

while those who serve in an administrative capacity over them are governed by the provisions of sections 2 and 12.

Employes whose principal employment is not in connection with a Federally financed project do not come under the provisions of section 12 of the act.

Members of the various professional licensing boards and all other employes of the State who are paid entirely by State funds do not come under the provisions of the act.

The Superintendent of Public Instruction is subject to section 2 of the act.

12. TREASURY DEPARTMENT

The employes of the bureau handling disbursements of money on behalf of the Unemployment Compensation System come under sections 2 and 12 of the act.

The State Treasurer is subject to section 2 of the act.

13. DEPARTMENT OF WELFARE

The Supervisor and employes of the Rural Extension Unit are subject to sections 2 and 12 of the act.

The Director of the Bureau of Community Work and the Secretary of Welfare are subject to section 2 of the act.

Very truly yours,

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

OPINION No. 370

State employes—Oath of allegiance.

(1) The Governor may require the officers and employes of his office, as well as those persons employed by him for the Executive Board to take the oath. (2) The heads of the several administrative departments and the several independent administrative and departmental administrative boards and commissions may require the employes therein to take the oath with certain exceptions. (3) The Pennsylvania Liquor Control Board may require its employes to take the oath. (4) The Pennsylvania Liquor Control Board, the Secretary of Labor and Industry and the Employment Board of the Department of Public Assistance may, by rule or regulation, prescribe, as one of the qualifications of employment by the Liquor Board, the Bureau of Employment and Unemployment Compensation and the Department of Public Assistance, respectively, that persons making application for employment therein be required to take the oath.

Harrisburg, Pa., October 15, 1940.

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

Sir: This department is in receipt of your communication in which

you ask to be advised whether all State employes under your jurisdiction may be required to take the following oath of allegiance:

I, do solemnly swear (or affirm) that I will support, obey, and defend the Constitutions of the United States and of the Commonwealth of Pennsylvania.

That I do not and will not, as long as I am an employe of the Commonwealth, solicit or hold membership in any organization that advocates the overthrow of the Government of the United States nor engage in any activities designed to weaken the framework of our form of government.

In using the words "employes under (your) jurisdiction" we assume that you mean all persons employed in your office, in the several administrative departments of the State Government, as set out in section 201 of the Act of April 9, 1929, P. L. 177, 71 P. S. §61, known as The Administrative Code of 1929, (except the Department of the Auditor General and the Treasury Department), by the Executive Board, the Pennsylvania Motor Police, and by the several independent administrative and departmental administrative boards and commissions.

So far as we can ascertain, the precise questions raised by your inquiry have never been adjudicated by the courts of this Commonwealth. A similar situation, however, existed in the case of *Harding v. Pinchot et al.*, 306 Pa. 139 (1932). In that case plaintiff, who had held a commission as a notary public for many years, refused, in her application for reappointment, to subscribe to a pledge "that she would 'loyally support the policies approved by the people of the Commonwealth in the election of 1930.'" Governor Pinchot refused to make the appointment and a suit in equity was instituted to enjoin him from insisting on the pledge as a condition thereto. The bill was dismissed by the court below and the decision affirmed by the Supreme Court on appeal. Because the opinion is, we think, decisive of the fundamental question here involved, we set it out at length:

* * * These two acts [Act of March 5, 1791, 3 Smith's Laws 6 and Act of February 19, 1873, P. L. 36] empower the governor to judge the number and personality of those appointed by him to be notaries public in this State. Inasmuch as these appointments are entirely subject to his discretion, he may refuse to appoint for reasons best known to himself or for no reason, and what is true of original appointments is applicable to reappointments.

As to the legality of the pledge in question, which the governor has promulgated, we have only to say it appears so capable of various interpretations that we are at a loss to know what its exact legal significance is, if in law it has any. Whether "the policies" referred to indicate the

policies of a political party or those of an individual or individuals elected to office in 1930, or both, and whether or not any such policies are reducible to terms of sufficient exactitude to make the pledge legally significant, are matters we seriously question. Our view of the interpretation the governor may place on the words of the pledge could not be more than a surmise upon our part. Accordingly, we are powerless either to interpret the phrase or hold that it is intrinsically illegal. "Equity is concerned only with questions which affect property, and it exercises no jurisdiction in matters of wrongs to the person or to political right": Bispham's Equity, 10th edition, page 64. Miss Hamilton was not possessed of a right to be appointed a notary public, no matter how meritorious her application may have been.

