

DEPARTMENT OF JUSTICE

Commonwealth of Pennsylvania

OFFICIAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
Pennsylvania

FOR THE YEARS
1947 and 1948

T. McKEEN CHIDSEY, Attorney General

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Department of Justice
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OFFICAL OPINIONS

1947 - 1948

OPINION No. 559

*United States Army Officers' Reserve Corps—State employes—Military leave—
Three months reserve officers' training course—Acts of May 17, 1921, P. L.
869; April 5, 1929, P. L. 177; June 7, 1917, P. L. 600; July 12, 1935, P. L. 677:*

Military leaves of absence under the Act of June 17, 1917, P. L. 600, can be granted to the employes enumerated, viz., members of the United States Army Officers' Reserve Corps in time of war or contemplated war, and that when World War II has been technically and legally terminated, military leave will cease and all leaves of absence must be obtained under the provisions of the Act of July 12, 1935, P. L. 677, limiting leave to fifteen days. and sections 222 and 709(e) of the Act of April 9, 1929, P. L. 177, which require the approval of the Executive Board for all leaves beyond the thirty-day period.

Harrisburg, Pa., March 13, 1947.

Honorable Frank A. Robbins, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting advice relative to military leave of absence to attend a three months' reserve officer training course to State employes who are members of the United States Army Officers' Reserve Corps.

Specifically, you present the following question:

Can military leave of absence, with the privileges pertaining thereto, be granted to employes attending the above mentioned courses?

You inform us that it is your understanding that the Army intends (starting March 1947) to conduct three month training courses for reserve officers to refresh their knowledge of the latest materials and techniques. These training courses are not mandatory. The officer attending the course will be on temporary duty and will receive full pay and allowances from the Army for the period of attendance. At a later date the Army contemplates giving similar courses for enlisted men, as well as opening officer candidate schools for those enlisted men who are interested in acquiring a reserve commission. For composition of the Army of the United States, see 10 USCA, § 2.

Under our Formal Opinion No. 377, dated December 9, 1940, reported in 1939-1940 Op. Atty. Gen. 486, this department ruled that the benefits of the Act of June 7, 1917, P. L. 600, 65 P. S. § 111 et seq., providing for military leave, were at that time applicable.

Under our Formal Opinion No. 538, dated March 8, 1946, reported in 1945-1946 Op. Atty. Gen. 57, this department ruled that World War II had not been technically nor legally terminated, and as long as the war was not so terminated, the military leave provided for by the Act of June 7, 1917, P. L. 600, as amended, *supra*, would continue to be applicable to State employes who reenlisted for active duty in the military service, upon full compliance with the various provisions of the act. Said Formal Opinion No. 538 is applicable to State employes who are members of the United States Army Officers' Reserve Corps and attend a three months' reserve officer training course. For statement that state of war still exists, see President's Proclamation 2714, dated December 31, 1946.

If and when the war is technically and legally terminated, the provisions of the Act of June 7, 1917, P. L. 600, as amended, *supra*, providing for military leave, will cease to be applicable. Thereupon, the Act of July 12, 1935, P. L. 677, 65 P. S. § 114, relating to leave of absence to State officers and employes who are members of the reserve component of the United States Army, Navy or Marine Corps, will become applicable. This act provides as follows:

All officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any reserve component of the United States Army, Navy, or Marine Corps, shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year during which they shall, as members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces.

This act has been fully construed in our Formal Opinion No. 314, dated January 30, 1940, reported in 1939-1940 Op. Atty. Gen. 165, and Formal Opinion No. 362, dated August 6, 1940, reported in 1939-1940 Op. Atty. Gen. 389. In these opinions, leave with pay was limited to fifteen days in any one year. Thereafter, additional leave could only be obtained as provided for in §§ 222 and 709(e) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. §§ 82 and 249, that is, with the approval of the Executive Board.

Only in the case of employes who are members of the Pennsylvania National Guard would this approval be unnecessary. See § 68 of the Act of May 17, 1921, P. L. 869, 51 P. S. § 95, which pertains to leave of absence with pay to members of the Pennsylvania National Guard. This act was construed to apply to per diem and hourly employes by Informal Opinion No. 1060, dated December 6, 1939, and Formal Opinion No. 379, dated December 16, 1940.

It is our opinion, therefore, that military leaves of absence, under the Act of June 17, 1917, P. L. 600, as amended, 65 P. S. § 111 et seq., and under our Formal Opinion No. 538, dated March 8, 1946, reported in 1945-1946 Op. Atty. Gen. 57, can be granted to the employees enumerated, viz., members of the United States Army Officers' Reserve Corps in time of war or contemplated war, and that when World War II has been technically and legally terminated, military leave will cease and all leaves of absence must be obtained under the provisions of the Act of July 12, 1935, P. L. 677, 65 P. S. § 114, limiting leave to fifteen days, and Sections 222 and 709(e) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. §§ 82 and 249, which require the approval of the Executive Board for all leaves beyond the thirty-day period.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

M. LOUISE RUTHERFORD,

Deputy Attorney General.

OPINION No. 560

Insurance—Excess broker's license—Fire and marine—Insurance Department Act, secs. 622 and 624.

An applicant for an excess broker's fire and marine license must meet the qualifications imposed by section 622 of the Insurance Department Act of May 17, 1921, P. L. 789, and if he does, he may be granted a license to conduct the business indicated under section 624 of the act as amended; the license may confine the applicant's authority to that portion of excess insurance to which applicant proposes limiting himself.

Harrisburg, Pa., May 20, 1947.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You inquire upon what terms you may grant an excess broker's license to a resident applicant who desires to place fire and marine insurance exclusively on interstate and foreign commerce risks with insurance carriers not authorized to do business in Pennsylvania. You state that the applicant does not now hold a domestic fire and marine broker's license.

To answer your question requires an interpretation of Section 624 of the Insurance Department Act, the Act of May 17, 1921, P. L. 789, as amended by the Act of May 1, 1929, P. L. 1186, 40 P. S. § 254, which we quote in full:

The Insurance Commissioner may issue a license, revocable at any time, permitting the person, copartnership, or corporation named therein to act as a broker to procure for his clients policies of fire or marine insurance from companies, associations or exchanges not authorized to do business in this Commonwealth. Before any fire or marine insurance excepting however marine insurance on vessels and vessel property engaged in interstate or foreign commerce shall be procured under or by virtue of said license, there shall be executed and filed with the Insurance Commissioner by the licensed broker, and also by the party desiring the insurance, an affidavit, which shall have force and effect for one year only from date thereof, setting forth that the party desiring insurance is, after diligent effort, unable to procure the amount required to protect the property owned or controlled or entrusted to him, from fire or marine insurance companies,—mutual insurance companies, associations, or exchanges excepted,—duly authorized to transact business in this Commonwealth. The licensed broker procuring or delivering policies in such unauthorized companies, associations, or exchanges shall keep a separate account thereof, open at all times, without notice, to the inspection of the Insurance Commissioner, showing the exact amount of insurance placed, giving the name of the insured, the location of the insured property, the gross premium mentioned in the policy, the name of the company, association, or exchange issuing the contract, and the number, date, and term of the policy. Each policy shall have written or printed on the outside of it the name of the licensed broker who obtained the same and introduced it into the Commonwealth, and after his name shall appear the words "licensed excess insurance broker." Nothing in this section shall be so construed as giving any such licensed broker authority to act as agent for, or to in any way represent, any such unlicensed company, association, or exchange in this Commonwealth.

From the foregoing, it would appear that one not licensed as a fire and marine insurance broker in this State could hardly be eligible to receive an excess broker's license to procure fire and marine insurance on local risks from carriers unauthorized to write such insurance here. For in order lawfully to obtain such coverage the excess broker must make an affidavit that after diligent effort similar insurance cannot be obtained in the amount required from a stock fire and marine insurance company authorized to do that business in Pennsylvania. The solicitation essential to justify the affidavit would in itself require a broker's license.

However, in the case of fire and marine insurance on interstate and foreign risks from unauthorized companies, no affidavit is required nor is there, accordingly, an obligation imposed upon the excess broker which would necessitate his soliciting domestic companies for the amount of insurance required to protect vessels and vessel property engaged in interstate and foreign commerce. On the other hand, there is nothing in this section which would indicate that the legislature intended to break down the classification of excess brokers into two groups, that is, those who would deal exclusively in interstate and foreign insurance and those who would deal in domestic insurance. Consequently, it must be presupposed that the legislature intended all excess brokers to be qualified to deal in all the insurance authorized by this section of the Insurance Department Law.

As has been pointed out above, in order to do domestic insurance business with unauthorized companies, an excess broker would necessarily have to be qualified as a regular fire and marine broker. Therefore, even though he intends to confine his activities to insuring risks in interstate and foreign commerce, he would nevertheless have to meet the qualifications essential for writing domestic risks. They are not severe.

Section 622 of the Insurance Department Act of 1921, 40 P. S. § 252, provides that licenses may be issued to persons twenty-one years of age, partnerships and corporations to sell insurance other than life insurance when the applicant shall answer in writing and under oath interrogatories prepared by the Insurance Commissioner, when he is vouched for by endorsement of at least two agents or by the officers of an insurance company, association or exchange, acquainted with the applicant, to the effect that the applicant is of good business reputation, and has experience in underwriting, other than soliciting, and is worthy of a license. The Insurance Commissioner himself must be satisfied that the applicant is worthy of a license and is familiar with the provisions of the insurance laws of the Commonwealth of Pennsylvania before the license may issue.

The very fact that the legislature has specifically enumerated these preliminary requirements for a general broker's license is indicative of the fact that it did not contemplate that any one other than a licensed broker would apply for an excess broker's license. Elsewise it would have been as meticulous in spelling out qualifications in section 624 of the act as it was in specifying them in section 622. If section 624 were construed without reconciling it with section 622, the unreasonable result would follow that excess brokers would not need to be twenty-one years of age, would not have to be vouched for and would not have to familiarize themselves with the provisions

of the insurance laws, or be worthy of a license—a result which would be absurd and unreasonable and, therefore, to be avoided under the rule of construction set forth in Section 52 of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 552.

But the law should never be construed to require a useless thing. If then an applicant for an excess broker's license meets all the qualifications imposed by section 622 of the Insurance Department Law as prerequisites for granting a broker's license, and also meets the additional requirements imposed by section 624 upon excess brokers, he should be granted an excess broker's license without first having to obtain a regular domestic broker's license.

Whether, any Pennsylvania license at all is necessary to enable a person to obtain fire and marine insurance on interstate and foreign risks from companies not authorized to write fire and marine insurance in this State, appears to have been decided in the affirmative by the Supreme Court of the United States in *Robertson v. People of State of California*, 66 S. Ct. 1160, 328 U. S. 440 (1946). There it was held the State of California could license surplus line brokers;* that reasonable licensure requirements placed no undue burden upon interstate commerce contrary to Article I, Section 8 of the Constitution of the United States. Mr. Justice Rutledge, speaking for the Court at 66 S. Ct. 1166, 328 U. S. 450, says:

* * * In the absence of any showing that it is administered arbitrarily, the requirement that the license shall issue only after a finding of trustworthiness and competence by the commissioner cannot be taken to be other than an appropriate means of safeguarding the public against the obvious evils arising from the lack of those qualifications. *People of State of California v. Thompson*, supra. [313 U. S. 109, 110, 61 S. Ct. 930, 931, 85 L. Ed. 1219]. Considered separately from any relationship to other sections of the Code, therefore, the prescribed conditions for securing the surplus line broker's license are no more invalid than those which must be fulfilled to secure the general agent's license * * *.

We are of the opinion that if the applicant before you for an excess broker's fire and marine license meets the qualifications imposed under section 622 of the Insurance Department Act, the Act of May 17, 1921, P. L. 789, 40 P. S. § 252, he may be granted an excess insurance broker's license to conduct the business indicated in section

* Under the California Insurance Code, Chapter Six, Surplus Line Brokers, Sections 1760-1779, surplus line brokers generally correspond and are analogous to excess brokers in Pennsylvania.

624 of the same act as amended by the Act of May 1, 1929, P. L. 1186, 40 P. S. § 254, and although there is no authority under the provisions of this section to issue a limited excess broker's license you may, nevertheless, at the request of the applicant, confine his authority to that portion of excess insurance to which the applicant proposes limiting himself.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 561

Criminal procedure—Judgment to pay fine and costs—Enforcement after expiration of court term—Uncollectible fines—Remission by Governor.

1. The final judgment of a court of record that defendant pay a fine and costs actually due the Commonwealth is enforceable even after a period of three and more years of noncompliance by commitment of defendant, execution against his property, or attachment for contempt.

2. Uncollectible fines actually due the Commonwealth and charged to a county may be exonerated only by the Governor.

3. Suggested, as a matter of practice, that applications by counties for the remission of fines by the Governor be addressed to the Board of Pardons for its consideration and recommendation to the Governor thereon.

Harrisburg, Pa., June 4, 1947.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice in which you ask if a court of quarter sessions may enforce a sentence of "fine \$200.00 and pay costs of prosecution, further sentence suspended" three and more years after the original judgment was rendered, by commitment, attachment for contempt or civil execution process.

You also ask if the sole power to authorize remission of uncollectible fines, actually due the Commonwealth, is vested in the Governor.

A court, upon the expiration of the term at which a final sentence is pronounced is without authority to alter, modify or vacate its judgment, except for clerical errors or matters of form. *Com. v. Rosser*, 26 Luzerne 410 (1931); *Com. v. Harrison*, 142 Pa. Super. 453 (1940); *Com. v. Denson*, 157 Pa. Super. 257 (1945).

Suspended sentences are authorized by statutes such as the Act of August 6, 1941, P. L. 861, Section 25, 61 P. S. §331.25, known as the Pennsylvania Board of Parole Act, the Act of June 19, 1911, P. L. 1055, as amended, 19 P. S. § 1051, and the Act of May 10, 1909, P. L. 495, 19 P. S. § 1081. These statutes authorize the suspension of sentences and the probation of defendants for definite periods and under terms and conditions that are duly entered as a part of the record in each case.

Even without statutory authority, courts of record have inherent power under common law to suspend sentences. *Com. ex rel. McGinnis v. Ashe*, 330 Pa. 289 (1938); *Com. ex rel. Paige v. Smith*, 130 Pa. Super. 536 (1938); *Com. v. Wentz*, 52 D. & C., 690 (1945).

The terms of the sentence you have cited, "fine \$200.00 and pay costs of prosecution, further sentence suspended", are not within the provisions of the statutes authorizing and regulating suspended sentences, since at least part of the sentence has been imposed and no express terms and conditions, duly entered of record in the case, have been recited in the suspended portion. Regardless of the power of the court to clarify and impose the "further sentence suspended" portion of the judgment within a reasonable time under its common law powers, a sentence of "fine \$200.00 and pay costs of prosecution" has been imposed and becomes a final judgment after the expiration of the term at which it was pronounced. *Com. ex rel Nuber v. Keeper of Workhouse*, 6 Pa. Super. 420 (1898).

In the case of *Com. v. Ciccone*, Appellant, 84 Pa. Super. 224 (1924), the court said:

* * * By the Act of 1860 the court had the power to fine and to imprison; having done either, the power to resentence expired with the term. * * *

After this case was decided, the Act of June 19, 1911, P. L. 1055, was amended by the Act of May 7, 1925, P. L. 554, 19 P. S. § 1051, so that courts which have entered suspended sentences under the discretionary conditions authorized by the act, may, upon violation of the probation conditions, sentence defendants under the provisions of the original acts under which they were convicted, and the payment of money required as a condition of the probations, shall not be considered as the imposition of fines and of sentences.

May then a defendant be imprisoned for his failure to pay a sentence of "fine \$200.00 and pay costs of prosecution"?

Federal Courts hold that payment of a fine imposed by a court in a criminal prosecution may be enforced by imprisonment only where such consequence is expressly prescribed in the terms of the sentence. *Hill v. United States ex rel. Wampler*, 298 U. S. 460 (1936).

However, the courts of our Commonwealth hold that a sentence of a court of quarter sessions, ordering the defendant to pay a fine, may be enforced by imprisonment, even though the sentence does not expressly direct imprisonment of the defendant upon his failure to pay the fine. *Com. v. Borden*, 61 Pa. 272 (1869); *Com. v. Hough*, 1 Dist. 51 (1892); *Com. ex rel. Colbert v. Kerr*, 42 P. L. J. 367, 32 Atl. 276 (1895); *Com. ex rel. McAleese*, 2 Dist. 499 (1892).

The Act of June 24, 1939, P. L. 872, known as The Penal Code, at Section 1104, 18 P. S. § 5104, provides:

In all cases where a remedy is provided or duty enjoined, or any thing directed to be done by the penal provisions of any act of assembly, the direction of said act shall be strictly pursued; and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law in such cases, further than shall be necessary for carrying such act into effect.

In the case of *Com. ex rel. v. McClelland*, 33 D. & C. 341 (1938), the defendant was sentenced to pay a fine of \$100 and costs. On his inability to comply with the sentence, he was committed to the county jail "until the fine and costs are paid or he is discharged by law." After institution of habeas corpus proceedings, the court said:

I hold that the legislative authority to sentence a defendant to pay a fine carries with it the incidental power to imprison, upon failure to pay.

* * * * *

Under the common-law rules, it is the practice, when a punishment inflicted is by sentence to pay a fine, to include in the judgment an order that the prisoner be committed to jail until the fine is paid. This has been the practice in England from the earliest times until a comparatively recent date at least, and it seems that it has never been successfully assailed on the ground that such judgment inflicted perpetual or indefinite imprisonment. The rule above stated has been followed very generally in this country, either from the adoption of the common-law doctrine, or under statutes in effect confirming it. . . . Committing a prisoner to jail until a fine

is paid is no part of the punishment. The penalty, or the punishment adjudged, is the fine, and the custody adjudged is the mode of executing the sentence; that is, of enforcing the payment of the fine. This is in accordance with the common law: 8 R. C. L. 269, § 282, et seq.

In the absence of a statute or judicial decision limiting the period of time after imposition of final judgment, that a court may enforce its order to pay a fine, by imprisonment of the defendant, the remedy is still available as on the day the sentence was pronounced.

After a final judgment of the court in a criminal action to pay a fine is once imposed, it can only be satisfied by payment, commitment of defendant, remission by the Governor, or discharge by operation of the insolvency laws of the Commonwealth or the bankruptcy laws of the federal government. The burden is on the defendant to pay his debt to society after imposition of sentence. If he delays in the performance of this duty, he is not entitled to relief from the full penalty imposed by the sentence, because there has been a passage of time since the conviction and the imposition of the original sentence. *Miller v. Evans*, 88 N. W. 198 (Iowa 1901), 56 LRA 101; ex parte *Volker*, 233 N. W. 890 (Neb. 1931); ex parte *Eldridge*, 106 Pac. 980 (Okla. 1910); *Sartain v. State*, 10 Tex. App. 651 (1881), Annotation 72 A. L. R. 1271; *Libtz v. Coleman*, 5 So. (2d) 60 (Fla. 1941); *Moore v. Littlefield*, 14 So. (2d) 902 (Fla. 1943); *Etheridge v. Poston*, 168 S. E. 25 (Ga. 1933); *Dixon v. Beaty*, 4 S. E. (2d) 633 (Ga. 1939); ex parte *Silverman*, 42 N. E. (2d) 87 (Ohio 1942); 24 C. J. S. Criminal Law, Section 1999; 72 A. L. R. 1271; 15 Am. Jur. Criminal Law, Section 514.

In ex parte *Salisbury*, 265 S. W. 696 (Tex. 1924), a defendant on conviction of aggravated assault in 1921, was sentenced to pay a fine of \$450. After appeal the judgment was affirmed the same year. The defendant did not pay the judgment and in 1924 he was remanded to custody. On habeas corpus proceedings, the court held:

On the facts revealed by the present record, at the time the mandate was filed, it was the privilege of the state to enforce the judgment by seizing the appellant under a *capias pro fine*, by forfeiting the recognizance, by proceedings against the sureties, or by issuing execution against his property. See *Carleton v. State*, 45 Tex. Cr. R. 73, 73 S. W. 1044. The duty of proceeding by one of these methods was upon the officers of the state. A duty likewise rested upon the appellant, and the sureties on his recognizance. He might have paid the fine or surrendered himself; so might the sureties. None of the officers of the state had the right to affirmatively release the appellant or waive the state's right to the satisfaction of the judgment of the court. They having no right to do so by affirmative action, it is our opinion that their negligence in performing the duties which the law imposed upon them

would not operate to discharge the appellant from the necessity of suffering the penalty imposed upon him by the judgment of conviction. Nor would the appellant's failure to pay the fine or satisfy the judgment deprive the state of the right to enforce it.

In your letter you express the thought that a charge of contempt should not be used to enforce payment of a fine three years or more after the defendant's original conviction and sentence. All courts of record have the inherent right to punish for contempt, but the manner of its exercise is regulated by the Act of June 16, 1836, P. L. 784, as amended, 17 P. S. § 2041, which restricts attachments and summary punishments for contempt to (1) official misconduct of an officer of the court, (2) disobedience or neglect by an officer, party, juror or witness of or to the lawful process of the court, and (3) misbehavior of any person in the presence of the court, thereby obstructing the administration of justice. *Penn A. M. Co. v. Anth. Min. of Pa.*, 114 Pa. Super. 7 (1934); *Mark's Appeal*, 144 Pa. Super. 556 (1941).

A contempt proceeding is a special and separate action, and, although courts do take cognizance of the passage of time since the court has had knowledge or reason to have had knowledge of the original commission of the contempt, no case has been brought to our attention where delay has prevented a court from enforcing its final sentence for the payment of a fine actually due the Commonwealth by means of an attachment for contempt.

In *Mark's Appeal*, 144 Pa. Super. 556 (1941), an alleged conspiracy to disobey the court's order to destroy gambling devices occurred approximately three years before the contempt proceedings were initiated. The court said:

Any conspiracy shown by the evidence in this case was at most an indirect contempt and in our opinion Section 77 of the Act of March 31, 1860, *supra*, limiting the time within which prosecutions for certain crimes may be brought, should be held applicable by analogy and as constituting an effectual bar to the present prosecution. As in force at the time this proceeding was instituted, it provided: "All indictments and prosecutions . . . for all misdemeanors . . . shall be brought or exhibited within two years next after such misdemeanor shall have been committed. . .".

Where an act sought to be punished is a criminal contempt, the court may, by analogy, adopt the limitation prescribed by statute for criminal prosecutions: *Gompers v. United States*, 233 U. S. 604, 34 S. Ct. 693, 58 L. Ed. 1115; 13 *Corpus Juris*, page 61, Sec. 84; 17 *C. J. S.* pages 83, 84, Sec. 67.

Where an act sought to be punished as contempt also constitutes a crime, courts have frequently adopted by analogy the limitation prescribed by statute for criminal prosecutions: *Gordon v. Commonwealth*, 141 Ky. 461, 133 S. W. 206; *Goodall v. Superior Court in and for Santa Barbara County*, 174 P. 924, 926, 37 Cal. App. 723; *Beattie v. People*, 33 Ill. App. 651.

Under the facts in Mark's Appeal, ante, the court held that process in the way of attachment for contempt, to be legally effective should have been issued within the time limit required by statute for a criminal prosecution of the crime under which the original prosecution or indictment was founded. However, it is pointed out that this case may not be authority for limiting the time for instituting an action for contempt for failure of a defendant to pay a fine actually due the Commonwealth. In the Mark's case, the lower court attempted to punish an officer of the court for his alleged disobedience of the court's order, which it was charged, occurred some three years before the contempt proceedings were brought. The production of witnesses and evidence in defense of this type of contempt after a period of three years could be an unfair burden on the defendant.

Section 20 of the Act of June 16, 1836, P. L. 784, 17 P. S. § 2080, authorizes courts of quarter sessions "to award process, to levy and recover such fines, forfeitures and amercements, as shall be imposed, taxed or adjudged by them respectively." Likewise, under the provisions of Section 32 of the Act of March 31, 1860, P. L. 427, 17 P. S. § 361, courts of quarter sessions are authorized "to award process to levy and recover such fines, forfeitures and amercements, as shall be imposed, taxed or adjudged by them respectively," which power has been held to include authority for the issuance of a fi. fa. for the collection of a fine and costs. *Commonwealth v. Gabriel*, 14 Dist. 862 (1904); *McNamara v. Earley*, 2 C. C. 491 (1887); *Com. to use of Rowe v. Rowe*, 28 Dist. 496 (1919).

Under the provisions of the Act of May 8, 1901, P. L. 143, 12 P. S. § 1001, "a copy of the said order, sentence, decree or judgment may be certified to any court of common pleas of the same county, and be entered and indexed in said court as a judgment with like force and effect as if the same had been recovered therein as a judgment of the latter court." The judgment then becomes a lien for the same period of five years after the date of its entry. *Beck v. Finnefrock*, 72 Pa. Super. 537 (1919).

A claim against the county for costs must be presented within six years or it will be barred by the statute of limitations. The County of Lancaster *v. Brinthall*, 29 Pa. 38 (1857); *Zeidler v. Luzerne County*, 1 Kulp 448 (1878); *Lineberger v. Mercer County*, 19 C. C. 532 (1897).

The converse is not true, however, and unless the Commonwealth is expressly included in the terms of a statute, it is not embraced within the prohibition contained therein. *Com. v. Baldwin*, 1 Watts 54 (1832); 1939-1940 Off. Op. Atty. Gen., p. 122; *Com. v. Yeakel*, 1 Woodward 143 (1863); 38 Ill. Law Rev. 418 (1944).

It follows that unless otherwise provided by statute, a final judgment of a fine and costs may be enforced by fi. fa. issued by the court of quarter sessions or certified to the courts of common pleas in the same county, and execution by fi. fa. issued thereon, even though as in the case cited, three and more years have elapsed since the original pronouncement of the sentence, in addition to other means of enforcement, some of which are herein discussed.

You also state that a county controller has asked what procedure should be used to clear the county's books of fines which have been remitted by decree of its county court of quarter sessions, as well as fines which may be definitely uncollectible by reason of death or other cause.

The provisions of Section 9, Article IV of the Constitution have been judicially interpreted as having vested the Governor with the exclusive power to remit fines and forfeitures. Court of quarter sessions is without authority to amend or reform its sentence by remission of a fine, after the expiration of the term at which the sentence was imposed. *Com. v. Smith*, 18 D. & C. 460 (1932); 36 C. J. S. Fines, Section 18. In *Com. ex rel. Banks v. Cain*, 345 Pa. 581 (1942), the court in discussing the remission of fines, states " * * * there is no legislation granting such power to any other authority, not even to the courts; * * *." Likewise, the County Commissioners are without authority to remit a fine due the Commonwealth, and thus interfere with the judgment of the judiciary as well as usurp the pardoning power. *Schwamblé v. The Sheriff*, 22 Pa. 18 (1853); *Com. ex rel. Johnson v. Holloway*, 42 Pa. 446 (1862); Off. Op. Atty. Gen. 1909-10, p. 271, 18 Dist. 737 (1909); *Com. v. Mahoney*, 32 Delaware 219 (1943).

In *Com. ex rel. Banks v. Cain*, *supra*, the court held that, under the provisions of Article IV, Section 9, of the Constitution, the State Board of Parole is without authority to remit fines and a defendant who desires to release himself from actual payment of a fine " * * * must obtain a remission of the fine from the Governor, or take the benefit of the insolvency laws after serving such additional period of confinement as is prescribed by existing laws, or avail himself of the procedure provided by other legislation which may be applicable to his particular case."

However, Article IX, Section 909 of the Act of April 9, 1929, P. L. 177, 71 P. S. § 299, provides as follows:

The Board of Pardons shall have the power to hear applications for the remission of fines and forfeitures, and the granting of reprieves, commutations of sentence, and pardons, except in cases of impeachment, and to make recommendations in writing to the Governor thereon, in the manner provided in and under and subject to Article IV, Section 9, of the Constitution of this Commonwealth.

Under the provisions of this section, applications for the remission of fines and forfeitures, as a matter of practice, can be made by the county official charged with their collection, to the Board of Pardons, for its consideration and recommendation thereon to the Governor.

Where a defendant dies after the sentence of a fine actually due the Commonwealth has been imposed and before its payment, remission, or other satisfaction, there is no statutory or other known legal authority for the exoneration on the county's books of the amount as an uncollectible item due the Commonwealth, except remission of the fine by the Governor. Costs which accrued prior to the defendant's death, however, are not abated, and may still be enforced as a valid claim against the estate of the deceased defendant. *Com. v. Embody*, 37 D. & C. 280 (1940).

