Commonwealth of Pennsylvania

OPINIONS

OF THE

ATTORNEY GENERAL

OF

Pennsylvania

1963-1966

WALTER E. ALESSANDRONI
(Died May 8, 1966)

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(May 11, 1966 to January 17, 1967)

Attorneys General

OFFICIAL OPINIONS

1963-1966

OFFICIAL OPINION No. 258

Search warrant—Procedure prior to entering building—Reading warrant—Police officers.

A police officer in executing a search warrant is not required to read the search warrant before or after entering the premises to be searched. All that is necessary is that he exhibit the search warrant and inform the person to whom the same is being exhibited what is being done and why.

Harrisburg, Pa., April 30, 1963.

Honorable E. Wilson Purdy, Commissioner, Pennsylvania State Police, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to whether the law requires that police officers read a search warrant to the occupant of a building before entering such building.

In Pennsylvania, a number of statutes authorize the issuance of search warrants for various purposes. None of these statutes sets forth the degree of formality which must be followed in executing the warrant.

There is no Pennsylvania law or decision which renders a search illegal because the officer failed to announce and make known the purpose before entering the premises to execute a search warrant. See, U. S. *ex rel. Campbell v. Rundle, et al.* 216 F. Supp. 41 (E. D. Pa. 1963). Also, the Federal Rules of Criminal Procedure (Rule 41) do not require that the warrant be read before the search is valid.

The majority view appears to be that no formal statement as to the contents of a search warrant is required in order to validate its service: *Garrett v. State,* 194 Tenn. 124, 250 S. W. 2d 43 (1952); *Varon: Searches, Seizures and Immunities,* Vol. I, p. 373.

The general rule is that a search warrant should be served or exhibited to the person in charge of the place or premises to be searched before any search is commenced, and the peace officer should conduct the search with due regard for the person and property, and comport himself in a reasonable and orderly manner. The officer should inform the person named in the search warrant what is being done and why, as the purpose of the execution of the warrant is not only to empower the officer to make the search, but to inform the

suspected person of the nature of the offense which is the subject matter of the writ: *Goodman v. State*, 178 Md. 1, 11 A. 2d 635 (1940); *Varon: Searches, Seizures and Immunities*, Vol. I, p. 373.

From a consideration of the foregoing authorities, it is our conclusion that there is no obligation under Pennsylvania law for a police officer to read a search warrant either before or after entering the premises to be searched. All that is necessary is that the officer exhibit the search warrant and inform the person to whom the same is exhibited what is being done and why.

We suggest that when obtaining a search warrant, the police officer request a copy of the same from the issuing authority. Upon making the search the copy should be given to the person in charge of the premises to be searched.

Very truly yours,

DEPARTMENT OF JUSTICE,

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

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 259

Governor—Interim appointments—Senatorial confirmation—Term of office—Pennsylvania Constitution, Article IV, Section 8.

Under Article IV, Section 8 of the Pennsylvania Constitution interim appointees, those made by the Governor during the recess of the Senate, do not require Senatorial confirmation and are legally qualified to perform all of the duties of the office to which they have been appointed during a term expiring at the end of the next session of the Senate.

Harrisburg, Pa., August 12, 1963.

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

Sir: You have requested our opinion with respect to the status and extent of the authority of a gubernatorial appointee to hold and perform the duties of an office to which he has been appointed by the Governor during the recess of the Senate.

The Constitution of Pennsylvania clearly and unequivocally defines the authority of the Governor to appoint persons to certain offices. Article IV, Section 8 thereof requires that all appointments made while the Legislature is in Session must be confirmed by two-thirds of all the members of the Senate. It also makes specific provision for appointments by the Governor to fill vacancies in office occurring during the recess of the Senate without the consent of the Senate in the following language:

> "* * * he shall have power to fill all vacancies that may happen, in offices to which he may appoint, *during the recess of the Senate,* by granting commissions which shall expire at the end of their next session * * *" (Emphasis supplied)

Such appointments are known as "interim" appointments.

The Constitution and the law of Pennsylvania make no distinction with respect to the status, powers and authority of gubernatorial appointees whether or not made while the Senate is in Session or while it is in recess. The only distinction between the two types of appointments is that those confirmed by the Senate serve for the balance of the term, whereas those made during the recess of the Senate serve only until the end of their next Session. Upon taking the oath of office, the interim appointees are legally qualified officers.

You are, therefore, advised that under the Constitution of Pennsylvania interim appointees, those made by the Governor during the recess of the Senate, do not require Senatorial confirmation. Such appointees are fully and legally qualified to perform each and all of the duties of the office to which they have been appointed during a term expiring at the end of the next Session of the Senate.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 260

Public schools—Daily Bible reading—Section 1516 of the Public School Code of 1949, as amended—Validity.

Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by the Act of December 17, 1959, P. L. 1928, providing for readings from the Holy Bible at the beginning of each school day is unconstitutional.

Group Bible reading and prayer, as the practices have heretofore existed as devotional exercises or ritual in the public schools of the Commonwealth, may no longer be conducted, whether or not they are required or permitted by school boards, administrators or teachers, and whether or not the pupils engage in the practices voluntarily, or even with the express written consent of their parents.

Daily recitation of the Pledge of Allegiance, a period of silent meditation, readings from great literature, messages and speeches of great Americans and from other documents of our heritage, presentation of inspirational music, poetry and art, objective study about religion as a cultural force, objective study of comparative religion or the history of religion and Bible study for literary and historic qualities as part of a secular program of education may lawfully be substituted in the public schools in place of corporate prayer and Bible reading.

Harrisburg, Pa., August 26, 1963.

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

Sir: On June 17, 1963 in *Abington School District v. Schempp*, 374 U. S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963), the Supreme Court of the United States declared unconstitutional, under the Establishment Clause of the First Amendment to the United States Constitution, the Pennsylvania statute which requires the practice of beginning each school day readings from the Holy Bible: Section 1516 of the Public School Code of 1949, the act of March 10, 1949, P. L. 30, as amended December 17, 1959, P. L. 1928, 24 P. S. §15-1516. The Court simultaneously invalidated a rule of the Baltimore City Board of School Commissioners which required the recitation of the Lord's Prayer by the students in unison, in addition to the daily reading of Bible verses, as part of an opening exercise.

You have requested our opinion on the following questions:

1. What is the effect of the decision upon Section 1516 of the Public School Code of 1949 which requires that at least ten verses from the Holy Bible be read without comment at the opening of each public school on each school day?

2. May a board of school directors or a school administrator require or permit the Bible to be read and/or the Lord's Prayer recited as part of an opening exercise in the public schools of the school district?

3. May a public school teacher require or permit Bible reading and/or recitation of the Lord's Prayer as part of an opening exercise in his classroom?

4. May Bible reading and/or Lord's Prayer recitation as part of an opening exercise be permitted for pupils who voluntarily wish it and whose parents request it in writing?

Analysis of
Abington School District v. Schempp

The majority opinion in the *Abington* case, delivered by Mr. Justice Clark, laid stress upon the fact that throughout American history our national life reflects a religious people and a close identification of religion with our history and government:

> "* * * The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God'. Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. * * *" (374 U. S. 203, 213)

The Court cited precedents which held that neither a state nor the Federal Government can set up a church, or pass laws which aid one religion, aid all religions, or prefer one religion over another, and that the purpose of the First Amendment providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," was "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Everson v. Board of Education,* 330 U. S. 1 (1947); *McCollum v. Board of Education,* 333 U. S. 203 (1948).

In relating the Establishment and Free Exercise Clauses of the First Amendment, the Court defined the requirement of "neutrality" with respect to religion and religious beliefs imposed upon the government, and stated: "In the relationship between man and religion, the state is firmly committed to a position of neutrality." (374 U. S. 203, 226)

The test for determining when the bounds of "neutrality" are breached and the scope of legislative power exceeded is stated to depend upon whether either the purpose or the primary effect of the law "is the advancement or inhibition of religion." In other words, "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." The Court applied this test to the facts of the cases before it and found that Bible reading and recitation of the Lord's Prayer conducted as part of a daily program of opening exercises held in public schools under the supervision and with the participation of teachers constituted a religious ceremony.

Effect of the Supreme Court Decision Upon
The Pennsylvania Bible Reading Statute

The rule is well settled that an unconstitutional statute, though having the form and name of law, is in reality no law. Such a statute is void, and in legal contemplation is as inoperative as if it had never been passed. See: 11 Am. Jur., Constitutional Law, §148, at pages 827-829. Thus, Section 1516 of the Public School Code of 1949, having been declared unconstitutional by the Supreme Court of the United States, is absolutely void. As such, it cannot impose duties, create rights or confer legal power or authority on anyone.

Discontinuance of
The Bible Reading Practice

The second, third and fourth questions presented can be treated together for purposes of this Opinion, since each involves the same issue, whether public school officials may require or permit Bible reading as a devotional, classroom exercise.

The ruling of the Supreme Court prohibits Bible reading in the public schools as a devotional exercise no matter who the sponsoring or supervising agent or agency. The fact that it was a school board rule of Baltimore which was stricken down in *Murray v. Curlett*, No. 119, October Term, 1962, the companion case decided with

Abington, clearly precludes school board action to accomplish by rule or regulation that which cannot be done by statute. Nothing appears in the various opinions of the Supreme Court to indicate that the strictures upon legislative and school board action do not equally bind school administrators and classroom teachers. In each situation it is the power, prestige and authority of the Commonwealth represented by school boards, administrators and teachers which would be made to subtly stand behind and sanction the conduct of the religious observance. This the First Amendment is held to forbid.

Further, it makes no legal difference that Bible reading as a devotional exercise is "permitted" rather than "required". The mere permission constitutes tacit approval and violates the concept of neutrality as defined by the Supreme Court. To permit group religious ceremony or activity in the public schools merely because it is not mandated would be inconsistent with the Supreme Court's decision. Its result would be a repudiation of the law of the land by subterfuge. Group Bible reading and prayer, therefore, as the practices have heretofore existed as devotional exercises or ritual in the public schools, cannot continue in the public schools, whether or not they are required or permitted by school boards, administrators or teachers, and whether or not the pupils engage in the practices voluntarily, or even with the express written consent of their parents.

