

* * * We hesitate to disagree with the authority of this opinion, but its logic would lead us into other positions to which we could not agree. Potatoes and other vegetables for instance were, we think, sold almost universally by dry measure prior to 1913. They are now sold almost exclusively by weight. The newer method operates the better to protect the purchaser, yet the logic in the opinion quoted would make it illegal to sell potatoes or other vegetables by weight. * * *

The letter of the Department of Justice, dated March 25, 1935, is based on the same logic as the opinion of Judge Alessandroni, with which logic we cannot agree and the said letter is overruled.

The act of 1913, *supra*, is a criminal statute and must be strictly construed, and, when the act says all dry commodities shall be sold by weight, dry measure or numerical count, it means just what it says.

The court further stated, in the case of *Commonwealth v. Tea Company*, *supra*, at page 289:

* * * Upon the face of the act numerical count is a legal method of selling a chicken, which is a dry commodity. Any such commodity may be sold by weight or by dry measure or by numerical count. The seller may use any of the methods for any dry commodity. * * *

Therefore, it is our opinion that poultry in package form may legally be sold at a certain price per package, or, in other words, by numerical count.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,
Attorney General.

ROBERT E. SCRAGG,
Deputy Attorney General

Opinion No. 409 withdrawn

Opinion No. 411 substituted

OPINION No. 410

Public officials—Vacancies—Appointment by Governor—Expiration of Commissions—Date—General and municipal elections—Primaries—Art. IV, sec. 8 of the Constitution—Act of June 3, 1937, P. L. 1333.

Commissions issued by the Governor to persons appointed by him to fill vacancies in elected public offices, or the office of justice of the peace or alder-

man, which occur subsequent to the tenth Tuesday preceding the fall primary election in any odd-numbered year must expire the first Monday of January following the second succeeding municipal election. The election code of June 3, 1937, P. L. 1333, provides for special elections to fill vacancies in the following offices only: (1) United States Senator, (2) Representative in Congress, (3) Member of the General Assembly. It is impossible for the electorate, at a municipal election, to fill a vacancy which occurs in any of the offices specified later than the tenth Tuesday preceding the fall primary election.

Harrisburg, Pa., January 14, 1942.

Honorable J. Paul Pedigo, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: This will acknowledge receipt of your recent request for advice regarding the proper expiration date of commissions issued by the Governor to persons appointed by him to fill vacancies in elected county offices, or the office of justice of the peace or alderman, which occur more than two months before the next municipal election but subsequent to the date when, as required by the provisions of the Pennsylvania Election Code, the Act of Assembly approved June 3, 1937, P. L. 1333, 25 P. S. § 2601 et seq., the first action must be taken to accomplish the nomination of candidates for such offices in the primary election preceding said municipal election.

You advise us that heretofore, in conformity with the provisions of Article IV, Section 8 of the Constitution of this Commonwealth,* when such a vacancy has occurred within two months of the next municipal election a commission has issued to the Governor's appointee for a term ending the first Monday of January following the second succeeding municipal election; but that if it occurred more than two months prior to the next municipal election the vacancy has been filled only to the first Monday of January following such election.

We believe that the question involved is ruled by two recent decisions of the Supreme Court, viz., *Watson, Appellant v. Witkin, et al.*, 343 Pa. 1 (1941) and *O'Neill et al v. White et al.*, 343 Pa. 96 (1941). In the former case a vacancy in the office of Mayor of Philadelphia occurred on August 22, 1941, eighteen days before the fall primary election. Since the office would not ordinarily have been filled at the next municipal election, no nomination petitions or papers had been filed on behalf of any candidates therefor. It was, of course, impos-

* Article IV, Section 8 of the Constitution provides, in part, as follows:

* * * but in any such case of vacancy, in an elective office, a person shall be chosen to said office on the next election day appropriate to such office according to the provisions of this Constitution, unless the vacancy shall happen within two calendar months immediately preceding such election day, in which case the election for said office shall be held on the second succeeding election day appropriate to such office.
* * *

sible under the provisions of the Code to nominate any candidates for the office at the following fall primary election and the question arose whether the vacancy could be filled at the next municipal election on November 4, 1941. The court below decided that the nomination of candidates for the office should be left to the political parties to be selected in accordance with their rules and regulations and that certificates of nomination from these parties be accepted by the County Board of Elections and used in preparing the official election ballots for the municipal election. Although the office involved is not one of those mentioned in your inquiry, the underlying legal principles are so decisive of the question here at issue that we quote at length from the opinion of the Supreme Court, reversing the decision of the Court of Common Pleas of Philadelphia County:

