * * * (d) The place in which it is to be established or located. * * * "

The place of business or location of the company is where the corporate functions are to be performed, the stockholders hold their elections, and the directors manage and direct the business of the corporation:1895-96 Op. Atty. Gen. 332 (1877); Fletcher Cyclopedia Corporation, Vol. 5, Section 2001.

It is our opinion, therefore, and you are advised accordingly that:

1. Annual and special meetings of stockholders or members of domestic stock and mutual insurance companies must be held within the boundaries of the Commonwealth of Pennsylvania.

2. Such meetings are to be held in the city set forth in the insurance company's Articles of Agreement as the location of its principal office.

Very truly yours,

DEPARTMENT OF JUSTICE,

FREDERIC G. ANTOUN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 256

Fiduciary funds—Investments in bonds of municipal authorities—Sections (5)3 and 6 of the Fiduciaries Investment Act of 1949, as amended.

Section 6 of the Fiduciaries Investment Act of 1949, the Act of May 26, 1949, P. L. 1828, as amended by the Act of September 28, 1961, P. L. 1720, does not authorize investments of "legal" fiduciary funds in bonds of municipal authorities organized under the laws of Pennsylvania or municipal authorities organized under the laws of other states. Section 5(3) of the Fiduciaries Investment Act of 1949, establishing standards governing investments in Pennsylvania municipal authority bonds, remains in full force and effect, and is in no way modified by the 1961 amendment of Section 6 of that act.

Harrisburg, Pa., December 11, 1962.

Honorable Robert L. Myers, Jr., Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have asked to be advised whether the expanded definition of "corporation" in the 1961 amendment of Section 6 of the Fiduciaries Investment Act of 1949 changes the law with respect to investments in bonds of municipal authorities by State bank and trust companies or trust companies for the benefit of fiduciary accounts.

You specifically raise the following questions:

1. Are investments of "legal"[1] fiduciary funds in bonds of municipal authorities organized under the law of Pennsylvania now governed or affected by Section 6 of the Fiduciaries Investment Act of 1949, as amended in 1961?[2]

2. Are investments of "legal" fiduciary funds in bonds of municipal authorities organized under the law of other states of the United States now authorized by the amended Section 6 of the Fiduciaries Investment Act of 1949, so as to permit investment in their bonds by Pennsylvania trustees of "legal" accounts?

3. What effect, if any, does the new wording of Section 6 of the Fiduciaries Investment Act of 1949 have upon subsection (3) of Section 5 of the act, which still purports to limit Pennsylvania fiduciaries of "legal" accounts wishing to invest in municipal authorities to the purchase of the bonds of Pennsylvania municipal authorities and subjects such purchases to other restrictions?

[1] "Legal" fiduciary accounts apply to those situations where fiduciaries are not operating under trust instruments granting discretion to purchase municipal authority obligations, and where, accordingly, such investments are governed by the Fiduciaries Investment Act of 1949.

[2] Section 6 contains the so-called "prudent man" investment standard.

Prior to 1961, Section 6 of the Fiduciaries Investment Act of 1949, the Act of May 26, 1949, P. L. 1828, 20 P. S. Section 821.6, provided:

> "Any fixed interest-bearing obligation, including bonds, notes, debentures, and car-trust certificates, issued, guaranteed, or assumed by, a corporation organized under the laws of the United States, of any commonwealth or state thereof, or of the District of Columbia, shall be an authorized investment if—
>
> "(1) purchased in the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital;
>
> * * * * * * *
>
> " 'Corporation' as used in this section shall include a voluntary association, a joint-stock association or company, a business trust, a Massachusetts trust, a common-law trust, and any other organization organized and existing for any lawful purpose and which, like a corporation, continues to exist nothwithstanding changes in the personnel of its members or participants, and conducts its affairs through a committee, a board, or some other group acting in a representative capacity."

The 1961 amendment added to the definition of "corporation" the words "a municipal or quasi-municipal corporation by whatever name called".

Standing alone, bonds of municipal authorities would appear to be covered by Section 6 regardless of the 1961 change. A municipal authority is a corporation (*Evans v. West Norriton Township Municipal Authority*, 370 Pa. 150, 87 A. 2d 474 (1952)), and the expanded definition of "corporation" in Section 6 covers organizations which are not usually thought of as corporations.

