In relation to your second inquiry, we desire to point out that, inasmuch as there is no liability on the part of a State teachers college or of the Commonwealth for an injury received under the circumstances as described by you, it is self-evident that it would not be lawful for a State teachers college to spend the money of the Commonwealth for the purpose of liability insurance to provide coverage for these injuries unless there is statutory authority to that effect. From our research, we have been unable to find any such legislative authority.

We are of the opinion, therefore, that:

1. A spectator cannot recover from a State teachers college or from the Commonwealth if he is injured at an athletic meet between two or more State teachers colleges, or between a State teachers college and another educational institution other than a State teachers college, as a result of being hit by a baseball or shot-put, regardless of whether the injury occurred either on or off State property, and

2. Inasmuch as there is no liability on the part of State teachers colleges for such injuries, it is not permissible for State teachers colleges to provide themselves with any form of liability insurance in the absence of any statutory authority.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

GEORGE J. BARCO,
Deputy Attorney General.

OPINION No. 325

Motor vehicles—Prosecution for driving while intoxicated—Physical examination of defendant—Constitutionality—Constitution, art. I, sec. 9—Admissibility of result of examination in evidence.

Compulsory examination by a physician of a person accused of operating a motor vehicle while under the influence of intoxicating liquor, in violation of section 620 of The Vehicle Code of May 1, 1929, P. L. 905, is not a violation of article I, sec. 9, of the Constitution, providing that an accused cannot be compelled to give evidence against himself, since the word "evidence" does not comprehend physical examination; but not decided whether evidence obtained by compulsory examination is admissible in the courts.

Harrisburg, Pa., February 29, 1940.

Honorable Lynn G. Adams, Commissioner, Pennsylvania Motor Police, Harrisburg Pennsylvania.

Sir: You have requested this department to advise you whether a person accused of operating a motor vehicle while under the influence of intoxicating liquor, may constitutionally be compelled to submit to examination by a physician. Your inquiry states that the proposition has been advanced that to require such examination without the permission of such accused person, after he has been informed of the charge against him, violates the accused's rights under Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania.

Nowhere in The Vehicle Code, the Act of May 1, 1929, P. L. 905, as amended, (75 PS §1 et seq.), is there any provision requiring a person accused of operating a motor vehicle while intoxicated to undergo an examination such as that described above. The Vehicle Code does, of course, in article VI, section 620, as amended, (75 PS §231 (f)), make it unlawful for anyone to operate a motor vehicle while under the influence of intoxicating liquor; but the only reference to an examination such as you mention is in Section 1207 of Article XII of the Code, as amended, (75 PS §737 (a)). This reference is, in part, as follows:

> * * * all fines and penalties collected, and all bail forfeited for violations of * * * section * * * (620), [cited supra] shall be paid to the treasury of the county wherein the violation occurred, to be used by such county *for the payment of physicians' fees for the examination of persons accused of violating the provisions of the said section.* * * * (Italics supplied.)

As a result, we are not confronted with the necessity of ruling upon the constitutionality of any portion of The Vehicle Code, or of any other Act of Assembly. And, in any event, it is not the proper function of the Department of Justice to pass upon the constitutionality of legislation. Op. Atty. Gen. 1905-1906, page 398, 32 C. C. 520 (1906); Op. Atty. Gen. 1909-1910, page 264, 13 Dauphin 49, 36 C. C. 689 (1909); Op. Atty. Gen. 1913-1914, page 47, 41 C. C. 216 (1913); and see Commonwealth ex rel. *v.* Lewis, 282 Pa. 306 (1925).

The question resolves itself, therefore, into one of whether the Pennsylvania Motor Police may constitutionally require a person, accused as aforesaid, to submit involuntarily to the examination hereinbefore described.