It is our opinion, therefore: (1) That the final judgment of a court of record to pay a fine and costs actually due the Commonwealth is enforceable, even after a period of three and more years of non-compliance, by commitment of the defendant, execution against his property or attachment for contempt.

(2) That all uncollectible fines actually due the Commonwealth and charged to a county, may be exonerated only by the Governor.

It is suggested as a matter of practice that applications by a county for the remission of fines by the Governor are addressed to the Board of Pardons for its consideration and recommendation to the Governor thereon.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

RAYMOND C. MILLER,

Deputy Attorney General.

OPINION No. 562

Anti-Narcotic Act—Cough medicines—"Cheracol"—Sale of—Prohibited classes—Act of July 11, 1917, P. L. 758, as amended.

Harrisburg, Pa., June 26, 1947.

Honorable Norris W. Vaux, Secretary of Health, Harrisburg, Pennsylvania.

Sir: Recently you made a request to this department for an opinion as to whether the sale or the offering for sale of a cough medicine having the trade name "Cheracol" constituted a violation of Section 2 of the Act of July 11, 1917, P. L. 758, as amended, 35 P. S. § 852, in view of the fact that the label on the container in which this preparation is sold indicates that it contains codeine and also prescribes dosages for infants and children. Your request was accompanied by a sample of the preparation in question in the original container in which it is offered for sale. Aside from the kinds and quantities of the ingredients listed on the label of the sample, no independent chemical analysis of its contents was submitted.

The first words printed on the label of the sample submitted are "Exempt Narcotic". After the trade name appears the following: "Each fluidounce contains: Codeine Phosphate, 1 grain, Warning—May be habit forming; Chloroform, 2 grains; Potassium Guaiacolsulfonate, 8 grains; Ammonium Chloride, 8 grains; Antimony and Potassium Tartrate, $\frac{1}{12}$ grain; Alcohol 3% with White Pine and Wild Cherry Bark."

The Act of July 11, 1917, P. L. 758, as amended, 35 P. S. § 851 et seq., is known and referred to both as the "Anti-Narcotic Act", (Commonwealth v. Cohen, 142 Pa. Super. Ct. 199 (1940)), and the "Narcotic Drug Act," (Commonwealth v. LaRosa, 42 Pa. District and County Rep. 34 (1941)). The first section of the act defines the word "drug", except as limited in section 2, to include: (a) opium; (b) coca leaves; (c) marihuana; (d) any compound or derivative of opium, coca leaves or marihuana; (e) any substance or preparation containing opium, coca leaves or marihuana; (f) any substance or preparation containing any compounds or derivative of opium, coca leaves or marihuana and any substance identified chemically as 1-methyl-4-phenylpiperidine-4-carboxylic acid ethyl ester, or any salt or derivative thereof, or any preparation containing such substance or its salts or derivatives.

Section 2 provides in part:

The word "drug" shall *not* be construed to include—(1) preparations and remedies and compounds which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or *more than one grain of codeine*, or any salt or derivative of any of them, in one fluid ounce, * * *

Provided, however, That no preparation, remedies, or compounds containing *any opium, or coca leaves, or any compounds or derivative thereof, in any quantity whatsoever, may be sold, dispensed, distributed, or given away to, or for the use of, any known habitual user of drugs or any child of twelve years of age or under, except in pursuance of a prescription of a duly licensed physician or dentist*. (Italics ours.)

Section 12 as amended, 35 P. S. § 865, provides that anyone who shall violate the provisions of the act shall be guilty of a felony and specifies the penalty for any conviction thereunder.

Assuming that an independent chemical analysis of the sample submitted would establish the same amounts and kinds of ingredients as those appearing on the label, then there is no question that this preparation is not a drug within the meaning of section 2 of the act, since it does not contain *more* than one grain of codeine per fluid ounce, and therefore it may be sold, dispensed or given away to, or for the use of, any person not a known habitual user of drugs and over the age of twelve years without restriction.

However, with respect to the selling, dispensing or giving away of this preparation to, or for the use of, known habitual users of drugs or children twelve years of age or under, without the prescription of a duly licensed physician or dentist, our conclusion is different. Under such circumstances the exception under section 2 specifically prohibits sales, deliveries or donations of any preparation containing *any opium or derivative thereof in any quantity whatsoever*. Inasmuch as the preparation in question does contain codeine, it falls within this restriction since codeine is a derivative of opium.

The "Pharmacopoeia of the United States", 12th Revision, at page 139, states:

Codeine is an alkaloid *obtained from opium* or prepared from morphine by methylation. (Italics ours.)

The "American Illustrated Medical Dictionary", 19th Edition, at page 341, states:

Codeine: A white or whitish, crystalline alkaloid, morphine methyl ether, $C_{18}H_{21}NO_3 + H_2O$, *from opium*. *** (Italics ours.)

In *State v. Brennan*, 300 Pacific Rep. 273 (Mont. 1931), at page 275, the court stated:

* * * Codeine is an alkaloid associated in opium with morphine, therefore extracted in some manner from opium.
* * *

In *United States v. 5 One-Pint Bottles and 23 One Gallon Bottles, More or Less, of Elixir Terpin Hydrate and Codeine*, 9 Fed. Supp. 990 (Dist. Ct. S.D.N.Y. 1934), the court stated at page 991:

* * * That codeine is a derivative of opium or morphine is undisputed. * * *

The terms of the exception of section 2 above quoted not only make it a violation of the act to sell, dispense, or give away the preparation in question to a child twelve years of age or under without a prescription, but they also make it a violation, in the absence of such prescription, to sell, deliver or give away the preparation to an adult where the seller or donor knows, or has reason to know, that the preparation is to be used for a child in the prohibited class. Where the sale or delivery is directly to such child the seller or donor acts at his peril and it is no excuse that he was ignorant of the fact that the child was under the age specified in the act, or had no intent to disobey the statute, for the mere doing of the forbidden act constitutes a violation of the act.

The above statute was clearly enacted, in the exercise of the police power of the Commonwealth, to protect the public health and safety by regulating the traffic in narcotic drugs. The police power is the greatest and most powerful attribute of government—on it the very existence of the state depends: *Commonwealth v. Widovich*, 295 Pa. 311 (1929). One of its well known objects is the protection of the public health, and laws prohibiting the import, export, sale or transfer of articles deleterious to the public are valid under it: *Commonwealth v. Stofchek*, 322 Pa. 513 (1936).

It is well settled that statutes in the nature of police regulations may define acts which are *mala prohibita* so that the mere doing of the forbidden acts constitute violations of the statutes irrespective of whether those acts were done without criminal intent or in ignorance of the facts or state of things contemplated by the statutes. This principle has been carefully and fully considered in the opinion of Judge Keller in *Commonwealth v. Liberty Products Company*, 84 Pa. Super. Ct. 473 (1925) at pages 476-477, wherein it is stated in part:

* * * Where the statute forbids the sale of liquors it is not necessary in a prosecution for its violation to prove a criminal intent; if the sale be contrary to law, the intent is immaterial: *Com. v. Holstine*, 132 Pa. 357, 361. * * * It was held in *Com.*

v. Weiss, 139 Pa. 247, that a restaurant keeper who furnished oleomargarine with his meals, not knowing it was oleomargarine but believing it was butter, was guilty of violating the provisions of the Act of May 21, 1885, P. L. 22, * * *. In *Com. v. Pflaum*, 50 Pa. Superior Ct. 55 (affirmed, 236 Pa. 294) it was held that the defendant could be convicted of violating the Act of May 13, 1909, P. L. 520, forbidding the use of sulphur dioxide in confectionery although he did not know that the merchandise sold by him contained the prohibited substance. The same ruling has been made with respect to other violations of the pure food laws: as for example, the sale of milk just as received by defendant: *Com. v. Hufnal*, 4 Pa. Superior Ct. 302; the sale of renovated butter, bought by defendant as creamery butter and believed by him to be such: *Com. v. Seiler*, 20 Pa. Superior Ct. 260; the sale of ice cream, containing less than a standard amount of butter fat: *Com. v. Crawl*, 52 Pa. Superior Ct. 539 (affirmed, 245 Pa. 554); cold storage eggs: *Com. v. Baird*, 66 Pa. Superior Ct. 275; adulterated syrup: *Com. v. Kevin*, 202 Pa. 23; adulterated canning compound: *Com. v. Fulton*, 70 Pa. Superior Ct. 95 (affirmed, 263 Pa. 332).

Additional analogous examples might be cited such as selling tobacco, in any form, to minors under the age of sixteen years in violation of the Act of June 24, 1939, P. L. 872, § 647, 18 P. S. § 4647, and selling liquor to minors in violation of the Pennsylvania Liquor Control Act of November 29, 1933, Sp. Sess. P. L. 15, Art. VI, Section 602 (5), as amended, 47 P. S. § 744-602 (5).

It is our opinion, therefore, that, upon the facts submitted and as herein recited, and under Section 2 of the Act of July 11, 1917, P. L. 758, as amended, 35 P. S. § 852, the selling, dispensing, or giving away of preparations corresponding to the sample submitted under the trade name "Cheracol":

(a) To or for the use of any person over the age of twelve who is not a known habitual user of drugs is permissible and constitutes no violation of the above statutory provision.

(b) To any adult where the seller, dispenser or donor knows, or has reason to know, that the preparation is to be used by any known habitual user of drugs or for a child twelve years of age or under, is not permissible without the prescription of a duly licensed physician or dentist, and would constitute a violation of the above statutory provision.

(c) To any known habitual user of drugs or to any child twelve years of age or under, is not permissible without such written prescription and would constitute a violation of the above statutory provision.

As to children in the prohibited class, the seller, dispenser or donor acts at his own peril and lack of knowledge or absence of criminal intent on his part would not excuse the commission of the offense.

(d) Whenever any person, authorized by law to fill prescriptions, does sell, dispense, or give away this or a similar preparation to or for the use of one in the prohibited classes upon the requisite prescription, he is required to affix to the container in which the preparation is sold, dispensed, or given away a label showing the date, his own name, address, and registry number, or the name, address and registry number of the pharmacist for whom he lawfully acts; the name and address of the patient; the name, address, and registry number of the physician or dentist by whom the prescription was written, and such directions as may be stated on the prescription in compliance with Section 7 of the Act of July 11, 1917, P. L. 758, as amended, 35 P. S. § 858.

(e) Although there is no specific prohibition in the Act of July 11, 1917, P. L. 758, as amended, 35 P. S. § 851 et seq., again the "offering for sale" of this or a similar preparation to those in the prohibited classes without the requisite prescription, nevertheless, the facts and circumstances of a particular transaction might be such as to amount to a wrongful attempt to sell the preparation. Such an attempt would constitute a violation of the criminal law. In the absence of the submission of any facts on this point, no determination is made with respect thereto.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

FRANCIS J. GAFFORD,

Deputy Attorney General.

OPINION No. 563

Administrative Law—Veterans' preference in public position—Civil Service—Public office—Contractor's employees—Reduction in personnel—Act of May 22, 1945.

A "soldier," as defined by the Act of May 22, 1945, P. L. 837, as well as the widow or wife of a disabled soldier, is entitled, under the classification of "soldier" to preference in appointment to, or promotion, as well as retention in public positions, as follows:

1. After a soldier has successfully passed any civil service examination, it shall be marked or graded an additional 10 points, and the total final grade or mark thus obtained shall determine his standing on any eligible or promotion list, certified or furnished to the appointing or promoting power.

2. Where no civil service examination is required, a soldier must be selected for appointment or promotion if he is an eligible applicant or candidate and, in the discretion of the appointing power, possesses the requisite qualifications efficiently to perform the duties of the position.

3. A soldier must be selected for public office if his name appears on the certified list furnished the appointing power, as the result of a required civil service examination, and in the event that the names of more than one soldier appear on the said certified list, the appointing power may select, in his discretion, any one of them, even though the soldier selected did not attain the highest mark as shown on the list.

4. A soldier may be selected, in the discretion of the appointing or promoting power, if he has the qualifications and, without the addition of any points to his final grade or mark, has passed the required civil service examination, even though his name does not appear on the eligible or certified list furnished the appointing or promoting power.

5. A soldier's lack of academic or scholastic training or experience, age or lack of physical qualifications must be waived, if in the reasonable judgment of the appointing or promoting power, the soldier is not actually incapacitated from performing the duties of the position as efficiently as a qualified and eligible applicant or candidate not entitled to the waiver, and provided the soldier possesses the other requisite qualifications satisfactorily to perform all of the duties which the position requires.

6. The specifications issued by the Commonwealth for the construction, alteration, or repair of any public works, shall require the contractor or subcontractor chosen to give the same preferential rating to a soldier applicant for employment upon such public works, that is given by the Commonwealth to its own employees, who are entitled to preference.

7. Whenever a necessary reduction of personnel employed in public positions or on public works is made on a seniority basis, a soldier is entitled to have the total number of years he served as a member of the armed forces of the United States or in any women's organization officially connected therewith, during any war in which the United States engaged, added to his total years in the civil service or on public works, in the computation of his seniority rights.

Harrisburg, Pa., July 16, 1947.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice on the interpretation of the word "preference" as it is used in the Act of May 22, 1945, P. L. 837, as last amended by Act No. 392, approved June 25, 1947, 51 P. S. §§ 492.1-492.8, inclusive, which provides and requires preference in appointments to, or promotions, as well as retention in public positions or on public works of honorably discharged

persons who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war in which the United States engaged; and includes such preference of the widows and wives of disabled soldiers.

From early days, the Commonwealth has had legislation in effect granting various exemptions, privileges and preferences to men and women who have served in the wartime military service of our country in recognition of their patriotism and sacrifices as well as giving them credit for the experience and training gained while so engaged.

Webster's New International Dictionary, Second Edition (page 1948), includes the following definitions of the word "preference":

1. Act of preferring, or state of being preferred; the setting of one thing before or above another; higher estimation; predilection; prior choice; also, the power or opportunity of choosing; as, to give him his preference.

* * * * *

3. One who or that which is preferred; the object (person or thing) of choice or superior favor; as, which is your preference?

* * * * *

7. Law. Priority in the right to demand and receive satisfaction of an obligation, as the payment of a debt in full or in part."

Statutes requiring soldiers' preferment in appointment to public office or employment are generally held valid by present day decisions, provided they require that the soldier possess, independently of any preference granted to them, the minimum qualifications necessary for the discharge of the public duties involved: *People ex rel. Sellers v. Brady et al.*, 105 N. E. 1, 262 Ill. 578 (1914); *Herman et al. v. Sturgeon*, 293 N. W. 488 (Iowa 1940); *State v. Addison et al.*, 92 Pac. 581, 76 Kan. 699 (1907); *Ricks v. Department of State Civil Service et al.*, 8 So. (2d) 49, 200 La. 341 (1942); *Mayor of Lynn v. Commissioner of Civil Service et al.*, 169 N. E. 502 (Mass. 1929); *Swantush et al. v. City of Detroit et al.*, 241 N. W. 265, 257 Mich. 389 (1932); *State ex rel. Kangas v. McDonald et al.*, 246 N. W. 900 (Minn. 1933); *State ex rel. Raines et al. v. City of Seattle et al.*, 235 Pac. 968 (Wash. 1925).

In *Bateman et al. v. Marsh et al.*, 64 N. Y. S. (2d) 678 (1946), in approving the New York Veterans' Preference Statute, the court said that the preference was in the nature of the payment of a debt of gratitude by the people of the State to persons who have loyally served their country in time of war and, as such, is valid under the Fourteenth Amendment.

In *Commonwealth ex rel. Graham (to use of Markham et al., Appellants) v. Schmid*, 333 Pa. 568 (1938), Annotation 120 A. L. R. 777, the Court said (pp. 574, 575):

In the cases considering preferences, the various statutes fall into groups or types. Some give preference to veterans where the position does not require an examination. * * *

Other statutes, though ostensibly mandatory and not expressly requiring that veterans be equally qualified with other candidates or at least reasonably qualified to handle the position, have been held constitutional by construing them to contain the implied condition that the preferred veterans be qualified to do the work in a reasonably efficient manner.
* * *

Another class of cases deals with civil service requirements creating varying types of preferences, such as: an absolute or discretionary preference regardless of standing on the list if a passing grade has been obtained; complete exemption from examinations required of non-veterans; giving veterans additional points or percentage credits in determining a passing grade, or the equivalent, lowering the passing grade for veterans; and, finally, giving added points when the veteran has passed the examination at the regular passing grade and is thus placed on the eligible lists.

The courts of the Commonwealth, in general, have given a liberal interpretation of legislation favoring war veterans. 1945-1946 Op. Atty. Gen. 58.

In 1939-1940 Op. Atty. Gen. 190, a formal opinion, dated February 15, 1940, of this department, addressed to the Chairman of the Liquor Control Board, after discussing at length the historical background and application of veterans' preference statutes, came to conclusions in relation to appointments under the provisions of the Act of June 27, 1939, P. L. 1198, now repealed, that are now in effect, for appointments and promotions of soldiers, as defined by the Act of May 22, 1945, P. L. 837. Paragraphs 6 and 7 of the said opinion's holdings were, as follows (p. 200):

6. Whenever a soldier, as defined in the Act of June 27, 1939, P. L. 1198, possesses the requisite qualifications and is eligible to appointment to such public position, where no civil service examination is required, the appointing power must appoint such soldier to such position, provided he is morally and physically fitted for the position.

7. A soldier, as defined in the Act of June 27, 1939, P. L. 1198, who has passed a civil service examination, and who possesses the requisite qualifications, may be preferred by the appointing power, even though his name does not appear on the eligible list.

In an opinion of this department, dated September 2, 1942, and discussing the Act of August 5, 1941, P. L. 872, reported in 1941-1942 Op. Atty. Gen. 228, the Chairman of the State Civil Service Commission was advised, *inter alia*, that the appointing power must select a veteran for appointment from the certified list of eligibles, if a veteran's name appeared thereon, although if two or more veterans' names appeared on the certified list, he could, in his discretion, select any one of them, even though the selected veteran's grade was not the highest thereon. In the event that no veteran's name appeared on the certified list, the appointing power could, in his discretion, select the name of a veteran farther down on the eligible list, so long as the veteran selected had met the prerequisite qualification of a passing grade, without the aid of the ten point addition to his initial grade.

In 1945-1946 Op. Atty. Gen. 26, the 1945 Veterans' Preference Act is discussed in many of its phases, and it is held, *inter alia*, that the term "preferential rating" as contained in section 7, gives to wives and widows of disabled soldiers all preferences in the act, to which honorably discharged soldiers are entitled. The present act retains and re-enacts all of the preference provisions in the Acts of June 27, 1939, P. L. 1198, and August 5, 1941, P. L. 872, and further broadens the definition of the word "soldier" as a person who served in the armed forces of the United States, to include a person who served in any women's organization officially connected therewith, during any war in which the United States was engaged, and who has an honorable discharge from such service, and also gives to wives and widows of disabled soldiers all preferences in the act, to which honorably discharged veterans are entitled.

The 1945 Act, as amended, contains three new sections, 51 P. S. §§ 492.5, 492.6 and 492.7, which provide as follows:

Section 5. The lack of academic or scholastic training or experience, age, loss of limb or other physical impairment which does not in fact incapacitate any such soldier shall not be deemed to disqualify him, provided he possesses the other requisite qualifications to satisfactorily perform all of the duties which the position requires.

Section 6. Whenever the Commonwealth issues specifications for the construction, alteration or repair of any public works, such specifications shall include a provision under which the contractors and subcontractors shall agree to give a preferential rating similar to that given by this Commonwealth, as herein provided, to any soldier making application for employment upon such public works.

Section 6.1. Whenever a reduction in force is necessary in any public position or on public works of this Commonwealth and its political subdivisions and personnel are discharged according to seniority the number of years of service

of any soldier shall be determined by adding his total years of service in the civil service or on public works to his total years of service as a member of the armed forces of the United States or in any women's organization officially connected therewith during any war in which the United States engaged.

Section 7. The same preferential rating given to soldiers under the provisions of this act shall be extended to include the widows and wives of disabled soldiers.

Section 8 of the 1945 Act, as amended, 51 P. S. § 492.8, provides as follows:

Section 8. This act shall be construed as being the exclusive law applying to the Commonwealth, and its political subdivisions, in giving preference to soldiers in appointment or promotion to or retention in public position or on public works.

Sections 5, 6, 6.1, and 7 of the 1945 act, as amended, require contractors and subcontractors who construct, alter or repair public works, to extend the same preferences in employment to soldier applicants, and applicants who are the widows, or wives of disabled soldiers.

In the case of *Wood v. Philadelphia*, 46 Pa. Super. 573 (1911), the provision of the Act of May 5, 1906, P. L. 83, excepting honorably discharged soldiers, sailors and marines, as well as their widows and children, from examinations for qualifications and fitness, was held class or special legislation and "an attempt at legislation beyond the constitutional powers of the general assembly, and therefore inoperative and void." The Court, in discussing the exception in the 1906 act, makes the following statement (pp. 579, 580):

It has no relation whatever to the subject-matter of the legislation. Satisfactory qualifications for the discharge of the duties which fall upon the officials of a city can no more be predicated of the children of soldiers and sailors than they could be of the offspring of doctors and lawyers. The attempted classification here sought to be made rests upon no natural reason and certainly upon no necessity, because it is impossible to see any reason why, with relation to the public service of a great city, the children of soldiers and sailors should be treated differently from other applicants whose parents, however useful and honorable their lives, had not been fortunate enough to have served the government in time of war. * * *

It is to be noted that the provisions excepting honorably discharged soldiers, sailors and marines, as well as their widows and children from civil service requirements, as contained in the 1906 act, did not require the excepted class to meet the minimum standard qualifications that are made mandatory in the 1945 act for all applicants, including soldiers, and the widows and wives of disabled soldiers.

In other words, an applicant entitled to preference in appointment, under the provisions of the 1945 act, must meet the same minimum standard requirements that are established by the civil service commission for applicants not entitled to preference, including the successful passing of a written examination, before any preference is extended to him. After the applicant entitled to preference has successfully passed the regular examination given all applicants, the 1945 act waives an academic or scholastic training, experience, age or physical requirement *which does not in fact disqualify him*, so long as he possesses the other necessary qualifications satisfactorily to perform all of the duties which the position requires. In effect, section 5 of the 1945 act waives very little, if any, of the qualifications required of all applicants. The appointing power, in the performance of its appointing function, is confined in its authority by the express terms of section 5 to waive a particular qualification, only if it will not prevent the appointee from performing *all* of the duties required of the office in a satisfactory manner.

The appointing power has the duty to determine the other qualifications of an applicant as well as those determined by the results of the written examination, where so authorized and directed by the act governing the appointment. *Seward, Director of Public Service v. State ex rel. Kratt*, 195 N. E. 241, 129 Ohio St. 296 (1935); *Platt v. Prince, General Treasurer*, 167 A. 540 (R. I. 1933).

Section 6, which requires contractors and subcontractors, in the performance of contracts on public works, to give the same preferential consideration to soldiers as is made mandatory on the Commonwealth is an exercise by the Commonwealth of its right, so long as it does not interfere with the public interest, to employ any person it chooses, with the same freedom of contract that belongs to an individual. No contractor or subcontractor is asked to do more than others who perform the same work. *Shaw v. City Council of Marshalltown*, 104 N. W. 1121, 131 Iowa 128 (1905). The contractor is not required to pay higher wages to the employes, so preferred, under his control on public works, nor accept sub-standard services. The public interest, therefore, is not adversely affected by section 6 since the same services, at the same cost, are rendered the public by the contractor or subcontractor who complies with the provisions of the act. *Commonwealth ex rel. Graham (to use of Markham et al., Appellants) v. Schmid*, supra; *Carney et al. v. Lowe et al.*, 336 Pa. 289 (1939).

Under the provisions of the 1945 act, all applicants, including soldiers, or the widows and children of disabled soldiers, must first successfully pass the same examination or other qualifying prerequisite before appointment, without the aid of any preferential rating of their

examination or selection of them as appointees. Likewise, the 1945 act is not subject to the objections which held invalid the Act of June 17, 1917, P. L. 600, as amended by the Act of April 21, 1942, P. L. 50, which provided for specified payments to the widows and dependent children of public employes in the armed service of the United States. In the case of *Kurtz v. Pittsburgh et al.*, 346 Pa. 362 (1943), the 1917 act, as amended, was held invalid, as a violation of Article III, Section 18 of the Constitution, as well as being an unreasonable and artificial distinction between members of a class and the general public. The 1945 Preference Act is applicable and available to all applicants whom the Commonwealth, in its considered action, has manifested a desire to prefer for employment in the performance of the public services covered by the act, so long as there is no loss in the efficiency nor increase in the cost of operation of government by reason of the preference.

It is our opinion, therefore, that a "soldier", as defined by the Act of May 22, 1945, P. L. 837, as well as the widow or wife of a disabled soldier, is entitled, under the classification of "soldier" to preference in appointment to, or promotion, as well as retention in public positions, as follows:

1. After a soldier has successfully passed any civil service examination, it shall be marked or graded an additional ten points, and the total final grade or mark thus obtained, shall determine his standing on any eligible or promotion list, certified or furnished to the appointing or promoting power.

2. Where no civil service examination is required, a soldier must be selected for appointment or promotion if he is an eligible applicant or candidate and, in the discretion of the appointing power, possesses the requisite qualifications efficiently to perform the duties of the position.

3. A soldier must be selected for public office if his name appears on the certified list furnished the appointing power, as the result of a required civil service examination, and in the event that the names of more than one soldier appear on the said certified list, the appointing power may select, in his discretion, any one of them, even though the soldier selected did not attain the highest mark as shown on the list.

4. A soldier may be selected, in the discretion of the appointing or promoting power, if he has the qualifications and, without the addition of any points to his final grade or mark, has passed the required civil service examination, even though his name does not appear on

the eligible or certified list furnished the appointing or promoting power.

5. A soldier's lack of academic or scholastic training or experience, age or lack of physical qualifications must be waived, if in the reasonable judgment of the appointing or promoting power, the soldier is not actually incapacitated from performing the duties of the position as efficiently as a qualified and eligible applicant or candidate not entitled to the waiver, and provided the soldier possesses the other requisite qualifications satisfactorily to perform all of the duties which the position requires.

6. The specifications issued by the Commonwealth for the construction, alteration, or repair of any public works, shall require the contractor or subcontractor chosen to give the same preferential rating to a soldier applicant for employment upon such public works, that is given by the Commonwealth to its own employees, who are entitled to preference.

7. Whenever a necessary reduction of personnel employed in public positions or on public works is made on a seniority basis, a soldier is entitled to have the total number of years he served as a member of the armed forces of the United States or in any woman's organization officially connected therewith, during any war in which the United States engaged, added to his total years in the civil service or on public works, in the computation of his seniority rights.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RAYMOND C. MILLER,
Deputy Attorney General.

OPINION No. 564

Erie Railroad Company—Bonus—Acts of February 16, 1841, P. L. 28; March 26, 1846; P. L. 179.

The Auditor General should continue to pay the bonus received from the Erie Railroad Company to the counties of Pike and Sullivan.

Harrisburg, Pa., July 17, 1947.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether the annual bonus paid by the Erie Railroad Company to the Commonwealth may be paid by the Commonwealth to the county or counties through which the lines of such railroad run.

The Erie Railroad Company, formerly the New York and Erie Railroad Company, was originally granted power to construct a railroad through a portion of Susquehanna County, Pennsylvania, by the Act of February 16, 1841, P. L. 28.

The aforesaid statute was supplemented by the Act of March 26, 1846, P. L. 179, whereby the railroad company was authorized to extend its lines through Pike County, and which act provided in section 5 thereof, in part, as follows:

* * * That after said railroad shall have been completed and in operation to Dunkirk, or shall have connected at the western end with any other improvement extending to Lake Erie, said company shall cause to be paid into the treasury of this state, annually, in the month of January, ten thousand dollars; and any neglect or refusal by said company to pay as aforesaid, shall work a forfeiture of the rights and privileges granted by this act.

The aforesaid act of 1846 was supplemented by the Act of April 1, 1848, P. L. 330, but this supplement does not affect the question before us.

The Act of May 11, 1899, P. L. 289, 72 P. S. § 1854, provided as follows:

Wherever by provision of law a railway corporation of any other state is required to pay a bonus into the state treasury for the right of passing through one or more counties of this commonwealth, and by virtue of the payment of such bonus is relieved from the payment of local taxes in the districts through which its lines are located, the money so paid into the state treasury shall be paid to the county or counties through which said lines are located, and the county commissioners shall have discretionary authority to use the same for county purposes, or to divide the whole or any part thereof among the districts in their respective counties for the purpose of relieving such districts from the oppressive taxation that exists on account of the exemption of the property of such foreign railway corporation from local taxation.