Conclusion

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

(1) Section 1516 of the Public School Code of 1949, the act of March 10, 1949, P. L. 30, as amended December 17, 1959, P. L. 1928, 24 P. S. §15-1516, is unconstitutional and, therefore, absolutely void; and

(2) Group Bible reading and prayer, as the practices have heretofore existed as devotional exercises or ritual in the public schools of the Commonwealth, may no longer be conducted, whether or not they are required or permitted by school boards, administrators or teachers, and whether or not the pupils engage in the practices voluntarily, or even with the express, written consent of their parents.

Permissible Programs

In view of the foregoing, it becomes pertinent to consider what programs are permissible in the public schools.

The majority opinion and the separate concurring opinions of Mr. Justice Brennan and Mr. Justice Goldberg in *Abington* each call attention to methods and means whereby the secular ends and purposes sought to be obtained from devotional exercises employing Bible reading and prayer may be obtained without offending the First Amendment.

Secular ends and purposes such as those of fostering harmony and tolerance among the pupils, enhancing the discipline and authority of the teacher and inculcating moral values and ethical precepts might equally be served by methods other than devotional exercises. This would be consistent with the suggestion of Mr. Justice Brennan, where he stated:

> "* * * It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government. * * *" (374 U. S. 203, 281)

Referring specifically to non-devotional use of the Bible in the public schools, Mr. Justice Brennan further stated:

> "The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum religious materials should be cited, are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. * * *" (374 U. S. 203, 300)

Teaching *about* religion as a substitute for Bible reading was encouraged in the majority opinion as follows:

> "* * * In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or

> of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment. * * *" (374 U. S. 203, 225)

Mr. Justice Goldberg's concurring opinion, joined in by Mr. Justice Harlan, said this concerning teaching about religion:

> "Neither the state nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinion in the present and past cases that the Court would recognize the propriety of providing military chaplains and of teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools. * * *" (374 U. S. 203, 306)

In view of the foregoing, the following nonreligious practices may be substituted lawfully in the public schools in place of corporate prayer and Bible reading without offending the First Amendment: daily recitation of the Pledge of Allegiance; a period of silent meditation; readings from great literature, messages and speeches of great Americans and from other documents of our heritage; presentation of inspirational music, poetry and art; the objective study about religion as a cultural force; objective study of comparative religion or the history of religion; and Bible study for literary and historical qualities as part of a secular program of education.

It should be clear that nothing in the decision of the Supreme Court or in this Opinion imposes ironclad limitations upon the mention of God, references to the Bible or teaching about religion in the public schools, nor is there any restraint upon unorganized, private, personal prayer or Bible reading by pupils during free moments of the day which is not a part of the school program and does not interfere with the school schedule.

Very truly yours,

DEPARTMENT OF JUSTICE,

JOHN D. KILLIAN III,
Deputy Attorney General,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 261

Escheat—Limitations on action for escheat or for payment into State Treasury without escheat—Act of July 10, 1963, P. L. 233.

The Act of July 10, 1963, P. L. 233, which provides that no action for escheat, or for payment into the State Treasury without escheat, shall be commenced or maintained unless commenced within 15 years after the property sought shall first have escheated, or become escheatable or payable into the State Treasury without escheat under any act of the General Assembly, applies only to judicial proceedings.

The fifteen-year repose period provided therein begins to run at the time when the property became escheatable or payable into the State Treasury without escheat.

No pending action may be maintained with respect to any claim made therein for property which became escheatable or payable into the State Treasury without escheat more than fifteen years prior to commencement of the action.

The period of repose does not bar an action for escheat or for payment into the State Treasury without escheat in cases where the reporting requirements were not strictly complied with, as a consequence whereof the Commonwealth did not receive notice within the time specified in the law.

Harrisburg, Pa., December 18, 1963.

Honorable Theodore B. Smith, Jr., Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: We are in receipt of your request for an interpretation of Act of July 10, 1963, P. L. 233 (Act No. 130), which provides as follows:

> "No action for escheat, or for payment into the State Treasury without escheat, shall be commenced or maintained unless such action has been, or is commenced, within fifteen years after the property sought in such action shall first have escheated, become escheatable or payable into the State Treasury without escheat under any act of the General Assembly."

Initially, it should be stated that the word "action" as used in this act applies to judicial proceedings by which the Commonwealth seeks to enforce its rights of escheat in a court of law.

Period Covered by the Statute

The right of a state to take by escheat property, the owner of which is unknown or whose whereabouts unknown, is a time-honored

prerogative of sovereignty both at common law and by statutory enactment. Proper statutory interpretation presumes that the legislature does not intend to deprive the Commonwealth of any right or property unless it expresses its intention to do so in explicit terms or makes such inference irresistible.

The act clearly indicates a definite legislative intent to divest the Commonwealth of a portion of its sovereign prerogative in regard to escheatable property. It bars the Commonwealth from instituting legal proceedings to take monies or property which have been escheatable or subject to being taken without escheat for fifteen years or more. As noted above, the act applies only to judicial actions. It does not prevent the Commonwealth from taking escheatable property when it is voluntarily paid over by a custodian more than fifteen years after it has escheated or become subject to being taken without escheat.

The act provides that the fifteen-year period prescribed therein does not commence until "the property shall first have escheated, become escheatable or payable into the State Treasury without escheat". This manifests a clear intent that the period of repose commences only *after* property has become escheatable or payable into the State Treasury without escheat under any law of the Commonwealth, i. e., after it has been unclaimed, or its owner unknown, for the period of time specified in the applicable statute. The fifteen years must be "tacked on" to that period before the bar of the statute is effective. Once an action has been commenced within the fifteen-year period, there is no time limit with regard to the time consumed in the prosecution of the Commonwealth's claim to final judgment.

Effect on Pending Litigation

The statute makes no specific reference to pending litigation. If the sole purpose of the legislature was to bar future claims, this object could have been accomplished by providing that no action should be "commenced" within the statutory period. However, legislative intent in this regard is disclosed in the use of the phrase "commenced *or maintained*". The word "maintained" must be given significance, otherwise its use by the legislature would be superfluous and meaningless. The use of the term "maintained" must, therefore, be construed to manifest an intention to have the law applied retroactively and bar that part of any action which includes a claim for monies which became escheatable or payable into the State Treasury more than fifteen years prior to the date of the institution of such

action. Accordingly, actions for escheat or payment into the State Treasury without escheat may be maintained only insofar as they apply to funds which became escheatable no more than fifteen years prior to the commencement of such action, i.e., the filing of a petition. Thus, an action commenced in 1963 may reach back only to funds which became escheatable in 1948, and any judgment rendered therein must exclude any item that may have been claimed for any period of time prior thereto.

Application of Statute Where Required Reports are not Filed

You have asked whether the act will bar an action for escheat or for payment into the State Treasury without escheat in situations where (1) a holder of property never filed a report required by law when, in fact, it had escheatable items in its possession; or (2) a holder filed an erroneous report concerning escheatable items in its possession; or (3) a holder filed a report of escheatable items more than fifteen years after property became escheatable.

Under the various provisions of the escheat law positive reporting duties are imposed upon parties holding escheatable property. The Act of June 7, 1915, P. L. 878, §4, 27 P. S. §262, requires verification by affidavit of reports of escheatable property required to be given to the Auditor General. The Acts of May 16, 1919, P. L. 169, §6, 27 P. S. §361, and of June 25, 1937, P. L. 2063, §11, 27 P. S. §444, provide that the improper reporting of escheatable property is a misdemeanor punishable by fine and/or imprisonment. The failure to report escheatable funds in their correct amounts results in significant sanctions against the party charged with a duty to report.

To conclude that this act bars actions where escheatable funds were not properly reported to the Commonwealth would, in effect, reward one for his own misdemeanor—an absurd result. Since the legislature is presumed never to intend such a result, a contrary conclusion must be reached: *Commonwealth v. Peoples et al.*, 345 Pa. 576 (1942).

The courts have held that when one ought to speak but remains silent, or when he fails to disclose what he ought to disclose, his inaction amounts to fraudulent concealment: *Rushbrook Coal Company v. Jenkins*, 6 Lack. Jur. 322, affirmed 214 Pa. 517 (1906). Similarly, the failure of corporate officers to record certain transactions on corporate books is fraudulent concealment: *Rush v. Butler Fair & Agricultural Association*, 391 Pa. 181 (1958). If a party does anything

to conceal the accrual of the Commonwealth's right of action and thus to mislead it, whether fraudulently or as a result of an innocent mistake, the period of limitations will not commence to run until the Commonwealth discovers the facts or until the circumstances are such that by the exercise or ordinary prudence it reasonably could have discovered them: *Barr v. Luckenbill,* 351 Pa. 508 (1945); *Plazak v. Allegheny Steel Company,* 324 Pa. 422 (1936); *Tellip v. Home Life Insurance Company of America,* 152 Pa. Super. 147 (1943). Since holders of escheatable property have a positive duty to report all such property, failure to so report is tantamount to affirmative concealment, and the period of limitations will not begin to run until a report is made or the Commonwealth is or should be put on notice that certain funds have become escheatable or payable into the State Treasury without escheat.

It is, therefore, our opinion, and you are accordingly advised, that (1) Act No. 130 of 1963 applies only to judicial proceedings; (2) the fifteen-year repose period provided therein begins to run at the time that the property became escheatable or payable into the State Treasury without escheat; (3) no pending action shall be maintained with respect to any claim made therein for property which became escheatable or payable into the State Treasury without escheat more than fifteen years prior to the commencement thereof; and (4) the period of repose provided for by the statute does not bar an action for escheat or for payment into the State Treasury without escheat in those cases where the reporting requirements of any statute were not strictly complied with, as a consequence whereof the Commonwealth did not receive notice within the time specified in the law.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 262

Constitutional law—Status of bill in even-numbered year session of the Legislature—Payments in lieu of taxes to political subdivisions—Pennsylvania Constitution, Article II, Section 4.

House bill providing for payments to political subdivisions in which Commonwealth property is situate in lieu of taxes may not be constitutionally enacted at a regular session of the Legislature occurring in even-numbered years.

If enacted, this bill would be neither an act to provide revenue nor to make an appropriation and its enactment at a regular session convening in an even-numbered year would be in violation of Article II, Section 4 of the Pennsylvania Constitution.

Harrisburg, Pa., May 26, 1964.

Honorable Stanley G. Stroup, Senate of Pennsylvania, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to whether House Bill No. 129, Printer's No 155, of the 1964 Session may be constitutionally enacted at the current regular Session of the Legislature. The answer to this inquiry depends upon whether or not the said bill is within the category prescribed by Article II, Section 4 of the State Constitution, as the type of legislation which may be enacted at regular sessions occurring in even-numbered years.