* * * * *

In answer to statements made by the attorney general at bar regarding immunity of the governor, it may be well to repeat that when we, in the past, refrained from issuing judicial process against the governor, in deference to the fact that he represents a co-ordinate branch of the government (Hartranft's App., 85 Pa. 433), this court did not divest itself of power to issue judicial process to him in an appropriate case. The rule enunciated in the Hartranft Case was that, where it was sought to compel the governor by judicial process and he made answer that the decree prayed for would interfere with the proper performance of his executive duties, the courts would not issue mandamus to compel him to act. However, it should not be forgotten that the people are sovereign and their Constitution is the fundamental law. That Constitution provides: "All courts shall be open: and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay": Article I, section 11. This court has at no time declared that, in our bounden duty to protect the Constitution and constitutional rights of Pennsylvania citizens, we may not in extreme cases restrain even the governor. Although it is true that we will not issue judicial process to the chief executive except in a case of magnitude, yet where his action is in conflict with constitutional provisions, it is still the law that we retain the power thus to proceed should he act unconstitutionally so as to divest private rights or dispose of public property: *Mott v. P. R. R. Co.*, 30 Pa. 9, 33. "It is idle to say the authority of each branch is defined and limited in the Constitution, if there be not an independent power able and willing to enforce the limitations * * * From its every position, it is apparent that the conservative power is lodged with the judiciary": Chief Justice Gibson in *DeChastellux v. Fairchild*, 15 Pa. 18, 20.

We have frequently issued or sustained process to high officials of the State of lesser rank than the governor: *Com. v. Lewis*, 282 Pa. 306; *Busser v. Snyder*, 282 Pa. 440; *Com. v. Snyder*, 279 Pa. 234; *Mott v. P. R. R. Co.*, supra. * * *

It therefore becomes necessary to ascertain, first, the official in whom has been vested the power of appointing the employes under consideration and, second, whether or not the power to appoint is circumscribed or entirely discretionary. It is also necessary to consider whether or not the oath to be required is "intrinsicly illegal." Although the appointing power in the case of *Harding v. Pinchot et al.*, supra, happened to be the governor, we are of the opinion that under similar circumstances the decision in that case would apply to and control any other high official of the State Government vested by law with wide discretionary powers of appointment.

Section 211 of The Administrative Code of 1929, supra, provides as follows:

The Governor shall appoint, to serve at his pleasure, a Secretary to the Governor, a Budget Secretary, and such consultants, experts, accountants, investigators, clerks, stenographers, messengers, watchmen, and other employes, as may be required for the proper conduct of the work of his office, and of the Executive Board, and shall fix their salaries, wages, fees, or other compensation.

It will be observed that the above section vests in you wide discretion with respect to the appointment of officers and employes in your office, as well as those persons employed by you for the Executive Board. In the words of the Supreme Court, in *Harding v. Pinchot et al.*, supra:

* * * Inasmuch as these appointments are entirely subject to * * * [your] discretion, * * * [you] may refuse to appoint for reasons best known to * * * [yourself] or for no reason, and what is true of original appointments is applicable to reappointments.

Furthermore, the persons so employed by you serve only at your pleasure and you may remove them from their positions at any time, for any reason. Consequently, you may, as a condition to appointment or continued employment, require such employes to take any pledge or oath you deem necessary and proper, save only that the same is not "intrinsicly illegal" (*Harding v. Pinchot et al.*, supra).

Section 214 of The Administrative Code of 1929, supra, provides as follows:

* * * the heads of the several administrative departments, except the Auditor General and State Treasurer, and the independent administrative boards and commissions, shall appoint and fix the compensation of such directors, superintendents, bureau or division chiefs, assistant directors, assistant superintendents, assistant chiefs, experts, scientists,

engineers, surveyors, draftsmen, accountants, secretaries, auditors, inspectors, examiners, statisticians, marshals, clerks, stenographers, bookkeepers, messengers, and other assistants and employes as may be required for the proper conduct of the work of their respective departments, boards, or commissions. Except as otherwise provided in this act, the heads of the respective administrative departments shall appoint and fix the compensation of such clerks, stenographers and other assistants, as may be required for the proper conduct of the work of any departmental administrative bodies, boards, commissions, or officers, and of any advisory boards or commissions established in their respective departments.

It will be noticed that, pursuant to the foregoing provisions of The Administrative Code of 1929, generally the heads of the several departments comprising the executive branch of the State Government are vested with broad discretionary powers in the appointment of the personnel of their respective departments. It is true that you must approve the number and compensation of such employes before the appointments are effective but, nevertheless, the head of the department remains the appointing power. They, like you, may appoint, or refuse to appoint, for reasons best known to themselves, or for no reason at all. These officers are, of course, subject to be summarily removed by you (article VI, section 4 of the Constitution of Pennsylvania). The reason for this rule is clearly stated in *Commonwealth ex rel. Kelley v. Sheridan et al.*, 331 Pa. 415 (1938), at page 421:

* * * It is obvious that the main constitutional purpose was to allow officials to dismiss at pleasure the subordinates whom they had appointed, and thus be able to have under them at all times persons who would carry out their policies and directions loyally and efficiently.