For many years the Auditor General has been paying the annual bonus of ten thousand dollars, paid by the Erie Railroad Company to the Commonwealth, into the treasuries of the counties of Pike and Susquehanna, through which counties the Erie Railroad runs. Presumably, this has been done under authority of the aforesaid act of 1899.

Under date of February 26, 1918, the Department of Justice, in an opinion by Deputy Attorney General Hargest, advised the State Treasury Department concerning these payments and said "For many years it has been the custom of our Legislature to specifically appropriate an annual sum of ten thousand dollars for distribution between the counties through which the railroad, before named, passes, but at the Session of 1917, however, no such specific appropriation was made." This raised the question as to whether a specific appropriation was necessary or whether the Act of May 11, 1899, *supra*, operated by virtue of its own provisions to appropriate the money. The answer was that section 2 of the act of 1899 constitutes a specific appropriation of the money paid into the State Treasury.

In 1917 and 1918, ten thousand dollars was paid to Pike and Susquehanna Counties. See Smull's Legislative Handbook for 1919 at page 1150.

You inform us that the Erie Railroad Company presently runs through, not only Pike and Susquehanna Counties, but also Wayne and Lackawanna Counties; and you request us to advise you whether the Counties of Wayne and Lackawanna should share in the distribution of the bonus.

The Act of April 19, 1945, P. L. 264, 72 P. S. § 1854 (pocket part), which amended the title and body of the Act of May 11, 1899, P. L. 289, *supra*, provides as follows:

Wherever by provision of law a railway corporation of any other state is required to pay an annual bonus into the State Treasury for the right of passing through one or more counties of this Commonwealth the money so paid into the State Treasury shall be paid to the county or counties through which said lines are located, and the county commissioners shall have discretionary authority to use the same for county purposes, or to divide the whole or any part thereof among the districts in their respective counties for the purpose of relieving such districts from the oppressive taxation that exists on account of the exemption of the property of such foreign railway corporations from local taxation.

In Formal Opinion No. 496, dated April 18, 1944, addressed to the Secretary of Revenue (1943-1944 Opinion of the Attorney General 221) we referred to the right given to the railroad company to enter the Counties of Pike and Susquehanna, as a contract between the railroad company and the Commonwealth. This designation was based upon the language used in the opinion of the Supreme Court of the United States in the case of *New York, Lake Erie and Western Railroad Company v. Pennsylvania*, 153 U. S. 627, 38 L. ed. 846

(1893). The court on page 643, in referring to the acts of 1841 and 1846, *supra*, said:

* * * Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. * * *

As the contract remains unchanged, the terms and conditions remain unaltered.

The rights and privileges granted by the acts of 1841 and 1846 relate solely to the construction of lines in Pike and Susquehanna Counties, as only these lines fulfill the conditions set forth in the act of 1899, *supra*.

It is noted that the Jefferson Railroad Company was incorporated by the General Assembly of Pennsylvania, by the Act of April 28, 1851, P. L. 724, and later in 1863 was authorized to lease its road and its lessee was authorized to accept such lease. The Jefferson Company leased its road to the New York and Erie Railroad Company. The acts of 1841 and 1846 refer to the construction of lines of the New York and Erie Railroad Company in Pike and Susquehanna Counties; the act of 1899 refers to lines constructed and located in these counties and owned by the New York and Erie Railroad Company, now the Erie Railroad Company, rather than to lines which have been leased by the latter company.

We are, therefore, of the opinion that you should continue to pay the bonus received from the Erie Railroad Company to the Counties of Pike and Susquehanna.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. MCKEEN CHIDSEY,

Attorney General.

HARRINGTON ADAMS,

Deputy Attorney General.

OPINION No. 565

Foods and drugs—Commodities—Package form—Marking as to net quantity—Nonpackage form—Statement of amount, measure or weight—Exemptions—Commodities Act of July 24, 1913, sec. 7, as amended June 20, 1947.

1. It is a violation of section 7 of the Commodities Act of July 24, 1913, P. L. 965, as last amended by the Act of June 20, 1947, for a retail merchant to sell

or distribute or to have in his possession with intent to sell or distribute, a commodity as defined in the act wrapped in package form and unmarked as to net quantity of its contents.

2. Commodities not considered as packages within the meaning of the Commodities Act of 1913, as amended, or labeled as to net contents at the time of sale, must be counted, measured or weighed in full view of the customer if present and a statement of the result communicated at once to the customer, or if the customer is not present, the commodity when delivered must be accompanied by a statement clearly indicating the weight, measure or numerical count.

3. Dry or liquid commodities containing less than one ounce in volume or by weight and selling for less than five cents are exempt from the regulations respecting indication of weight, measure or numerical count imposed by section 7 of the Commodities Act of 1913, as amended.

Harrisburg, Pa., July 29, 1947.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your letter in which you ask if it is a violation of Section 7 of the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. § 241, sometimes referred to as the "Commodities Act", for a retail merchant to distribute, offer for sale, sell or have in his possession to distribute, offer for sale, or sell over the counter to a consumer, a commodity wrapped in package form and not marked as to net quantity.

Section 7 of the Commodities Act, 76 P. S. § 247, as amended by Act No. 310, approved June 20, 1947, provides as follows:

No person shall distribute or sell or have in his possession with intent to distribute or sell any commodity in package form, unless the net quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: Provided, however, That reasonable variations shall be permitted; and tolerances may be established by rules and regulations made by the department. Before any tolerances are granted, producers and manufacturers of commodities must make written application for a tolerance to the department, and must furnish proof that the use value of the commodity will not be affected by the granting of the tolerance. Exempt from marking as to net content contained shall be:

(a) All packages sold as liquid commodities containing less than one ounce liquid measure, and selling for five cents or less.

(b) All packages sold as dry commodities containing less than one ounce avoirdupois, and selling for five cents or less.

In a previous formal opinion of this department, dated June 11, 1946, and addressed to the Secretary of Internal Affairs, 1945-1946

Op. Atty. Gen. page 85, several phases of section 7, inter alia, of the Commodities Act were discussed and a conclusion reached, as follows:

* * * commodities, such as groceries, meats and vegetables, ordered by telephone or personal contact from merchants or their representatives, and not weighed, measured or counted in the presence of the purchaser, when wrapped in paper, placed in bags or put in some other kind of a container for delivery at a later time, either must be marked to show their net content in weight, measure or numerical count, or must be accompanied by a statement clearly indicating such weight, measure or numerical count.

Section 7 expressly forbids a seller from selling, distributing or having in his possession with intent to distribute or sell, any commodity in package form, unless the net quantity of the contents are plainly marked on the outside of the package.

The sale or distribution of a commodity in unmarked package form is a violation of the act. However, possession of an unmarked packaged commodity is not a violation of section seven's provisions, in the absence of an intent on the part of the possessor to sell or distribute it without marking it in terms of weight, measure, or numerical count. The intent of the possessor is a matter to be gathered from the circumstances surrounding the possession and to be determined by the judicial tribunal before whom the case is brought.

If, for example, as you cite in your letter, the commodities consist of cheese cut from large cakes into small cakes weighing approximately four ounces, eight ounces, twelve ounces, etc., and then wrapped in package form, the violation would be complete, irrespective of intent, upon the sale or distribution of the packages of cheese in an unmarked condition. If the unmarked packages of cheese were stored in a back room, or left in the store's cooler room, it might be quite difficult to convince a court that the purpose of the possessor was to sell or distribute the packages in their unmarked condition. However, if the unmarked packages of cheese were arranged on a grocer's display shelves, on his selling counter, in his display window or display refrigerator cabinet, with a sign on them stating "Cheese, 39c a package", the intent of the grocer could well be quite evident to a court as an offer to sell the packages without compliance with the Commodities Act.

We are, therefore, of the opinion that it is a violation of section 7 of the Commodities Act, the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. § 247, for a retail merchant to sell or distribute a commodity, as defined in the act, wrapped in package form and not marked as to net quantity of its contents.

Further, it is a violation of section 7 of the Commodities Act for a retail merchant to have in his possession, with intent to sell or distribute, a commodity, as defined in the act, wrapped in package form and unmarked as to net quantity of its contents.

However, commodities not considered as packages within the meaning of the act, or labeled as to net contents at the time of sale, must be counted, measured, or weighed in full view of the customer, if he is present at the time of sale, and a statement of the result of the counting, measuring, or weighing communicated at once to the purchaser by the person making the sale. If the customer is not present at the time the commodities are counted, measured, or weighed, each commodity must be marked to show its net content in weight, measure, or numerical count, or must be accompanied by a statement clearly indicating such weight, measure, or numerical count.

Dry or liquid commodities containing less than one ounce in volume or by weight, which sell for less than five cents, are made expressly exempt from the above regulation requirements.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

RAYMOND C. MILLER,

Deputy Attorney General.

OPINION No. 566

Insurance—Group accident and health insurance—"Professional society"—Real estate board—Institute of certified public accountants—The Insurance Company Law of 1921, sec. 621.1(a), as amended April 6, 1945.

Neither the Philadelphia Real Estate Board nor the Pennsylvania Institute of Certified Public Accountants constitutes a "professional society" within the meaning of section 621.1(a) of the Insurance Company Law of May 17, 1921, P. L. 682, as amended by the Act of April 6, 1945, P. L. 148, making members of professional societies eligible for group accident and health insurance.

Harrisburg, Pa. August 11, 1947.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have inquired whether members of the Philadelphia Real Estate Board and whether members of the Pennsylvania Institute of

Certified Public Accountants are eligible for group accident and health insurance policies under the provisions of Section 621.1(a) of the Insurance Company Law, the Act of May 17, 1921, P. L. 682, as last amended by the Act of April 6, 1945, P. L. 148, 40 P. S. § 756.1.

This pertinent section reads as follows:

(a) Group Accident and Health Insurance is hereby declared to be that form of accident and health insurance covering not less than twenty-five employes or members, and, in addition, may include the employes' or members' dependents, written under a master policy issued to a summer camp, scout troop, college, school system, school or other institution of learning, or to the head or principal thereof, who, or which shall be deemed the policyholder, or to any governmental corporation, unit, agency or department thereof, or to any corporation, copartnership, individual employer, or to any association, or organization of employes of one employer, its affiliates or subsidiaries, *or to the members of any labor union, bar association, medical, dental or other professional society, volunteer fire department*, or to any organization or association of Federal or State employes, or school teachers, or school employes or nurses, where officers, members, employes, or classes or departments thereof, may be insured for their individual benefit. (Italics ours.)

We have emphasized the portion of Section 621.1(a), which was added by the amendment of April 6, 1945, P. L. 148. The construction of this will furnish an answer to your query. For it is only under the phraseology "other professional society", following as it does "bar association, medical, dental", that members of a real estate board, or members of a society of certified public accountants, could be included in those for whom group accident and health policies are authorized.

As to the meaning of "other professional society", we are confined under the rule of ejusdem generis to a construction which will limit it to the general types of societies indicated by the words immediately preceding it. And the word professional as there used, must be defined in the light of the class of professionals indicated by the legislative reference to lawyers, doctors and dentists.

Under common law where there is in the same statute specific provisions relating to a particular subject, they must govern, although there are also general provisions in other parts of the statute, which, if they stood alone, would be broad enough to include that subject: Endlich on the Interpretation of Statutes, Section 216; Davis' Appeal, 314 Pa. 357, 362 (1934); and Vale Pennsylvania Digest—Statutes—Key 194.

It is provided in the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Section 33, 46 P. S. § 533, as follows: "General

words shall be construed to take their meanings and be restricted by preceding particular words."

It is to be noted that the words "professional society" are preceded by the word "other". This adjective has attained a legal meaning which dovetails very nicely with the common law and statutory rules of construction. Black's Law Dictionary defines the word, as follows: "Other. Following an enumeration of particular classes 'other' must be read as 'other such like,' and includes only others of like kind and character. * * *"

Bar associations comprise a membership exclusively of lawyers. Doctors and dentists are members of healing professions. It, therefore, follows that "other professional society" must be construed to mean any other society of lawyers or of members of the healing profession. It would thus include a lawyer's guild or societies of osteopaths, chiropractors, chiropodists, etc., but would exclude members of real estate societies, or of certified public accountant societies.

We are of the opinion that under the provisions of Section 621.1(a) of the Insurance Company Law, the Act of May 17, 1921, P. L. 682, as last amended by the Act of April 6, 1945, P. L. 148, 40 P. S. § 756.1, neither members of the Philadelphia Real Estate Board, nor of the Pennsylvania Institute of Certified Public Accountants are eligible for group accident and health insurance.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 567

Charities—Solicitation of funds—Necessity for registration—Exemption of religious organizations—State Young Men's Christian Association of Pennsylvania.

The State Young Men's Christian Association of Pennsylvania is not exempt as a religious organization from compliance with the provisions of the Solicitation Act of May 13, 1925, P. L. 644, as amended, and is therefore required to obtain a certificate of registration before soliciting moneys and property for the purposes enumerated in the act.

Harrisburg, Pa., August 21, 1947.

Honorable Charlie R. Barber, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: We have your request for advice as to whether the State Young Men's Christian Association of Pennsylvania is exempt from compliance with the provisions of the Act of May 13, 1925, P. L. 644, and therefore, not required to obtain a certificate of registration before soliciting funds for the purposes enumerated in the act.

You inform us that several of the local branches operate under certificates of registration; that until you receive a ruling from the Department of Justice regarding the claim of the state organization, you hesitate to request compliance with the provisions of the law by all of the local groups; and that this organization claims exemption from the provisions of the act on the grounds that it is a religious organization.

With your request, you have transmitted a copy of the charter granted June 5, 1886, and a copy of the constitution adopted November 25, 1930.

The title of the Act of May 13, 1925, P. L. 644, as amended, 10 P. S. § 141, et seq., usually referred to as the Solicitation Act, is as follows:

An act relating to and regulating the solicitation of moneys and property for charitable, *religious*, benevolent, humane and patriotic *purposes*. (Italics ours.)

Section 1 of the Solicitation Act, supra, as amended, 10 P. S. § 141, provides as follows:

Thirty days after the approval of this act it shall be unlawful for any person, copartnership, association, or corporation, except in accordance with the provisions of this act, to appeal to the public for donations or subscriptions in money or in other property, or to sell or offer for sale to the public any thing or object to raise money, or to secure or attempt to secure money or donations or other property by promoting any public bazaar, sale, entertainment, or exhibition, or by any similar means for any charitable, benevolent, or patriotic purpose, or for the purpose of ministering to the material or spiritual needs of human beings, either in the United States or elsewhere, or by relieving suffering of animals, or of inculcating patriotism, unless the appeal is authorized by and the money or other property is to be given to a corporation, copartnership, or association holding a valid certificate of registration from the Department of Welfare, issued as herein provided.

Subsequent sections of the act regulate the applications for and the issuing of such certificates, and prescribe the conditions under which such appeals for funds, etc., may be made.

The purpose of the act is stated in the case of *Commonwealth v. McDermott*, 10 D. & C. 618, 621 (1928), as follows:

The basis of the act in question is protection to the public from fraudulent solicitation for funds under the guise of aiding a charity. The purpose is a laudable one and should be encouraged. But that purpose must be accomplished, if at all, in a proper manner consistent with constitutional rights.

* * *

The purpose of the act is further set forth in the case of *Commonwealth v. McDermott*, 296 Pa. 299, 304 (1929), wherein it is stated:

* * * the act * * * embraces specifically any and all kinds of associations that may be entirely or in part carrying out plans and campaigns for benevolent purposes; and its enactment was an exercise by the legislature of the police power of the State to prevent the public from being made the victim of swindling and corrupt operations engineered by persons or associations hiding their illegal practices under the guise of charity. * * *

Under the provisions of Section 11 of the Solicitation Act, *supra*, as amended, 10 P. S. § 151, certain organizations and purposes are exempt as follows:

This act shall not apply to fraternal organizations incorporated under the laws of the Commonwealth, religious organizations, raising funds for religious purposes, colleges, schools, universities, or associations of alumni or alumnae thereof, raising funds for fellowships or scholarships, federated women's clubs, labor unions, municipalities, or subdivisions thereof, nor to charitable institutions or agencies required by the provisions of existing law to file reports with the Department of Welfare or with any other department or office of the Commonwealth, nor to any war veterans' organization or any subordinate units thereof, whenever the purpose for which it is soliciting funds has been approved by the Department of Military Affairs.

In the case of *Commonwealth v. McDermott*, 10 D. & C. 618, 620 (1928), it was stated:

* * * This section limits the act by exempting from its provisions various organizations which would otherwise be within its express provisions. * * *

* * * religious organizations are exempt, thus contradicting the provisions of the title which makes the act apply to solicitations for religious purposes. * * *

The sole precise question suggested by your request for advice is whether the State Young Men's Christian Association of Pennsylvania is a religious organization, within the meaning of Section 11 of the Solicitation Act, *supra*, and accordingly, exempt from compliance with the terms of the act.

The purpose of the State Young Men's Christian Association of Pennsylvania, as set forth in the certificate of incorporation, dated June 5, 1886, is as follows:

This corporation is formed for the purpose of establishing and assisting Young Men's Christian Associations, and promoting the spiritual, mental, social and physical conditions of young men, in accordance with the aims and methods of the Young Men's Christian Associations of this Commonwealth, and to this end to be capable of taking, receiving and holding absolutely and in trust, for its general uses and purposes, and for any particular department of its work, and for any particular Young Men's Christian Association in the State, by purchase, gift, grant, devise or otherwise howsoever, real and personal estate, to sell and convey or mortgage the same, and to have all other powers incident to corporation to the "first class."

The purpose includes promoting different conditions—spiritual, mental, social and physical. Mental, social and physical obviously are not religious activities.

The word "spiritual" has a much broader significance than the word "religious".

In Webster's New International Dictionary, Unabridged, the word "spiritual" is defined as follows:

1. Of, pertaining to, or consisting of, spirit; not material; incorporeal; as, a spiritual substance or being.
2. Of or pertaining to the intellectual and higher endowments of the mind; mental; intellectual; also, highly refined in thought or feeling.
3. Of or pertaining to the moral feelings or states of the soul, as distinguished from the external actions; reaching and affecting the spirit.
4. Of or pertaining to the soul or its affections as influenced by the divine Spirit; controlled and inspired by the Spirit; proceeding from the Holy Spirit; pure; holy; divine; heavenly-minded; * * *
5. Of or pertaining to sacred things or the church; sacred; as spiritual songs; not lay or temporal; ecclesiastical; as, lords spiritual and temporal.

Both in the definition of its charter purpose, and in the actual activities of the associations, religious effort does not predominate. One of the four activities listed, "spiritual", but spiritual activity, by the definition of the word, is not limited to religious activity.

The objects of the association, as set forth in the constitution, adopted November 25, 1930, are as follows:

(1) To promote and assist the work of the Young Men's Christian Associations of every kind in the State of Pennsylvania.

(2) To organize new Young Men's Christian Associations in the State, wherever and whenever deemed expedient by its State Executive Committee.

(3) To promote, supervise and administer such other lines of work as may, in the judgment of its State Executive Committee, tend to the spiritual, social, moral, intellectual, or physical improvement of the Youth and Adults of Pennsylvania.

From the foregoing purpose of the corporation, set forth in the charter, and the foregoing objects of the association, set forth in the constitution, it is apparent that not all of the purposes and objects of the association are those of a religious organization.

There is nothing in the foregoing provisions, contained either in the charter or in the constitution, which establishes the State Young Men's Christian Association of Pennsylvania as a religious organization. While some of its purposes and objects may be spiritual in nature, yet the organization itself is largely educational and charitable in its purposes and objects, and purely commercial in many of its operations.

Unless an organization is exempt under the provisions of section 11, it is subject to the requirements of the licensing provisions of the act, regardless of the worthiness of the purposes of the organization and regardless of how well known the organization may be.

In 1925-1926 Op. Atty. Gen. 527, it is stated:

This section (Section 11) expressly exempts religious organizations from the operation of the Act. Included in this term are churches, religious societies, religious corporations (sometimes called ecclesiastical corporations and religious associations (incorporated and unincorporated)).

In order to determine whether the association under discussion is a "religious organization," consideration must be given to definitions of that and similar terms.

In Black's Law Dictionary, page 1524, a "religious society" is defined as follows:

A body of persons associated together for the purpose of maintaining religious worship. The communicants of a denomination who statedly attend services in the church edifice. *Fiske v. Beaty*, 201 N. Y. S. 441, 444, 206 App. Div. 349.

A "religious society" has been defined as follows:

A religious society is an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instruction. * * * 54 C. J. Section 1. *Silsby v. Barlow*, 16 Gray (Mass.) 329.

* * * It is made up of individuals who have associated together for religious as opposed to secular purposes, having no regard to the particular mode or manner of constituting or forming the society, or to its being incorporated, although the term as used in particular statutes may have reference to incorporated or quasi-incorporated religious societies. * * * (54 C. J. Section 1.)

* * * The term includes all religious societies or congregations met for public worship without regard to their being incorporated and may or may not include a church or spiritual body. *Silsby v. Barlow*, 16 Gray (Mass.) 329.

A "religious or church society" has also been defined as:

* * * a voluntary organization whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry, and providing the conveniences of a church home, and promoting the growth and efficiency of the work of the general church, of which it forms a co-ordinate part. *Mt. Vernon Presbyterian Church v. Dennis* (Iowa), 161 N. W. 183; *Runkel v. Winemiller*, 4 Har. and M'H. (Md.) 429; *Jones v. State*, 28 Neb. 495.

A "religious corporation" has been defined as follows:

A religious corporation in American Law is a private corporation formed by or pursuant to law to hold and administer the temporalities of a church. *II Century Dictionary & Cyclopedia* 1275.

A religious corporation is one whose purposes are directly and manifestly ancillary to divine worship or religious teaching. It is not necessarily a church in the one acceptance of the term, or even a religious society. A corporation whose charter powers are to be used in and of the propagation and practice of a religious belief is a religious corporation. In re *St. Louis Institute of Christian Science*, 27 Mo. App. 633.

A religious corporation is a corporation whose purposes as defined by charter or statute are directly ancillary to divine worship or religious teaching, although the scope and application of the term may be defined and restricted by the terms of the statute in which it is used. A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation, even though engaged in educating youths for the ministry, or place under the management of a religious body. Nor is a charitable society made into a religious corporation by being controlled by a church. A statute defining a religious corporation as a corporation created for religious purposes,

has been held to apply to a corporation organized to provide churches for seamen, although other corporations so closely allied to religion that they may be broadly classed as religious corporations have been held not to be within the class designated as such by a particular statute. (54 C. J. Section 3.) (Italics ours.)

In 1925-1926 Op. Atty. Gen. 527, 530, it is stated:

* * * the term "religious organization", as used in this Act includes every religious body definitely constituted, which has for its purpose the propagation of the reverent acknowledgment both in heart and in act of a Divine being, or whose purpose is directly and manifestly ancillary to divine worship or religious teaching, or whose members are associated together not only for religious exercises, but also for the purpose of maintaining and supporting its ministry and providing the conveniences of a church home and promoting the growth and efficiency of the work of the general church of which it forms a co-ordinate part, or one having power to sue and be sued and to hold and minister all the temporalities of a religious society or church as distinguished from the body of communicants or members united by a confession of faith, or one whose officers, agents and members work together for a common religious or spiritual end.

In view of the foregoing definitions, it is difficult to state a satisfactory comprehensive rule defining "a religious organization"; however, it may be stated briefly that a religious organization is a body of individuals associated together for religious purposes, such as divine worship, or religious teaching, as opposed to secular purposes; and that religious purposes are those ancillary to divine worship or religious teaching.

An example of a religious organization within the meaning of the Solicitation Act, is discussed in the case of *Commonwealth v. Schuman*, 125 Pa. Super. Ct. 62 (1937), in which it was stated:

The purpose of the corporation was the dissemination of Bible truths in various languages by means of the publication of tracts, pamphlets, papers and other religious documents * * *

It will be observed that while the Solicitation Act relates to and regulates, inter alia, the solicitation of moneys and property for both charitable and religious purposes, the exemption granted by the act extends to religious organizations, but not to charitable organizations as such, but only to charitable institutions or agencies required by the provisions of existing law to file reports with the Department of Welfare or with any other department or office of the Commonwealth. Therefore, it is necessary to bear in mind the distinction between religious organizations and those which are institutions of purely public charity.

A definition of the word "charity", contained in Webster's New International Dictionary, 2d Edition, and cited with approval in the case of *Y. M. C. A. of Germantown v. Philadelphia*, 323 Pa. 401, 411 (1936), is as follows:

An organization or institution engaged in the free assistance of the poor, incapacitated, distressed, etc. * * *

In Black's Law Dictionary, page 312, a "charitable corporation" is defined as follows:

One that freely and voluntarily ministers to the physical needs of those pecuniarily unable to help themselves. In re Rockefeller's Estate, 177 App. Div. 786, 165 N. Y. S. 154, 158; Brooklyn Children's Aid Society v. Prendergast, 166 App. Div. 852, 151 N. Y. S. 720, 723.

In Black's Law Dictionary, page 312, the term "charitable use" is defined as follows:

A gift for a "charitable use" is a gift for the benefit of persons by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering, or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class thereof, indefinite as to names and numbers. In re Coleman's Estate, 167 Cal. 212, 138 P. 992, Ann. Cas. 1915C, 682.

The word "charity" is defined as follows:

* * * "charity" includes substantially any scheme to better the conditions of any considerable part of society, and includes any gift, not inconsistent with the law, which tends to promote science or the education, enlightenment, or the amelioration of the conditions of mankind, or which is for the public convenience. *Wilson v. First Nat. Bank*, 164 Iowa, 402, 145 N. W. 948, Ann. Cas. 1916D, 481. (10 A. Jur. Section 3, page 586.)

Cognizance must be taken of the distinction between the charitable work or religious organizations and that performed by educational and other associations.

In the case of *Commonwealth v. McDermott*, 296 Pa. 299, 305 (1929), the court said:

* * * The Legislature however recognized the fact that there are many *organizations* and institutions *which engage in charity work*, either in whole or in part, *as churches, educational bodies, and other associations*, * * * (Italics ours.)

It must be remembered that religious organizations are exempt from compliance with the terms of the Solicitation Act, while charitable organizations, as such, are not exempt, as hereinbefore stated.

The constitutionality of the act was sustained in the case of *Commonwealth v. McDermott*, 296 Pa. 299 (1929), which upheld the right of the legislature to enact laws containing exemptions; however, that case is not decisive of the question herein presented.

In the case of *Young Men's Christian Association of Germantown v. Philadelphia*, 323 Pa. 401 (1936), the association sought to have its real property, consisting of the building in which its organized activities were carried on, declared wholly exempt from real estate taxes under the exemption from taxation statutes cited which authorize such exemption, inter alia, for "actual places of religious worship" and "institutions of purely public charity".

The association based its claim, not on the ground that it was a place of religious worship, but on the ground that the association was a public charity.

The defense was that the operation of a lodging and rooming-house business, from which large revenues were derived, deprived the association of the right to total exemption.

Concerning the nature of the activities of the association, the court stated, p. 404:

* * * *There is no religious qualification for membership.* Control of the association is vested in a board of managers, who are elected by members with voting privileges, and serve without compensation. The officers of the board of managers select a general secretary, a full-time, paid employee, who has actual charge of all the activities of the association. Under him are paid under-secretaries who supervise the various departments of its work. The association ministers to the physical, social, educational and religious needs of boys and young men, affords them physical training and offers them recreation in games and sports, conducts classes in public speaking, salesmanship, and sociology, and other high school courses, encourages social contacts between its members in the form of club meetings, lectures and small entertainments, and offers religious instruction in Bible classes and devotional meetings. (Italics ours.)