The pertinent provision of Article II, Section 4 of the Pennsylvania Constitution provides as follows: "At regular sessions convening in even-numbered years the General Assembly *shall not enact any laws, except laws raising revenue and laws making appropriations.*" (Emphasis supplied)

House Bill No. 129 provides for the making of payments by the Commonwealth to the tax levying authorities of the political subdivisions of the Commonwealth in which Commonwealth property is situate in lieu of taxes. The bill specifies that payments shall be made on the basis of a certified list of property showing location by political subdivision and assessed valuation as established by the State Tax Equalization Board. The rate for payment is fixed at two mills to tax levying authorities of school districts and one mill to all other tax levying authorities. The sum of $1,500,000 or as much thereof as may be necessary is appropriated to the Department of Property and Supplies for the making of the required payments.

Your question does not present any issue involving the authority of the Legislature to determine the form in which its enactment shall be put, *Commonwealth ex rel. Greene v. Gregg*, 161 Pa. 582, nor does it specify the purposes for which appropriations may be made. See *Commonwealth ex rel. Schnader v. Liveright, et al.*, 308 Pa. 35. It is significant that in the latter case the court stated at page 67:

> "The control of the state's finances is entirely in the legislature, subject only to these constitutional limitations; and, except as thus restricted, is absolute. * * *"

Here we are concerned with a specific constitutional provision limiting the Legislature to the type of subjects upon which it may enact legislation. The issue here involves the constitutional authority of the Legislature to do a certain act at its session occurring in an even-numbered year and not the method whereby that act is done.

Clearly the enactment of this bill into law would not result in a law raising revenue. Accordingly, it could only be enacted during the present Session of the Legislature if it fits within the category of "laws making appropriations".

The courts have uniformly held than an act making new and affirmative law is a general law and its classification as such is not affected by the fact that it requires an appropriation to carry out its purpose. They have also held that the term "appropriation act" does not comprehend an act of general legislation and a bill proposing such an act is not converted into an appropriation bill simply because it has engrafted upon it a section making an appropriation.

Bengzon v. Secretary of Justice of the Philippine Islands, et al., 299 U. S. 410, involved the question as to whether a bill providing and making an appropriation for the payment of retirement gratuities to certain officers and employes of the Insular Government was an appropriation bill. The provisions of the bill dealt with the right to and the amount of gratuity and provided funds for the carrying out of this purpose. The Supreme Court of the United States held that the provisions of the statute could stand as generic legislation without the appropriation which could be dealt with by separate enactment. Accordingly, it was not an appropriation bill. The court stated at page 413:

> "* * * The term 'appropriation act' obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation. *An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident.* * * *" (Emphasis supplied)

A similar result was reached in the case of *Dorsey v. Petrott,* 13 A. 2d 630 (Md.) (1940), wherein the meaning of the term "law making an appropriation for maintaining the state government" was involved. The court stated at page 640:

> "* * * An act of the General Assembly which relates primarily and specifically to a subject matter of general legislation cannot be converted into an appropriation bill merely because there may be an incidental provision for an appropriation of public funds."

The House of Representatives has likewise recognized the fact that the essential characteristic of an appropriation bill is that its primary and specific purpose is to make an appropriation. Rule 13.1 of the House of Representatives provides:

> "A bill is a bill making an appropriation when its primary and specific purpose is to make expenditure of money from the State Treasury, and which contains no provisions of law other than those which may be lawfully imposed as conditions upon which such money may be expended."

From the foregoing, it follows that the Legislature can only impose new affirmative duties upon the Commonwealth during an odd-numbered session. If such affirmative duties involve the expenditure of money, the appropriation made therefor is incidental to the main and primary purpose.

The primary and specific purpose of House Bill No. 129 is to waive the Commonwealth's tax immunity by requiring payments to be made by it in lieu of taxes. The necessity of an appropriation to discharge this newly created liability would make the primary purpose of waiving the Commonwealth's tax immunity incidental to the appropriation necessary to effectuate that result. Neither would it convert a general law into an act making an appropriation.

It has been suggested that since this bill is entitled an act making an appropriation it satisfies the constitutional requirement. The fallacy of this suggestion is self-evident. A misleading title is not sufficient to validate a bill. Furthermore, the title gives notice that the appropriation is made "for payments in lieu of taxes". The drafters of the bill recognize the fact that without the inclusion of this phrase the title of the bill would not have provided a clear expression of its subject matter and would have thus violated the requirements of Article III, Section 3 of the Pennsylvania Constitution that "no bill

* * * shall be passed containing more than one subject *which shall be clearly expressed in its title*". (Emphasis supplied) The above quoted language was essential to give the title meaning and to express its primary purpose.

It is most significant that the bill if enacted into law would become a temporary law effective only during the fiscal year 1964-65 and not thereafter.

It has been suggested that the constitutional limitation with respect to even-numbered year legislative limitation should not apply in this case for the reason that this bill is of limited effect and duration. This fact cannot convert it from general legislation to "an act making an appropriation". Nor is it made constitutional by the fact that similar legislation will have to be introduced at every succeeding session of the Legislature in order to accomplish the identical purposes of this bill.

The attempt of the drafters of this legislation to circumvent and evade the constitutional inhibition is manifest from their failure to prepare a general bill permanently waiving the immunity of the Commonwealth from taxation or permanently imposing upon the Commonwealth the obligation to make payments in lieu of taxes rather than imposing this responsibility and the appropriation therefor for the short period of one year.

House Bill No. 129 constitutes an attempt to indirectly and circuitously evade the mandate of the Constitution. The appropriation made is incidental to the principal purpose of partially surrendering the State's tax immunity.

We conclude that an act which seeks to accomplish an affirmative change in the basic law cannot be defined as one making an appropriation merely by reason of the fact that it contains an appropriation. Any other conclusion would open the scope of even-numbered years' sessions so as to make possible the enactment of all types of legislation so long as each statute carried with it an appropriation to implement its purposes. It would render meaningless the constitutional limitation upon the authority of the Legislature during sessions occurring in even-numbered years. The necessity for an appropriation to effectuate the purposes of positive law does not change the primary character of such law. It is well settled that the inclusion of an appropriation in a general law to finance the pur-

poses thereof does not constitute a separate subject in violation of Article III, Section 3 of the Constitution, supra. Nor does it convert that general law into an appropriation act.

It is therefore our opinion and you are advised that House Bill No. 129, Printer's No. 155, of the 1964 Session, if enacted would be neither an act to provide revenue nor to make an appropriation. Accordingly, its enactment at a regular session convening in an even-numbered year would be in violation of Article II, Section 4 of the Pennsylvania Constitution.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 263

Pennsylvania Project 70 Temporary Borrowing Notes, First Series, dated September 15, 1964, maturing September 15, 1966—Legal status.

Harrisburg, Pa., September 15, 1964.

Honorable William W. Scranton, Honorable Thomas Z. Minehart, Honorable Grace M. Sloan.

Dear Sirs and Madam: You have asked our opinion in connection with the issuance and sale of $4,500,000 aggregate principal amount of Commonwealth of Pennsylvania Project 70 Temporary Borrowing Notes, First Series (hereinafter called "Notes"), dated as of September 15, 1964, maturing September 15, 1966, subject to redemption subsequent to March 15, 1965, bearing interest at the rate of 1.92% per annum, payable September 15, 1965 and at maturity, or upon redemption of the Notes if redeemed prior to September 15, 1965, or upon September 15, 1965, and upon redemption if the Notes are redeemed subsequent to September 15, 1965 but prior to stated maturity.

Two Notes, one numbered 1 in the principal amount of $2,500,000 and the other numbered 2 in the principal amount of $2,000,000, were delivered today.

The Notes are authorized by and have been issued and sold pursuant to (a) Section 24 added to Article IX of the Constitution of Pennsylvania by an Amendment approved November 5, 1963 (hereinafter called the "Amendment"), providing that the Commonwealth may be authorized by law to create debt and issue bonds to the amount of $70,000,000 for the acquisition of land for state parks, reservoirs and other conservation and recreation and historical preservation purposes as more particularly specified therein, (b) Act No. 8 of the 1964 Special Session of the General Assembly of the Commonwealth of Pennsylvania approved on June 22, 1964 (hereinafter called the "Act"), and (c) certain preambles and resolutions adopted by the Governor, the Auditor General and the State Treasurer which, among other things, authorized the issuance and sale of the Notes, prescribed the forms thereof, the manner of bidding therefor, and the bidding documents used in connection with the issuance and sale of the Notes.

We have examined such constitutional provisions and statutes and such other matters and documents, including the Notes, the preambles and resolutions adopted by the Governor, the Auditor General and the State Treasurer, and the certificates delivered at the Closing, as we have thought necessary or appropriate.

In our opinion:

1. The Amendment was duly approved and has become part of the Constitution of Pennsylvania, and the Act has been duly and properly enacted.

2. The Governor, the Auditor General and the State Treasurer have, pursuant to the full and adequate legal power conferred upon them by the Amendment and the Act, validly taken all necessary and proper action to issue and sell the Notes, and the Notes have been validly authorized, issued and sold pursuant to proper and appropriate action of such officials in accordance with the Amendment and the Act.

3. The Notes are exempt from taxation for state and local purposes within the Commonwealth of Pennsylvania (except succession or inheritance taxes).

4. The Notes are lawful, valid, direct and general obligations of the Commonwealth of Pennsylvania, and the faith and credit of the Commonwealth are pledged for the payment of interest thereon as the same shall become due, and the payment of principal thereof at maturity.

5. The Commonwealth of Pennsylvania has the power to provide for the payment of principal of and interest on the Notes by levying unlimited ad valorem taxes upon all taxable property within the Commonwealth and excise taxes upon all transactions within the Commonwealth, except certain excise taxes which are specifically limited to special purposes by Section 18 of Article IX of the Constitution and certain revenue raising measures the revenues from which are specifically limited pursuant to Section 23 of Article IX thereof.

Very truly yours,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 264

Banks and banking—National banks—Debt cancellation contracts—Identity with credit life insurance.

A debt cancellation contract which provides that the debt will be automatically cancelled in the event of the borrower's death is essentially the same as credit life insurance and the fee charged is an insurance premium.

The laws of a State apply to national banks operating therein unless they conflict with the National Banking Law or impose a burden on national banks as agencies of the Federal Government.

A national bank operating in Pennsylvania may not enter into debt cancellation contracts without qualifying under the insurance laws of the Commonwealth.