Looking at the entire statute, however, Section 6 is not controlling because Section 5, subsection (3), of the 1949 act *specifically* provides for investment in Pennsylvania municipal authority bonds which meet certain tests relating to revenue ratios and other financial standards. The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Section 63, 46 P. S.

Section 563, provides that when there is present in the law a general provision and a special provision, the special shall prevail and shall be construed as an exception to the general provision. Thus, because of the specific provisions of Section 5, subsection (3), bonds of municipal authorities, state or out-of-State, were considered as excepted from the general provisions of Section 6.

The 1961 amendment of Section 6, the Act of September 28, 1961, P. L. 1720, Section 1, did not, in our opinion, change this situation. As previously indicated, the amendment specifically included in the definition of "corporation" the words " * * * a municipal or quasi-municipal corporation by whatever name called * * * " As we have seen, the original act, standing alone, was broad enough to have covered municipal authorities. Furthermore, a municipal authority is not a "municipal or quasi-municipal corporation"—it is a corporate agency of the State, not the child of a municipality. See *Simon Appeal,* 408 Pa. 464, 467, 470, 184 A. 2d 695 (1962), and cases there cited.

If, for the purpose of discussion, we assume that the term "quasi-municipal corporation" does include a municipal authority, then investment in out-of-State municipal authority securities would be allowed under Section 6. But the restrictions imposed by Section 5, subsection (3), of the 1949 act would still govern investments in bonds of *Pennsylvania* municipal authorities. It would indeed be a strained statutory interpretation to hold that the inclusion of municipal authorities within the term quasi-municipal corporation under Section 6 impliedly repeals the strict standards previously established for Pennsylvania municipal authority investments. Thus we would be faced with the alternative result that out-of-State municipal authority investments would be subject to the standards of a prudent man while Pennsylvania municipal authority investments would still be subject to the stricter tests relating to revenue ratios,[3] a result which is not supportable.

It is our opinion, therefore, and you are accordingly advised that:

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[3] Section 5, subsection (3), of the 1949 act authorizes investments in the bonds of Pennsylvania municipal authorities "* * * if the obligations are not in default and if the project * * * is under lease * * * or subject to a service contract * * * pursuant to which the authority will receive lease rentals or service charges available for fixed charges on the obligations, which will average not less than one and one-fifth times the average annual fixed charges of such obligations over the life thereof, * * *" 1949, May 26, P. L. 1828, Section 5(3), as amended.

1. Investments of "legal" fiduciary funds in bonds of municipal authorities organized under the laws of Pennsylvania are not authorized under Section 6 of the Fiduciaries Investment Act of 1949, as amended.

2. Investments of "legal" fiduciary funds in bonds of municipal authorities organized under the laws of other states of the United States are not permitted by the amended Section 6 of the Fiduciaries Investment Act of 1949.

3. Section 5, subsection (3), of the Fiduciaries Investment Act of 1949, establishing standards governing investments in Pennsylvania municipal authority bonds, remains in full force and effect, and is in no way modified by the 1961 amendment of Section 6 of that act.

Very truly yours,

DEPARTMENT OF JUSTICE.

FREDERIC G. ANTOUN,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

OFFICIAL OPINION No. 257

School health services—Private and parochial school children—Use of local tax funds—Article XIV of the Public School Code of 1949—Article X, Section 2 of the Constitution of Pennsylvania.

Local school districts may use local tax funds to supplement State reimbursements in providing school health services to private and parochial school children as required by Article XIV of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, and the use of tax funds for this purpose is not in violation of Article X, Section 2 of the Constitution of Pennsylvania.

Harrisburg, Pa., January 9, 1963.

Honorable Charles H. Boehm, Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: In response to a question raised by the State Advisory Committee to the Interdepartmental School Health Council, you request advice concerning the legal authority of local school districts to use local tax funds to supplement State reimburse-

ments in providing school health services to private and parochial school children.[1]

Article XIV of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended, 24 P. S. §§14-1401 to 14-1423, requires all school districts and joint school boards to provide school health services to *all* children of school age within the Commonwealth.

"Health services" are defined in Section 1402, 24 P. S. §14-1402, to include an annual vision test, a hearing test, height and weight measurements, chest X-rays and school nurses services. In addition, comprehensive health records are required to be maintained for each child of school age, and dental examinations are required to be given (Section 1403, 24 P. S. §14-1403).