As to whether the dormitories were essential in the carrying out of the association's charitable activities, the court states, page 414:

* * * *Counsel for appellant contend that the dormitories "were essential in the carrying out of the association's charitable activities,* that these dormitory rooms enabled the association to provide a comfortable, decent home, surrounded by proper influences, to men coming to the city for employment or those having no homes in the city. Being away from home, these men are particularly in need of moral, spiritual and physical guidance and protection and by being able to pro-

vide a home for them in the building, the workers of the association are able to reach and minister to their needs and wants, and to establish contacts with them, in a way which would be impossible if these men were living in rooming houses, scattered throughout the vicinity." *Should this argument be accepted, it would lead to legally unacceptable conclusions.* Not only could the plaintiff association build a lodging house large enough to take care of every single male in its vicinity and claim tax exemption on the ground that thereby it was the better able to minister to the moral, spiritual and physical wants of its lodgers, but every other institution of benevolence or charity in this Commonwealth could do likewise. Such institutions could maintain on a commercial basis restaurants, barber shops, golf links, baseball parks, billiard and pool rooms, and other establishments where young men like to congregate and then claim exemption from all taxes on such establishments on the ground that through them the institution could maintain closer contacts with those young men whom it desired to uplift spiritually. *Even the most praiseworthy institutions must expect to support the government by paying taxes when it engages in commercial activities no matter how it uses the net proceeds of such activities.* (Italics ours.)

The court also stated, page 412:

* * * *The part of the Germantown Y. M. C. A. which contains lodging facilities is primarily commercial in character. It competed with lodging houses which are avowedly commercial in character. The fact that the environment is religious, and mentally and morally uplifting, does not alter the fact that the renting of its rooms is substantially like the renting of rooms in other lodging houses.* * * * (Italics ours.)

And at page 420:

The view we have herein taken of the question before us is in accord with the views of the appellate courts in many other states on the same or similar questions * * * And see cases cited.

The court reached the conclusion, page 424:

* * * Plaintiff's dormitory in which rooms are rented commercially to lodgers, is not so clearly "necessary for the occupancy and enjoyment" of that part of plaintiff's building in which its work of charity or benevolence is carried on as to entitle it to exemption from paying taxes on the dormitory.

From the foregoing, it is obvious that the State Young Men's Christian Association of Pennsylvania is not a religious organization, but a purely public charity, and only to the extent indicated.

A desire to be generous toward institutions which are doing praiseworthy work must not mislead us into investing the words "religious

organization" with unwarranted meanings. As stated in the case of *Young Men's Christian Association of Germantown v. Philadelphia*, supra, page 411:

* * * A judicial desire to be liberal toward institutions which are doing praiseworthy public work has sometimes led the courts to invest the word "charity," as used in the above excerpt from the Constitution, with a meaning not warranted either lexicologically or by a consideration of the ideology of the constitutional provision invoked. Webster's New International Dictionary, 2d. edition, defines a "charity" (in the institutional sense) as "an organization or institution engaged in the free assistance of the poor, incapacitated, distressed, etc." * * *

The Young Men's Christian Association has been held not to come within the description of a religious society, inasmuch as it exercises no ecclesiastical control over its members, prescribes no form of worship for them, and does not subject to church discipline such of them as fail to conform to its rules. 23 R.C.L.422.

The Salvation Army has been held to be within the scope of a similar law, by an opinion of the Attorney General of the State of North Carolina, dated September 28, 1946, in which it is stated, in part, as follows:

Nothing in this article shall apply to any church, religious denomination,* * *

While it may be true that the strict ecclesiastical activities of the Salvation Army may come within the meaning of some of these exemptions, nevertheless, the Salvation Army in our opinion is vastly much more than a religious organization; and it is our opinion that all of the solicitations of the Salvation Army and the organization itself by reason of the breadth and scope of its activities is subject to the application of this law. * * *

We are of the opinion, therefore, that the State Young Men's Christian Association of Pennsylvania is not exempt, as a religious organization, from compliance with the provisions of the Act of May 13, 1925, P. L. 644, as amended, 10 P. S. § 141, et seq., usually referred to as the Solicitation Act: and therefore, it is required to obtain a certificate of registration before soliciting moneys and property for the purposes enumerated in the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. J. WOODWARD,

Deputy Attorney General.

OPINION No. 568

Public schools—Salary—Increases—Incumbents—Public officers—County superintendents—Assistants—Special supervisors—District superintendents—Authority—Constitutional law.

Salary increases mandated by Act No. 515 approved July 5, 1947 may not be made effective for those county superintendents, district superintendents, assistant county superintendents, and supervisors of special education who were elected or appointed for terms beginning before the effective date of the act, but must be deferred until their next terms of office, or until successors are elected or appointed.

Superintendents of schools, and supervisors of education, whose offices are created by statute and whose duties involve judgment, discretion, intelligence and technical knowledge, have the status of public officers within the meaning of Article 3, Section 13 of the Pennsylvania Constitution prohibiting increases of salary of a public officer after election or appointment.

Harrisburg, Pa., September 3, 1947.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: Your inquiry of July 15, 1947 asks whether the salary increases provided for district superintendents, county superintendents, assistant county superintendents and supervisors of special education in the public school system by Act No. 515 approved July 5, 1947 may be made effective immediately or must they be deferred until their next terms of office.

The legislation in question amended the School Code, Act of May 18, 1911, P. L. 309, to establish minimum salaries and increments thereto for certain officers and employes of the public schools. A new section, 1228, was added which entitles the above-named officers to specified minimum annual salaries in excess of those mandated by the amendment of May 29, 1945, P. L. 1112, 24 P. S. § 1163.1.

Article 3, Section 13, of the Pennsylvania Constitution provides that:

No law shall extend the term of any public Officer, or increase or diminish his salary or emoluments, after his election or appointment.

If the officers in question are public officers within the meaning of article 3, section 13, it would appear that their salaries may not be increased by law during their present terms of office.

The definition of the term "public office" most frequently cited by our appellate courts is that contained in *Richie v. Philadelphia*, 225 Pa. 511, 516 (1909), where it is said that:

* * * In every case in which the question arises whether the holder of an office is to be regarded as a public officer within the meaning of the constitution, that question must be determined by a consideration of the nature of the service to be performed by the incumbent and of the duties imposed upon him, and whenever it appears that those duties are of a grave and important character, involving * * * some of the functions of government, the officer charged with them is clearly to be regarded as a public one. * * * Where * * * the officer exercises important public duties and has delegated to him some of the functions of government and his office is for a fixed term and the powers, duties and emoluments become vested in a successor when the office becomes vacant, such an official may properly be called a public officer. The powers and duties attached to the position manifest its character. * * *

With this analysis in mind, let us examine the nature of the offices in question.

1. *County Superintendents.*

(a) Duties.

This office was created by the legislature "for the superintendence and supervision of the public schools of this Commonwealth", School Code, section 1101. These officers are required to visit the schools under their supervision, to note the courses and methods of instruction, give directions in the art and methods of teaching, and to report inefficiency found for the purpose of achieving uniformity of instruction (section 1123); and to inspect grounds and buildings for the purpose of informing the directors of the condition thereof (section 1124). They direct the activities of the assistant superintendents and the supervisors of special education (section 1131). And they are to see that there is taught in every district the branches required by the Code (section 1149).

They may call at any time a convention of school directors for the purpose of voting salary increases (Act No. 538 approved July 7, 1947), and must call such a convention every four years for the purpose of electing superintendents (section 1106).

In addition they are charged with other important functions not contained in the School Code, e. g., to see to the faithful performance of the provisions of the Act of April 27, 1927, P. L. 465, as amended, relating to the conduct of fire drills in the public schools.

(b) Election and Term of Office.

County superintendents are elected every four years (section 1104) by a convention of school directors of the county (section 1105).

If a vacancy occurs, the office is filled temporarily by an appointee of the county board of directors who serves until the Superintendent of Public Instruction appoints a successor for the unexpired term (section 1120).

(c) Salaries.

The minimum salary of county superintendents prescribed by the School Code is paid by the Commonwealth, but conventions of school directors may increase these salaries above the statutory amount. This increase is paid by the districts under the jurisdiction of the superintendent. These conventions may be called at any time by him (section 1121), as amended by Act No. 538, approved July 7, 1947.

2. *Assistant County Superintendents.*

(a) Duties.

These officers are also charged with the superintendence of the public schools of the Commonwealth (section 1101), and perform the duties of county superintendents when directed. They are the chief executive assistants of the superintendents (section 1131).

(b) Selection of Term of Office.

Assistant County Superintendents are selected by the county board of school directors from nominations of the county superintendent and serve for the duration of his term of office (section 1127).

(c) Salary.

The salary provisions are the same in substance as those for county superintendents (section 1130), but vary in amount (section 1228).

3. *Supervisors of Special Education.*

(a) Duties.

These officers are likewise charged with supervision of the public schools of the Commonwealth (section 1101).

They examine and investigate the abilities, disabilities and needs of the exceptional children in the schools, make recommendations for and supervise their instruction. They report as well to the judges of juvenile courts, and assist the assistant county superintendent in the preparation, administration and interpretation of examinations for promotion on graduation (section 1131).

Along with assistant county superintendents they meet and confer with the boards of school directors and report monthly to the county superintendents on the condition and progress of the schools, the needs of the pupils (section 1132).

(b) Selection and Terms of Office.

These provisions are identical in effect with those applicable to assistant county superintendents (section 1127).

(c) Salary.

These provisions are identical in effect to those applicable to assistant county superintendents (sections 1130, 1228).

4. *District Superintendents.*

(a) Duties.

The duties of district superintendents are the same as those required of county superintendents and, in addition, include those required by the school board selecting them (section 1142). The distinction between the two offices is largely one of geographic jurisdiction. School districts of the first and second class must, and those of the third class may, select district superintendents. These officers operate within their districts only and therein replace the jurisdiction of the superintendent of the county in which the district is located (section 1133).

(b) Selection and Term of Office.

The manner of selection is the same as for county superintendents except that the electors are the school directors of the district only (section 1134). In districts of the first class they are appointed by the Boards of Public Education (section 2223).

(c) Salary.

Their salary is determined by the district boards of directors and paid out by the funds of the district (section 1135). These salaries are, however, subject to the minimum salary provisions of the School Code (section 1228).

It is significant that these four offices, together are given the responsibility of supervising the public schools which the General Assembly is required to provide and maintain by Article 10, Section 1 of the Pennsylvania Constitution.

The conclusion, which results from the application of the test prescribed by the *Richie* case, *supra*, to the foregoing, is that all four officers are public officers within the meaning of the Constitution, Article 3, Section 13.

That these officers exercise important public duties need not be argued unless the position is taken that supervision of the public schools is not important. Certainly there is delegated to each of such officers a substantial part of the governmental function of providing

a public school system. Each serves for a term fixed by statute. The powers, duties and emoluments become vested in a successor when the office becomes vacant.

A Formal Opinion issued by this Department on September 6, 1917 reaches a similar conclusion: Salaries of Superintendents of Public Schools, 1917-1918 Op. Atty. Gen. 541. That opinion holds that two acts amending Sections 1121 and 1130 of the School Code to increase the salaries of county superintendents and assistants could not operate to increase the salaries of the incumbents.

More recently in *Foyle v. Commonwealth*, 101 Pa. Super. 412 (1931), the court specifically determined that assistant county superintendents were public officers and therefore, not employees entitled to the benefits of the workmen's compensation laws. The reasoning in this case is derived from the *Richie* case, *supra*. The conclusion of the opinion, speaking of the assistant county superintendent is as follows (p. 422):

* * * His office is created by the legislature, his minimum salary is fixed by law, he takes and subscribes to an oath, receives a commission, and cannot be removed in any method other than that provided by statute. His duties are prescribed by statute and involve judgment, intelligence, discretion and technical knowledge, and are of such consequence to the public as to place him in a position of such dignity and responsibility that he must be considered a public officer as distinguished from an employee. * * *

The same reasoning is applicable to supervisors of special education. Certainly it applies with even greater force to county superintendents. And since district superintendents, in their districts, occupy a position identical to the latter, they may likewise be included.

Furthermore, *Weiss v. Ziegler*, 327 Pa. 100 (1937) indicates that district superintendents have the status of public officers because it applies to that office the provisions of Article 6, Section 4, and Article 12, Section 1 of the Constitution. These sections deal with the selection and removal of officers and would have had no application if district superintendents were regarded as mere employees. See *Malone v. Hayden*, 329 Pa. 213, 230 (1938); *Hetkowski v. Dickson City School District*, 141 Pa. Super. 526, 529 (1940).

We are, therefore, of the opinion that the salary increases mandated by Act No. 515 approved July 5, 1947 may not be made effective for those county superintendents, district superintendents, assistant county superintendents and supervisors of special education who were elected

or appointed for terms beginning before the effective date of the act but must be deferred until their next terms of office, or until successors are elected or appointed.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

JOHN C. PHILLIPS,

Deputy Attorney General.

OPINION No. 569

Townships—Second class townships—Responsibility for private sewers.

The Sanitary Water Board has no authority to require supervisors of second class townships to abate the pollution of waters caused by the discharge of sewage therein by private persons through private sewer lines, irrespective of whether said lines lie wholly in private property, partly in township property or under State highways or township thoroughfares, or to require such supervisors to submit plans to the board with the ultimate view that the board will subsequently order the construction of a sewage system or treatment works or both in accordance with such plans when approved by the board.

Harrisburg, Pa., September 11, 1947.

Honorable Norris W. Vaux, Secretary of Health and Chairman of the Sanitary Water Board, Department of Health, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication reinstating a former request for an opinion as to whether the Sanitary Water Board has the authority to require the supervisors of a second class township, the population of which discharges sewage into the waters of the Commonwealth, to abate such discharge or to submit for the approval of the Board plans for the construction of sewers or a sewer system and a sewage disposal works or a plant for the treatment of such sewage. In the latter instance, it would follow that after the approval of the submitted plans, the Board would issue a subsequent order to such supervisors either to construct the sewer system and the plant called for by the plans designed to render the discharge of such sewage innocuous or to abate the discharge. It is our understanding that the sewers of the second class townships discharging sewage into the waters of the Commonwealth to which you refer are not municipal sewers but are private sewerage systems which fall into three general

categories: (a) those which are laid under the surface but in or across township thoroughfares or township property; (b) those which are laid under the surface but in and across State highways and which may not lie in or across township thoroughfares or township property; and (c) those which are laid in private property from the point of origin to the point of discharge.

The Sanitary Water Board was created by Section 202 of The Administrative Code of 1923, the Act of June 7, 1923, P. L. 498, as amended, 71 P. S. § 12, as a departmental administrative board within the Department of Health. The board was continued under the corresponding section of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 62.

Under the recent amendment to Section 439 of The Administrative Code of 1929, by Act No. 65 approved May 2, 1947, the board now consists of seven members including the Secretary of Health, the Secretary of Forests and Waters, the Secretary of Mines, the Commissioner of Fisheries and three appointive members. Certain powers and duties relating to the study of the means to eliminate pollution of the waters of the Commonwealth, the adoption of rules and regulations in conformity with existing laws prohibiting such pollution, the exercise of powers previously exercised by the "former Department of Fisheries, the former Commissioner of Fisheries and the former Water Supply Commission of Pennsylvania" to prevent such pollution, and the exercise of all powers which were formerly exercised by the Department of Health or the "Commissioner (now Secretary) of Health" with regard to the granting of permits for the construction of sewage disposal plants and sewer systems were vested in the board by Section 2110 of the same code, as amended by the Act of June 21, 1937, P. L. 1865, 71 P. S. § 540. The Department of Health is specifically charged with the duty of acting as the enforcement agent of the board (Section 2109 of the Code, *supra*, 71 P. S. § 539) and the board may call upon that department to do such "acts as may be necessary and proper in the exercise of the powers and the performance of the duties of the board" (Section 2110 (g) of the Code, *supra*, 71 P. S. § 540 (g)).

The general statute concerning anti-pollution, which has been frequently referred to as the "Pure Streams Law", is the Act of June 22, 1937, P. L. 1987, as amended by the Act of May 8, 1945, P. L. 435, 35 P. S. § 691.1 et seq. The pollution of the waters of the Commonwealth by the discharge therein of sewage, industrial waste, or any noxious and deleterious substance which is or may become inimical and injurious to the public health, or to animal or aquatic life, or to the uses of such waters for domestic, industrial, or recreational pur-

poses is declared in section 3 of the act, 35 P. S. § 691.3, to be against public policy and to constitute a public nuisance. Under the provisions of the statute the Sanitary Water Board is charged with the important duty of protecting the Commonwealth's waters from pollution and, in turn, has conferred upon it great powers to regulate the same or to abate any nuisance resulting therefrom: Formal Opinion No. 297, 1939-40 Op. Atty. Gen. 92, 36 Pa. D. & C. 27 (1939).

Judicial recognition has long been taken of the fact that the drainage of untreated sewage into any flowing stream is a menace to public health. The reason was clearly stated by the Supreme Court of Pennsylvania in *Commonwealth v. Kennedy*, 240 Pa. 214 (1913) at p. 219 of the opinion as follows:

* * * Because sewage is the most efficient medium for the dissemination of infecting germs which do their deadly work in such an infinite variety of insidious ways, not at all dependent upon free access of the public to the stream which the germs pollute, it cannot be said that the "riparian owners alone have an interest in the stream." When this deleterious substance pollutes any running stream the public health is endangered thereby * * *.

The legislature's presently applicable enactment on the subject is the Act of June 22, 1937, P. L. 1987, 35 P. S. § 691.1 et seq. Inasmuch as the amendatory Act of May 8, 1945, P. L. 435, makes no change in the original act with reference to sewage pollution, and in the absence of any duty imposed by any other statute on the supervisors of second class townships to abate the discharge of sewage into the Commonwealth's waters caused by private persons through private sewer lines or to comply with orders of the Sanitary Water Board with respect thereto (which will be hereafter considered), it is the interpretation of the provisions of the 1937 Act that is here controlling.

An analytical consideration of the provisions of the Act of June 22, 1937, P. L. 1987, supra, 35 P. S. § 691.1 et seq., discloses that there was a manifest intent on the part of the legislature to carefully designate those provisions applicable to "municipalities" and those applicable to "persons"

Section 201 of the act, 35 P. S. § 691.201, flatly prohibits either persons or municipalities from discharging any sewage into any of the waters of the Commonwealth except as provided in the act. Section 202, 35 P. S. § 691.202, requires any municipality discharging sewage "from any sewer system owned and maintained by the municipality" and any person discharging sewage into waters of the Commonwealth, or in such a manner as to cause pollution thereof, to discontinue such discharge upon the order of the Sanitary Water Board at such time as the board shall be of opinion that the discharge is or may become

inimical or injurious to the public health, animal or aquatic life, or to the use of the water for domestic, industrial or recreational purposes.

Section 203 of the act, 35 P. S. § 691.203, provides that orders of the board to discontinue existing discharges of sewage, in the case of a municipality, shall be by written notice, after investigation and hearing and an opportunity for all persons interested to be heard, which notice shall be served personally or by registered mail on the corporate authorities of the municipality "owning or maintaining and using the sewage system". The same section of the act provides that an order of the board directed to a person to discontinue existing discharges of sewage shall be by written notice served on such person but does not set forth any requirement for a prior hearing. Such order, whether against a municipality or a person, must specify the time within which the offending discharge shall be discontinued, which in the case of a municipality shall not exceed two years and in that of a person one year. Section 204 of the act, 35 P. S. § 691.204, prescribes the penalty to be imposed upon persons, convicted in summary proceedings, who continue to discharge sewage contrary to the act or after the time fixed in the notice of the board for discontinuance. Municipal officers are not designated in this section.

Section 205 of the act, 35 P. S. § 691.205, requires the corporate authorities having "charge of the sewer system of each municipality" from which sewage is discharged into the Commonwealth's waters to file reports with the board from time to time as the board may require. Under this same section of the act it is declared that "no municipal sewer system" shall be exempt from the provisions of the act for which a satisfactory report shall not be filed. It is further declared that the continued discharge of sewage "from any such sewer system" without the filing of such reports constitutes a nuisance and is abatable as such.

Section 206 of the act, 35 P. S. § 691.206, provides that upon application made to the board by the "corporate authorities having by law charge of the sewer system of any municipality", otherwise prohibited by the act from discharging sewage into the waters of the Commonwealth, the board may permit such discharge under stipulated conditions provided it finds said discharge necessary and not injurious to the public health or to animal or aquatic life, or to domestic, industrial or recreational uses. The section also provides that a similar application may be submitted by persons.

Section 207 of the act, 35 P. S. § 691.207, provides that all plans for the construction or extension of a sewer system "by a municipality" or for the construction of treatment works or intercepting sewers

"by a person or municipality" shall be approved by the board prior to construction.

Section 208 of the act, 35 P. S. § 691.208, provides for the revocation or modification of permits issued by the board for the discharge of sewage from a sewer system or for the construction of a sewer system or treatment works after investigation and hearing and upon due notice served on the "corporate authorities of the municipality or the person owning, maintaining or using the sewer system, or the person or municipality operating the treatment works." Such notice shall state the time when the discharge or inadequate treatment of such sewage shall be discontinued which shall not exceed "two years in the case of a municipality, or a reasonable time, not exceeding one year in the case of a person."

Section 210 of the act, 35 P. S. § 691.210, provides that whenever the board serves an order upon a municipality to abate "its discharge of untreated or inadequately treated sewage" which is not reversed on appeal, such municipality shall take steps for the acquisition, construction, alteration, repair, extension or completion of a sewerage system or sewage treatment works or both, "as may be necessary for the treatment of its sewage" in compliance with such order.

Section 302 of the act, 35 P. S. § 691.302, relates to the discharge of industrial wastes, as differentiated from sewage, into the Commonwealth's waters. It provides that after due investigation by the board and a declaration that such discharge is or may become inimical and injurious to the public health, to animal or aquatic life, or to the use of the waters for domestic, industrial or recreational purposes, the board may order any person to discontinue the discharge of such industrial wastes into said waters or "into any municipal sewer system." Section 306 of the act, 35 P. S. § 691.306, forbids either a "municipality or person" to discharge into the clean waters of the Commonwealth any sewage or industrial waste.

Section 606 of the act, 35 P. S. § 691.606, provides that notwithstanding the pollution of the waters of the State by other sources, nothing contained in existing law of the Commonwealth shall estop the board from proceeding under the act against "any particular municipality or person" discharging polluting substances into said waters.

All of the foregoing statutory provisions, considered as a whole, impel us to the conclusion that there was no intent on the part of the legislature to impose upon municipalities the responsibility for the pollution of the State's waters by private persons discharging sewage into said waters through private sewer lines. It is immaterial whether such private sewer lines lie wholly in private property, or partly in

township property, or run beneath township or State thoroughfares for it is the persons causing the unauthorized discharge in the manner indicated who alone are made responsible by the statute for the pollution. By its very terms the act imposes liability for such offending discharges upon a municipality only when it is the municipality which "owns and maintains", or "owning, maintaining and using" the particular sewer system or whose corporate authorities have by law "charge of the sewer system" which causes the pollution.

A like result was reached in a judicial consideration of previous statutory provisions relating to the discharge of sewage into the waters of the State and embodied in the statute known as the "Purity of Waters Act", the Act of April 22, 1905, P. L. 260, Sections 4 to 11 inclusive, now superseded by the Act of June 22, 1937, P. L. 1987, supra, and specifically repealed by Section 801, 35 P. S. § 691.801, of the latter act. With respect to the prior act, the Supreme Court of Pennsylvania adopted the opinion of the Superior Court in *Commonwealth v. Emmers*, 221 Pa. 298 (1908), wherein it is stated as follows (p. 310):

* * * These *public sewer systems* and the house drains which lead into them have by the legislation of the state been made subject to the regulation, inspection and control of the municipalities, and the duty of exercising such supervision has been imposed upon the municipal authorities. * * * (Italics ours.)

In this connection it should be also noted that when a municipality does own and maintain a sewer system it does so in its proprietary capacity and not in its governmental capacity. As stated by the Supreme Court of Pennsylvania in *Hamilton's Appeal*, 340 Pa. 17 (1940) at p. 20 of the opinion:

* * * The construction, operation, or maintenance of sewer systems, water systems and gas systems by a municipal corporation is in the nature of a private enterprise. A municipality is not required to construct, own, or operate such public utilities. * * *

Similarly, we find nothing in the provisions of "The Second Class Township Law", the Act of May 1, 1933, P. L. 103, 53 P. S. § 19093-101 et seq., which was reenacted, amended and revised by the last session of the legislature as Act No. 567, approved July 10, 1947, and entitled "The Second Class Township Code," which would impose upon the supervisors of such municipalities the duty to abate or to submit to the Sanitary Water Board plans calling for the construction of sewers or treatment plants, or both, which when constructed would bring about the abatement of pollution of the State's waters caused by the discharge of untreated sewage into such waters, not by municipal sewerage systems, but by private sewers. It is true that under sec-

tion 31 of the code, which reenacts and amends section 1501 of the former act (53 P. S. § 19093-1501) such supervisors are vested with the authority to construct sewer systems for that section provides, in part, as follows:

Townships may establish and construct a system of sewers and drainage, locating the same as far as practicable along and within the lines of the public roads of the townships as seems advisable to the board of supervisors. The supervisors may permit and, where necessary for the public health, require adjoining and adjacent property owners to connect with and use the same. * * *

However, the mere grant of authority to a municipal corporation to construct sewers does not amount to the imposition of a duty to do it: *Carr v. The Northern Liberties*, 35 Pa. 324, 330 (1860). It is only where a person has a right to demand the exercise of a public function, and authority, which is not discretionary in character, is vested in an officer or set of officers to exercise that function, that the right and the authority give rise to a duty: *Carr v. The Northern Liberties*, *idem*.

It is also true that section 9 of the code, *supra*, which reenacts and amends Section 702 (XII) of "The Second Class Township Law," 53 P. S. § 19093-702 (XII), empowers the supervisors of such municipalities to prohibit nuisances and authorizes them "to remove any nuisance on public or private grounds after notice to the owner to do so." However, in the absence of an appropriate ordinance on the subject, a municipality is under no duty to abate a nuisance for which it is in nowise responsible although it may be authorized by statute to abate the same. As was stated by the Superior Court of Pennsylvania in *Allebrand v. Borough of Duquesne*, 11 Pa. Super. 218 (1899) at p. 223 of the opinion:

* * * There is a wide difference between the commission of an act, which, whether committed by a municipal corporation or by a private person, would be an actionable nuisance, and the mere failure of the corporation to exercise its charter power to abate nuisances, not rendering its streets unsafe, and for the creation of which it was nowise responsible: 2 Dill. Mun. Corp. Sec. 951; *McDade v. Chester*, 117 Pa. 414.

See also *Martinowsky v. Hannibal*, 35 Mo. App. 70 (1889); *St. Albans v. Noble*, 56 Vt. 525 (1884); *Crystal Spring Brook Trout Hatchery Co. v. Lomira*, 165 Wis. 515, 162 N.W. 658 (1917); *Wilson v. City of Ottumwa*, 164 N.W. 613 (Ia.) (1917); and 19 R.C.L. Sec. 385, p. 1102.

The case of *Commonwealth ex rel. v. Borough of Dravosburg*, 38 Municipal Law Reporter, 169 (1947), which is referred to in your request for advice, is not, by reason of its factual differences, applicable

to the question before us. In that case an individual developer of land induced the municipality to apply to the Sanitary Water Board for a sewerage permit for a tract of land on which he was engaged in building houses. The board issued the permit to the borough to construct the sewer system in accordance with the plans which the individual developer, as agent for the borough, had prepared and submitted to the board. The developer finished the building project but left the sewerage system uncompleted. The court awarded a mandatory injunction against the borough directing it to complete the sewer system in compliance with the permit issued to it, and ordered that the developer reimburse the borough for the costs of completing the work. In the question here presented to us, the second class townships have not applied to the board for permits, nor have permits been issued, to allow private persons to discharge sewage through presently existing private sewer lines. On the contrary, these persons are using these lines and effecting unauthorized discharges without permits.