* * * Under the Election Code of June 3, 1937, P. L. 1333, 25 P. S. 2601, (hereinafter referred to as "the Code") certain legal steps must be taken by proper public officials for the nomination each year of candidates for offices to be filled at the ensuing November election, as early as "on or before the tenth Tuesday preceding the Fall primary." Section 904 of Article 9 of the Code (25 P. S. 2864) provides that: "To assist the respective county boards in ascertaining the offices to be filled, it shall be the duty of the clerks or secretaries of the various cities, boroughs, towns, townships, school districts and poor districts, with the advice of their respective solicitors, on or before the tenth Tuesday preceding the Fall primary, to send to the county boards of their respective counties a written notice setting forth all city, borough, town, township, school district and poor district offices to be filled in their respective subdivisions at the ensuing municipal election, and for which candidates are to be nominated at the ensuing primary . . ." Section 905 of Article 9 of the Code (25 P. S. 2865) provides: "On or before the tenth Tuesday preceding each primary, the Secretary of the Commonwealth shall send to the county board of each county a written notice designating all the offices for which candidates are to be nominated therein, or in any district of which such county forms a part, or in the State at large, at the ensuing primary, and for the nomination to which candidates are required to file nomination petitions in the office of the Secretary of the Commonwealth, . . ."

* * * * *

Section 907 of Article 9 of the Election Code (25 P. S. 2867) provides that "the names of candidates . . . for party nominations . . . shall be printed upon the official primary ballots . . . of a designated party, upon the filing of separate nomination petitions in their behalf, in form prescribed by the Secretary of the Commonwealth, signed by duly registered and enrolled members of such party who are qualified electors . . . of the political district . . . within which the nomination is to be made or election is to be held. The name of no

candidate shall be placed upon the official ballots to be used at any primary, unless such petition shall have been filed in their behalf." Clause 9d of Section 913 of Article 9 of the Election Code (25 P. S. 2873) provides that "all nomination petitions shall be filed at least fifty days prior to the primary." These and other provisions of the Code prove the impossibility of placing on the ballot or on the voting machine used in the November 4th election in Philadelphia *any nominee for the office of Mayor*. Yet despite this fact appellants contend that a Mayor must be chosen at the forthcoming municipal election on the date named.

Section 42 of Article 2 of the Charter Act of Philadelphia (Act of June 25, 1919, P. L. 581) reads as follows: "When a vacancy shall take place in the office of mayor, a successor shall be elected for the unexpired term at the next election occurring more than thirty days after the commencement of such vacancy, unless such election should occur in the last year of said term, in which case a mayor shall be chosen by the council by a majority vote of all the members elected thereto."

If we construe that section *literally* it means that a Mayor of Philadelphia must be elected on November 4th next. If "next election" means *that* next election held at a date so far ahead of the date the vacancy arose as to give the entire electoral machinery prescribed by law, including the machinery of "primary" elections, whose due functioning the law declares *shall* be a preliminary to the "final" elections, time to function, then the election of a Mayor *cannot* be held on November 4th next.

* * * * *

The Uniform Primary Law has completely integrated nominations for public office with the election which takes place in November following such nominations. Under the Code the electoral machinery to choose public officials at any November election must begin to function at least "ten Tuesdays" before the date of the Fall primary. Section 604, article 6 of the Code, (25 P. S. 2754), provides that "candidates for all offices to be filled at the ensuing municipal election shall be nominated at the Fall primary." There is a similar provision in Section 902, article 9 of the Code (25 P. S. 2862), which adds that candidates "shall be elected in no other manner."

* * * * *

* * * Since a Mayor under the charter must be chosen at a *Municipal* Election, and not at a *General* election,* it

* A similar prescription respecting the offices mentioned in your inquiry is to be found in Article VIII, Section 3 of the Constitution of this Commonwealth which provides that "All elections for judges of the courts for the several judicial districts, and for county, city, ward, borough, and township officers, for regular terms of service, shall be held on the municipal election day; namely, the Tuesday next following the first Monday of November in each odd-numbered year, but the General Assembly may by law fix a different day, two-thirds of all the members of each House consenting thereto: Provided, That such elections shall be held in an odd-numbered year; * * *."

follows that a Mayor of Philadelphia cannot be elected until the next Municipal Election *after* the 1941 Municipal Election, unless there is some statutory provision for a special election for Mayor to be held at the time of the General Election in 1942. There is no such provision in the Election Code of 1937 or elsewhere. This Code provides for special elections to fill vacancies in the following offices only: (1) United States Senator, (2) Representative in Congress, (3) Member of the General Assembly. Special elections are also provided for "on a proposed constitutional amendment or other question, to be voted on by the electors of the state at large or by the electors of any political district." (See 25 P. S. 2787 and 3069).

O'Neill et al. Appellants *v.* White et al., *supra*, is directly in point. In that case the Register of Wills of Westmoreland County, an elected county official, died on August 22, 1941, seventy-three days before the Municipal Election of 1941. A question arose as to whether the vacancy could be filled at that municipal election and several taxpayers filed a bill in equity to restrain the County Board of Elections from expending public funds in the publication of notices of an election to fill the office. The court below refused to grant an injunction and on appeal this decision was reversed. In the Supreme Court the appellees (defendants below) relied upon the provisions of Article IV, Section 8 of the Constitution, *supra*, contending that its provisions are mandatory and would require the holding of an election to fill the vacancy which had occurred more than two months before the next appropriate election day, i. e. the municipal election.