And in *Commonwealth ex rel. Schofield v. Lindsay*, 330 Pa. 120 (1938), at page 123 the court said:

Article VI, section 4, of the Constitution is an expression of a governmental principle which is supported both by reason and authority. It is a tenet of good government that except in those cases where the public welfare requires that an official charged with important governmental functions should be protected against interference on the part of the executive and in those cases where special classes of public servants, such as policemen and firemen, are placed under civil service protection, the power of removal is correlative with the power of appointment. The liability to summary removal attaches with manifest appropriateness to those subordinates who occupy close confidential relations with their superiors in the public service. * * *

As you may remove the officers appointed by you, *they* may remove, subject to exceptions hereinafter noted, those whom they have appointed. In *Glessner's Case*, 289 Pa. 86 (1927), at page 90, the court says:

Under the common law it is the rule that the tenure of ministerial officers in general is during the pleasure of the appointing power, unless the law clearly provides otherwise. "An officer is not appointed for his own sake, but for that of the public. If he misbehaves, the sooner he is removed the better, because the country suffers every moment that he continues in office * * * Never was it supposed, in Pennsylvania, either before or since the revolution, that it was proper for ministerial officers to hold by any stronger tenure than the pleasure of the persons through whom they received their appointment, except in special cases where by law it was provided otherwise. This long continued custom is powerful evidence of the law; particularly in the United States, where every freeman stands on the same proud footing, where offices are sought with avidity, and where there is neither inclination to submit to executive oppression, nor danger in resisting it": *Com. v. Bussier*, 5 S. & R. 451, 461. In the case of *Field v. Com.*, 32 Pa. 478, we also find a statement (page 481) that "where an appointment is during pleasure, or the power of removal is entirely discretionary, there the will of the appointing or removing power is without control, and no reason can be asked for, nor is it necessary that any cause should be assigned." * * *

See also *Commonwealth ex rel. Smith v. Clark et al.*, 331 Pa. 405 (1938).

Subordinate officers and employes in the several administrative departments, boards and commissions being appointed by the head of the department or by the board or commission, as the case may be, it follows, upon the authority of the foregoing cases, that they can be removed from their positions at any time or for any reason by the appointing power. Consequently, as in the case of those officers and employes appointed directly by you, the appointing power may, as a condition to appointment or continued employment, require officers and employes alike to take any pledge or oath which you desire them to take provided, of course, that the same is not "intrinsicly illegal." Your assurance that a department head will require employes in his department to take the required oath is, obviously, that you can summarily dismiss such officer in the event he does not comply with your request.

An examination of the oath which you propose shall be taken by employes of the several administrative departments, boards and commissions convinces us that it is one that any person loyal to his country and to the principles of the American form of government

should be proud to take. The first paragraph thereof pledges the employe to support the Constitutions of the United States and the Commonwealth of Pennsylvania. Since all persons in this Commonwealth are bound by these, the fundamental, organic laws of our Nation and State, and since the Constitution of Pennsylvania (article VII) requires all senators and representatives and all judicial, state and county officers to take a similar oath, one could hardly say that it is illegal. Considering the second paragraph, is it illegal to require a person who is earning his very livelihood from the Commonwealth of Pennsylvania, who is living a free and independent life under the protection of the laws of the Commonwealth of Pennsylvania and the laws of the United States, and who is secure in his right to enjoy the benefits of American institutions, to take an oath that he will not engage in or advocate the overthrow of the Government of the United States? To state this question is to answer it. The Supreme Court of this Commonwealth in *Commonwealth v. Widovich et al.*, 295 Pa. 311 (1929), at page 317 said:

Whatever may have been the understanding of Section 2 [Constitution of Pennsylvania], the Civil War definitely decided that no change in the form of government can come about through secession or the withdrawal of a part of the people from our scheme of government. * * * The established government is the government of all the people; any change in its form should come from the majority, and the Constitution points the way to effect such a change. * * * The legislature, under the police power, to preserve the State's republican form of government, to suppress insurrection and to maintain the safety, peace and order of its citizens, may enact laws to suppress acts or attempts to commit acts of violence toward the government; it may prohibit the teaching or advocacy of a revolution or force as a means of redressing supposed injuries, or effecting a change in government. * * *

To require a pledge from an employe not to engage in an enterprise which the legislature of this Commonwealth has declared to be unlawful, could hardly be said to be "intrinsically illegal."