Harrisburg, Pa., December 8, 1964.

Honorable Audrey R. Kelly, Insurance Commissioner, Harrisburg, Pennsylvania.

Madam: You request the advice of this department upon the following question:

> "May a national bank operating in Pennsylvania enter into a debt cancellation contract or similar arrangement, which provides that the debt will be automatically cancelled in the event of the borrower's death, without complying with Pennsylvania's insurance laws?"

Your question arises as a result of an opinion issued by Honorable James J. Saxon, Comptroller of the Currency, United States Treasury, under date of March 10, 1964, wherein he concluded:

> "The use of debt cancellation contracts, the imposition of an additional charge, and the establishment of reserves as protection against losses arising out of such contracts is a lawful exercise of the powers of a National Bank. The exercise of such powers is necessary to and is a part of the business of banking. Such activities may not therefore properly be considered as engaging in the life insurance business."

Widespread borrowing and considerable increased buying on the installment plan, relying upon earnings to repay loans and make payments on account of purchases, has led to the use of "credit life insurance". The insurer issuing such policy undertakes to pay any balance due on the loan or purchase price in the event of the borrower's or purchaser's death.

The Act of May 17, 1921, P. L. 682, 40 P. S. Section 361 et seq., regulates the insurance business in the Commonwealth of Pennsylvania. The statute provides in 40 P. S. Section 367:

> "Except as herein provided, the doing of any insurance business in this Commonwealth, as prescribed in this act, for insurance companies, by any private individual, association, or partnership, is prohibited. * * *" (Emphasis supplied)

Section 202, Article II of the Act of May 17, 1921, P. L. 682, provides (40 P. S. Section 382):

> "Purposes for which companies may be incorporated; underwriting powers.
>
> * * * * * * *
>
> "(7) To carry on the business of credit insurance or guaranty, either by agreeing to purchase uncollectible debts

> or otherwise; and to insure against loss or damage from the failure of persons indebted to the insured to meet their liabilities."

Credit life insurance is now a well-established and recognized form of term insurance and is regulated in Pennsylvania by "The Insurance Company Law of 1921": Act of May 17, 1921, P. L. 682, Article I, Section 1 et seq., which provides for incorporation, minimum capital and reserves against unpaid losses and the manner in which it is to be computed, all under the supervision of the Insurance Commissioner.

The opinion of the Comptroller permits the charging of a fee, the establishing of a reserve for the payment of claims, and would permit a National Bank to do all those things which are traditionally a part of the insurance business. This includes the calculation of premiums, the discretion to adopt standards such as age and health of the borrower and to determine its reserve on an actuarial basis. It appears that the only difference between the debt cancellation contract and credit life insurance is the name "debt cancellation contract" instead of credit life insurance, and the consideration to be paid for the contract is called a fee rather than a premium.

We conclude from the foregoing analysis that debt cancellation contracts are credit insurance and the fee charged by whatever name it is called is an insurance premium.

The powers of National Banks are specifically defined by federal statute, 12 U. S. C. A. Ch. 2, "National Banks". The power to write debt cancellation contracts is not mentioned. The only other authority of the bank is:

> "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; * * *" (12 U. S. C. A. Ch. 2, Section 24)

The United States Court of Appeals for the 7th Circuit in *Kimen v. Atlas Exchange Nat. Bank of Chicago,* 92 F. 2d 615 (7th Cir. 1937), in defining the power of National Banks stated at page 617:

> "National banks may rightfully exercise *only such powers as are expressly granted and such as are necessarily incidental to the effectuation of their chartered purposes.* Incidental powers can avail neither to create powers which expressly or by reasonable implication are withheld nor to

enlarge the powers granted. *They are inferred and exist only to carry into effect such powers as are granted.* * * *"
(Emphasis supplied)

Debt cancellation contracts have never been considered banking business or a part of the banking business and are not incidental or necessary to accomplishing the purposes of a bank.

The Supreme Court of the United States, in *Memphis City Bank v. Tennessee,* 161 U. S. 186 (1896), differentiated between banks and insurance companies. It stated at page 191:

"* * * An insurance corporation *differs radically* from a banking corporation, and the powers given to one cannot be exercised by the other without some authority granted by the State through its legislature. * * *" (Emphasis supplied)

Although National Banks are instrumentalities of the United States, it has been consistently held that they are subject to State law so long as that law does not interfere with the purposes of the creation of the "National Banks". Accordingly, State regulation of matters outside the purpose of National Banks has been unheld by the Supreme Court of the United States. In *Lewis v. Fidelity & Deposit Company of Maryland,* 292 U. S. 559, 54 S. Ct. 848 (1934), the Court stated at page 569:

"* * * *The ultimate decision of this question is for the Supreme Court of Georgia but until it decides otherwise we see no reason for not accepting the holding of the court below* [Federal Court] *as correct."* (Emphasis supplied)

In *First National Bank v. Missouri,* 263 U. S. 640, 656, 68 L. Ed. 486, 492, 44 S. Ct. 213, the Court stated:

"National banks are brought into existence under federal legislation, are instrumentalities of the Federal Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purpose of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States.

"* * * *since the sanction behind it is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter.* * * *" (Emphasis supplied)

Although the Comptroller of the Currency has general authority to control the activities of National Banks, his determination with respect to nonbanking activities is subject to the laws of the particular state wherein the bank operates. In fact, Congress has legislated specifically with regard to the powers of the State to regulate the business of insurance. The McCarran-Ferguson Act, 59 Stat. 33, 34 (1945), as amended, 15 U. S. C. Sections 1011-15 (Supp. IV, 1964), provides as follows:

> "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." (15 U. S. C. Section 1011)
>
> * * * * * * *
>
> "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance.* * *"
>
> (15 U. S. C. Section 1012)

The National Bank Act has no pertinency or relation to the business of insurance.

We therefore conclude as follows:

(1) That debt cancellation contracts constitute insurance under the laws of Pennsylvania.

(2) Assuming that the definition of banking business as carried on today could be construed to include the power to write credit life insurance referred to as debt cancellation contracts, nonetheless the contracts and the banks issuing them would be and are subject to the insurance laws of Pennsylvania pursuant to the McCarran-Ferguson Act.

(3) State Laws are applicable to National Banks unless they conflict with the national banking law or impose a burden on National Banks as agencies of the federal government. Accordingly the opinion

of the Comptroller of the Currency cannot be binding upon the Commonwealth of Pennsylvania in so far as it is inconsistent with the laws of the Commonwealth of Pennsylvania.

It is our opinion and you are therefore advised that a National Bank cannot lawfully write debt cancellation contracts in Pennsylvania without qualifying under the insurance laws of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 265

Taxation—Refunds of taxes and other moneys paid to Commonwealth—Board of Finance and Revenue—Power to grant cash refunds in lieu of credit—Section 503 of The Fiscal Code.

Under the Act of June 23, 1965, P. L. 134, amending Section 503(a) and (b) of The Fiscal Code, Act of April 9, 1929, P. L. 343, the authority of the Board of Finance and Revenue to grant refunds extends to the refund of any money to which the Commonwealth is not entitled; hence, a taxpayer who made an overpayment as result of an error in computation in preparing its tax report qualifies for a cash refund.

The Board of Finance and Revenue should credit the account of the person entitled to the refund if the latter owes the Commonwealth taxes from some other year or is indebted to the Commonwealth in some other account.

The board should continue its present practice of granting credits, except where refund of a nonrecurring tax is sought, in which case cash refunds are proper.

Where a petition for a cash refund is filed prior to settlement or resettlement and the settlement results in a corporate tax credit in favor of the taxpayer, the Board of Finance and Revenue has jurisdiction to act on the petition, and convert an existing tax credit to cash.

If the taxing departments have resettled interest under the provisions of Section 806 of The Fiscal Code, so that a credit results, the Board of Finance and Revenue has jurisdiction to refund interest the same as in the case of principal.

The Board of Finance and Revenue has jurisdiction to issue cash refunds irrespective of when filed, provided that amendments to petitions for refunds be filed within the statutory period for the initial filing of a petition for refund.

The Board of Finance and Revenue should not grant a cash refund in cases in which the board has previously issued a tax credit, unless a petition of a rehearing to obtain cash in lieu of credit is filed.

If the total amount of refund claims for cash exceeds the amount authorized by the Governor, the board must hold in abeyance such refund claims in excess of the authorized amounts until the Governor makes an additional authorization.

Harrisburg, Pa., September 13, 1965.

Honorable Martin H. Brackbill, Budget Secretary and Deputy Secretary of Administration, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning certain questions that have arisen under Act No. 92, the Act of June 23, 1965 P. L. 134, and effective July 1, 1965, further amending §503(a) and (b) of The Fiscal Code (72 P. S. §503(a)(b)).

Act No. 92 makes the following changes in §503(a) of The Fiscal Code:

> "Section 503. Refunds of State Taxes, License Fees, Et. Cetera.—The Board of Finance and Revenue shall have the power, and its duty shall be,
>
> (a) To hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonuses or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled and, upon the allowance of such petition, to refund such taxes, license fees, penalties, fines, bonuses or other moneys, out of [any appropriation or appropriations made for the purpose] *the fund into which such taxes, license fees, penalties, fines, bonuses or other moneys were originally paid,* or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund. *So much of the proceeds of the various taxes, license fees, penalties, fines, bonuses or other moneys as shall be necessary for the payment of refunds out of the General or Special Funds shall be authorized by the Governor.* * * *"

Under this amendment, all cash refunds granted by the Board of Finance and Revenue will be payable, without any express appropriation, "out of the fund into which such taxes * * * were originally paid." The amendment further requires prior authori-

zation by the Governor for the allocation of those proceeds of the various taxes, etc., necessary for the payment of refunds.

Act No. 92 was authorized under the amendment of November 7, 1961 to Article III, Section 16 of The Pennsylvania Constitution, which now permits cash refunds without legislative appropriation. However, that amendment was not self-executing as to refunds authorized under §503 of The Fiscal Code; see Official Opinion No. 247 of the Department of Justice dated February 1, 1962, 1961-1962 Op. Atty. Gen. 62, 26 D. & C. 2d 377. Consequently in order to authorize cash refunds under §503 it became necessary to enact Act No. 92, effective July 1, 1965.

We shall answer your questions seriatim.

> 1. Is the authority of the Board of Finance and Revenue to grant cash refunds restricted to those cases where petitions for refund are filed that contain specific issues relating to taxes, license fees, penalties, fines, bonuses or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled? For example, is a taxpayer who made an overpayment due to a computation error in preparing its tax reports entitled to file a petition for refund for the purpose of obtaining a cash refund?