Research has revealed only one case in Pennsylvania dealing with the subject of inquiry, and that occurred in the criminal courts of Montgomery County: Commonwealth *v.* Cox, 10 D. & C. 678 (1927). In this case, the defendant had been arrested for driving an automobile while under the influence of liquor, in violation of Section 23 of the Act of June 30, 1919, P. L. 678. After his arrest, he was

examined by a physician, who testified at the trial that in his opinion, the defendant was under the forbidden influence. The doctor admitted that without the examination he could not have so testified; and that he had not warned the accused that whatever he (the accused) might say or do under examination could be used against him later. The contention was made by the defendant that the admission of the physician's testimony at the trial compelled the defendant to give evidence against himself in violation of Article I, Section 9, of the Constitution of the Commonwealth, which provides, in part:

> In all criminal prosecutions the accused * * * cannot be compelled to give evidence against himself * * *.

It should be noted here that the Fifth Amendment to the Federal Constitution, that no person "* * * shall be compelled in any criminal case to be a witness against himself * * *" is not involved in our decision because that amendment applies only to the National Government. Twining et al. *v.* New Jersey, 211 U. S. 78, 53 L. ed. 97 (1908).

The court found, in the Cox case, from the evidence as a whole, that the defendant had submitted to the examination *voluntarily.* However, by way of obiter dicta, the court went on to say that whatever the defendant disclosed against himself during the physician's examination was not evidence within the meaning of the Pennsylvania Constitution; that the word "evidence" in article I, section 9, supra, means "testimony"; and that the word "testimony" means speaking or discourse, or voluntary signs, by the accused. The court said, further, at page 686 of 10 D. & C.:

> The prohibition of compelling the accused in a criminal prosecution to give evidence against himself is a prohibition against the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when such body is material. * * *

Consequently, said the court, an examination by a physician of a person accused of operating a motor vehicle while under the influence of intoxicating liquor, whether consented to or not, does not violate Article I, Section 9, of the Constitution of Pennsylvania. As indicated above, this is not a decision, for the point was not at issue in the Cox case: it is pure dicta; but the opinion may be taken as an expression of the average judicial viewpoint.

In an able opinion by Schaeffer, P. J., the Berks County Court held in Commonwealth *v.* Rocci, 9 D. & C. 389 (1926), that fingerprints of a defendant in a criminal case, obtained under compulsion, were admissible as evidence without violating article I, section 9, supra. See also, Ladd and Gibson: The Medico-Legal Aspects of the

Blood Test to Determine Intoxication, 24 Iowa Law Review 191 (1939).

No useful purpose would be served by reviewing the numerous cases and authorities cited and quoted in the decisions hereinbefore cited. Suffice it to say that they support the conclusions reached herein. At the same time, cognizance is taken of the fact that on January 3, 1940, the Attorney General of Illinois ruled that a person accused of causing the death of another cannot lawfully be compelled to submit to a blood test for the purpose of ascertaining whether he was intoxicated at the time he is supposed to have caused such death.

Both on reason and authority, it would be a strained construction of Article I, Section 9, of the Pennsylvania Constitution, to hold that a compulsory medical examination of a person accused of driving a motor vehicle while under the influence of intoxicating liquor, is forbidden by it; and, in our opinion, such examination is not so prohibited. The rights, constitutional or otherwise, of the thousands of motorists lawfully using our highways, to be secure in their persons and property, and the enjoyment thereof, from the menace of the drunken driver, certainly transcend the right, constitutional or otherwise, of the drunken driver, not to be compelled to testify against himself.

It should be noted, of course, that this opinion does not comprehend, nor rule upon, the question of whether evidence obtained by compulsory examination, as herein discussed, is admissible in the courts.

It is the opinion of this department, that compulsory examination by a physician of a person accused of operating a motor vehicle while under the influence of intoxicating liquor, is not a violation of such person's rights under Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 326

State Government—Members of General Assembly—Exemption from arrest—Constitution, art. II, sec. 15—Applicability to criminal proceedings.

1. Members of the General Assembly have no privilege from arrest on sight