"Children of school age" or "child of school age" are defined in Section 1401(1), 24 P. S. §14-1401(1), to mean "every child attending or who should attend an elementary grade or high school, either public or private, within the Commonwealth and children who are attending a kindergarten which is an integral part of a local school district."

State reimbursements for health services rendered to children of school age by school districts and joint school boards are paid pursuant to Section 2505.1 of the Public School Code of 1949, *supra,* as amended September 29, 1961, P. L. 1743, 24 P. S. §25-2505.1. This program of State-aid to local school districts is designed to relieve the districts of the major financial burden of the school health services program. However, health services in excess of those reimbursed by the Commonwealth may be provided by local school districts. Subsection (c) of Section 2505.1, 24 P. S. §25-2505.1(c), expressly states:

> "(c) Nothing herein contained shall be construed to prohibit any school district or joint school board from expending for health services amounts in excess of the reimbursable amounts."

[1]This question involves an interpretation of the power of local school districts to expend tax funds, and the opinion of the State Department of Justice is not necessarily binding on the school districts. On the other hand, the Superintendent of Public Instruction, under Section 1302(d) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 352, is required to give advice to school districts on school laws which, of course, would include the School Health Services article of the Public School Code discussed *infra.* The question involved is of state-wide application and it is, therefore, appropriate for this Department to respond to your inquiry.

These specific sections of the Public School Code of 1949, especially the latter quoted provision, establish the legal authority of local school districts to provide health services to school children attending private as well as public schools. Section 507 of the Public School Code of 1949, 24 P. S. §5-507, provides school districts with legal authority and power to levy and collect the necessary taxes required to provide school health services.

While the foregoing ostensibly supplies the answer to your inquiry, the question must be pursued further to consider the matter of the constitutionality of taxation to provide health services to private and parochial school children, whether by the Commonwealth or by its agents and instrumentalities, the local school districts.

Article X, Section 2 of the Pennsylvania Constitution provides that "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." This constitutional provision does not prohibit the rendering of health services to parochial school children as the rendering of such services does not constitute an appropriation or use of tax moneys for the support of a sectarian school. Such services are intended to preserve the health of children, not to promote the sectarian school they might attend.

The distinction between aiding a sectarian institution and aiding an individual was clearly recognized by the Supreme Court of Pennsylvania in *Schade* v. *Allegheny County Institution District,* 386 Pa. 507, 126 A. 2d 911 (1956), where the Court sustained the payment of funds by a county institution district for the support, care and maintenance of delinquent, neglected or dependent children placed by the Juvenile Court of Allegheny County in sectarian or denominational homes and institutions. The opinion of the Court, written by Mr. Justice (later Chief Justice) Jones, specifically recognized the distinction between aiding needy children and promoting the establishment of religion.[2]

In *Everson* v. *Board of Education,* 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1946), the Supreme Court of the United

[2]The *Schade* case was considered at length in Formal Opinion No. 686, 1957 Op. Atty. Gen. 24, in which direct payments to sectarian or denominational nursing homes made at the request of needy persons applying for financial assistance for nursing home care were held not to offend the Constitution of Pennsylvania.

States upheld the constitutionality of a use of public tax funds for the transportation of pupils to and from parochial or private schools as a public welfare activity and as not serving to promote the establishment of religion. The opinion of the Supreme Court delivered by Mr. Justice Black, contained the following significant language (330 U. S. at 16) :

> "* * * New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief."

The *Schade* case is authority for the proposition that tax funds may be expended in the furtherance of an admittedly governmental function, the care of needy children, and that such expenditure does not constitute support or establishment of religion. Essentially the same reasoning was used to reject the constitutional attack in *Everson,* where the Court deemed the transportation of school children "public welfare legislation."

The holdings in these cases apply with striking force to the question under consideration. The protection and preservation of the health of school children is clearly a proper governmental function in the nature of public welfare legislation, whether the children attend public, private or parochial schools, and the use of tax funds for this purpose cannot successfully be attacked on constitutional grounds. In fact, our question presents less difficulty as no tax moneys are being paid directly to sectarian schools or institutions, and school health services provided to individual children can hardly be found to aid even remotely the sectarian school attended by the recipients of such services.

We are, therefore, of the opinion and you are accordingly advised that local school districts may expend local tax funds to supplement State reimbursements in providing school health services to private and parochial school children.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,
Deputy Attorney General.

DAVID STAHL,
Attorney General.

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