Of greater weight in the situation before us, is the case of *Wanamaker v. Benzon*, 63 Pa. Super. 401 (1916). In that case a syndicate purchased land and built houses thereon from which sewage was discharged into a covered stream which ran under a street in the Borough of Jenkintown. The street was dedicated to and accepted by the municipality. The borough cut openings into the covered drain to provide for surface drainage. It was contended that the mandatory injunction sought by a lower riparian owner against the upper proprietors to discontinue the use of the covered stream as a sewer was improper and that the action should have been brought against the borough on the ground that the sewer was a borough sewer. However, the Superior Court rejected this contention, refused to hold the municipality liable for the pollution, and sustained the injunction awarded against the individual defendants. The court's reasoning is set forth, in part, on p. 405 of the opinion as follows:

* * * The borough never adopted the underground stream as part of its sewerage system. In fact, in the entire borough the ordinary method of disposing of sewage was by means of cesspools. The conduit in question was not built or constructed by the borough, and the borough never exercised any control or supervision over it. The stream of water that passes through the covered watercourse would naturally be augmented at times by surface water. Where the borough drained surface water into this conduit, it was merely putting the water to the place where it would have naturally gone. We cannot see that by this action the borough became responsible for the act of the defendant in the depositing of sewage into it. * * * As the defendant with others is directly responsible for the pollution of this stream, unless compelled by the

facts, we would not shift the responsibility of the defendant onto the borough, nor can we disturb the finding of the learned trial judge that "under the facts, the enclosed water course under Mather Road is not a sewer of the Borough of Jenkintown." There is nothing that the borough has done that has contributed to the damage complained of. * * *

We are, therefore, of the opinion that the Sanitary Water Board has no authority to require supervisors of second class townships to abate the pollution of the waters of the Commonwealth caused by the discharge of sewage therein by private persons through private sewer lines—irrespective of whether said lines lie wholly in private property, partly in township property, or under State highways or township thoroughfares—or to require such supervisors to submit plans to the board with the ultimate view that the board will subsequently order the construction of a sewerage system or treatment works, or both, in accordance with such plans when approved by the board, in order, in that manner, to bring about the abatement of the discharge of such untreated sewage. Although Section 701 of the Act of June 22, 1937, P. L. 1987, 35 P. S. § 691.701, provides that the remedies prescribed in the act to abate pollution are not exclusive, it would be necessary, nonetheless, that any proceeding taken by the board on any cause of action arising by reason of any pollution of the character such as is herein considered be instituted against the person or persons responsible therefor.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

FRANCIS J. GAFFORD,

Deputy Attorney General.

OPINION No. 570

Beneficial societies—Exclusion from social membership—Right to retain beneficial membership.

A fraternal benefit society, whether domestic or foreign, may legally provide in its bylaws that a general member may surrender his social membership or be expelled from social membership and still retain his beneficial membership in the society.

Harrisburg, Pa., November 17, 1947.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have inquired if a domestic fraternal benefit society may provide in its by laws for the retention of the benefits provided for in its certificates by persons who have been excluded from social membership in the fraternity. You also ask if a like provision in the bylaws of a foreign fraternal benefit society, operating in Pennsylvania, must be recognized as effective in this State.

The Act of July 17, 1935, P. L. 1092, as amended, 40 P. S. § § 1051 et seq., authorizes the incorporation of domestic fraternal benefit societies and prescribes the conditions under which they may lawfully exist and operate.

Briefly, such a society must not be operated for profit, must have a lodge system and representative form of government, or must limit its membership to a secret fraternity having a lodge system and a representative form of government. These societies are authorized to make provision for the payment of death benefits and for the erection of monuments for deceased members. They may regulate the admission and classification of members, control and regulate the terms and conditions governing the issuance of beneficiary certificates, the character of benefits payable, the manner of payment and they may fix the rates of contribution, fees or dues payable by members.

Section 11 of this act, 40 P. S. § 1061, reads as follows:

Any person may be admitted to beneficial or general or social membership in any society in such manner and upon such showing of eligibility as the laws of the society may provide, and any beneficial member may direct any benefit to be paid to such person or persons, entity, or interest as may be permitted by the laws of the society: Provided, That no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable in conformity with the provisions of the contract of membership, and the member shall have full right to change his beneficiary or beneficiaries in accordance with the laws, rules, and regulations of the society.

From the foregoing it is quite evident that the word "or" as used between "beneficial" and "general" and between "general" and "social" is disjunctive rather than conjunctive and that the legislature contemplated three types of membership in a fraternal benefit society, i. e., social members, beneficial members and general members. It follows, therefore, that a social member need not necessarily be a beneficial member nor a beneficial member a social member. But if

a person be both, he is a general member. This conclusion is made obvious by section 13 of the act, 40 P. S. § 1063, which reads as follows:

Any such society may admit to beneficial membership *any person* not less than sixteen, and it shall be lawful for minors who have attained the age of sixteen years to make all needed contracts and assume all needful obligations to become members. Nothing herein contained shall prevent such society from accepting general or social members. (*Italics ours.*)

If the terms under which a member may retain one type of membership and surrender or be deprived of another, are spelled out in the bylaws, both the society and its members of all classes are thereby bound, even though the benefit certificates contain no specific reference to that subject. The bylaws of the society are an inseparable part of the contract between the society and its members: *Bagaj v. First Slovak Wreath*, 136 Pa. Super. 344 (1939).

The answer to that part of your query pertaining to foreign fraternal benefit societies is found in section 22 of the act of 1935, *supra*, 40 P. S. § 1072, which in general provides that foreign societies may be admitted into Pennsylvania on a parity with domestic societies, and by Article IV, Section 2 of the Constitution of the United States, which provides:

The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

We are, therefore, of the opinion that a domestic fraternal benefit society may legally provide in its bylaws that a general member may surrender his social membership or be expelled from social membership and still retain his beneficial membership in the society. Like provisions in the bylaws of a foreign fraternal benefit society licensed to do business in Pennsylvania are to be recognized as valid by the Department of Insurance and enforceable under our law.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 571

Veterans—Preferences—Veterans' Preference Act of May 22, 1945, as amended June 25, 1947—Application to Spanish-American War and World War veterans—Employees on military leave from service of Commonwealth—Factors to be considered on reduction of force.

1. The provisions of the amendment of June 25, 1947 (No. 392), to the Veterans' Preference Act of May 22, 1945, P. L. 837, apply to personnel who were members of the armed forces of the United States during the Spanish-American War and World War I, as well as World War II.

2. In determining the right to benefits under the Veterans' Preference Act of 1945, as amended, military service in connection with the Spanish-American War may be considered between April 21, 1898, and April 30, 1899, in World War I between April 6, 1917, and July 2, 1921, and in World War II between December 7, 1941, and the termination of the war.

An employe on military leave from the service of the Commonwealth is entitled to the benefits of the Act of June 25, 1947, but while on such military leave is temporarily separated from the service of the Commonwealth and cannot therefore receive double credit as being also "in the civil service or on public works."

4. The term "exclusive law", as used in section 8 of the Veterans' Preference Act of 1945, as amended, does not limit reduction of force to the one factor of seniority or length of service, but other factors may be considered in determining which employes may be furloughed in the event of reduction in force.

Harrisburg, Pa., November 24, 1947.

Honorable William H. Chesnut, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication of August 21, 1947, requesting interpretation to be given the Veterans' Preference Act, the Act of May 22, 1945, P. L. 837, as added thereto by Act No. 392, approved June 25, 1947, 51 P. S. §§ 492.1 et seq., under the following circumstances:

1. Do the provisions of this act apply to personnel who were members of the armed forces of the United States during the Spanish-American War and World War I?

2. If the answer to question No. 1 is in the affirmative, between what dates shall military service be considered in connection with the Spanish-American War, World War I, and World War II?

3. Is an employe who is on inactive military status "during any war" a member of the armed forces for such period of inactive status within the meaning of the act?

4. Where an employe is on military leave of absence from the service of the Commonwealth, is he considered as being in the "service of the civil service or on public works" during such period of military leave?

5. If the answer to question No. 4 is in the affirmative, does such an employe receive double credit for such period of military service?

6. Does the term "exclusive law" as used in section 8 make it unnecessary to consider factors other than length of service in determining which employes shall be furloughed in the event of reduction in force?

The amending Act No. 392, approved June 25, 1947, *supra*, inserts a right under certain circumstances of retention in the public service, as well as original preference for appointment of the soldier to any public position, or on public works of the Commonwealth.

Section 6.1 of the amending Act No. 392, approved June 25, 1947, provides:

Whenever a reduction in force is necessary in any public position or on public works of this Commonwealth and its political subdivisions and personnel are discharged according to seniority the number of years of service of any soldier shall be determined by adding his total years of service in the civil service or on public works to his total years of service as a member of the armed forces of the United States or in any women's organization officially connected therewith during any war in which the United States engaged.

Generally speaking, it is clear from this section that whenever a reduction in force is necessary, and the reduction is made on the basis of seniority, then the soldier employe is entitled to have added to his or her years of service with the Commonwealth, the number of years in the military service.

Section 1 of the Veterans' Preference Act, *supra*, 51 P. S. § 492.1, defines "soldier" as:

* * * a person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war in which the United States engaged, and who has an honorable discharge from such service.

Section 6.1 above quoted also uses the phrase "any war in which the United States engaged". It is clear, therefore, that the answer to your first question is in the affirmative, and that the provisions of the Veterans' Preference Act, including the 1947 amendment, apply to personnel who were members of the armed forces of the United States during the Spanish-American War and World War I.

For answer to question 2, some consideration should be given to the beginning and termination dates of the Spanish American War, World War I and World War II.

The power of declaring war is vested in Congress by Article I, Section 8, paragraph 11 of the United States Constitution. Though the beginning dates of wars are definite, the termination dates vary depending on the particular statutes involved. For example, see Ex. Ord. 6098, 38 USCA, Chapter 12, page 685, which provided for the following beginning and termination dates:

The beginning and termination dates of the wars shall be: The World War, April 6, 1917, and November 11, 1918, but as to service in Russia, the ending date shall be April 1, 1920; the Spanish-American War, April 21, 1898, and August 13, 1898; the Philippine Insurrection, August 13, 1898, and July 4, 1902, but as to engagements in the Moro Province, the ending date shall be July 15, 1903; the Boxer Rebellion, June 20, 1900, and May 12, 1901.

This Executive Order was promulgated by the President March 31, 1933 under specific authority of the Act of Congress of March 20, 1933, c. 3, Title I, Section 4, 48 Stat. 9, 38 USCA, Section 704, which directed the President to prescribe what, for the purpose of Federal pension legislation, would be deemed wartime service.

As to the end of former wars, see *The Speedwell*, 2 Dall. 40, 1 L. ed. 280 (1784); *Nephews v. United States*, 222 U. S. 558, 32 Sup. Ct. 179, 56 L. ed. 316 (1908); *MacLeod v. United States*, 229 U. S. 416, 33 Sup. Ct. 955, 57 L. ed. 1260 (1913); and that World War I did not cease on the day of the armistice: *Weisman v. United States*, 271 Fed. 944 (1921).

See also *In Re Miller*, 281 Fed. 764, 775, wherein it was stated that the alien property custodian had the right to seize property of enemy aliens after the armistice November 11, 1918 was entered into and before July 2, 1921 when the war was declared at an end by joint resolution of Congress, approved and signed by the President.

See also *Zimmerman v. Hicks*, 7 F. (2d) 443, that war between the United States and Germany ceased on July 2, 1921 until which time the German nationals were alien enemies despite earlier resumption of commercial relations.

See also *Hijo v. United States*, 194 U. S. 315, 323, relative to the Spanish-American War, in which the Court said that the state of war did not in law cease until ratification, in April, 1899, of the treaty of peace.

Since veterans' legislation should have a liberal interpretation, we conclude that the latter dates should govern and, therefore, the Spanish-American War commenced April 21, 1898 and was terminated April 30, 1899; World War I commenced April 6, 1917 and was terminated July 2, 1921; World War II commenced December 7, 1941 and it has not yet been officially ended. See Formal Opinion No. 538, dated March 8, 1946.

It is the date of enlistment or draft which sets in motion rights under the Veterans' Preference Act, as amended, *supra*. If the employee enlisted or was drafted during the war period, that is between the above dates, then the entire military service should be considered, that is, the time of employee's military service should be computed to date of discharge. The termination of war has nothing to do with the military service; if the enlistment or draft was during the war period, the soldier's discharge will satisfy the provisions of section 6.1.

We shall consider your questions 3, 4 and 5 together. An employee of the Commonwealth, who is serving on active duty in one of the armed forces of the United States, or in any women's organization officially connected therewith, is on military leave, and is therefore separated from the service of the Commonwealth. It should be noted, however, that under Section 1 of the Act of June 7, 1917, P. L. 600, 65 P. S. § 111, such an employee has a preferred status since he cannot be removed while on military leave, and if an appointment is made to the vacancy, such an appointee is but a substitute. If an employee has inactive military status during any war, since he is inactive, we assume that he is still in the service of the Commonwealth, and would not be on military leave. There would then be no question of his total years of service. As for the soldier who is on military leave, the number of years of service of the soldier would be computed as stated in the act, namely, the total years of service in the civil service or in public works shall be added to his total years of service as a member of the armed forces of the United States, or in any women's organization officially connected therewith. Since the answer to question 4 is in the negative, it is unnecessary to discuss question 5.

As to question 6, the term "exclusive law" refers to the entire Veterans' Preference Act. The phrase means that the Veterans' Preference Act, the Act of May 22, 1945, P. L. 837, as amended by Act No. 392, approved June 25, 1947, 51 P. S. §§ 492.1 et seq., shall be the exclusive law pertaining to veterans' preference of appointment and retention. However, the Veterans' Preference Act must be construed with other pertinent acts, for example, the Pennsylvania Civil Service Act, the Act of August 5, 1941, P. L. 752, as amended, 71 P. S. §§ 741.1 et seq., the Parole Act, the Act of August 6, 1941, P. L. 861,

as amended, 61 P. S. §§ 331.1 et seq. Seniority would not necessarily be the only factor considered when a reduction in force is necessary, and furloughs and discharges are made. Section 6.1, which amends the Veterans' Preference Act, *supra*, merely states that if the furlough or discharge is made according to seniority, then the number of years of service of the soldier shall be determined by adding his total years of service in the civil service or on public works, to his total years of service as a member of the armed forces of the United States, or in any women's organization officially connected therewith, during any war in which the United States engaged. It is therefore possible to consider factors other than seniority or length of service in determining which employes shall be furloughed or discharged, in the event of reduction in force.

To summarize, it is our opinion:

1. That the provisions of Act No. 392, approved June 25, 1947, amending the Act of May 22, 1945, P. L. 837, 51 P. S. §§ 492.1 et seq., apply to personnel who were members of the armed forces of the United States during the Spanish-American War and World War I.

2. That military service should be considered in connection with the Spanish-American War between the dates of April 21, 1898 and April 30, 1899; in connection with World War I, between the dates of April 6, 1917 and July 2, 1921; and, in connection with World War II, between the dates of December 7, 1941 and the termination of the war.

3. If the employe is on military leave from the service of the Commonwealth, he would be within the meaning of Act No. 392, approved June 25, 1947, *supra*. Otherwise, the answer is in the negative.

4. That an employe who is on military leave of absence is during that period temporarily separated from the service of the Commonwealth, and therefore cannot be considered as being in "the civil service or on public works", and cannot receive double credit for such period of military service.

5. Since the answer to question 4 is in the negative, it is unnecessary to answer question 5.

6. That the term "exclusive law", as used in Section 8 of the Veterans' Preference Act, the Act of May 22, 1945, P. L. 837, as amended, 51 P. S. § 492.8, does not limit reduction of force to the one

factor of seniority or length of service; therefore, other factors may be considered in determining which employes may be furloughed in the event of reduction in force.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

M. LOUISE RUTHERFORD,

Deputy Attorney General.

OPINION No. 572

Taxation—Right to refund—Taxation paid under existing interpretation of statute—Subsequent holding of misinterpretation or unconstitutionality—Fiscal Code of April 9, 1929, section 503(a) (4), as amended—Consent judgment.

1. The Board of Finance and Revenue, acting within the scope of its statutory powers and duties, is authorized to hear and determine a petition for refund under section 503(a) (4) of The Fiscal Code of April 9, 1929, P. L. 343, as amended, only when, and to the extent that, any tax or other money has first been paid to the Commonwealth under a provision of an act of assembly held, subsequent to such payment, by final judgment of a court of competent jurisdiction, to be unconstitutional, or held by such court to be erroneously interpreted, provided that the petition for refund shall have been filed within five years of the payment of which a refund is requested, or within five years of the settlement of such taxes, bonus or other moneys due the Commonwealth, whichever period last expires.

2. A consent judgment entered by stipulation does not constitute a court holding within the meaning of section 503(a) (4) of The Fiscal Code, as amended, providing for the refund of taxes paid under an interpretation of an act subsequently "held" by a court to be erroneous.

Harrisburg, Pa., November 25, 1947.

Board of Finance and Revenue, Commonwealth of Pennsylvania,
Harrisburg, Pennsylvania.

Sirs: Your recent letter requests the advice of this Department as to the proper construction to be given the refund provision of The Fiscal Code of April 9, 1929, P. L. 343, 72 P. S. 503, as amended, contained in section 503, clause (a), subdivision (4). The construction given this section is determinative of the scope of the powers and duties of the Board of Finance and Revenue with respect to a par-

ticular class of cases. According to your request, numerous cases of this type are presented before the Board. The facts of one such case, *Commonwealth v. Schuylkill Valley Mills, Inc.*, are presented with your request and clearly illustrate the circumstances giving rise to the question involved.

Schuylkill Valley Mills, Inc., filed its corporate net income tax report for the year 1939 on April 15, 1940, and paid the self-assessing tax on that date in the amount of \$1,835.88. The tax was settled and approved by the Commonwealth's fiscal officers in the said amount on November 21, 1940. The company filed a Federal Report of Change for the year 1939 on October 2, 1944, reporting a change in the Pennsylvania corporate net income tax for that year to \$3,157.49, and remitted the difference calculated to be due in the amount of \$1,321.61. The tax was resettled and approved by the fiscal officers on December 15, 1944, as per report of change.

Subsequently, on January 10, 1945, the fiscal officers settled and approved interest charges as follows:

Interest on \$1,321.61 from due date, May 1, 1940,	
to 60 days after settlement date (Nov. 21, 1940),	
or 264 days @ 6%	\$57.35
Additional interest from Jan. 20, 1941, to payment	
date (Oct. 2, 1944), or 3 years, 265 days @ 12%..	586.71
Total	<u>\$644.06</u>

On January 17, 1945, the company paid the interest settlement in the said amount of \$644.06. This is the amount of which refund is requested by petition filed with the Board on July 17, 1947, more than two years, but less than five years, after the settlement and payment of this interest charge.

The petitioner claimed the benefit of the five-year period of limitations provided for in Section 503 (a) (4) of The Fiscal Code, *supra*, and relied upon *Commonwealth v. The Bell Telephone Company of Pennsylvania*, 55 Dauph. 321, 53 D & C 296 (1944), as supporting both the merits of its claim and the authority of the Board to apply section 503 (a) (4). That case was decided by the Dauphin County Court on July 17, 1944.

The general question raised by your request and occasioned by the presentation of this case before the Board involves the scope of the Board's powers and duties and may be stated as follows:

Does it lie within the scope of the Board's statutory powers and duties under section 503 (a) (4) to hear and determine a petition for refund of a tax or other money which has been paid to the Commonwealth under a provision of an act of assembly held, prior to such

payment, by final judgment of a court of competent jurisdiction to be unconstitutional or held, *prior to such payment*, by such court to be erroneously interpreted, when the said petition has been filed with the Board more than two years, but less than five years, after the payment of which the refund is requested, and more than two years, but less than five years, after the settlement of such taxes, bonus, or other moneys due the Commonwealth?

The question is one of construction.

The relevant provisions of Section 503 of The Fiscal Code, *supra*, 72 P. S. § 503, are as follows:

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, bonus, or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled and, upon the allowance of any such petition, to refund such taxes, license fees, penalties, fines, bonus, or other moneys, out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund. The jurisdiction of the Board of Finance and Revenue to hear and determine a petition for refund, as aforesaid, shall not be affected or limited by the fact that proceedings under sections 1102, 1103, or 1104 of this act, involving the same tax or bonus and period for which a refund is sought, are pending or have been closed, provided such proceedings relate to other objections than those raised in the petition for refund. All such petitions must be filed with the board within two years of the payment of which a refund is requested, or within two years of the settlement in the case of taxes or bonus, whichever period last expires, except * * *

(4) When any tax or other money has been paid to the Commonwealth, under a provision of an act of assembly *subsequently* held by final judgment of a court of competent jurisdiction to be unconstitutional, or under an interpretation of such provision *subsequently* held by such court to be erroneous. In such case, the petition to the board shall be filed within five years of the payment of which a refund is requested, or within five years of the settlement of such taxes, bonus or other moneys due the Commonwealth, whichever period last expires. * * * (Italics supplied.)

Section 503 is not a pure statute of limitations, but contains rather a typical special statutory limitation qualifying or conditioning the existence of a substantive right. A pure statute of limitations, on the other hand, affords an affirmative defense to an existing substantive right and thus provides a procedural limitation with respect to the enforcement of such right.

There is a wide variety of the former type of statute. Section 315 of the Pennsylvania Workmen's Compensation Act of June 2, 1915, P. L. 736, as amended by the Act of June 21, 1939, P. L. 520, 77 P. S. § 602, provides that in cases of personal injury or death all claims for compensation "shall be forever barred" unless within one year (formerly two years under the Act of June 3, 1937, P. L. 1552) after the accident (or in case of death, after date of death) a claim petition shall have been filed. See *Guy v. Stoecklein Baking Co., et al.*, 133 Pa. Super. 38, 45 (1938); *Lewis v. Carnegie-Illinois Steel Corp.*, 159 Pa. Super. 226, 228, 229 (1946).¹

In the field of Federal legislation, the Tucker Act of March 3, 1887, as amended, 28 U.S.C.A. Sec. 41 (20), precludes recovery by the plaintiff upon causes of action where fines have been imposed and money has been covered into the Treasury of the United States more than six years prior to the commencement of the actions. See *Compagnie Generale Transatlantique v. United States*, 51 F. (2d) 1053 (1931); *McMichael v. United States, et al.*, 63 F. Supp. 598 (1945).

The distinction has frequently been recognized between this type of special statutory limitation qualifying given rights and a pure statute of limitations. In construing section 315 of the Workmen's Compensation Act, *supra*, the Superior Court of Pennsylvania, in *Guy v. Stoecklein Baking Co., et al.*, *supra*, at page 45, gave expression to the distinction in the following language:

A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation: 37 C. J. 686. Statutes of the latter kind are in the nature of conditions put by the law upon the right given: *Peters v. Hanger*, 134 Fed. 586, 588; *Wheatland v. Boston*, 202 Mass. 258, 88 N. E. 769.

The general rule is that a pure statute of limitations provides a procedural *limitation*, but does not deal with substantive rights: *Philadelphia Electric Co. case*, 352 Pa. 457, 463, 464 (1945). A special statutory limitation provides a procedural *condition* qualifying substantive rights. A statute of the latter type was held not merely a statute of limitations, but also jurisdictional in its nature and limiting

¹ Another example is the Act of June 10, 1897, P. L. 139 (repealed by the Act of June 24, 1939, P. L. 872, Sec. 1201), creating an action against the surety on a constable's bond if filed within five years of the date of the bond. See *Commonwealth ex rel. Fenton Storage Co. v. McClane*, 154 Pa. Super. 246, 247, 248 (1944).

the cases of which cognizance can be taken: *Finn v. United States*, 123 U. S. 227 (1887); *United States v. Wardwell*, 172 U. S. 48, 52 (1898).

In discussing the Tucker Act, *supra*, the Circuit Court of Appeals, Second Circuit, in an opinion by Judge Augustus N. Hand, stated, in *Compagnie Generale Transatlantique v. United States*, *supra*, at pages 1056, 1057:

But section 1 of that act [28 USCA § 41 (20)] is not a statute of limitations. The provision that no suit shall be brought against the United States unless "within six years after the right accrued for which the claim is made" is a jurisdictional requirement, compliance with which is necessary to enable suit to be maintained against the sovereign.

It has long been held that failure to bring action against the United States within six years after such rights have accrued is a bar to recovery. *Ford v. United States*, 116 U. S. 213, 6 S. Ct. 360, 29 L. Ed. 608; *Finn v. United States*, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128; *United States v. Wardwell*, 172 U. S. 48, 19 S. Ct. 86, 43 L. Ed. 360; *Louisville Cement Co. v. Int. Com. Comm.*, 246 U. S. at page 642, 38 S. Ct. 408, 62 L. Ed. 914. The statutory provisions under which recovery may be had are clear and mandatory, and no official has been authorized by repaying a portion of the fines or otherwise to waive the limitations enacted for the protection of the United States. *Finn v. United States*, 123 U. S. at page 233, 8 S. Ct. 82, 31 L. Ed. 128; *Utah Power & Light Co. v. United States*, 243 U. S. at page 408, 37 S. Ct. 387, 61 L. Ed. 791; *Tucker v. Alexander*, 275 U. S. at page 231, 48 S. Ct. 45, 72 L. Ed. 253; *Ritter v. United States* (D.C.) 19 F. (2d) at page 252.

In *McMichael v. United States*, *supra*, it was ordered that the motion of the United States be granted to dismiss the action for lack of jurisdiction. The court, in its opinion, stated that where permission to sue the United States is granted, compliance with all conditions imposed upon this right to maintain the action is jurisdictional, and that the bringing of suit under the Tucker Act within six years after the right accrues is jurisdictional.

Section 503 of The Fiscal Code, *supra*, is a typical special statutory limitation, establishing a *procedural condition* to the existence of a substantive right. This procedural condition is in the nature of a jurisdictional limitation, qualifying a given right. The construction given section 503 (a) (4) governs the scope of the Board's power and duty to hear and determine a petition for refund thereunder rather than the substantive right of the petitioner.

The nature of section 503 having thus been determined as being a special statutory limitation, we come now to the analysis of the provisions of that section.

The plain wording of clause 503 (a) in addition to conferring jurisdiction upon the Board of Finance and Revenue to hear and determine petitions for refunds, clearly sets forth the conditions under which such jurisdiction may properly be exercised. These conditions require (1) that moneys of which refund is requested shall have been paid the Commonwealth, (2) that the Commonwealth shall not be rightfully or equitably entitled to such moneys, and (3) that all petitions shall have been filed within two years of payment or within two years of settlement in case of taxes or bonus, whichever last expires.

Clause 503 (a) thus provides for a general two-year period of limitations within which jurisdiction over petitions for refund may be exercised upon full compliance with the other requisite conditions. This general two-year period of limitations is modified by way of exceptions in the succeeding subdivisions of 503 (a). In one instance² the period is reduced to one year; in other cases³ the period is extended. Of the latter cases, the one with which we are here concerned is contained in subdivision 503 (a) (4) hereinbefore quoted.

The relevant portion of 503 (a) (4), in a particular case, extends the general limitations period of 503 (a) to five years. The particular case provided for, and the necessary conditions under which this subdivision is to become operative are clearly specified in the first sentence thereof. Its applicability contemplates (1) the prior payment of tax or other moneys to the Commonwealth, and (2) that such

²Subdivision 503 (a) (1) provides as follows: "Where a petition for refund filed by a domestic or foreign corporation involves the valuation of its capital stock, or in case of a foreign corporation the valuation of its tangible property for bonus purposes, or where a petition for refund filed by a bank, title insurance or trust company involves the valuation of its shares of stock, such petition must be filed with the board within one year of the payment of which refund is requested, or within one year of the settlement of such taxes or bonus, whichever period last expires."

³Subdivision 503 (a) (2) provides as follows: "When the estate upon which any transfer inheritance tax has been paid shall have consisted in whole or in part of a partnership, or other interest of uncertain value, or shall have been involved in litigation, by reason whereof there shall have been an overvaluation of that portion of the estate on which the tax has been assessed and paid, which overvaluation could not have been ascertained within said period of two years. In such case, the application for repayment shall be made to the Board of Finance and Revenue, within one year from the termination of such litigation, or ascertainment of such overvaluation."

"(3) When a court of record has adjudged a person to be legally dead, and thereafter, in the settlement of his or her estate, a transfer inheritance tax shall have been paid on such estate, and, after such payment has been made, such person shall reappear and the court shall rescind its order and adjudication. In such case, the petition to the board shall be filed within six months after the court shall have rescinded its order and adjudication."

payment shall have been made (a) under a provision of an act of assembly *subsequently* held by final judgment of a court of competent jurisdiction to be unconstitutional, or (b) under an interpretation of such provision *subsequently* held by such court to be erroneous. The language immediately following the statement of the requisite conditions declares:

In such case, the petition to the board shall be filed within five years of the payment of which a refund is requested, or within five years of the settlement of such taxes, bonus or other moneys due the Commonwealth, whichever period last expires. (Italics supplied.)

The word "subsequent" is defined in Webster's New International Dictionary (second edition, unabridged) as meaning, "following in time", or "coming or being later than something else". The word "subsequently" is a temporal adverb signifying some relationship in time to some fixed time of reference. The only temporal clause in the sentence to which the adverb can logically and grammatically refer is the clause "When any tax or other money has been paid to the Commonwealth". Thus the word "subsequently" as used in 503 (a) (4) means, "subsequent to the payment of any tax or other money to the Commonwealth". Hence, the conditions under which this subdivision becomes operative clearly import that the tax or other money of which a refund is requested shall have been paid to the Commonwealth under a provision of an act of assembly which, subsequent to such payment, shall have been held by final judgment of a court of competent jurisdiction to be unconstitutional, or the interpretation of which, subsequent to such payment, shall have been held by such court to be erroneous. The payment must *precede* the court's appropriate action; the court's action must *follow* the payment of which the refund is requested.