The Act of December 5, 1936, P. L. (1937) 2897, 43 PS §751, known as the "Unemployment Compensation Law," the Act of November 29, 1933 (Special Session) P. L. 15, known as the "Pennsylvania Liquor Control Act," and the Act of April 9, 1929, P. L. 177, as amended by the Act of June 24, 1937, P. L. 2003, (71 PS §664), which established the Department of Public Assistance, contain provisions for the selection of personnel and established, in the above-named departments, so-called civil service or merit systems. The employes in these departments were originally appointed to their positions, and now hold them, under and subject

to such provisions. The Unemployment Compensation Law, *supra*, provides, *inter alia*, as follows:

Section 208. Civil Service; Selection of Personnel; Additional Duties of Secretary and Board. * * *

* * * * *

(o) The Secretary may, * * * summarily dismiss any employe of the department engaged in the administration of this act, who has been finally convicted of an offense in connection with his duties in the administration of this act, or of any felony or any crime involving moral turpitude.

The secretary may * * * dismiss any employe of the department engaged in the administration of this act for delinquency or misconduct in his or her duties under this act.

It will be observed, therefore, that an employe of the Bureau of Employment and Unemployment Compensation may be summarily dismissed by the Secretary of Labor and Industry for (a) conviction of an offense in connection with his duties in the administration of the act, (b) conviction of a felony or any crime involving moral turpitude, or (c) delinquency or misconduct in his duties under the act.

The provisions of this act are mandatory upon the Secretary of Labor and Industry and he cannot, therefore, dismiss an employe of the aforesaid bureau for the reason that such employe refuses to take the oath which we are now considering. However, section 208 of the said act provides, *inter alia*, as follows:

(e) The secretary shall prescribe, by rules and regulations, the qualifications to be possessed by persons desiring employment in the various grades of employment in the administration of this act. * * *

By virtue of this provision the Secretary of Labor and Industry undoubtedly has the authority to adopt a rule which would make it mandatory for every future applicant for a position in this bureau to subscribe or take the required oath. Failing to do so, he would of course, be ineligible for appointment for the reason that he did not possess the qualifications prescribed by the secretary's rules and regulations.

The Administrative Code of 1929, *supra*, as amended by the Act of June 24, 1937, P. L. 2003, 71 PS §61, *et seq.* and supplemented by the Act of June 24, 1937, P. L. 2051, as amended, 62 PS §2501, *et seq.*, known as the Public Assistance Law, and the Pennsylvania Liquor Control Act, *supra*, both contain provisions similar to the one above referred to and give the Employment Board in the Department of Public Assistance and the Pennsylvania Liquor Control

Board, respectively, the authority to prescribe, from time to time, by rule or regulation, the qualifications to be possessed by persons desiring employment. Upon request by you, these boards would, therefore, have a similar power to adopt a rule or regulation requiring applicants for positions to take the oath referred to as one of the required qualifications. Unlike the Unemployment Compensation Law, *supra*, however, these acts contain provisions which confer upon the Governor summary power of removal of persons employed thereunder when such action is deemed to be in the best interests of the public service. These provisions undoubtedly confer upon you the right to remove employes in the Department of Public Assistance, upon recommendation of the Secretary, and the Pennsylvania Liquor Control Board, in your discretion, should they refuse to take the required oath.

In view of the foregoing, we are of the opinion:

1. That you may require the officers and employes in your office, as well as those persons employed by you for the Executive Board, to take the oath set forth on the first page of this opinion.

2. That, at your request, the heads of the several administrative departments of the State government and the several independent administrative and departmental administrative boards and commissions may require the employes therein to take the aforesaid oath. Provided, however, that as to present employes in the Bureau of Employment and Unemployment Compensation, subject to the above civil service provisions, there is no effective way of enforcing this requirement.

3. That, at your request, the Pennsylvania Liquor Control Board may require its employes to take the aforesaid oath.

4. That the Pennsylvania Liquor Control Board, the Secretary of Labor and Industry and the Employment Board in the Department of Public Assistance may, by rule or regulation, prescribe, as one of the qualifications of employment by the Pennsylvania Liquor Control Board, the Bureau of Employment and Unemployment Compensation and the Department of Public Assistance, respectively, that persons making application for employment therein be required to take the aforesaid oath.

Very truly yours,

DEPARTMENT OF JUSTICE,
CLAUDE T. RENO,
Attorney General.
FRED C. MORGAN,
Deputy Attorney General.