Section 503(a) of The Fiscal Code authorizes the Board of Finance and Revenue to hear and determine any petition for the refund of taxes, etc., or other moneys paid to the Commonwealth "and to which the Commonwealth is not rightfully or equitably entitled."

Nothing in the statutory language limits the refund powers of the Board to those petitions which raise justiciable issues, but the Board's jurisdiction extends to the refund of any money to which the Commonwealth is not entitled.

In our opinion, an overpayment of tax due to an error in computation or for any other reason would qualify for a cash refund under §503 of The Fiscal Code.

> 2. Does the Board of Finance and Revenue have the discretionary power to either grant a cash refund to or credit the account of the person, association, corporation, body politic, or public officer entitled to the refund? This question becomes most important and pertinent in those situations where taxpayer although entitled to the refunds are, however, indebted to the Commonwealth for other taxes?

The refund jurisdiction of the Board of Finance and Revenue as set forth in §503(a) of The Fiscal Code is in the alternative, i.e., the Board has the power either (a) to refund the taxes or other moneys in question out of the fund into which they were originally paid, or (b) to credit the account of the petitioner. It has been the historic policy of the Commonwealth not to pay out funds to persons or corporations which owe similar amounts to the Commonwealth, and the set-off principle has frequently been applied in various areas of State Government.

In the field of corporation taxes, no cash refunds should be granted where the taxpayer owes the Commonwealth taxes from some other year or in some other tax account. Working within this principal, the Board of Finance and Revenue should determine the extent of the proof to be furnished by the taxpayer or the taxing department of the non-existence of outstanding debits of the taxpayer, before the Board will grant a cash refund based upon the taxpayer's credits.

3. If a Petition for Refund does not specify whether the taxpayer desires a tax credit or refund, what action should be taken?

At present, on petitions for refunds or corporation taxes, the Board of Finance and Revenue grants credits only. Since most of those taxpayers continue to pay such taxes year after year, it would be advisable to continue the present practice of granting credits. However, where the petitioner is seeking a refund of a non-recurring tax (e.g. decedent's estate claiming refund of inheritance taxes) the Board should continue to grant cash refunds as heretofore.

4. If a Petition for a cash Refund is filed subsequent to payment but prior to settlement or resettlement by the Departments of Revenue and the Auditor General and the settlement or resettlement then results in a corporate tax credit in favor of the taxpayer, does the Board of Finance and Revenue have the jurisdiction to act on the Petition when the only action would be to convert an existing tax credit to cash?

The Board of Finance and Revenue would have jurisdiction to act on petitions for refund where the only action would be to convert an existing tax credit to cash; but as noted supra, such jurisdiction should be exercised only in cases where there are no other debits on the books of the Commonwealth against the same taxpayer.

5. Does the Board of Finance and Revenue in light of Section 806 of The Fiscal Code have jurisdiction to entertain a Petition for Refund for interest paid on Petitions for Refund filed:

(a) Prior to July 1, 1965?

(b) Subsequent to July 1, 1965?

(c) Filed prior to July 1, 1965 and amended thereafter?

The jurisdiction of the Board to entertain a petition for refund for interest in cases where the taxing departments have resettled interest under provisions of §806 of The Fiscal Code, so that a credit results, is the same as the Board's jurisdiction to refund the principal of tax for which the taxing departments have established an overpayment credit.

If the petition for refund requests a cash refund of such interest, the Board would have jurisdiction to grant such a cash refund; however, if the petition did not request a cash refund, it could only be amended to do so within the statutory time limit for the initial filing of the petition.

6. Does Act No. 92 confer jurisdiction upon the Board of Finance and Revenue to issue cash refunds when a Petition was filed prior to July 1, 1965?

Act No. 92 confers jurisdiction upon the Board to issue cash refunds, effective July 1, 1965. If the Board adopts the policy of making cash refunds only where requested, this policy would be applicable to refund petitions irrespective of when filed. As noted above, amendments to such petitions could be made only within the statutory period for the initial filing of a petition for refund.

7. Does the Board of Finance and Revenue have the power to grant a cash refund concerning refund cases in which the Board has already issued a determination but the tax credit issued has not been utilized, transferred, or assigned?

The Board of Finance and Revenue should not grant a cash refund in refund cases in which the Board has previously issued a tax credit. Although the present rules of the Board permit applications for the rehearing of refund petitions within six months, a rehearing for the purpose of obtaining cash in lieu of a credit would be a substantial change in the petition, and would be subject to the limitations on amendments heretofore expressed.

8. When the Secretary of Revenue has certified to the Governor, through the Budget Secretary, the official estimate of revenue for a fund and the aggregate of the appropriations and executive authorizations plus or minus any surplus or deficit results in a fund having no unappropriated balance and further claims for refund are presented which total more than the sum already authorized for refunds shall such additional claims for refund be held in abeyance until funds become available?

Act No. 92 requires that the amounts paid on cash refunds shall be authorized by the Governor. If the total amount of refund claims for cash exceeds the amount authorized by the Governor, it would be necessary to hold in abeyance such refund claims in excess of the authorized amounts until the Governor makes an additional authorization.

If the Governor should be of the opinion, based on fiscal information furnished him, that no additional funds would be available for such cash refunds, he would appropriately withhold any additional authorization until he was satisfied that a working balance had been restored to the fund in question. In the interim, the action of the Board on cash refunds would necessarily be held in abeyance.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 266

Escheat—Jurisdiction over intangible property—Requirement as to reporting.

The right and power to escheat is accorded to the State of the creditor's last known address as shown by the debtor's books and records as ruled by the United States Supreme Court in the case of Texas v. New Jersey, 379 U. S. 674 (1965).

Reports are to be filed with the Department of Revenue of certain property without a rightful owner notwithstanding the fact that the property in question may be subject to escheat or to custodial taking by another jurisdiction.

Property belonging to persons whose last known address is in Pennsylvania is subject to escheat by the Commonwealth of Pennsylvania.

Harrisburg, Pa., December 6, 1965.

Honorable Theodore B. Smith, Jr., Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested our opinion regarding the implementation of the decision of the United States Supreme Court in *Texes v. New Jersey,* 379 U. S. 674 (1965).

In this Opinion the Court settled the long standing controversy as to which State is entitled to escheat intangible property. The Court stated "* * * that since a debt is property of the creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." The Court reasoned as follows:

> "* * * The rule recommended by the Master will tend to distribute escheats among the States in the proportion of the commercial activities of their residents. And by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified. * * *"

Pursuant to its Opinion the Court, on April 26, 1965, entered the following:

> "*Final Decree.*
>
> "This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having stated its conclusions in its opinion announced on February 1, 1965, 379 U. S. 674, and having considered the positions of the respective parties as to the terms of the decree,
>
> "*It is Ordered, Adjudged and Decreed as Follows*:
>
> "1. Each item of property in question in this case as to which a last-known address of the person entitled thereto is shown on the books of defendant Sun Oil Company is subject to escheat or custodial taking only by the State of that last-known address, as shown on the books and records of defendant Sun Oil Company, to the extent of that State's power under its own laws to escheat or to take custodially.

"2. Each item of property in question in this case as to which there is no address of the person entitled thereto shown on the books and records of defendant Sun Oil Company is subject to escheat or custodial taking only by New Jersey, the State in which Sun Oil Company was incorporated, to the extent of New Jersey's power under its own laws to escheat or to take custodially, subject to the right of any other State to recover such property from New Jersey upon proof that the last-known address of the creditor was within that other State's borders.

"3. Each item of property in question in this case as to which the last-known address of the person entitled thereto as shown on the books and records of defendant Sun Oil Company is in a State, the laws of which do not provide for the escheat of such property, is subject to escheat or custodial taking only by New Jersey, the State in which Sun Oil Company was incorporated, to the extent of New Jersey's power under its own laws to escheat or to take custodially, subject to the right of the State of the last-known address to recover the property from New Jersey if and when the law of the State of the last-known address makes provision for escheat or custodial taking of such property.

"4. Any relief prayed for by any party to this action which is not hereby granted is denied."

In considering the effect of the Opinion, it is initially important to distinguish the power of a state to require reports to be filed from the power of a state to escheat or take property in a custodial capacity.

The various Pennsylvania statutes governing escheats, including the reporting requirements, are codified in 27 P. S. §1, et seq., and 72 P. S. §1301, et seq. These statutes specifically provide for reports to be filed with the Department of Revenue of certain moneys and property which are or have been unclaimed and are without a rightful owner for the period provided in each statute. They also provide that the reports shall show the name and address of the rightful owner. If there is no last known address or name of the rightful owner, the report must so indicate.

The Opinion, Order and Decree of the United States Supreme Court is directed toward the power to escheat or to take custodially and not to the requirement of reporting.

Under Pennsylvania's statutes, reports are required to be filed by every person, copartnership, unincorporated association and every company, corporation, bank, national bank, safe deposit company and trust company doing business in this Commonwealth, supra. These reports are required to be filed notwithstanding the fact that the property in question may be subject to escheat or to the custodial taking by another jurisdiction.

In cases where there is property belonging to persons whose last known address as shown on the books and records of the debtor is in Pennsylvania, or where the Commonwealth can prove that the last known address of the creditor is in Pennsylvania notwithstanding the absence of any such address on the books and records of the debtor, such property is subject to escheat or custodial taking by the Commonwealth of Pennsylvania.

Where the books and records of a domestic (Pennsylvania) corporation disclose no last known address of a creditor or where the last known address of the creditor is in a jurisdiction which does not escheat property nor take same in a custodial capacity, such property may be taken custodially or escheated by Pennsylvania. Such property is subject to being recovered by another jurisdiction upon proof that the last known address of the creditor was within that other state's borders, and that it is subject to the laws of that state which make provision for escheat or custodial taking of the property in question.

Where the report is filed by a foreign (non-Pennsylvania) corporation the Commonwealth may escheat or take custodially such property belonging to a creditor whose last known address is in Pennsylvania as disclosed by the books and records of the corporation, or in the absence of a showing of the last known address by the books and records, then by the proof of the Commonwealth that the last known address of such creditor is in Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 267

Judges—Seniority—Oldest in commission—Appointed service.

The continuous service which qualifies a judge of a court of common pleas for the position of president judge includes both appointed and elected service.

Harrisburg, Pa., December 13, 1965.