This construction placed upon subdivision 503 (a) (4) is grounded in good reason, as well as supported by rules of syntax. The extension of the general two-year period of limitations provided for in clause 503 (a) to a five-year period in subdivision 503 (a) (4) has the effect of encouraging prompt payment of taxes or moneys to the Commonwealth in special circumstances.

It can readily be seen that, in the absence of any provision such as contained in 503 (a) (4), the taxpayer would be induced to withhold the payment of any tax or money to the Commonwealth under a provision of an act of assembly, the constitutionality or interpretation of which was the subject of pending litigation. In order to preserve the two-year period of limitations granted under 503 (a), the taxpayer would withhold payment pending determination of such litigation. However, the presence of subdivision 503 (a) (4) makes such

withholding impractical. It has the multiple effect of encouraging prompt payment to the Commonwealth, of avoiding to the taxpayer the incurring of additional interest charges and penalties, and of extending the period of time in which a refund may be requested beyond the probable period of pending litigation involving the interpretation or constitutionality of a provision of any act under which payment should have been made.

To ignore the presence of the word "subsequently" in 503 (a) (4), to treat the word as mere surplusage, or to fail to give it the full significance of proper interpretation would violate the basic rules of statutory construction and principles of good reason. In construing the statute no word of the statute is to be left meaningless, unless no other construction is possible: *Keating v. White*, 141 Pa. Super. 495, 15 A (2d) 396 (1940). On the contrary, every law should be considered, if possible, to give effect to all its provisions: Statutory Construction Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 51, 46 P. S. § 551. Moreover, it is to be presumed "That the legislature does not intend a result that is absurd * * * or unreasonable": Statutory Construction Act of 1937, supra, Art. IV, Sec. 52, 46 P. S. 552.

If, for purposes of argument, the word "subsequently" were treated as surplusage, the unreasonable effect of subdivision 503 (a) (4) in operation would become readily apparent. In such case the provision governing the five-year period of limitations would be invoked (1) if the provision of an act should, at any time, be held by final judgment of a court of competent jurisdiction to be unconstitutional or held by such court to be erroneously interpreted, and (2) if payment were made under such provisions at any time either before *or after* such adjudication. It would then be contended that if the payment of the tax or other money were made ten, fifteen or more years after the adjudication, the taxpayer would still have five years from the time of payment within which to request a refund. Obviously, such a consequence would give an undue and unequal advantage to such taxpayer as against one who had made a payment erroneously to the Commonwealth under the provision of an act which had never been litigated and to which payment the Commonwealth would not be "rightly or equitably entitled". The latter taxpayer would be restricted to the general two-year limitations provided for in clause 503 (a); the former would reap the advantage of the five-year period under subdivision 503 (a) (4). Such an unduly discriminatory result would obtain without benefit of reason and squarely in the face of principles established in law.

It is a well settled principle of law that when a statute has been construed by the highest court having jurisdiction to pass on it, such

construction is as much a part of the statute as if plainly written into it originally: 59 C. J., p. 1036, Sec. 613 (citing cases); 50 Am. Jur. p. 199, Sec. 221 (citing cases). Without limitation as to the tribunal passing on the statute, it has been stated that judicial construction of a statute, so long as it is unreversed, is as much a part of it as if it had been written into it originally: *Roos v. The City of Mankato, et al.*, 199 Minn. 284, 371 N. W. 582 (1938). Likewise, where, as here, a statute refers to a holding by "a court of competent jurisdiction", the construction of such a court placed upon the provision of an Act of Assembly is as much a part of the provision as if plainly written into it originally. Especially, is the construction, placed upon a statute by a court, assumed to be the correct interpretation of the original intention of the legislature where the legislature specifically adopts the court's interpretation at the next session following the adjudication.*

In view of these considerations, the proper construction of section 503 (a) (4) would permit the Board, acting within the scope of its statutory powers and duties, to hear and determine a petition for refund under the said subdivision only when, and to the extent that, a tax or other money has been paid to the Commonwealth under a provision of an act of assembly held, subsequent to such payment, by final judgment of a court of competent jurisdiction to be unconstitutional or held, subsequent to such payment, to be erroneously interpreted; provided, however, the petition for refund shall have been filed within five years of the payment of which a refund is requested, or within five years of the settlement of such taxes, bonus or other moneys due the Commonwealth, whichever last expires.

*The Corporate Net Income Tax Act of May 16, 1935, P. L. 208, as amended was reenacted and amended by the Act of April 11, 1945, P. L. 190 (72 P. S. 3420 a, et seq.). The relevant portion of Section 4 thereof was reenacted and amended to read as follows: "Every corporation, upon the date its report is required herein to be made, shall pay to the department not less than one-half of the tax due to the Commonwealth by it for such preceding year, and the remaining one-half of such tax shall be paid within the thirty days next succeeding, and, except as otherwise provided by law, no extension of time for the filing of any report granted by the department shall extend the date any tax, imposed by this act, shall be due and payable. The amount of all taxes, imposed under the provisions of this act, not paid on or before the time as above provided, shall bear interest at the rate of six (6) per centum per annum from the date they are due and payable until paid, *except that if the taxable income has been, or is increased by the Commissioner of Internal Revenue, or by any other agency or court of the United States. interest shall be computed on the additional tax due from thirty days after the corporation receives notice of the change of income until paid*: Provided, however, That any corporation may pay the full amount of such tax, or any part thereof, together with interest due to the date of payment, without prejudice to its right to present and prosecute a petition for resettlement, a petition for review, or an appeal to court. If it be thereafter determined that such taxes were overpaid, the department shall enter a credit to the account of such corporation, which may be used by it in the manner prescribed by law."

In arriving at this conclusion we are not unmindful of the various statutory recourses available to the taxpayer who may, even subsequent to adjudication, have made an erroneous payment of taxes or other moneys to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled. Under Section 1102 of The Fiscal Code, *supra*, the taxpayer may, within ninety days of notice of settlement of any charge against him deemed to be erroneous, petition the Department of Revenue for resettlement. Succeeding procedure by way of petition for review before the Board of Finance and Revenue and subsequent appeal to the courts is provided for by Sections 1103 and 1104 of The Fiscal Code, *supra*. Moreover, under section 1105, the Department of Revenue may, of its own initiative, make a resettlement within two years of the date of the original settlement if such is made erroneously. Another alternative is provided the taxpayer by section 503 (a) hereinbefore quoted and referred to, which permits the filing of a petition for refund of taxes or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled, if such petition is filed within two years of the payment of which refund is requested, or within two years of the settlement in the case of taxes or bonus, whichever expires last.

For purposes of clarity and by way of illustration, the scope of the Board's power and duty under section 503 (a) (4), as herein construed, may be readily considered in conjunction with the facts of the Schuylkill Valley Mills, Inc., case referred to in your request.

The taxpayer in that case, as hereinbefore stated, claimed the benefit of the five-year period of limitations provided for by Section 503 (a) (4) of The Fiscal Code, *supra*, and relied upon *Commonwealth v. The Bell Telephone Company of Pennsylvania*, *supra*, as supporting both the substance of his claim and the authority of the Board to apply section 503 (a) (4) insofar as the time limit for the filing of a petition for refund is concerned.

The case of *Commonwealth v. The Bell Telephone Company of Pennsylvania*, *supra*, involved an appeal from an interest settlement made against the taxpayer for delayed payment of a portion of its 1935 corporate net income tax. The facts of that case indicated that the taxpayer had filed its original report and had paid the tax indicated thereby within the time prescribed by law. Two and one-half years later the Federal Government made a final determination of the taxpayer's net income for the year in question. A report was promptly made to the Commonwealth and the additional tax paid. The change in net income made by the Federal Government was due to the fact

that it had disallowed a claim for accrued depreciation which had been allowed in previous years. Upon receipt of the report of change, the Commonwealth's taxing authorities made a settlement of interest against the taxpayer computed on the additional tax at the rate of six percent (6%) from May 1, 1936, to November 28, 1937, being sixty days after the original settlement, and at twelve percent (12%) from November 28, 1937, to December 8, 1938, when the additional tax was paid. The court held that the interest settlement was not sanctioned by law and entered judgment subject to exceptions in favor of the taxpayer. In the course of its opinion the court suggested that a feasible and equitable determination of interest charges would rest upon a computation dating from the time that the corrected report is filed with the Commonwealth. (This suggestion was substantially adopted by the legislature at its next session upon re-enacting and amending the Corporate Net Income Tax Act, *supra*, as set forth in footnote 4, *supra*).

Thus, *Commonwealth v. The Bell Telephone Company of Pennsylvania* supplies the substantive basis of the petitioner's claim. The effect of this decision in regard to the scope of the Board's power and duty to exercise jurisdiction determined by the timeliness of the filing of the petition for refund under section 503 (a) (4) is another matter entirely.

The illustrative case of *Schuylkill Valley Mills, Inc.*, involves a petition for refund of certain interest payments. Hence, the petitioner relies upon *Commonwealth v. Bell Telephone Company*, *supra*, as the focal case, by virtue of which it is claimed the Board is given the power and authority to apply section 503 (a) (4). Other cases before the Board may involve petitions for refunds of payments other than interest under section 503 (a) (4) and, hence, other focal cases may be relied upon as controlling by petitioners. The focal case in each instance is the original case which is held by final judgment of a court of competent jurisdiction to be unconstitutional, or held by such court to be erroneously interpreted, and upon which a subsequent like case relies for invocation of section 503 (a) (4). However, the general conclusion herein arrived at as determining the proper construction of section 503 (a) (4) applies in all instances wherein any type of refund is sought under that section, irrespective of the particular focal case relied upon for that particular type of payment of which refund is claimed. However, where *Commonwealth v. Bell Telephone Company*, *supra*, is relied upon as the focal case, an additional feature appears.

In that case the decision of the Dauphin County Court was handed down on July 17, 1944, in the form of a written opinion concluding with a decree nisi in the following language, appearing in 55 Dauph. at page 325:

And now, to-wit: July 17, 1944, judgment is entered against the Commonwealth and in favor of the defendant in the sum of \$4,312.91, unless exceptions hereto be filed within the time limited by law. The Department of Revenue is hereby directed to enter a credit for this amount upon its books in favor of the defendant.

The Prothonotary is directed to notify the parties or their counsel of this decree forthwith.

This decision constituted the only pronouncement of the court on the merits of the case before it.

Exceptions to the decree nisi having been filed within the time prescribed, the Commonwealth, on April 20, 1945, entered into a stipulation with counsel for the Bell Telephone Company whereby it was agreed that the exceptions should be withdrawn and final judgment entered as of August 17, 1944. The stipulation was presented to the court in the form of a petition. Thereupon, on the same day, the court, without further discussion or holding, made the following order:

ORDER OF COURT

AND NOW, to wit, April 20, 1945, the above petition having been presented in open court and after due consideration thereof, it is ordered and decreed that the Exceptions be withdrawn and final judgment entered as of August 17, 1944.

BY THE COURT

Karl E. Richards

P. J.

This consent judgment was entered on April 20, 1945, as of August 17, 1944, with no accompanying opinion.

With respect to the effect on section 503 of a consent judgment entered by stipulation between the Commonwealth and counsel for a taxpayer "agreeing that final judgment might * * * be entered * * * against the Commonwealth", *Platt, et al., Executors, v. Wagner, et al.*, 347 Pa. 27 (1943) is particularly pertinent.

That case originated with a mandamus proceeding before the Dauphin County Court (*Platt and Bissell v. Board of Finance and Revenue*, 53 Dauph. 266 [1942]) by the executors of Jane Livingston Armour to compel the Board of Finance and Revenue to refund a

transfer inheritance tax. The tax in question, which was paid on May 3, 1928, was on the transfer of Pennsylvania corporation's stocks owned by the decedent, who died on February 23, 1928, a resident of New York. The petition for refund was presented to the Board on July 6, 1932, and refused on June 4, 1942. The tax was imposed under the provisions of the Act of 1919, P. L. 521, as amended, which provided, *inter alia*, that personal property of a non-resident would not be subject to the tax if a like exemption is made by the laws of the state of the decedent's residence in favor of residents of Pennsylvania.

At the time the tax was paid there was no reciprocity between Pennsylvania and New York, due to the rulings, *without final decision*, of the Supreme Court of Pennsylvania in *Commonwealth v. Taylor's Executor*, 297 Pa. 335 (1929), reargued under the caption *Commonwealth v. Farmers Loan & Trust Co.*, 301 Pa. 114 (1930). However, on July 3, 1931, the Attorney General of Pennsylvania entered into a written stipulation with counsel for the Taylor estate reciting that the New York act of 1931 had reestablished reciprocity between the two states for the period during which reciprocity had been suspended, and agreeing that final judgment might, therefore, be entered in the Taylor case in favor of the executors against the Commonwealth. Accordingly, the Supreme Court of Pennsylvania made an order as follows:

Because of the foregoing agreement judgment is hereby entered in the above case in favor of the defendant and against the plaintiff.

The Dauphin County Court held that the consent judgment constituted a final order of the Supreme Court, determining that actual reciprocity had been established for the period in question and that, since the tax in the present case was paid under an interpretation of law subsequently held to be erroneous by the Supreme Court, the petitioners were entitled to the refund, and directed the Board of Finance and Revenue to make the refund requested.

On appeal from this order the Supreme Court of Pennsylvania (347 Pa. 27 [1943]) reversed the Dauphin County Court and declared, at page 35, in its opinion as follows:

The view we have thus taken on the merits makes it unnecessary to discuss at length whether the application by these plaintiffs for a refund was barred in any event by reason of the provision of section 503 of the Fiscal Code that a petition for that purpose must be filed with the Board within two years of the payment alleged to have been erroneously made. Plaintiffs' petition was filed long after the expiration of two years from the time they paid the tax.

It is true it was filed within five years, and section 503 provides, by way of an exception, that the petition may be filed within five years of the payment in case the tax was paid under a provision of an Act of Assembly subsequently held by the court of final jurisdiction to be unconstitutional, or under an interpretation of such provision subsequently held by such court to be erroneous. Here, however, there was no act held by this Court to be unconstitutional nor any interpretation thereof subsequently held by this Court to be erroneous, it having already been pointed out that the consent-judgment in the Taylor case was not a "holding" by this Court.⁵

The amendment to subdivision 503 (a) (4) by the Act of May 7, 1943, P. L. 229, renders that provision even more applicable to the instant case, first—by the express requirement of a "final judgment", and, secondly—by broadening the field of the adjudicating tribunals to include lower courts as "court(s) of competent jurisdiction".

Furthermore, the pronouncement of the Supreme Court of Pennsylvania, hereinabove quoted in the Platt case, applies with even greater force to the facts of the instant case, Schuylkill Valley Mills, Inc. In the former case the tax was paid on May 5, 1928, being prior even to the adjudication of its focal case, the Taylor case, by the lower court (January 31, 1929). In the instant case the payment was made January 17, 1945, being *subsequent* to the decree nisi in its own focal case, the Bell Telephone Company case (July 17, 1944), and even *subsequent* to August 17, 1944, being the date as of which "final judgment" was entered by stipulation. In neither focal case—the Taylor case nor the Bell Telephone Company case—was there a "holding" by final judgment.

Had the taxpayer in the instant case sought a resettlement under Section 1102 of The Fiscal Code, *supra*, of the interest charge within ninety days of the settlement complained of, no doubt it would have been entitled to its claim. Or, having failed to take advantage of this

⁵ At the time this case was before the Supreme Court of Pennsylvania, subdivision (4) excepted from cause (a) of Section 503 of The Fiscal Code of April 9, 1929, P. L. 343, as amended by the Act of August 5, 1941, P. L. 797, provided, *inter alia*, as follows: "When any tax or other money has been paid to the Commonwealth, under a provision of an act of Assembly subsequently held by the court of final jurisdiction to be unconstitutional, or under an interpretation of such provision subsequently held by such court to be erroneous. In such case, the petition to the board shall be filed within five years of the payment of which a refund is requested. * * *" (Italics supplied.) This portion was later twice amended to read as it presently does.

By the Act of May 7, 1943, P. L. 229, the above italic portion was replaced by the clause "final judgment of a court of competent jurisdiction" By the Act of May 15, 1945, P. L. 528, the above portion of subdivision (4) as thus amended, was further amended by adding at the end thereof "or within five years of the settlement of such taxes, bonus or other moneys due the Commonwealth, whichever period last expires."

provision, it might have filed a petition for refund under section 503 (a) within two years of the payment of the money of which refund is requested, which time expired in this case on January 17, 1947, no doubt it would have likewise prevailed in its claim.

When, having failed to act diligently in accordance with either of these sections, it seeks to invoke the benefit of section 503 (a) (4) it finds itself directly confronted with the undisputed facts that the decree nisi of the Dauphin County Court in *Commonwealth v. Bell Telephone Company of Pennsylvania*, *supra*, was not *subsequent to*, but fully six months *prior to* the payment of the moneys to the Commonwealth of which refund is requested; that the date of the "final judgment" as stipulated August 17, 1944, was itself fully five months *prior to* the said payment; and, finally, that the consent judgment is itself not such a "holding" as required by section 503 (a) (4) under the authority of *Platt, et al. v. Wagner, et al.*, *supra*.

Accordingly, under the construction hereinbefore placed upon section 503 (a) (4), the facts of this particular case do not bring it within the scope of the Board's power and duty to herein determine the petition under the said section.

Ignorance of one's rights will not stay the operation of a statute of limitations: *New Holland Turnpike Co. v. Farmers' Insurance Co.*, 144 Pa. 541 (1891). Neither is it an effective restraint to the running of the statute of limitations to call attention to the ignorance of other responsible parties to such rights. The erroneous settlement of interest charges by the Commonwealth taxing authorities, almost six months after an adjudication rendering a similar settlement unsanctioned by law, does not excuse the taxpayer's lack of diligence nor toll the running of the statute of limitations. No fraud or concealment of facts is charged against the Commonwealth's fiscal officers.

In *Clapp v. Township of Pine Grove*, 138 Pa. 35 (1890), it was held that a statute of limitations runs against a right of action for moneys paid under an erroneous assessment of county and township taxes from the time the money was paid, although the purchaser at a sale of the land for taxes was ignorant of the facts, and that an offer to prove that the township assessors and the county commissioners "were notified that the assessment was erroneous" before the sale, is insufficient to show such fraud or concealment of facts as will toll the statute.

While these principles have been enunciated with respect to a pure statute of limitations, they are equally applicable in a case involving a special statutory limitation qualifying or conditioning the creation or existence of a substantive right: *Guy v. Stoecklein Baking Co.*, *et al.*, *supra*.

We are, therefore, of the opinion that: (1) The Board of Finance and Revenue, acting within the scope of its statutory powers and duties, is authorized to hear and determine a petition for refund under Section 503 (a) (4) of The Fiscal Code of April 9, 1929, P. L. 343, as amended, 72 P. S. Sec. 503, only when, and to the extent that, any tax or other money has first been paid to the Commonwealth under a provision of an Act of Assembly held, subsequent to such payment, by final judgment of a court of competent jurisdiction, to be unconstitutional, or held by such court to be erroneously interpreted, provided that the petition for refund shall have been filed within five years of the payment of which a refund is requested, or within five years of the settlement of such taxes, bonus or other moneys due the Commonwealth, whichever period last expires: and

(2) The consent judgment entered by stipulation in the case of *Commonwealth v. Bell Telephone Company of Pennsylvania*, 55 Dauph. 321 (1945), does not constitute a "holding" as required by Section 503 (a) (4) under the authority of *Platt, et al., v. Wagner, et al.*, 347 Pa. 27 (1943).

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

DAVID FUSS,
Deputy Attorney General.

OPINION No. 573

Schools—Payment of salaries to ill employes—Physician's certificate—Qualification to give certificate—School Code of 1911, sec. 1206, as amended June 28, 1947.

The phrase "physician or other practitioner", as used in section 1206 of the School Code of May 18, 1911, P. L. 309, as amended by the Act of June 28, 1947 (No. 441), requiring school districts to pay the full salary of professional employes prevented by illness from following their occupation upon their furnishing a certificate of illness from a physician or other practitioner, includes at least physicians and surgeons, osteopaths, drugless therapists, dentists and chiroprodists.

Harrisburg, Pa., January 15, 1948.

Honorable Francis B. Hass, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You have requested an interpretation of the phrase "physician or other practitioner" as used in the Act of June 28, 1947 (No. 441), 24 P. S. § 1162.

This act amends Section 1206 of the School Code and requires school districts to pay full salary to professional employes who are prevented by illness from following their occupation under certain conditions including the following:

* * * Provided further that the board of school directors shall require the professional employe to furnish a certificate from a *physician or other practitioner* certifying that said professional employe was unable to perform his or her duties during the period of absence for which compensation is required to be paid under this section. (Emphasis added).

The word "physician" is defined by the Statutory Construction Act, Section 101,¹ as meaning "an individual licensed under the laws of this Commonwealth to engage in the practice of medicine and surgery in any or all of its branches."

But the word "practitioner" and the phrase "or other practitioner" are not defined either in the statute in question or in the Statutory Construction Act or in any Pennsylvania court decisions.

It is a rule of statutory construction that general words shall be construed to take their meanings and be restricted by preceding particular words.² If this rule is applied, in view of the definition of the word "physician", "other practitioner" would include those who are licensed by the Commonwealth to practice any or all of the various branches of medicine or surgery.

The Medical Practice Act, Section 1,³ for the purposes of that act, defines the term "medicine and surgery" as meaning

the art and and science having for their object the cure of diseases of and the preservation of the health of man including all practice of the healing art with or without drugs, except healing by spiritual means or prayer.

and also the term "healing art" as meaning

the science of diagnosis and treatment in any manner whatsoever of disease or any ailment of the human body.

Under this act the State Board of Medical Education and Licensure licenses physicians and surgeons as well as practitioners of drugless therapy, chiroprody and physiotherapy.⁴

"Drugless therapy" embraces any treatment which has the spine for a basis and includes chiropractice, naprapathy, neuropathy, naturopathy, spondylotherapy and other systems of practice of similar

¹ Act of May 28, 1937, P. L. 1019, Section 101, 46 P. S. § 601.

² Statutory Construction Act, Section 33, 46 P. S. § 533.

³ Act of June 3, 1911, P. L. 639, Section 1, as amended, 63 P. S. § 401.

⁴ 1 Pa. Reg. (1946) 603; Act of March 21, 1945, P. L. 51, 63 P. S. § 41.1 et seq.

nature.⁵ The licenses issued for these special branches of medicine limit the holders to practice of the specific form of therapy designated therein.

Drugless therapists are required by regulations of the State Board of Medical Education and Licensure to have completed satisfactorily a two years' course in the basic medical sciences similar to that required of medical students, including anatomy, physiology, physiological chemistry, bacteriology and pathology. They must likewise complete a third year which includes hygiene, preventive medicine, dietetics, symptomatology, diagnosis, analysis and pathology equivalent in amount to that required of the medical schools of the Commonwealth.

This regulation indicates that drugless therapists receive education in the diagnosis of ailments and diseases of the human body comparable to doctors of medicine. The variation and limitation in the license are restricted to the methods of treatment. Whereas physicians are trained and licensed to treat by drugs and surgery, drugless therapists cannot use drugs or surgery and may only employ the methods of their particular form of therapy.⁶

"Chiropody" is defined by a separate act, which places this form of medical practice under the jurisdiction of the medical board, as follows:

Chiropody or Podiatry, as used in this act, is defined to be the diagnosis of foot ailments, and the practice of minor surgery upon the feet, limited to those structures of the foot superficial to the fascia of the foot, the padding, dressing and strapping of the feet, the making of models of the feet, and palliative and mechanical treatment of functional disturbances of the feet.⁷

The educational preparation required of chiropodists is by no means as extensive as that required of the more general branches of medicine. But the diagnosis of foot ailments is included by definition within the scope of chiropody and unquestionably foot ailments may render professional employes unable to perform their duties.

Under the authority of the Medical Practice Act, the State Board of Medical Education and Licensure licenses physiotherapists. "Physiotherapy" covers a broad field of treatment of the human body, but the regulations of the medical board indicate that the practitioners of these branches of medicine are not required to have training in the

⁵ *Ibid.*

⁶ See *Cowdery v. Shafer*, 57 Dauph. 365 (1946).

⁷ Act of March 21, 1945, P. L. 51, as amended by Act of June 25, 1947, No. 416.

diagnosis of the conditions of the human body. Their activities are limited solely to methods of treatment. Because the treatment of bodily conditions can be considered one of the healing arts, it would be possible to place these practitioners in the same class legally with physicians. We do not believe, however, that the legislature intended such a result. The object to be attained by the proviso in Section 1206 of the School Code, which is here under consideration, is a method by which school districts may justify sick leave payments to professional employes. The certificates that such employes are unfit for duty should, therefore, be made by one who, by legislative standards, is competent to evaluate the effect of a particular bodily condition or disease on the ability of such employes to discharge the duties of their occupations. Under our system of licensing, this means a practitioner whose professional qualifications include a knowledge of diagnosis, rather than a practitioner whose license permits him only to treat or correct bodily conditions or diseases.

The Medical Practice Act by its terms does not regulate the practice of osteopathy, dentistry, optometry or pharmacy.⁸

We have no doubt that the practitioners of pharmacy and optometry were never intended to be included in the phrase in question. By judicial determination optometrists are not practitioners in medicine, *Martin v. Baldy*, 249 Pa. 253 (1915), and it is apparent from the act regulating pharmacy⁹ that no practice of any healing art is involved.

The "practice of osteopathy", however, does involve the diagnosis and treatment of ailments and diseases of the human body.¹⁰ In any respect the scope of osteopathy is as broad as and is coextensive with that of medicine. Since practitioners of osteopathy are licensed by the legislature to practice what is obviously one of the healing arts, we have no doubt in determining that they should be included within the class sought to be defined by the phrase in question, even though the courts may not agree with prior opinions of this department that for certain purposes osteopaths are physicians.¹¹

A more difficult question is presented by the "practice of dentistry" which, within the meaning of the Dental Law¹², includes the diagnosis and treatment of any disease, pain or injury, or regulation of any deformity or physical condition of the human teeth, jaws or over-

⁸ Act of June 3, 1911, P. L. 639, as amended, 63 P. S. § 411.

⁹ Act of May 17, 1917, P. L. 208, as amended by the Act of April 13, 1945, P. L. 231, 63 P. S. § 291 et seq.

¹⁰ Act of March 19, 1906, P. L. 46, as amended, 63 P. S. § 266.

¹¹ Formal Opinions No. 456, 1943-1944 Op. Atty. Gen. 56; 526, 1945-1946 Op. Atty. Gen. 18; 534, 1945-1946 Op. Atty. Gen. 47; See *Tanenbaum v. D'Ascenzo*, 356 Pa. 260 (1947).

¹² Act of May 1, 1933, P. L. 216, Section 2, as amended, 63 P. S. § 121.

laying tissues. It is apparent from the scope of this practice that to secure a license in Pennsylvania these practitioners must be educated in diagnosis, as well as treatment of diseases and conditions pertaining to that portion of the human body to which the practice is limited. They would, therefore, qualify to be admitted to the class because of their professional qualifications. The fact that the practice is limited to a particular portion of the body is of no significance if chiropodists are also to be included in the class, as we have seen they should be.

The difficulty with dentistry is that the Dental Law, in the section above referred to, contains the following statement:

* * * The term "Practice of Dentistry" does not include:

(a) The practice of any of the healing arts by duly licensed practitioners.

This provision was evidently included in the Dental Law for the purpose of removing the licensure of dentists from the jurisdiction of the State Board of Medical Education and Licensure, and in our opinion should be given no significance in determining whether dentistry should be admitted to the class which the phrase in question is intended to include. It should be observed, however, that sick leave certificates signed by dentists, as well as those signed by chiropodists should be considered valid only if the disease or bodily conditions specified therein relate to those portions of the human body to which practice of chiropody and dentistry are limited by statutes and licenses.

We are, therefore, of the opinion that the phrase "physician or other practitioner", as used in the 1947 amendment of Section 1206 of the School Code, is intended to define a class which includes at least the following:

- (a) Physicians and Surgeons,
- (b) Osteopaths,
- (c) Drugless Therapists,
- (d) Dentists,
- (e) Chiropodists.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

JOHN C. PHILLIPS,

Deputy Attorney General.

