

within the intent of the legislature in the Appropriation Act 12-A, supra.

It is our opinion that the costs of food and supplies procured by the representatives of the Department of Military Affairs for the relief of the citizens of Honesdale, Wayne County, Pennsylvania, in the recent flash floods of May, 1942, may be paid by the Department of Military Affairs under the provisions of Appropriation Act No. 12-A, approved June 16, 1941.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

ROBERT E. SCRAGG,  
*Deputy Attorney General.*

---

OPINION No. 429

*County offices—McKean County—Prothonotary—Vacancy—Acceptance by elected officer of commission in the United States Army—Right of Governor to appoint—Act of May 2, 1929, P. L. 1278.*

A vacancy exists in the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphan's Court of McKean County. Such vacancy has existed since the date of the acceptance of a commission by Joseph R. Carvolth, the duly elected holder of said offices, as a Colonel in the United States Army. The Governor has the power to appoint Mr. Carvolth's successor. The official records in the office of the Secretary of the Commonwealth should have a notation made to the effect that Mr. Carvolth vacated his said offices by reason of the acceptance of his commission in the United States Army.

Harrisburg, Pa., July 15, 1942.

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

Sir: You have requested us to advise you whether a vacancy exists in the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphans' Court, of McKean County, due to the fact that Mr. Joseph R. Carvolth, who was duly elected to fill said offices for a term expiring the first Monday of January, 1944, has accepted a commission as a colonel in the 111th Infantry of the United States Army and is now serving as such.

A prothonotary is a constitutional county officer, as are also the clerks of the above mentioned courts. Article XIV, Section 1, Constitution of the Commonwealth of Pennsylvania. The Act of July 2, 1839, P. L. 559, as amended April 11, 1866, P. L. 763, 17 P. S. § 1430, provides that in the County of McKean one person shall be elected to fill the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphans' Court. The Act of June 29, 1923, P. L. 944, 16 P. S. § 2431, provides for the compensation of the aforesaid offices in counties of the Sixth Class, of which McKean County is one, and provides further that when one person holds three or more of such offices he shall receive the highest salary fixed for any one thereof plus an additional salary of \$1,000.

You have informed us that the County Commissioners of McKean County have declared the aforesaid offices vacant by reason of the acceptance by Mr. Carvolth of the military commission aforesaid.

Article III, Section 60, of the Act of May 2, 1929, P. L. 1278, as amended June 9, 1931, P. L. 401, 16 P. S. § 60, provides that in case of a vacancy occurring by reason of death, resignation or otherwise, in any county office created by the Constitution or laws of the Commonwealth, where no other provision is made by the Constitution or said act, the Governor of the Commonwealth shall 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 next municipal election which shall occur three or more months after the happening of such vacancy. The appointee shall be confirmed by the Senate, if in session.

Article XII, Section 2, of the Constitution of the Commonwealth, provides as follows:

No member of congress from this State, nor any person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. The General Assembly may by law declare what offices are incompatible.

As a Colonel of the United States Army Mr. Carvolth holds and exercises an office of trust or profit under the United States. See Commonwealth of Pennsylvania ex rel. Crow v. Smith, 343 Pa. 446 (1942), wherein it was held that a Major in the United State Army holds and exercises an office of trust or profit under the United States within the meaning of the aforesaid constitutional provision.

That the Prothonotary and Clerk of the Courts of Oyer and Terminer, Quarter Sessions and Orphans' Court of McKean County, holds

or exercises an office in this Commonwealth to which a salary, fees or perquisites are attached, is clear.

As indicated above, Article XII, Section 2, of the Constitution of the Commonwealth, expressly forbids one individual to hold an office of trust or profit under the United States and at the same time to hold an office in this State to which a salary is attached. It follows, therefore, that Mr. Carvolth cannot hold a commission as Colonel in the United States Army and also the offices to which he was elected in McKean County.

In speaking of Article XII, Section 2, the Supreme Court of Pennsylvania said in *DeTurk v. Commonwealth*, 129 Pa. 151 (1889), at page 160:

\* \* \* The prohibition may be enforced without legislative aid, and no action or inaction of the legislature can destroy it. \* \* \*

We next inquire whether DeTurk forfeited and created a vacancy in the office of postmaster by accepting and entering upon the duties of the office of county commissioner. In considering this question, regard must be had to the fact that the former is an office under the government of the United States, and the latter an office under the state government. If the titles to these offices were derived from a common source, it might well be held that an acceptance of the second office was an implied resignation and vacation of the first. This is the common law rule, and the current of authority in this country sustains it. But the state cannot declare the federal office vacant, nor remove the incumbent from it. It may, however, enforce the constitutional provision by proceedings to test his title to the office he holds under its laws, and it may remove him from that office if he does not surrender the office he holds under the government of the United States. \* \* \*

Continuing at page 161 the Supreme Court said:

Did his formal resignation and complete surrender of it, [the office of postmaster] before answer, place him in accord with the constitution, and perfect his title to the office of county commissioner? By accepting it, and entering upon its duties, he elected to hold it. This election was confirmed by his express resignation of the office of postmaster, and the appointment of his successor, before issue was joined. When he appeared, in obedience to the mandate of the writ, he was not holding an office of trust or profit under the United States. \* \* \*

The case of *Commonwealth of ex rel. v. Smith*, supra, involved the Mayor of the City of Uniontown who had entered the active

military service of the United States as a Major. The court remarked in footnote 3 as follows:

Ordinarily, one holding two incompatible offices is allowed to elect which he desires to resign; if he declines or neglects to make a choice the court determines which office he should be compelled to relinquish: \* \* \* [authorities]; in the present case, however, there is no choice possible since it is not within the power of relator to resign from his office in the army.

As a result of the foregoing, we are clearly of the opinion that Mr. Carvolth may not and does not hold or exercise the offices to which he was elected in McKean County, and has not held or exercised said offices since his entry into active military service as a Colonel in the United States Army.

It is our opinion that a vacancy exists in the offices of Prothonotary, Clerk of the Court of Quarter Sessions, Clerk of the Court of Oyer and Terminer, and Clerk of the Orphans' Court of McKean County, and that such vacancy has existed since the date of the acceptance of a commission by Joseph R. Carvolth, the duly elected holder of said offices, as a Colonel in the United States Army. We are further of opinion that you have the power to appoint Mr. Carvolth's successor. The official records in the office of the Secretary of the Commonwealth should have a notation made to the effect that Mr. Carvolth vacated his said offices by reason of the acceptance of his commission in the United States Army.

Very truly yours,

DEPARTMENT OF JUSTICE,

CLAUDE T. RENO,  
*Attorney General.*

WILLIAM M. RUTTER,  
*Deputy Attorney General.*

---

OPINION No. 430

*Insurance—War Damage Corporation policies—Legality of purchase—Protection of State-owned buildings—Appropriation Act No. 12-A of 1941.*

The Department of Property and Supplies may purchase, on behalf of the Commonwealth, policies of insurance, issued by the War Damage Corporation, to protect State-owned buildings. The decision as to whether such insurance will be purchased and the amount thereof is of course for the department. The cost of such insurance is payable out of the funds appropriated to the department by Appropriation Act 12-A of 1941.