Honorable W. Stuart Helm, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: Your office has requested that we review Official Opinion No. 145, 1958 Op. Atty. Gen. 318, insofar as the same defines the right of succession to the office of president judge of a court of common pleas. Specifically, you inquire as to the correctness of the conclusion of that opinion that in determining the order of succession to the office of president judge of a court of common pleas only elected service is to be considered and the term of appointed service is to be entirely disregarded.

The body of the Pennsylvania Constitution as adopted in 1873 made no provision for determining the order of succession to the office of president judge of a court of common pleas. That office is not even recognized or mentioned in Article V, the Judiciary Article of the Constitution. However, Section 16 of Schedule No. 1 to the Constitution provides that after the expiration of the term of any president judge of any court of common pleas commissioned at the time of the adoption of the Constitution, the judge of such court learned in the law and *oldest in commission* shall be the president judge thereof. This section also provides that where a president judge of a court shall be reelected he shall continue to be president judge of that court.

The subject of succession was fully considered in *Commonwealth ex rel. Reeder v. Pattison,* 109 Pa. 165 (1885). The significant portion thereof which is quoted in Official Opinion No. 145 reads as follows:

> "The most prominent feature of the system is that the *judge senior in continuous service* in each of said courts shall be the president thereof. In 1877, upon the resignation of the president judge of the Court of Common Pleas Number One of the Fifth District, the question arose, which of the remaining judges should be commissioned to fill the

vacancy. The judge holding the more recently dated commission had been longer in continuous service than the other, and the Governor, being advised by the then Attorney General that the phrase 'oldest in commission' meant, *'oldest in continuous service', without regard to the date of the commission under which he was then serving,* issued the commission accordingly. So far as we know, *this construction, as to the correctness of which we entertain no doubt, has ever since been adhered to by the executive department."* (Emphasis supplied.)

In the *Pattison* case the court clearly and unequivocally held that the term "oldest in commission" means oldest in continuous service without regard to whether that service was by appointment or by election. In other words the Supreme Court within a short period of time after the adoption of the present Constitution ruled that appointed and elected service should be added together in order to determine the continuous service which qualified a judge of the courts of common pleas for the office of president judge.

Significant comment was made by the court with respect to the provision in the schedule that where a president judge of a court shall be reelected he shall continue to be president judge thereof. It points out that this was merely a temporary qualification for the position of president judge and applied only to judges holding that office at the time of the adoption of the Constitution and not thereafter.

The conclusion of Official Opinion No. 145 completely ignores and disregards the precise language of the Supreme Court in the *Pattison* opinion. It overruled a court approved practice which had been followed for a period of over eighty years.

Conclusive language of a court determining a legal issue may not be disregarded by an Attorney General. He is without authority to overrule a court's opinion. On the contrary, he is bound thereby. This is particularly true in a case such as the present one where that court has spoken in language which contains no ambiguity and is susceptible of only one interpretation. In such case there is no basis for the Attorney General to make an interpretation of the Constitution or statutes which is inconsistent with the definitive and clear holding of the Pennsylvania Supreme Court.

The clear purpose of the constitutional provision in the cited schedule to the Constitution is to give preference to the judge best

qualified by reason of experience. Common sense requires that seniority in time of service be equated with seniority in rank.

A simple example illustrates the wisdom of the interpretation made by the Supreme Court in the *Pattison* case. Under Article VIII, Section 3 of the Pennsylvania Constitution it is possible for an appointed judge to serve for a period of over two years. Assuming that such appointed judge is then elected at the same election as a person who had never held the position in a county having two judges, Official Opinion No. 145 would require such judges to cast lots for the office of president judge. In such event the man with no experience could acquire seniority over a judge with two years experience on the bench. Any system which completely disregards experience in determining seniority is unjustifiable and unreasonable, particularly when applied to the office of president judge. There is no language in the Constitution which justifies such an illogical conclusion. The Supreme Court's interpretation and ruling in the *Pattison* case is based upon reason and judicial common sense.

It is accordingly our opinion and you are advised that the continuous service which qualifies a judge of a court of common pleas for the position of president judge includes both appointed and elected service.

That portion of Official Opinion No. 145 which is inconsistent with this conclusion is hereby withdrawn.

Sincerely yours,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 268

Appropriation under General Appropriation Act—Varying periods of time—More than one fiscal year—Pennsylvania Constitution, Article II, Section 1 and Article III, Section 15.

The Legislature has the power to make appropriations under the General Appropriation Act for such periods of time as it deems desirable within the limits of the revenues and moneys at its disposal.

The General Appropriation Act may contain items for ordinary expenses of the executive, legislative and judicial departments, interest and the public schools, as provided in Article III, Section 15 of the Pennsylvania Constitution, for more than one fiscal year.

Harrisburg, Pa., January 25, 1966.

Honorable Martin H. Brackbill, Budget Secretary and Deputy Secretary of Administration, Harrisburg, Pennsylvania.

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

1. Does the State Constitution require that all appropriations made by the General Appropriation Act be for the same period of time?

2. May the General Appropriation Act contain appropriations for more than one fiscal year?

1. The scope of the general appropriation bill is set forth in Article III, Section 15 of the Pennsylvania Constitution, 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."

The only other provision in the Constitution applicable specifically to the general appropriation bill is found in Article III, Section 3 which excludes general appropriation bills from the requirement that no bill "shall be passed containing more than one subject, which shall be clearly expressed in its title."

Other provisions in the Constitution applicable to appropriations are not limited to either general or special appropriations. For example, Article III, Section 16 prohibits the payment of money out of the treasury except on appropriations made by law. Article III, Section 17 requires a two-thirds vote appropriations to charitable or educational institutions not under absolute control of the Commonwealth. Article III, Section 18 prohibits appropriations to any person or community or any denominational or sectarian institution for charitable, educational or benevolent purposes, with certain specific exceptions. Article IV, Section 16 authorizes the Governor to disapprove any item in an appropriation act.

The term "ordinary expenses" embraced in the general appropriation bill under Article III, Section 15 of the Constitution has been construed on several occasions. In 1895-96 Op. Atty. Gen. 58 it was indicated that the Legislature had the right to determine what were the ordinary expenses of the various branches of the State Government, relying on *Commonwealth v. Gregg,* 161 Pa. 582, 587 (1894).

In Formal Opinion No. 51, 1931-32 Op. Atty. Gen. 100, it was ruled that in declaring every item in the general appropriation act to be for "an ordinary expense" of the State Government, the action of the Legislature was presumed to be constitutional. See also Official Opinion 126, 1958 Op. Atty. Gen. 254, 255.

Thus it appears that the Legislature has the plenary power to determine what expenses were "ordinary" so as to be includable in the general appropriation bill.

The only other constitutional limitation upon the legislative power to make appropriations is found in Article IX, Section 4 which provides that "the debt created to supply deficiencies in revenue shall never exceed, in the aggregate at any one time, one million dollars." Under this provision it has generally been held that appropriations should not exceed estimated revenues by more than one million dollars; and if they do, non-preferred appropriations abate pro rata so as to be within biennium receipts and cash on hand.

In *Commonwealth ex rel. Schnader v. Liveright,* 308 Pa. 35, 66, 67, 68, (1932), the court construed Article IX, Section 4 as follows:

> "* * * This section was intended to restrict legislative acts which incurred obligations or permitted engagements on the credit of the State *beyond revenue in hand or anticipated through a biennium,* and establishes the principal that we must keep within current revenue and $1,000,000. * * * Such debt may not be directly incurred by statute, nor through an appropriation in excess of current revenue for a gratuity or any purpose * * *." (Emphasis supplied)

In affirming the legislative power to make appropriations the court said:

> "Legislative power is vested in the General Assembly by article II, section 1, and its power is *supreme* on all such subjects unless limited by the Constitution. The control of the state's finances is *entirely* in the legislature, subject only to

these constitutional limitations; and, except as thus restricted, is *absolute*. Unless expressly prohibited or otherwise directed by that instrument, *appropriations may be made for whatever purposes and in whatever amounts the law-making body finds desirable. The legislature in appropriating is supreme* within the limits of the revenue and moneys at its disposal." (Emphasis supplied)

Regarding the priority of "ordinary expenses", the court said:

"* * * A survey of the Constitution would indicate that the ordinary current expenses of government would be the expenses of the executive, judicial and legislative departments of government, and of public schools. It was the intention of the framers of the fundamental law to safeguard and protect these ordinary expenses, that the government might exist as such. Therefore, they have a preference or prior claim on all moneys of the Commonwealth over all other expenditures, expenses, debts, or appropriations. * * *"

The court then concluded:

"The balance of the general revenue, subject to constitutional limitations, is in the absolute and complete control of the General Assembly. * * *"

Since the General Assembly has the absolute power to make appropriations "for whatever purposes" and, subject to the debt limitation, "in whatever amounts" it finds desirable, it would have the same absolute power to make appropriations in the General Appropriation Act for such different periods of time as it deemed desirable, within the limits of revenues at its disposal.

2. There is no limitation in the Constitution restricting the General Appropriation Act to appropriations for only one fiscal year. As noted supra, the only limitation is found in Article IX, Section 4 which restricts appropriations to "revenue in hand or anticipated through a biennium", not to be exceeded by more than one million dollars: *Commonwealth ex rel. Schnader v. Liveright,* supra, (308 Pa. 35, 66).

The fact that annual legislative sessions have now been established by a constitutional amendment to Article II, Section 4 does not affect the legislative powers and limitations, as construed by the Supreme Court in the *Liveright* case.

An examination of appropriation acts enacted by the Legislature over many years discloses that some appropriations are for a specified period, whereas other appropriations do not limit the time within which the sums appropriated are to be used.

It is thus clear that the Legislature has unlimited authority to make appropriations, provided always that the funds to supply such appropriations are derived from the revenues available during a specified fiscal period. It is not restricted as to the time during which such appropriations shall be paid or used. In other words, the Legislature is limited in its authority to make appropriations only by the amount of revenues on hand or anticipated during a specific fiscal period.

Accordingly, you are advised that the General Appropriation Act may contain items for ordinary expenses, interest, and public schools, as provided in Article III, Section 15 of the Constitution, for more than one fiscal year, and appropriations for different periods of time, within the revenue limits set forth in Article IX, Section 4 of the Constitution.

Very truly yours,

DEPARTMENT OF JUSTICE,

WALTER E. ALESSANDRONI,
Attorney General.

OFFICIAL OPINION No. 269

Civil service—Classified service—Professional or technical positions—Section 3(d)(13)(ii) of the Civil Service Act.