OPINION No. 574

Incompetents—Care—Private nursing homes and hospitals—State institutions—Type of license required—Act of June 12, 1931—Mental Health Act of July 11, 1923, section 201(c)—Nonpsychotic alcoholic patients and drug addicts—Temporary care in general hospital.

1. Private nursing homes and hospitals duly licensed under the Act of June 12, 1931, P. L. 510, as amended, may accept nonpsychotic alcoholic patients and drug addicts, but mental patients must be placed in State institutions or in semi-State or private institutions duly licensed therefor by the Department of Welfare; except that general hospitals may establish beds, wards or departments for the temporary care of mental patients under conditions approved by the department.

2. No mental patient should be admitted for care to any place except a general hospital unless such place has been licensed for such purpose by the Department of Welfare under the provisions of section 201 (c) of the Mental Health Act of July 11, 1923, P. L. 998, as amended.

Harrisburg, Pa., January 16, 1948.

Honorable Charlie R. Barber, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice is in receipt of your request for an opinion interpreting the Private Nursing Home and Private Hospital Licensing Act, in relation to non-psychotic alcoholic patients and drug addicts.

In amplification of your request, you state that the Bureau of Community Work, Division of Homes and Hospitals, which licenses nursing and convalescent homes under the Private Nursing Home and Private Hospital Licensing Act (the Act of June 12, 1931, P. L. 510, as amended, 35 P. S. § 424, et seq.), and the Bureau of Mental Health, which licenses facilities that restrain, care for and treat mental patients, under The Mental Health Act of 1923 (the Act of July 11, 1923, P. L. 998, as amended, 50 P. S. § 1, et seq.), wish a clarification of their proper jurisdictions under these respective acts, in the cases of facilities that accept only alcoholic and drug addict patients.

You further inform us that the Bureau of Mental Health has reviewed such sanatoria, but has been unable to license them as mental facilities, because each one vigorously protests the formal commitment of their clients, the association of the word, "mental" with their patients, and their extreme reluctance to co-operate with the rather strict regulations that must be exercised for mental facilities; and that, at the same time, such sanatoria deny that they exercise any form of restraint or forced detention of their patients; and that, since the Bureau of Mental Health issues only licenses "to detain mental patients", giving to such facilities that comply with statutory and

regulatory provisions, the privilege of exercising restraint, care, and treatment, this Bureau does not take any further action in such cases.

It appears that the reason for your request is that the Bureau of Community Work is uncertain as to the interpretation of its licensing powers, which govern facilities that house "persons requiring care, treatment, or nursing by reason of sickness, injury, infirmity, or other disability."

The act relating to private nursing homes and private hospitals, to which you refer, the Act of June 12, 1931, P. L. 510, as amended, 35 P. S. § 424, et seq., provides, in Section 1 thereof, as follows:

After the effective date of this act, *it shall be unlawful* for any person, copartnership, association, or corporation *to operate*, for profit, within this Commonwealth, *a private nursing home or private hospital, for persons requiring care, treatment, or nursing by reason of sickness, injury, infirmity, or other disability*, without a license as hereinafter required, but this act shall not be construed to apply to any State or State-aided institution or any institution licensed by the Department of Welfare under other statutes. (Emphasis supplied)

The foregoing act does not define what is meant by "private nursing home or private hospital"; however, from the above quoted section, it appears that a private nursing home or private hospital, within the meaning of the act, is a place for the reception of persons requiring care, treatment, or nursing by reason of sickness, injury, infirmity, or other disability.

Under the definition of the word, "hospital," 19 W. & P. Permanent Edition, Pocket Part, page 133, it is stated:

An institution, having a trained and a practical nurse on duty at all times and having a doctor retained for call in case of emergencies, with a small number of selected patients who were visited regularly by their own doctors and who were infirm or ill but not to such an extent as to require the attention or services given at a fully equipped hospital, was an institution having the attributes of both a "hospital" and a "boarding and lodging house," within meaning of a zoning ordinance, and was entitled to a permit under the ordinance. Ky. St. Section 3037H-111 et seq. Id.

It is clear that the private homes and private hospitals mentioned in the act have the right to receive for care, treatment or nursing, non-psychotic alcoholic patients, and drug addicts, who are not mental patients.

We understand that there are a number of such private homes or private hospitals within the Commonwealth, known as homes or

sanitaria; there are no bars on the windows; they accept only alcoholic patients and drug addicts; and they are required to be licensed under the Private Nursing Home and Private Hospital Act, *supra*, and not under The Mental Health Act, *supra*.

Patients are received upon their own voluntary applications, or the applications of friends or relatives, without court commitments; they are placed under no restraint, and they receive no forced detention, care or psychiatric treatment.

The attitude of such institutions in seeking to avoid any association with the idea of "mental patients," or "mental hospitals," in protesting the formal commitment of their patients, and in their reluctance in complying with the strict regulations governing "mental institutions," is readily understandable. Undoubtedly, such homes and hospitals render services to persons suffering from illnesses which do not fall within the classification of "mental illness" to the extent usually termed "insanity."

However, private nursing homes and private hospitals may not operate mental hospitals under the guise of compliance with the provisions of the Private Nursing Home and Private Hospital Licensing Act, *supra*.

Under Section 5 of said act, the Department of Welfare has the right of visitation, examination, and inspection of all such homes and hospitals; and under Section 6 of said act, upon any violation of the rules or regulations adopted, or any failure to establish, provide or maintain standards and facilities required, by the department, may revoke the licenses of such homes and hospitals.

By the express provisions of the act, the Department of Welfare is clothed with ample power to compel compliance with all the requirements of the act, and the rules and regulations thereunder issued.

Obviously, not all alcoholics or drug addicts require care and treatment in mental hospitals; although undoubtedly, many alcoholics and drug addicts are "mental patients," requiring care and treatment under the provisions of The Mental Health Act, *supra*, and related laws. There are many persons, who are dangerous to the public or to themselves, who should certainly be given forced care and treatment in hospitals for the mentally ill.

The care and treatment of mental patients is governed by The Mental Health Act of 1923, *supra*, which was a revision and codification of previous legislation with respect to insanity, and furnishes a complete method of procedure for mental patients, in conjunction with subsequent related laws.

It may be stated generally that admission to a hospital for mental diseases may be made upon voluntary application, upon application of relatives or friends, and upon order of court.

The term, "mental patient," is defined by Section 103 of The Mental Health Act of 1923, as amended, *supra*, 50 P. S. § 3, as follows:

"Mental patient" shall mean any person who is or is thought to be mentally ill, mentally defective, epileptic, or inebriate, or who is or has been an inmate of any hospital, school, or place for such persons or for whom admission thereto is being sought.

The word, "care," is defined by Section 103 of The Mental Health Act of 1923, as amended, *supra*, 50 P. S. § 3, as follows:

"Care" shall include reception, detention, custody, care, treatment, maintenance, support, segregation, education, culture, training, discipline, improvement, occupation, employment, medical and surgical treatment and nursing, food, and clothing.

The word, "inebriate," is defined by Section 103 of The Mental Health Act of 1923, as amended, *supra*, 50 P. S. § 3, as follows:

"Inebriate" shall mean a person habitually so addicted to the use of alcoholic or other intoxicating or narcotic substances as to be unable without help or unwilling to stop the excessive use of such substances. The term shall be held to include "dipsomaniac," "habitual drunkard," "person addicted to the use of alcoholic drink or intoxicating drugs," "person so habitually addicted to the use of alcoholic drink, absinthe, opium, morphine, chloral, or other intoxicating liquor or drug as to be a proper subject for restraint, care, and treatment in a hospital or asylum," "person habitually so addicted to the use of alcohol or narcotic drugs as to be a proper subject for restraint, care, and treatment." But for the purpose of this act, the term shall mean only those inebriates who, except for their inebriety, are of good character and reputation.

The license to care for mental patients is issued to mental hospitals under the provisions of Section 201 of The Mental Health Act of 1923, as amended, *supra*, 50 P. S. § 21, which is, in part, as follows:

Mental patients in the Commonwealth shall be cared for—

* * * * *

(c) In such semi-State or private institution or places as shall have procured from the department licenses as provided for in this act: Provided, That the authorities of general hospitals may set apart or establish beds, wards, or departments, for the temporary care of mental patients, under such conditions as may be approved by the department; but no mental patient shall be admitted for care to any place, except a general hospital, unless such place shall have a license for such purpose from the department.

How and to what extent may enforced care be exercised upon a person not suffering from a "mental illness"? Whether a person requires the care afforded by a private nursing home or private hospital, or that furnished by a mental hospital, is a question to be determined by the facts of each particular case.

In the Journal of the American Judicature Society, Volume 31, pp. 47, 48, August, 1947, Number 2, it is stated:

* * * we should, and may, legally provide for enforced hospitalization of the person who is mentally ill * * *, if he falls within the following definition:

The person who now is or with reasonable probability or certainty soon will become mentally ill to a degree which will so lessen the capacity of such person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it advisable for him to be under medical and hospital treatment, care, supervision or control either for the protection of society or of the individual.

While the foregoing definition is illustrative, nevertheless, it must be taken into consideration in conjunction with the provisions of The Mental Health Act of 1923, *supra*, and other related laws.

A comparison of the two statutes herein discussed reveals no inconsistency or conflict of laws.

We are of the opinion, therefore, that private nursing homes and private hospitals, properly licensed under the provisions of the Act of June 12, 1931, P. L. 510, as amended, 35 P. S. § 424, et seq., usually referred to as the Private Nursing Home and Private Hospital Licensing Act, may accept non-psychotic alcoholic patients and drug addicts, namely those persons requiring care, treatment, or nursing by reason of sickness, injury, infirmity, or other disability; but mental patients in the Commonwealth shall be cared for in State institutions, and in such semi-State or private institution or places as shall have procured licenses therefor from the Department of Welfare; provided, that the authorities of general hospitals may set apart or establish beds, wards, or departments, for the temporary care of mental patients, under such conditions as may be approved by the department; but no mental patient shall be admitted for care to any place, except a general hospital, unless such place shall have

a license for such purpose from the department, under the provisions of Section 201 (c) of The Mental Health Act of 1923, as amended, supra, 50 P. S. § 21 (c).

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

H. J. WOODWARD,

Deputy Attorney General.

OPINION No. 575

Insurance—Automobile insurance—Placement at time of financed sale—Right of dealer to share commissions—Insurance Department Act of 1921, secs. 635 and 636.

1. Unless it is an isolated transaction in an otherwise active agency, a motor vehicle dealer who is an insurance agent may not, under sections 635 and 636 of the Insurance Department Act of May 17, 1921, P. L. 789, receive any part of the agent's commission on fire, theft or collision insurance placed upon a motor vehicle which he sells on bailment lease or other time payment plan.

2. A motor vehicle dealer who is an insurance agent may not directly or indirectly share in an agent's commission for fire, theft or collision insurance placed upon any motor vehicle sold on bailment lease or any other time payment plan.

Harrisburg, Pa., January 23, 1948.

Honorable James F. Malone, Jr., Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have asked to be advised concerning the legality of certain common practices followed in the placing of fire, theft and collision insurance upon financed motor vehicles. In the cases to which you refer us the facts are briefly as follows:

1. A motor vehicle dealer is a fire insurance agent. He sells an automobile on bailment lease and adds to the cost of the vehicle, finance charges which include interest on the balance due and cost of fire, theft and collision insurance.*

(a) He holds the lease and pockets the agent's commission on the insurance;

* These must be itemized and the amounts kept within the limitations prescribed by the Motor Vehicle Sales Finance Act, the Act of June 28, 1947, P. L. 1110 (Act No. 476).

(b) He negotiates the lease to a finance company which in turn buys the insurance through him and he then pockets the agent's commission.

2. A motor vehicle dealer is not a fire insurance agent. He sells an automobile on bailment lease and adds to the cost of the vehicle, finance charges which include interest on the balance due and cost of fire, theft and collision insurance.

(a) He negotiates the lease to a finance company which refunds to the dealer a portion of the finance charges based on a percentage of the insurance commission collected by the finance company as a fire insurance agent, or by an agency which is a subsidiary of the finance company.

To answer your query requires an interpretation of Sections 635 and 636 of the Insurance Department Law of 1921, the Act of May 17, 1921, P. L. 789, 40 P. S. §§ 275 and 276, as they apply to the incidents of the transactions whereby a motor vehicle dealer sells vehicles on time payment plans. These sections we quote as follows:

No insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy or on any policy or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon or therefrom, or any special advantage in date of policy or age of issue, or any paid employment or contract for services of any kind, or any other valuable consideration or inducement, to or for insurance on any risk in this Commonwealth, now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such agent, solicitor, or broker, personally or otherwise, offer, promise, give, option, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever, as inducement to insurance or in connection therewith. Nothing in this section shall be construed to prevent the taking of a bona fide obligation, with legal interest, in payment of any premium.

No insured person or party or applicant for insurance shall, directly or indirectly, receive or accept, or agree to receive or accept, any rebate of premium, or of any part thereof, or all or any part of any agent's, solicitor's, or broker's commission thereon, or any favor or advantage, or share in any benefit to accrue under any policy of insurance, or any valuable consideration or inducement, other than such as are specified in the policy.

The plan of operation where a motor vehicle is sold on time payment plan is as follows:

The manufacturer sells the motor vehicle to its automobile dealer at a wholesale price. The dealer then becomes the owner of the vehicle. He leases it to the purchaser upon receiving from him a down-payment, and provides in the lease agreement that the balance of the retail purchase price, together with finance charges, which include interest on the balance due, and cost of fire, theft and collision insurance, shall be paid in equal installments over a fixed period of time. He retains certain rights upon default, one of which is the right to repossess the vehicle. The title* to the vehicle remains in the dealer until the final installment payment is met by the purchaser.

A dealer's insurable interest in the vehicle is, at the inception of the contract, equivalent of the unpaid balance of the contract price and diminishes to zero as payments on account are made by the purchaser. The dealer is at all times, up until the final installment payment, the legal owner of the insured property. The purchaser is the equitable owner whose equity increases to 100% as payments on account of the purchase price are made.

Where the dealer negotiates the lease to a finance company, title to the vehicle is transferred to it along with all the dealer's rights under the lease. But in so far as the insurance is concerned, that is covered by a binder from the time the vehicle leaves the dealer's floor and at a time when he is its owner. The lease may not be assigned to the finance company for days, weeks or months, during which period the dealer has, as above set forth, a very substantial insurable interest in the vehicle.

The language employed in sections 635 and 636 above quoted is quite similar to that found in the Act of May 3, 1909, P. L. 405 which was superseded by the Act of July 12, 1913, P. L. 745, repealed in so far as it applies to insurance agents, solicitors and brokers by Section 701 of the Insurance Department Law of 1921.

In construing the Act of 1909, Deputy Attorney General, later Superior Court Judge Cunningham, in *Dare's Case*, 13 Dauph. 30, 36 Pa. C. C. 683 (1909), had this to say with regard to a life insurance agent who collected the commission from the premium on a policy of insurance written on his own life:

By writing policies of insurance on his own property, or his own life, the agent eliminates the distinction existing in the act of 1909 between agents and insurants, and places himself in both classes, but by becoming an insurant in a company represented by him as agent, he does not lose his identity, or

* Title, as used here, is not to be confused with the title subject to an encumbrance issued by the Department of Revenue to the purchaser. That is an administrative expedient which does not affect the actual ownership.

rights, as agent of the company. Among these rights is the right to receive his usual commissions on all business written for his company. It can hardly be contended that the legislature intended to deprive a bona fide insurance agent of his commissions on policies covering his own life, or his own property, merely because he has followed a natural inclination to insure his life, or his property, in companies which he represents as agent.

The mischief which the legislature sought to remedy is the unfair treatment of prospective insureds of the same class by offering inducements to one person that are not available to all persons of the same class.

The advantage or inducement accruing to an agent in insuring his own life, or property, is not something held out to him by the company, or an agent of the company, but arises from the fact that he happens to be at the same time the agent of the company and the owner of something which he desires to insure in the company.

* * * * *

It must be understood, however, that *this conclusion is intended to apply only to the cases of bona fide insurance agents engaged in that occupation as a business, or regularly employed as such.*

If the circumstances of any particular case should disclose that an individual had been appointed the agent of an insurance company merely to the end that he as such agent might insure his property, or life, in the company appointing him, and thereby secure the advantage of the usual agent's commission, I am of the opinion that the retention of commissions under such circumstances would constitute the giving, and receiving, of a rebate of the premiums payable on the policy, and should properly be construed to be a violation * * *. (Italics ours.)

Applying this principle of law with which we fully agree to Sections 635 and 636 of the Insurance Department Law of 1921, we must conclude that unless they are isolated instances in an otherwise general fire insurance agency business, the transactions outlined in cases 1 (a) and 1 (b) are illegal: *Arcim Corporation v. Pink*, Superintendent of Insurance, 2 N.Y.S. (2d) 709 (1938), affirmed 280 N.Y. 721, 21 N.E. (2d) 213 (1939). And such transactions should not be countenanced by your department.

The facts indicated in case 2 (a) undoubtedly constitute a violation of the law in that under the guise of refunding part of the finance charges to a dealer who is not a fire insurance agent, he is given a share of the agent's commissions on fire insurance which has been

placed through his promotion. This is a rebate of premium which is specifically prohibited by Section 636 of the Insurance Department Law of 1921.

We are, therefore, of the opinion that unless it is an isolated transaction in an otherwise active agency, a motor vehicle dealer who is a fire insurance agent may not receive any part of the agent's commission on fire, theft and collision insurance placed upon a motor vehicle which he sells on bailment lease, or other time payment plan. Nor may a motor vehicle dealer who is not an insurance agent, directly or indirectly, share in the agent's commission for fire, theft and collision insurance which is placed upon any motor vehicle sold on bailment lease, or other time payment plan.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 576

Poor—Child dependents of county institution districts—Medical treatment—Liability for cost—Act of July 5, 1947, sec. 5.

With respect to those children who are dependents of a county institution district under the County Institution District Law of June 24, 1937, P. L. 2017, as amended, and whose records of medical or dental examination under the School Health Act of June 1, 1945, P. L. 1222, disclose conditions requiring medical, dental or surgical treatment, the cost of such treatment is payable by the Commonwealth, from the appropriation made to the Department of Public Assistance, upon the authorization of the appropriate county board of public assistance in accordance with the standards, rules and regulations made under, and the provisions of section 5 of the Act of July 5, 1947 (No. 522), in all cases where the said institution district, because of lack of funds, is financially unable to pay for such treatment and the proper authorities of said institution district make the requisite application to the appropriate county board of public assistance.

Harrisburg, Pa., February 4, 1948.

Honorable Frank A. Robbins, Jr., Secretary of Public Assistance,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your communication requesting an opinion on the following question, involving the administration of Act No. 522, approved July 5, 1947, viz.:

Whether the Department of Public Assistance can refuse payment for necessary medical, dental, or surgical treatment for those dependent children who are a financial responsibility of County Institution Districts.

You state that under the County Institution District Law, the Act of June 24, 1937, P. L. 2017, as amended, 62 P. S. § 2201 et seq., certain children are the financial responsibility of County Institution Districts, that these districts are now paying for medical services to such dependent children, and that various types of programs have been developed to meet the health needs of these children, such as: (1) the rendition of services by medical and dental personnel on the staffs of institutions or agencies; (2) contracts with hospitals and individual practitioners for services; and (3) fee payments to practitioners and agencies who have rendered services.

In 1937, the Legislature of Pennsylvania, as a direct result of the recommendations contained in the "Goodrich Report",¹ abolished all existent Poor Boards, County Mothers' Assistance Boards and the State Emergency Relief Board together with all of its subsidiary boards, and established the present system for the administration of poor relief in the Commonwealth.² The General Assembly, during that session, adopted the Public Assistance Law, Act No. 399 of June 24, 1937, P. L. 2051, 62 P. S. § 2501 et seq., The Support Law, Act No. 397 of June 24, 1937, P. L. 2045, 62 P. S. § 1972 et seq., and the County Institution District Law, Act No. 396 of June 24, 1937, P. L. 2017, 62 P. S. § 2201 et seq. The result of this legislation is to reduce the assistance organizations in each county to no more than two and to separate home assistance, which is subject to supervision by the State Department of Public Assistance under the Public Assistance Law, from institutional assistance, which is subject to supervision by the State Department of Welfare under the County Institution District Law.³

The single purpose of the County Institution District Law is to provide for indigent persons and children needing institutional care.⁴ The county commissioners, as officials in charge of the respective institution districts,⁵ have both the power and duty, inter alia, to care for any dependent not otherwise cared for, to contract with other local authorities for the care of any such dependent, and to contribute

¹ Published on December 15, 1936, entitled: "A Modern Public Assistance Program for Pennsylvania."

² *Poor District Case No. 1*, 329 Pa. 390, 395 (1938).

³ *Poor District Case No. 1*, 329 Pa. 390, 396 (1938).

⁴ *Idem.* 329 Pa. 390, 400 (1938).

⁵ *Idem.* 329 Pa. 390, 405 (1938).

moneys to the county to pay for the county cost of maintaining children in foster homes, institutions, and homes for children.⁶ With respect to contributions for medical care, Section 406 of the Act, 62 P. S. § 2306, provides as follows:

The commissioners of each county * * * shall have the power to make annual appropriations from the funds of the institution district * * * for the support of any public institution operated, or to any nonprofit corporation organized, to give medical care to the dependents and children of the county * * *.

Thus, it is to be observed that, although the quoted section specifically grants the *power* to the officials of the respective institution districts to make appropriations for the support of certain institutions whose functions are to give medical care to dependent children, it does not impose upon such officials the *duty* to appropriate funds for such care. A power given to a municipal corporation by statute does not impose an obligation to exercise the power conferred.⁷

Prior to the passage of Act No. 522 by the 1947 Session of the General Assembly⁸ and the enactment of the School Health Act⁹ by the 1945 Session, the system for examining the health of the school children of Pennsylvania was provided for in the School Code.¹⁰ Under Section 1501 of the code, 24 P. S. § 1501, school districts of the first, second and third class were required to provide annual medical inspections of all pupils of their public schools by medical inspectors appointed by the school directors of each district in conformity with standards prescribed by the Secretary of Health. As to school districts of the fourth class, Section 1503 of the code, 24 P. S. § 1503, places a present duty upon the State Department of Health to provide, in such manner as it may determine, medical inspections for all pupils in the public schools by medical inspectors appointed by the Secretary of Health. In the event that the department is unable to provide such inspections because of lack of funds, the aforesaid school districts "may" do so at their own expense. No specific periodic inspections are prescribed by this section. Under Section 1501.1 of the code, 24 P. S. § 1501.1, medical inspectors of all school districts are presently required to make "sight and hearing tests" of the pupils in "such schools" at least once during each school year. Section 1505 of the code, 24 P. S. § 1505, provided that medical inspectors in all school districts should, at least once a year, examine all pupils in the public

⁶ Section 401 (a), (b), (d), Act of June 24, 1937, P. L. 2017, 62 P. S. Section 2301 (a), (b), (d).

⁷ *Carr et al. v. The Northern Liberties*, 35 Pa. 324 (1860).

⁸ Approved July 5, 1947.

⁹ Act of June 1, 1945, P. L. 1222, 24 P. S. Sections 1525.1 et seq.

¹⁰ Sections 1501-1515 of the Act of May 18, 1911, P. L. 309, as amended, 24 P. S. Section 1501 et seq.

schools of their respective districts, and give special attention to defective sight, hearing, teeth or other defects specified by the Secretary of Health.

Act No. 522, approved July 5, 1947, the enactment which is the basis of your present inquiry, effected certain provisions of the School Code mentioned in the preceding paragraph. The annual medical inspections of public school pupils required to be made by school districts of the first, second and third class under Section 1501 of the code, supra, are now eliminated and in lieu thereof such school districts are charged with the duty of providing medical and dental examinations "in accordance with the provisions of the School Health Act" and the rules and regulations thereunder prescribed by the Secretary of Health (Section 2). The requirement for medical inspections by the State Department of Health of public school pupils in fourth class school districts under Section 1503 of the code, supra, is continued, except that such inspections are now designated as "examinations" and "inspectors" are designated as "examiners" (Section 3). The requirement for annual medical inspections for all public school pupils for defective sight, hearing, teeth or other specified defects prescribed by Section 1505 of the code, supra, is expressly repealed (Section 6).

The specific section of Act No. 522, approved July 5, 1947, which gives rise to the question presented by you is Section 5 which adds Section 1515.1¹¹ to the School Code and which reads, in part, as follows:

If the record of the medical or dental examination of *any child, examined under the School Health Act*, discloses a condition which requires medical, dental or surgical treatment and the parent or guardian states to the school authorities that he is financially unable to have a physician or dentist of his choice render such care, he shall be advised that the cost of such care will be provided if application is made to the appropriate county board of public assistance, which shall authorize payment for necessary medical, dental or surgical care as assistance, as defined in the standards, rules and regulations to be established by the Secretary of Public Assistance, in consultation with the Secretary of Health and the Superintendent of Public Instruction, and with the approval of the State Board of Public Assistance: * * *

In instances where it appears that the parent or guardian was financially able to pay for the medical, dental or surgical care, for which payment was made on the authorization of a county board of assistance, the Department of Public Assistance shall have full recourse to recover the amounts thus expended from the parent or guardian liable for the support of such child, as provided in the support law. (*Italics supplied.*)

¹¹ 24 P. S. Section 1512.2a.

Since the legislature expressly made the School Health Act the basis of administration of the above quoted section of Act No. 522, it is important, in interpreting the latter provisions, that careful consideration be given to the former act.

By the enactment of the School Health Act, the Act of June 1, 1945, P. L. 1222, 24 P. S. § 1525.1 et seq., the legislature provided for the establishment of a uniform health program for all children of school age "whether attending, or who should attend, an elementary, grade or high school, either public or private, within the Commonwealth" (Section 2). All of the 1,550,000 school children in public, private and parochial schools in this State were at once and without exception brought within the operative scope of the statute.¹² The purpose of the act, as declared by the legislature and expressed in section 8 thereof,¹³ was to establish a complete and permanent medical and dental record "in order to assist in building sound minds and healthy bodies for the youth of Pennsylvania."

Section 3 of the School Health Act, *supra*,¹⁴ 24 P. S. § 1525.3, specifically required that a complete medical and dental examination be given, at least once in every two years, by medical examiners, appointed or approved by the Secretary of Health, to all children of school age during the time they are members of the first, third, fifth, seventh, ninth, and eleventh grades in any school within the Commonwealth. Section 13 of the act,¹⁵ specifically provides that the required medical examination is in lieu of all other medical examinations provided for by law for children who are members of the designated grades. While objections to such examinations on religious grounds may provide a basis for exemption in certain cases,¹⁶ the only children of school age excepted from the act are those who provide local school officials with reports of medical or dental examinations made at their own expense, by medical or dental examiners of their own choice, on forms approved by the State Department of Health.¹⁷ School districts of the first, second and third class, which under Section 2 of Act No. 522, approved July 5, 1947, are initially required to provide for these examinations at their own expense, are compensated by the Commonwealth, from appropriations made to the Department of Health, at a specified statutory rate for each medical and dental examination performed.¹⁸

¹² "A Record of Achievement 1943-1945", published by the Commonwealth of Pennsylvania, 1946, page 30.

¹³ 24 P. S. Section 1525.8.

¹⁴ Amended by Act No. 430, approved June 28, 1947.

¹⁵ 24 P. S. Section 1525.13.

¹⁶ Section 11, 24 P. S. Section 1525.11.

¹⁷ Section 12, 24 P. S. Section 1525.12.

¹⁸ Section 14, 24 P. S. Section 1525.14.

In order to expand the health program established under the School Health Act of 1945 for the children of Pennsylvania, the 1947 Session of the Legislature increased the appropriation for the administration of the act from \$4,000,000 to \$7,000,000.¹⁹

When we construe Section 5 of Act No. 522, approved July 5, 1947, in conjunction with the provisions of the School Health Act, as we are bound to do in conformity with the specific legislative direction contained in the former provision, we are impelled to the conclusion that the above section of Act No. 522 was adopted as a health measure rather than a school measure, and applied to *every child of school age* in the Commonwealth. Where such child requires medical, dental or surgical care, as disclosed by the report of his examination under the School Health Act, and there is a financial inability on the part of his parent or guardian to provide it, it "will be provided" upon application made to the local board of public assistance which "shall authorize payment" for such care under standards established by the Secretary of Public Assistance, in consultation with the Secretary of Health and the Superintendent of Public Instruction, and with the approval of the State Board of Public Assistance, and in instances where such care is furnished at the Commonwealth's expense and the parent or guardian of the child receiving the treatment was financially able to pay for the same, recourse may be had by the Department of Public Assistance against such parent or guardian to recover the amounts expended for such care in accordance with the provisions of The Support Law.