Beside citing at length from its opinion in *Watson*, Appellant *v.* *Witkin et al.*, *supra*, the Supreme Court said:

The Constitutional provision invoked by appellees is unavailing in this case, for this provision is not self-executing and its mandate cannot be carried out because the legislature has not provided the means for doing so. "A Constitution is primarily a declaration of principles of the fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws, yet it is entirely within the power of those who establish and adopt the Constitution to make any of its provisions self-executing." 6 R. C. L., section 52, p. 57.

* * * * *

It is obvious that the above cited mandate of Article 4, Section 8 of the Constitution assumes the existence of election machinery to carry it out. But the election machinery provided by the Election Code is not geared to the carrying out of that constitutional mandate. For the reasons we have stated in the opinion this day filed in the "Philadelphia Mayoralty Election -Case," i. e. *Watson v. Witkin, Clark and*

Hennessey, County Commissioners of Philadelphia, Constituting the County Board of Election of Philadelphia, et al., defendants, and County Executive Committee of the Democratic Party of the City and County of Philadelphia, et al., as intervening defendants, the Uniform Primary Laws of this state completely integrate nominations for public office with the elections which take place in the November following such nominations, and under the Election Code of 1937 the electoral machinery to choose such public officials at any November election must begin to function at least "ten Tuesdays" before the date of the Fall primary.

The conditions precedent to the nomination of candidates for Register of Wills of Westmoreland County at the September ninth 1941 primaries not having been complied with because there was no time in which to do so after the death of the Register of Wills on August 22, 1941, no election to fill that office can be held at the Municipal election of November 4, 1941.

Section 60 of the Act of June 9, 1931 P. L. 401, 406, provides as follows: "In case of a vacancy, happening by death, resignation or otherwise, in any county office created by the Constitution or laws of this Commonwealth, and where no other provision is made by said Constitution, or by the provisions of this act, to fill said vacancy, it shall be the duty of the Governor to appoint a suitable person to fill such office, who shall continue therein and discharge the duties thereof until the first Monday of January next succeeding the first Municipal election which shall occur two or more months after the happening of such vacancy. Such appointee shall be confirmed by the Senate, if in session." Such being the law the Governor should appoint a Register of Wills for Westmoreland County to serve until the first Monday of January, 1944, as that will be the first Monday of January next succeeding the first Municipal election which will occur two or more months after the happening of the vacancy so arising on the first Monday of January, 1942, and at which a successor may be elected. * * * O'Neill et al., Appellants v. White et al., 343 Pa. 96, 99, 100, 101 (1941).

We are not unmindful of the decision of the Court in *Cavalcante v. O'Hara*, Secretary of the Commonwealth, 36 D. & C. 139 (1939), 47 Dauphin County Reporter 348. In that case there was a vacancy in the office of judge which occurred on July 16, 1939 by reason of the death of the incumbent. A nomination petition was presented to the Secretary of the Commonwealth by Mr. Cavalcante, a candidate for the office, but was refused on the ground that the office was not designated in the written notice sent by the Secretary of the Commonwealth to the County Board of Elections of Fayette County, pursuant to Section 905 of the Code, as an office for which candidates were to be nominated at the fall primary election in 1939. Mr. Cavalcante then made application for a writ of mandamus which, subsequently, the

court allowed and directed the Secretary of the Commonwealth to receive the petition. No appeal was taken from the court's judgment but, in view of the decisions of the Supreme Court in *Watson*, Appellant *v.* *Witkin*, et al. and *O'Neill v. White*, supra, there can be no question but that the lower court would have been reversed.

The practical effect of these decisions upon the present question is greatly to extend the period of "two calendar months" specified in Article IV, Section 8 of the Constitution, supra. Since the Code provides no method for the nomination of candidates for the offices under discussion where a vacancy occurs subsequent to the date when the nomination machinery provided by it *must* start to function, since nominations for public office are completely integrated with the election which occurs in November following such nominations, it is obviously impossible for the electorate, at a municipal election, to fill a vacancy which occurs in any of the offices specified later than the tenth Tuesday preceding the fall primary election.

In view of the foregoing we are of the opinion, and you are advised, that commissions issued by the Governor to persons appointed by him to fill vacancies in elected county offices, or the office of justice of the peace or alderman, which occur subsequent to the tenth Tuesday preceding the fall primary election in any odd-numbered year must expire the first Monday of January following the second succeeding municipal election.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,
Attorney General.

FRED. C. MORGAN,
Deputy Attorney General

OPINION No. 411

(Substituted for No. 409)

Police—Volunteer police officers—Commissions—Fee for issuance and filing—Eligibility of nonresident to serve—Acts of July 18, 1917, April 6, 1830, and May 2, 1929.

1. Under the Act of July 18, 1917, P. L. 1062, providing for appointment by the Governor of volunteer police officers during a time of war, no fee may be charged by anyone upon the issuance of a commission to such a police officer; the act is a war measure and not a revenue-producing statute.

2. A recorder of deeds may not collect any sum for commission of a volunteer police officer received by such recorder for filing in his office; section 4 of the Act of April 6, 1830, P. L. 272, relating to fees collectible by the recorder of