The Executive Board may include within the definition of classified service under Section 3(d)(13)(ii) of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended, extensions of or closely related positions to classes or series of classes designated by the Board on or before October 1, 1962 as professional or technical.

Harrisburg, Pa., June 22, 1966.

Honorable Martin H. Brackbill, Budget Secretary and Deputy Secretary of Administration, Harrisburg, Pennsylvania.

Sir: We have your request to be advised whether the Executive Board may include within the definition of the classified service under Section 3(d)(13)(ii) of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as last amended by the Act of August 27, 1963, P. L. 1257, classes of positions which were not explicitly designated by the Board as professional or technical on or before October 1, 1962, but which are extensions of or closely related to classes or series of classes that had been so designated.

Section 3(d)(13)(ii) of the Civil Service Act, as amended, provides:

"(d) 'Classified service' includes:

* * * * *

"(13) All positions now existing or hereafter created in any department or agency under the Governor's jurisdiction which * * * (ii) were designated as professional or technical by the Executive Board of the Commonwealth on or before October 1, 1962, * * *"

It is the clear intent of this provision to include in the classified service all positions containing as a component recognizable types of work which requires for its performance the exercise of skills determined by the Executive Board to be professional or technical, pursuant to standards developed by it on or before October 1, 1962. It is the application of these standards of professional and technical work which is determinative, rather than classification titles.

Accordingly, it is our opinion and you are hereby advised that the Executive Board may include within the definition of the classified service under Section 3(d)(13)(ii) of the Civil Service Act, the Act of August 5, 1941, P. L. 752, as last amended by the Act of August 27, 1963, P. L. 1257, classes of positions which were not explicitly designated by the Board as professional or technical on or before October 1, 1962, but which are extensions of or closely related to classes or series of classes that had been so designated.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD FRIEDMAN,
Acting Attorney General.

OFFICIAL OPINION No. 270

Audits—Contingent expense accounts of officers of the General Assembly—Department of the Auditor General.

The Department of the Auditor General has no power or authority under the Constitution or statutes of the Commonwealth of Pennsylvania to audit the contingent expense accounts of the officers of the General Assembly.

The Department of the Auditor General is without authority to audit the accounts of the legislative or judicial branches of the State Government.

Harrisburg, Pa., July 15, 1966.

Honorable Grace M. Sloan, Auditor General, Harrisburg, Pennsylvania.

Madam: You have requested our advice as to whether the Department of the Auditor General has the power and the duty to make and conduct an audit of those appropriations made for "contingent expenses" to certain officers, members and employes of the legislative departments. You inquire further with respect to the extent, if any, of the power and authority of that department to audit any appropriations made to the Legislative Department or the Judicial Department of State Government. You state that this request for advice is made at the suggestion of the duly constituted leaders of both parties of the General Assembly by reason of their denial of any authority in your department in these areas.

The office of the Auditor General is created by the Pennsylvania Constitution and is part of the executive branch of the State Government. Article IV, Section 1 of the Pennsylvania Constitution. While the State Treasurer and Auditor General are named in the Constitution, their duties are not set forth therein. The definition thereof thus becomes a subject for legislative determination. *Commonwealth ex rel. v. Lewis,* 282 Pa. 306.

The powers and duties of the Auditor General are set forth in Section 706 of the Act of April 9, 1929 (P. L. 177), known as The Administrative Code of 1929, 71 P. S. 246:

> "The Auditor General shall exercise such powers and perform such duties as may now or hereafter be vested in and imposed upon him by the Constitution and laws of this Commonwealth."

From the above it can be seen that the office of the Auditor General, being created by the Constitution and having its powers and duties defined in The Administrative Code of 1929, can only exercise such powers and duties as provided for by the Constitution or by statute. *Commonwealth ex rel. v. Powell,* 249 Pa. 144, 154, 155. There are no powers or duties inherent in the office of the Auditor General. This proposition applies with equal force to all public officials. The source of their official power is in the people as expressed by their Constitution or statutes.

The Pennsylvania Constitution does not confer any obligation or authority upon the Auditor General with respect to the auditing of the accounts of any department or branch of the State Government. Article III, Section 12 of the Pennsylvania Constitution contains the only provision conferring any duty or authority upon the Auditor General. That section requires, inter alia, that certain contracts made on behalf of the legislative and other departments of the State Government shall be subject to the approval of the Governor, Auditor General and State Treasurer.

The statutory duties of the Auditor General are subject to legislative control and in connection therewith the power of the State Legislature is supreme. *Commonwealth ex rel. v. Lewis,* supra. Specific statutory authority is an indispensible prerequisite to authorize the office of the Auditor General to require any accounting procedures or information from the General Assembly or any other party, or to audit their appropriations.

The primary statute relating to the power and duty of the Auditor General to audit accounts is the Act of April 9, 1929, P. L. 343, known as The Fiscal Code, 72 P. S. 1, et seq. as amended. The most pertinent sections of The Fiscal Code are §§1501 through 1505. These sections set forth procedures for the disbursement of money from the State Treasury. They confer upon the Auditor General power to audit requisitions and to draw warrants in relationship to expenditures made by the executive branch of the State Government. Section 1504 authorizes the Auditor General to require itemized vouchers of those units of the executive branch receiving advances out of appropriations which are of such nature as to make a submission of prior itemized receipts or vouchers impracticable.

It is significant that nowhere in these pertinent sections of The Fiscal Code is there any specific reference to the legislature or the leaders of the General Assembly. They refer to "Any department, board,

commission, board of trustees or agency . . ." Obviously, the legislature does not come within any of these classifications. Further, from a complete reading of The Code, it is clear that its provisions are to apply only to the executive branch of the government and not to the legislative or judicial branches. Since the provisions of The Fiscal Code cannot be construed to apply to the legislature, similarly these provisions could not apply to its officers.

Section 2 of The Fiscal Code, 72 P. S. 2, sets forth the general scope of the Act as follows:

> "This act is intended to define the powers and duties of the Department of Revenue, the Treasury Department, the Department of the Auditor General, the Secretary of the Commonwealth, the Board of Finance and Revenue, the Board of Fish Commissioners, the Board of Game Commissioners, county treasurers, registers of wills, mercantile appraisers, and other statutory agents, with respect to the collection of taxes and other moneys due the Commonwealth, the custody and disbursement or other disposition of all funds and securities belonging to or in the possession of the Commonwealth, and the settlement of claims againt the Commonwealth.
>
> "This act is not intended to change the incidence or amount of any existing tax, license fee, or bonus, payable to the Commonwealth, or any agency thereof, under existing law, or to impose any new tax, license fee, or bonus, accruing to the Commonwealth or any agency thereof, nor is it intended to provide for the organization of any department, board, or commission. The organization of all agencies whose powers and *duties are defined by this act shall continue to be governed by the Administrative Code and other applicable laws.*"
>
> (Emphasis supplied)

See also: Attorney General's opinion to the Auditor General of March 16, 1948; opinion of T. McKeen Chidsey, Attorney General to Senator Heyburn of November 14, 1947.

The provisions of The Administrative Code of 1929, as referred to in the above quoted section of The Fiscal Code clearly exclude the legislative and judicial branches of the State Government. See Sections 201 through 223, 71 P. S. 61-83 and Art. 3 of the Administrative Code of 1929. It is therefore clear that the general power and duties relating to the Auditor General in Sections 1501 through 1505 of The Fiscal Code relate solely to the executive branch of the State Government and cannot be construed to extend to the legislative or judicial branches.

Sections 401 through 409 of The Fiscal Code, 72 P. S. 401-9 impose certain powers and duties on the Department of the Auditor General. Again, it is clear that the said provisions refer to only the executive branch of the government and to those boards or commissions specifically mentioned therein. There is nothing contained therein that could be remotely construed as referring to the legislature or to the officers thereof.

Certain statutory provisions, which will be shown to be no longer in effect, purport or might be construed to confer certain powers and duties upon the Department of the Auditor General in connection with the legislature. For example, Section 48 of the Act of May 9, 1854, P. L. 688, 72 P. S. 4092, as set forth in Purdon's Pennsylvania Statutes, contains a reference to the power of the Auditor General with regard to settling accounts of the legislature. The complete section is as follows:

> "Section 48. For the support of the State Lunatic Hospital and for the payment of debts heretofore incurred, the sum of twenty-five thousand dollars; and that the accounts for all expenditures for said Hospital shall be settled by the accounting officers in the usual manner, and not more than five thousand dollars shall be drawn from the State Treasury at any time until the accounts for previous expenditures shall have been settled; and *the Auditor General shall have power in all cases in settling* said accounts, and *the accounts for the contingent and other expenses of the Legislature and other departments of the government, to enquire into the correctness and fairness of the prices charged; and it shall be his duty to disallow any excess over fair cash prices; and he may require the seller and any one procuring supplies for said* Hospital, or *departments, to make affidavits as to the prices actually paid or agreed to be paid for the same, and procure affidavits from those in the trade, as to the just and fair value thereof for his information and government.*"
>
> (Purdon's language underlined)

From the above quotation, it is apparent that only a part of the language of the section is quoted in Purdon's Pennsylvania Statutes. The language referring to a specific appropriation to the State Lunatic Hospital is deleted. The Act of May 9, 1854, was the General Appropriation Act for that particular year, and its provisions were intended to refer only to that year. Therefore, this excerpt became ineffective over 100 years ago and is improperly included in Purdon's Pennsylvania Statutes.

The Act of April 23, 1909, P. L. 146, 72 P. S. 3424, is a forerunner of Section 1504 of The Fiscal Code above discussed. Therein, reference is made to "other branch of the State Government" in listing the areas which are subject to audit by the Auditor General. Even assuming such phrase could have been interpreted to include the General Assembly, the subsequent enactment of The Fiscal Code effectually accomplished its repeal. The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Section 91, 46 P. S. 591, which provides in part:

> "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."

The Fiscal Code sets up an exclusive system relating to the subject matter included in the Act of April 23, 1909. Therefore, the provisions of that Act have been superseded by the provisions of The Fiscal Code.

It is our opinion, therefore, that the General Assembly has not by general law subjected its officers or agencies to any degree of accountability to the Auditor General. It has obviously exercised its constitutional prerogative to reserve that power to itself. This conclusion is further fortified by the fact that the General Assembly, regularly, in the General Appropriation Act subjects certain of its officers to specific accounting requirements, e.g., the Director of the Legislative Reference Bureau and the Chairmen of the Appropriations Committees of both the House and Senate. 1964, June 18 (Appropriation Acts, P. L. 36) (Act No. 50-A); at 61, 63. Furthermore when appropriations are made to special committees, accounting requirements are usually contained in the appropriation acts. The courts presume that the legislature never does a vain thing. 1937, May 28 (P. L. 1019), Sec. 51; 46 P. S. 551. Certainly if these officers were subject to accounting requirements under a general law, these provisions would be unnecessary, superfluous and vain.

Our conclusion is buttressed by the doctrine of the separation of powers between the executive, legislative and judicial branches of the State Government. This is a basic tenet of Pennsylvania's form of constitutional government which cannot be altered unless clearly and unequivocably provided for by the Constitution. The structure of the Pennsylvania Constitution carries out this doctrine by treat-

ing each branch of the government together with its powers and duties in separate articles. This concept has been strictly enforced by the courts of this Commonwealth. See *In re Shelley,* 332 Pa. 358; *In re Investigation by Dauphin County Grand Jury,* 332 Pa. 289, 295; *Commonwealth v. Moon,* 383 Pa. 18, 27. By virtue thereof the legislature is an independent branch of the State Government subject only to those limitations placed upon it by the Constitution or by itself. A unilateral action such as an audit of any expenses of the officers of the General Assembly by the Auditor General would most certainly be an intrusion upon the prerogative of a coordinate branch of the State Government and the violation of that fundamental doctrine inherent in our form of government.

In *Commonwealth ex rel. Schnader v. Liveright, et al.,* 308 Pa. 52, it was stated:

> "Legislative power is vested in the General Assembly by article II, section 1, and its power is supreme on all such subjects unless limited by the Constitution. *The control of the state's finances is entirely in the legislature, subject only to these constitutional limitations; and, except as thus restricted, is absolute.* * * *"
>
> (Emphasis supplied)

Your statement that the Auditor General is conferred with the power and invested with the duty to make such audits which may be necessary in connection with the administration of the Commonwealth's financial affairs, and to audit the accounts and records of every person receiving an appropriation of money from the State Treasury is without constitutional or statutory support and is not the law of this Commonwealth. Neither statutory nor constitutional authority is ever presumed. It must be specifically defined. Only those areas which are designated by the constitution or by the legislature are proper areas for audits by the Auditor General. As has been determined, this area is confined exclusively to the executive branch of the government. Since the legislature has not seen fit to provide by statute that its accounts, or the accounts of its officers should be subject to audit by the Auditor General, it cannot be presumed, or even inferred, that the Auditor General has any such inherent power. The same conclusion is true with regard to the judicial branch of the State Government since no specific authorization to audit the accounts of that branch of the State Government is conferred by the Constitution or by any statute.

Parenthetically, we are advised that the joint committee of both Houses of the General Assembly is preparing guidelines to regulate the disbursement of contingency funds. We recommend prompt action in this regard.

We are therefore of the opinion and you are accordingly advised that neither the Constitution nor the statutes of the Commonwealth of Pennsylvania confer any power or authority upon the Department of the Auditor General to audit the contingent expense accounts of the officers of the General Assembly. Consequently that Department has no such duty or authority. For the same reasons no such authority exists with respect to the accounts of the legislative or judicial branches of the State Government.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD FRIEDMAN,
Acting Attorney General.

OFFICIAL OPINION NO. 271

Schools—Indiana University of Pennsylvania—Board of Trustees—Status—Executive branch of the State government.

The Act of December 16, 1965, P. L. 1113, redesignating Indiana State College as "Indiana University of Pennsylvania" and the Board of Trustees thereof as the "Indiana University of Pennsylvania Board of Trustees" does not grant autonomy to the Indiana University of Pennsylvania.

The said University continues as a part of the Executive Branch of the State Government, and its Board of Trustees continues as an administrative board of the Department of Public Instruction of the Commonwealth, and as such, subject to the provisions of The Administrative Code of 1929 and other applicable laws of the Commonwealth.

Harrisburg, Pa., September 21, 1966.

Honorable Joseph J. McHugh, Acting Budget Secretary and Deputy Secretary of Administration, Governor's Office, Harrisburg, Pennsylvania.

Sir: You have requested our opinion with respect to the status of "Indiana University of Pennsylvania" and its Board of Trustees under Act No. 430 of the 1965 Session of the General Assembly, approved December 16, 1965, P. L. 1113, (hereinafter referred to as "Act") which, by its terms became effective on December 18, 1965 when the said University was accredited by the Middle States Association of Colleges and Secondary Schools.

You ask specifically whether by virtue of the provisions of Act No. 430, the newly designated University and its Board became autonomous or whether they continue as a part of the Executive Branch of the State Government, subject to The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. §51 et seq., and other applicable laws of the Commonwealth.

Sections 2 and 3 of the Act, respectively, redesignate Indiana State College as "Indiana University of Pennsylvania" and the Board of Trustees thereof as the "Indiana University of Pennsylvania Board of Trustees". Section 8 of the Act specifically provides for the continuation of the existing status of both the Board and the Institution. It provides:

> "Section 8. Continuation of Powers and Obligations.—All powers, rights, privileges, duties, and obligations, statutory, contractual, or of whatever kind, of the board and the institution shall remain in full force and unchanged, notwithstanding the change of the name of the board and the institution, but henceforth under the new names established by this act."

This language expressly manifests the Legislature's intent to make no basic changes whatsoever in the "powers, rights, privileges, duties and obligations" of the Board of Trustees or of the Institution.

The Act vests in the Board the authority to establish schools for graduate work, to award certain graduate degrees, and to select a treasurer, business manager, secretary, and such other officers as it shall determine. However, the creation of those additional, incidental functions does not alter the continuation of State gevernmental control as it existed immediately before and on the effective date of Act No. 430.

The Act does not direct the appointment of a new board, or a different board, or a differently constituted board. Sections 202 and 401

of The Administrative Code of 1929, supra, 71 P. S. §§62, 111, under which the said Board was originally constituted as a departmental administrative board in the Department of Public Instruction, remains in full force and effect.

Your reference to state colleges in other states which were raised to university status is not germane to the question before us. The status of the newly designated "Indiana University of Pennsylvania" can be determined only by reference to the statutes of this Commonwealth. Changes in that status can be accomplished only by the enactment of appropriate legislation by the General Assembly. Act No. 430 does not expressly grant autonomy to Indiana University.

You also ask why Indiana University of Pennsylvania cannot operate independently as do other institutions in the Commonwealth, such as Pennsylvania State University, Temple University and the University of Pittsburgh. An examination of the legal status of those institutions demonstrates certain distinctions among the several types of higher educational institutions in Pennsylvania. The principal difference lies in the fact that the named institutions are not under the exclusive ownership and control of the Commonwealth as is Indiana University of Pennsylvania.

Pennsylvania State University was accepted by the Commonwealth as a federal land grant college by the Act of April 1, 1863, P. L. 13, 24 P. S. §2571. Temple University was made a state-related university by Act No. 355, approved November 10, 1965, P. L. 843, 24 P. S. §2501 et seq. (pocket part). The University of Pittsburgh achieved state-related status by Act No. 3, Third Special Session of 1966, approved July 28, 1966. The University of Pennsylvania, Drexel Institute of Technology and others are privately owned and controlled.

None of these institutions are owned by or under the absolute control of the Commonwealth. Consequently, appropriations made to them are non-preferred and require a vote of two-thirds of the members of each House of the General Assembly by virtue of Article III, §17 of the Constitution of Pennsylvania, which provides as follows:

> "No appropriation shall be made to any charitable or educational institution *not under the absolute control of the Commonwealth.* * * * except by a vote of two-thirds of all members selected to each House".
>
> (emphasis added.)

The thirteen State Colleges and Indiana University of Pennsylvania are owned by and are under the absolute control of the Commonwealth. Appropriations for their operation are ordinary expenses of government, requiring only a majority vote of each House of the General Assembly, and thus they enjoy a preferred status. Money so appropriated must be paid out before any funds can be paid on non-preferred appropriations to the other types of institutions discussed above. *Com. ex rel. Schnader v. Liveright*, 308 Pa. 35 (1932); 1931-1932 Op. Atty. Gen. (No. 51) p. 178, 187-188. If Act No. 430 had made Indiana University of Pennsylvania autonomous and removed it from State ownership and control, it would have lost its membership in that class and its eligibility for funds from preferred appropriations.

You are also advised that by virtue of Section 5 of Act No. 430, the Indiana University of Pennsylvania Board of Trustees has, inter alia, the following powers:

1. To make such by-laws, rules and regulations for the management of the institution as it may deem advisable, subject to the approval of the Superintendent of Public Instruction under Section 1311(d) of The Administrative Code of 1929, supra, 71 P. S. §361.

2. To make purchases and other expenditures within the limitations of its budget. Such purchases and expenditures must be made in compliance with pertinent sections of The Administrative Code of 1929, particularly Sections 507 and 2403, 71 P. S. §§187, 633.

3. To establish tuition charges, waivers thereof, and student fees. Previously, under the Act of September 12, 1961, P. L. 1258, 24 P. S. §20-2008, such authority existed but with the exception of waivers of tuition charges. The Act of 1961 provides that "no difference in the charges for board, tuition and fees shall be made in favor of any students pursuing similar studies." Section 5(a)(2)(ii) of Act No. 430 authorizes the Board to grant waivers in any case where a tuition charge has been established. The estimated number of such waivers, however, should be reflected in the Board's budget request.

4. To establish graduate schools and curricular programs, and to establish admission and disciplinary policies.

5. To appoint members of the instructional and non-instructional staffs and administrative personnel on the recommendation of the

President of the University, and to establish salaries not inconsistent with those established by the Executive Board, under §1311(c) of The Administrative Code, 71 P. S. §361(c). However, the Board's actions in determining the number of employes to be appointed and in classifying those employes are subject to the approval of the Superintendent of Public Instruction and the Governor.

In conclusion, it is our opinion and you are accordingly advised, that Act No. 430 of the 1965 Session of the General Assembly, approved December 16, 1965, does not grant autonomy to Indiana University of Pennsylvania. You are further advised that the said University continues as a part of the Executive Branch of the State Government, and that its Board of Trustees continues as an administrative board of the Department of Public Instruction of the Commonwealth, and as such, subject to the provisions of The Administrative Code of 1929, supra, and other applicable laws of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

EDWARD FRIEDMAN,
Attorney General.

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