There is no exception contained in the aforesaid provision of Act No. 522 which exempts dependent children of county institution districts from its terms. The latter are state agencies²⁰ whose obligations are paid for by their own funds raised by county taxing authorities.²¹ They are responsible for the support of those dependent persons and children having a settlement therein, who are "not otherwise provided for."²² Although, by reason of the unlimited scope of the School Health Act, dependent children of school age of county institution districts, the same as any other children of like age, would receive the prescribed medical and dental *examinations* at the expense of the Commonwealth, they would, nevertheless, be subject to the same limitation with respect to receiving, without cost, the necessary medical, dental and surgical *treatment* for conditions disclosed by those examinations, as any other child who seeks to come within the provisions of Section 5 of Act No. 522, approved July 5, 1947. In the

¹⁹ The General Appropriation Act of 1947, Act No. 94-A, approved July 9, 1947.

²⁰ *Chester County Institution District et al. v. Commonwealth et al.*, 341 Pa. 49 (1941).

²¹ Act of June 24, 1937, P. L. 2017, Section 307, 62 P. S. Section 2257.

²² *Idem.* Section 401 (a), 62 P. S. Section 2301 (a).

latter case, the parent or guardian of such child must be financially unable to pay for such treatment and must make the necessary application to the appropriate county board of assistance before payment can be authorized. Similarly, for a county institution district to avail itself of the benefits of those statutory provisions, it likewise, would have to be financially unable to pay for the treatment, by reason of lack of funds, and it would be required to submit the necessary application to the county board of assistance.

We are, therefore, of the opinion that, with respect to those children who are dependents of a county institution district under the County Institution District Law, the Act of June 24, 1937, P. L. 2017, as amended, 62 P. S. § 2201 et seq., and whose records of medical or dental examinations under the School Health Act, the Act of June 1, 1945, P. L. 1222, 24 P. S. § 1525.1 et seq., disclose conditions requiring medical, dental or surgical treatment, the cost of the same is payable by the Commonwealth, from the appropriation made to the Department of Public Assistance, upon the authorization of the appropriate county board of public assistance in accordance with the standards, rules and regulations made under, and the provisions of Section 5 of Act No. 522, approved July 5, 1947, in all cases where the said institution district, because of lack of funds, is financially unable to pay for such treatment and the proper authorities of said institution district make the requisite application to the appropriate county board of public assistance.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

FRANCIS J. GAFFORD,
Deputy Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 577

Public officers—Incompatible offices—State Tax Equalization Board—County commissioner or treasurer—Act of June 27, 1947.

Since the Act of June 27, 1947 (No. 447), creating the State Tax Equalization Board, provides that each of its members shall devote his entire time to the duties of his office, a salary may not be paid to a member of the board who holds the position of county commissioner or county treasurer until he resigns from his county office or his term of county officer expires.

Harrisburg, Pa., February 9, 1948.

Honorable G. Harold Wagner, Auditor General, Harrisburg, Pennsylvania.

Sir: We have your request to be advised concerning whether you may lawfully approve requisitions for the payment of salaries of two members of the State Tax Equalization Board who respectively hold the office of county commissioner and county treasurer.

Article XII, Section 2 of the Constitution of Pennsylvania provides as follows concerning incompatible offices:

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.

This provision prohibiting a person from holding both a State and a Federal office is self-executing without legislative aid: Commonwealth ex rel. Crow v. Smith, 343 Pa. 446 (1942). However, under the concluding sentence of article XII, section 2, it has been held that " * * * the courts are not permitted to hold offices incompatible merely because the Legislature has failed to act, * * *": Commonwealth ex rel. Schermer v. Franek, 311 Pa. 341, 347 (1933). Nevertheless, it has been held that dual office holding will not be sanctioned where the two offices are such that it would be against public policy to permit one person to hold both of them: Commonwealth ex rel. v. Snyder, 294 Pa. 555 (1929); Commonwealth ex rel. Adams v. Holleran, 350 Pa. 461 (1944).

There does not appear to be any statutory provision in the General County Law or elsewhere prohibiting a county commissioner or a county treasurer from holding an appointive office under the State government.

There is likewise no provision in the act creating the State Tax Equalization Board (Act No. 447, approved June 27, 1947, P. L. 1046) expressly forbidding a board member from holding a county office. However, section 2(b) of that act significantly provides that:

* * * Each member of the board shall devote *his entire time* to the duties of his office. * * * (Italics supplied.)

In the case of this newly created board this requirement is particularly appropriate. There are 2,544 school districts in the Commonwealth, the taxable real property of each of which must be revalued by July 1, 1949 (section 14) and annually thereafter. The magnitude of this undertaking more than adequately demonstrates

that the board members must exclusively devote their time to the board unhampered by other governmental responsibilities.

Section 7 of the act provides that the board shall have power and its duties shall be:

(1) To determine the market value of taxable real property in each of the school districts and to conduct investigations, require information and have access to whatever public records are necessary in making each such determination.

(2) To require the county commissioners of each county to furnish to it, monthly, a list of all conveyances or other transfers of real estate, or any interest therein, recorded within such county during the preceding month, stating the value of the Federal tax stamps affixed to the deed for each such conveyance, and the assessed valuations for county tax purposes of such real estate.

* * * * *

(7) To subpoena State and local officials and to require from them such information as may be necessary for the proper discharge of its duties.

Section 16 of the act provides that:

Before granting any special aid to any school district, the Superintendent of Public Instruction shall submit the request therefor to the board. The board shall make its recommendations with respect thereto in so far as the same is affected by the district's ability to raise funds by taxation. Before making any such recommendation, the board shall carefully investigate and study the financial circumstances of the district and whether or not it has exhausted its available taxing power not only on real property, but also on all other available property and subjects of taxation, and that collection of such taxes is being effectively made and enforced. Such recommendations shall be for the advice of the Superintendent of Public Instruction in passing on such requests.

Section 9 provides that the county commissioners of each county on the fifteenth day of each month shall prepare, certify and deliver to the board a list of all conveyances of real estate, and paragraph (b) of the same section reads:

* * * * *

(b) The board shall pay to the county commissioners of each county, the sum of ten cents (10¢) for each such conveyance or transfer of real estate on each list so prepared, certified and delivered to the board for its use.

Section 2 of the act provides for an annual salary of \$10,500 for the chairman of the board and each other member thereof an annual salary of \$10,000.

In our opinion, the legislature has inserted this requirement that the board member devote his entire time to his duties as a condition to his incumbency; and this condition plainly precluded a board member from conducting the highly important and demanding duties of a county commissioner or a county treasurer simultaneously with his duties on the board. The term "entire time" connotes undivided and undiminished concentration of one's intelligence, industry and initiative to the task at hand.

Miller v. Walley, 84 So. 466, 468, 122 Miss. 521 (1920), construed a bill which read " * * * the superintendent shall devote his entire time to the duties of his office." * * * The Court said:

We think the word "entire" in the statute means something and imposed upon the superintendent obligations of greater extent than were imposed on him before, and that the Legislature had a right to require the full time of an officer or superintendent of one of its institutions and, at least, the statute was intended to remove from the field of disputation the amount of time that was necessary for the superintendent * * * to devote to the duties of that position.

Quoting from 11 Amer. & Eng. Enc. of Law, at page 48, the Court continued:

"Entire" means whole, undivided; not participated in by others.

See also First Calumet Trust & Savings Bank et al. v. Rogers et al., 289 F. 953 (C. C. A. 7th, 1923), where the Court construed a contract of employment between a private corporation and its executive officer requiring him to devote his entire time to the business of his employer. The Court said at page 958:

* * * The entire time * * * under the employment meant his entire capacity in mental attainments and experience.
* * *

Since we are of the opinion that the "entire time" condition in the act of 1947, supra, precludes a member of the State Tax Equalization Board from holding the office of county commissioner or county treasurer, it follows that present board members cannot receive compensation from the State Treasury so long as they also hold their respective county offices. This conclusion renders unnecessary the determination of any further question of incompatibility under statute or public policy. In accordance with the opinion in the case of Commonwealth ex rel. v. Snyder, supra, it would appear that the county commissioner or the county treasurer who has been appointed as a member of the State Tax Equalization Board should be given a reasonable opportunity to make an election between the respective offices.

We are therefore of the opinion that you may not lawfully approve requisitions for the salary of any member of the State Tax Equalization Board who holds the position of county commissioner or county treasurer, until such time as he resigns from his county office, or his term as county officer expires.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

HARRINGTON ADAMS,

Deputy Attorney General.

OPINION No. 578

Banks and banking—State institutions—Investments—Obligations of municipalities or corporations outside of Pennsylvania.

Section 1006 of the Banking Code of May 15, 1933, P. L. 624, as amended, prohibits any Pennsylvania bank or bank and trust company from investing more than 10 percent of its capital and surplus in bonds, debentures, or other evidences of indebtedness of any one out-of-State municipality or corporation.

Harrisburg, Pa., February 27, 1948.

Honorable D. Emmert Brumbaugh, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You ask to be advised concerning the limitations imposed upon local banks and bank and trust companies in respect to the amount of money which they may invest in bonds of municipalities or corporations outside of Pennsylvania. And you inquire particularly if such institutions may, under the restrictions contained in Section 1006 of the Banking Code, the Act of May 15, 1933, P. L. 624, as amended, invest more than 10% of their capital and surplus in the obligations of any out-of-state municipality or corporation.

Section 1006 of the Banking Code of 1933, as amended, 7 P. S. § 819-1006, consists of Subsection "A", which generally limits the amount to be loaned to any one corporation or person to 10% of capital and surplus of the creditor bank or bank and trust company, followed by five numbered exceptions; subsection "B", which modifies the preceding subsection in certain cases where collateral is involved; and subsection "C", which furnishes the criterion by which liabilities of debtors are to be measured and which defines loans.

The text of section 1006 in full appears in a footnote.¹ The portions relevant to your question we quote as follows:

A. A bank or a bank and trust company shall not, directly or indirectly, lend to any corporation or person an amount which, including any extension of credit to such corporation or person by means of letters of credit or by acceptance of drafts for, or the discount or purchase of the notes, bills of exchange, or other commercial paper of, such corporation or person, shall exceed ten per centum of the unimpaired capital and ten per centum of the unimpaired surplus of the bank or bank and trust company. However, this restriction shall have no application whatsoever to the following:

(1) Loans to the United States, or loans secured by not less than the face amount of bonds or other interest-bearing obligations of the United States, or bonds or other interest-bearing obligations for the payment of the principal and interest on which the faith and credit of the United States is pledged, * * *

(2) Loans to the Commonwealth of Pennsylvania, or any county, city, borough, township, incorporated town, or school district thereof, or an Authority which has been created as a body corporate and politic under any law of this Commonwealth, or loans secured by bonds or other interest-bearing obligations of the Commonwealth, or of any county, city, borough, township, incorporated town, or school district thereof, * * *.

(1) Loans to the United States, or loans secured by not less than the face amount of bonds or other interest-bearing obligations of the United States, or bonds or other interest-bearing obligations for the payment of the principal and interest on which the faith and credit of the United States is pledged, to the extent that such loans are secured or covered by guaranties, or by commitments or agreements to take over, or to purchase, made by any Federal Reserve Bank or by the United States, or any department, bureau, board, commission, or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States.

(2) Loans to the Commonwealth of Pennsylvania, or any county, city, borough, township, incorporated town, or school district thereof, or an Authority which has been created as a body corporate and politic under any law of this Commonwealth, or loans secured by bonds or other interest-bearing obligations of the Commonwealth, or of any county, city, borough, township, incorporated town, or school district thereof, or of any Authority which has been created as a body corporate and politic under any law of the Commonwealth, or bonds or other interest-bearing obligations for the payment of the principal and interest on which the faith and credit of the Commonwealth, or any county, city, borough, township, incorporated town, or school district thereof, or of any Authority which has been created as a body corporate and politic under any law of this Commonwealth is pledged.

¹Section 1006. A. A bank or a bank and trust company shall not, directly or indirectly, lend to any corporation or person an amount which, including any extension of credit to such corporation or person by means of letters of credit or by acceptance of drafts for, or the discount or purchase of the notes, bills of exchange, or other commercial paper of, such corporation or person, shall exceed ten per centum of the unimpaired capital and ten per centum of the unimpaired surplus of the bank or bank and trust company. However, this restriction shall have no application whatsoever to the following:

(3) The discount of drafts or bills of exchange drawn in good faith against actual existing values.

(4) The discount of trade acceptances or other commercial paper, actually owned by the corporation or person negotiating it to the bank or bank and trust company, and endorsed without restriction by such corporation or person.

(5) The discount of notes secured by shipping documents, warehouse receipts, or other similar documents conveying or securing title to readily marketable nonperishable staple goods, including live-stock, when the actual market value of the property securing the obligations, is not at any time less than one hundred fifteen per centum of the face amount of the notes secured by such documents, and when such property is fully covered by insurance.

B. However, a bank or a bank and trust company may, in addition to the ten per centum authorized by this section, lend to any corporation or person an additional fifteen per centum of the unimpaired capital and fifteen per centum of the unimpaired surplus of the bank or the bank and trust company, if such additional fifteen per centum is secured by collateral having an ascertained market value of at least twenty per centum more than the amount of the liability so secured.

C. In computing the total liabilities of any individual to a bank or a bank and trust company, there shall be included all liabilities to the bank or bank and trust company of any partnership or any unincorporated association of which he is a member, any loans made for his benefit or for the benefit of such partnership or unincorporated association, and any loans made to, or for the benefit of, a corporation of which he owns fifty per centum or more of the capital.

In computing the total liabilities of any partnership or unincorporated association to a bank or a bank and trust company, there shall be included all liabilities of its individual members to such bank or bank and trust company, loans made for the benefit of such partnership or unincorporated association, or any member thereof, and loans made to, or for the benefit of, any corporation of which the partnership or unincorporated association, or any member thereof, owns fifty per centum or more of the capital.

In computing the total liabilities of any corporation to a bank or a bank and trust company, there shall be included all loans made for the benefit of the corporation, and all loans to, or for the benefit of, any individual or any partnership or unincorporated association, or any member thereof, who owns fifty per centum or more of the capital of such corporation.

A loan shall be deemed to be made for the benefit of a corporation or a person to the extent that the proceeds of such loan are transferred to such corporation or person. (1933, May 15, P. L. 624, art. X, § 1006; 1935, June 21, P. L. 382; 1937, June 2, P. L. 1185; 1939, June 24, P. L. 737; 1943, May 21, P. L. 475; 1945, February 21, P. L. 7.)

This section speaks of loans to "any corporation or person", and while strictly speaking a municipality is not a person nor need it necessarily be a corporation—there are many unincorporated towns throughout the nation—we must conclude from the whole tenor of the law, that by this language the legislature intended to encompass all classes of debtors; hence the word corporation used there must be held to include municipal corporation and the word person, unincorporated municipality.

We point out that in the paragraphs following the general restrictions imposed in Subsection "A" of Section 1006 of the Banking Code of 1933, the legislature has made no reference to loans to municipali-

ties outside of Pennsylvania nor to their bonds. Consequently, if municipal bonds are loans within the meaning of subsection "A", then the limitations upon the amount to be invested in those out-of-state municipalities, are obviously applicable.

If the forepart of subsection "A", which speaks only of loans, leaves open to question whether or not the legislature intended this word to include the purchase price of bonds, the succeeding two paragraphs answer in the affirmative. Paragraph (1) refers to loans to the United States secured by bonds and paragraph (2) to loans to the Commonwealth and its political subdivisions secured by bonds.

It follows that the provisions of subsection "A" of section 1006 apply to municipal bonds, and out-of-state municipal bonds not being excepted from these general provisions, no Pennsylvania bank or bank and trust company may invest more than 10% of its capital and surplus in the bonds or other evidences of indebtedness of any out-of-state municipality or corporation.

This conclusion is not at variance, but in accord with Formal Opinion No. 184, dated October 4, 1935, to the then Secretary of Banking, 1935-36 Op. Atty. Gen. 90, 24 Pa. D. & C. 155. That opinion treated with investment in bonds issued under authority of the National Housing Act of June 27, 1934, and held, inter alia, that the limitations of Section 1006 did not apply to F.H.A. debentures guaranteed as to principal and interest by the United States, since they were exempted from the applicability of the 10% rule by paragraph (1) as loans to the United States. It held, however, as follows:

As to bonds not so secured, the limitation applies and a bank or a bank and trust company shall not hold at any time bonds of one person or corporation in excess of the amount permitted by Section 1006. * * *

Obviously if a municipality can lawfully post collateral security with a Pennsylvania creditor bank or bank and trust company, then the provisions of subsection "B" of section 1006 come into play and a loan to it may in such case, exceed the 10% restriction. With that problem, however, the request is not concerned. And we indicate it merely that our conclusion on the question involved may be read in a light undimmed by this collateral subject.

We are of the opinion that under Section 1006 of the Banking Code, the Act of May 15, 1933, P. L. 624, as amended, 7 P. S. § 819-1006, no Pennsylvania bank or bank and trust company may invest more than 10% of its capital and surplus in the bonds, debentures or other evidences of indebtedness of any one out-of-state municipality or corporation.

Yours very truly,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General.

RALPH B. UMSTED,

Deputy Attorney General.

OPINION No. 579

Evidence—Vital statistics—Microfilm records.

The Department of Health may, with the approval of the executive board, have microfilm records made of all records on file with the Bureau of Vital Statistics for the purpose of protecting, safeguarding and preserving the originals or for the purpose of conserving filing space, and copies made from such microfilms are, when duly certified by the department, admissible in evidence in place of the original as prima facie evidence of all facts therein stated in all courts of the Commonwealth.

Harrisburg, Pa., March 5, 1948.

Honorable Norris W. Vaux, Secretary of Health, Harrisburg, Pennsylvania.

Sir: We have your request for an opinion as to whether, if the Department of Health reproduces by microphotography¹ all records on file with the Bureau of Vital Statistics, copies made from the microfilms will be admissible as evidence in the courts of the Commonwealth.

At the outset it should be noted that there is a distinction between the instant inquiry and the question as to the extent which state officers or employes may be compelled to comply with a court order or a subpoena duces tecum requiring the production in court of official

¹ "Microphotography is not a new art. Tissandier's 'History and Handbook of Photography,' published by Sampson, Low and Company, London, England, in 1876, has an account of its use during the siege of Paris in the Franco-German War. Printed messages were reduced by photography, so considerably, that a bundle weighing fifteen grams and containing eighty thousand words was flown by carrier pigeon to those outside": *The Canadian Bar Review*, Vol. XX, No. 6, June, July, 1942, p. 546.

records of departments or administrative agencies. The latter has previously been the subject of published opinions of this department, as well as judicial decisions² and is, therefore, not here considered.

It is the existence of the fundamental principle in our law of evidence, known as the Hearsay Rule, that gives rise to your present inquiry. Succinctly stated, that rule renders inadmissible in evidence all statements, oral or written, made by a person not called as a witness and which are, therefore, made without the sanction of an oath and the opportunity to be tested by cross-examination.³ Official Statements, however, have long been recognized as an exception to this rule⁴ and under it copies of the same made by officers lawfully authorized to give copies are receivable in evidence.⁵

The legislature, which has the power to alter or create rules of evidence,⁶ by various enactments applicable to the official records on file in the several departments, boards and commissions of the Commonwealth, has expressly authorized that copies of such records shall be admitted in evidence. Under these acts, *certified* copies of such records are admissible in all cases where the originals would be admitted. This applies to records in the office of the Secretary of the Commonwealth,⁷ State Treasurer,⁸ Auditor General,⁹ Insurance Department,¹⁰ Department of Banking,¹¹ Department of Military Affairs,¹² Workmen's Compensation Board,¹³ Public Utility Commission,¹⁴ and the Pennsylvania Aeronautics Commission.¹⁵

² As to *Health Records: Marks's Appeal*, 121 Pa. Super. 181 (1936); 1917-1918 Op. Atty. Gen. 424, 27 Dist. Rep. 510; 1917-1918 Op. Atty. Gen. 507, 66 P. L. J. 669; 1923-1924 Op. Atty. Gen. 187, 2 Pa. D. & C. 725. As to *Public Assistance Records: 1939-1940 Op. Atty. Gen. 38, 35 Pa. D. & C. 89. As to Tax Reports; Com. v. Mellon National Bank and Trust Co.*, 58 Dauphin 445 (1947).

³ Henry "Pennsylvania Trial Evidence," (3d 1940) Section 270, p. 388.

⁴ 5 Wigmore, Evidence, (3d 1940), Section 1630, p. 513.

⁵ 4 Wigmore, Evidence, (3d 1940), Section 1281, p. 569.

⁶ 1 Wigmore, Evidence (3d 1940), Section 7, p. 208, citing: *Foster v. Gray*, 22 Pa. 9 (1853).

⁷ Section 1, Act of March 31, 1823, P. L. 233, 28 P. S. Section 99. As to *business corporation records* filed in the Department of State: Section 11 of the Business Corporation Law, the Act of May 5, 1933, P. L. 364, as amended, 15 P. S. Section 2852-11. As to *records of building and loan associations*: Section 13 of the Building and Loan Code, the Act of May 5, 1933, P. L. 457, No. 108, 15 P. S. Section 1074-13. As to *documents filed under the Banking Code*: Section 13, Act of May 15, 1933, P. L. 624, 7 P. S. Section 819-13.

⁸ Section 1, Act of March 31, 1823, P. L. 233, 28 P. S. Section 99.

⁹ *Ibid.*

¹⁰ Section 207 of The Insurance Department Act of 1921, Act of May 17, 1921, P. L. 789, 40 P. S. Section 45.

¹¹ Section 9 of the Department of Banking Code, Act of May 15, 1933, P. L. 565, 71 P. S. Section 733-9.

¹² Section 1, Act of April 11, 1867, P. L. 68, 28 P. S. Section 106.

¹³ Section 433 of The Workmen's Compensation Act, the Act of June 2, 1915, P. L. 736, as amended, 77 P. S. Section 1011.

¹⁴ Section 909 of the Public Utility Law, the Act of May 28, 1937, P. L. 1053, 66 P. S. Section 1349.

¹⁵ Section 610 of The Aeronautical Code, the Act of May 25, 1933, P. L. 1001, as amended, 2 P. S. Section 1484.

By Section 505 of The Administrative Code of 1929,¹⁶ it is provided that:

Each administrative department, each independent administrative board and commission, shall, and any departmental administrative board or commission may, adopt and use an official seal. A copy of any paper or document on file with any such department, board, or commission, authenticated by any such seal, shall be evidence equally and in like manner as the original.

With respect to the records of the Department of Health or of any bureau or division thereof, the Act of May 29, 1907, P. L. 305, 28, P. S. Section 98, provides:

* * * copies of all records, documents, and papers in the possession of the Department of Health, or of any bureau, division, or officer thereof, when duly certified by the Commissioner of Health (now Secretary of Health),¹⁷ under the seal of the Department of Health, shall be received in evidence in the several courts of this Commonwealth in all cases where the original records, documents, and papers would be admitted in evidence, with the same force and effect as the originals.

With particular reference to vital statistic records, i. e., relating to births, marriages and deaths, such records, being "public documents" or "official records," are receivable in evidence as a proper exception to the hearsay rule.¹⁸ By express legislative enactment,¹⁹ certified copies of these records are admissible in evidence and are prima facie evidence of the facts therein stated.²⁰ The statutory provision reads, in part, as follows:

* * * any such copy of the record of a birth, or death, or marriage, when properly certified by the Department of Health to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated * * *

Under this proviso, it has been held that courts are fully warranted in receiving in evidence certified copies of such records.²¹

A similar provision is contained in Section 14 (2) of the Uniform Vital Statistics Act,²² which act, we have previously stated, sets up a

¹⁶ Act of April 9, 1929, P. L. 177, 71 P. S. Section 185.

¹⁷ Section 206 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. Section 66.

¹⁸ 32 C. J. S. Section 638 (a) p. 495 citing: *Marks's Appeal*, 121 Pa. Super. 181, 189 (1936).

¹⁹ Section 21 of the Act of June 7, 1915, P. L. 900, as last amended by Section 7 of the Act of April 22, 1937, P. L. 399, 35 P. S. Section 471.

²⁰ "Case Records of Hospitals and Doctors As Evidence Under The Business Records Act" (1947), 21 Temp. L. Q. 113 at p. 118.

²¹ *Trotter v. Industrial Life Ins. Co.*, 115 Pa. Super. 487, 490 (1934).

²² Act of May 21, 1943, P. L. 414, as amended, 35 P. S. Section 505.14 (2), effective September 1, 1943.

general and exclusive system covering the subject it deals with,²³ and which provision reads as follows:

Copies of the contents of any certificate on file in the department (Department of Health), or any part thereof, certified by the department, shall be considered for all purposes the same as the original, subject to the requirements of sections 18, 19 and 20.²⁴

The authorization for the making of microfilm records was expressly conferred by the 1941 Session of the General Assembly which added Section 525 to The Administrative Code of 1929.²⁵ This section reads as follows:

Any administrative department, board or commission may, with the approval of the Executive Board, have micro film records made of any correspondence, records or other papers for the purpose of protecting and safeguarding the original correspondence, records or other papers, or for the purpose of conserving filing space, and such micro film reproduction shall, when properly identified, be admitted in evidence in any proceeding in place of the original correspondence, records or other papers.

The 1943 Session of the General Assembly enlarged²⁶ the scope of this section so as to provide that when such microfilm records are made in accordance therewith, for the conservation of filing space, the administrative department, board or commission whose records are so micro-filmed "may, with the approval of the Executive Board,²⁷ destroy such original correspondence, records or other papers."

The last session of the legislature, by an act²⁸ carrying a specific appropriation, provided for the establishment of a service unit to be available for all departments, boards and commissions for the photographing of correspondence, records, reports and papers of every description which are to be preserved. This enactment further provided that upon receipt by such departments, boards and commissions of the developed film and the determination of its clarity, the originals "shall" be destroyed, "with the approval of the Executive Board as provided by The Administrative Code of 1929, as amended."

From the foregoing statutory provisions, it is to be observed that while the 1941 amendment to The Administrative Code of 1929 makes the microfilm reproduction of records of departments, boards or com-

²³ 1943-1944 Op. Atty. Gen. 181 at p. 184; 49 Pa. D. & C. 432 at p. 435 (1944).

²⁴ Sections 18 and 19 relate to "delayed" and "altered" certificates and provide that the probative value of such certificates shall be determined by the judicial or administrative body or official before whom they are offered as evidence; Section 20 relates to the disclosure of vital statistic records.

²⁵ Section 5 of the Act of July 21, 1941, P. L. 429, 71 P. S. Section 205.

²⁶ Section 1 of the Act of May 7, 1943, P. L. 243, 71 P. S. Section 205.

²⁷ Section 204 of the Act of April 9, 1929, P. L. 177, 71 P. S. Section 64.

²⁸ Act No. 526, approved July 5, 1947, 71 P. S. Section 1661.1 et seq.

missions, "when properly identified", admissible in evidence in place of the original records, nevertheless, with reference to vital statistic records, both the prior Act of June 7, 1915 (Section 21), as last amended by the Act of April 22, 1937, *supra*, as well as the Uniform Vital Statistics Act of 1943 (Section 14 (2)) *supra*, provide that copies of such records are admissible in evidence only when "certified." A "certified" copy of such a record makes it admissible under both the enactment requiring identification and the acts requiring certification; for the term "certify", as ordinarily used with reference to documents, has been defined as meaning to affirm or to assert in writing the correctness or identity of the designated instrument.²⁹

We are, therefore, of the opinion, that the Department of Health may with the approval of the Executive Board, have microfilm records made of all records on file with the Bureau of Vital Statistics, for the purpose of protecting, safeguarding and preserving the originals or for the purpose of conserving filing space, and copies made from such microfilms are, when duly certified by the department, admissible in evidence in place of the originals, as *prima facie* evidence of the facts therein stated, in all courts of the Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,

Attorney General

FRANCIS J. GAFFORD,

Deputy Attorney General.

OPINION No. 580

Employes—Members of various components of the United States Army, Navy and Marine Corps—Military leave—Annual two weeks training period—Acts of June 7, 1917, P. L. 600; July 12, 1935, P. L. 677.

The Act of July 12, 1935 is presently effective, but such military leave is limited to a period of fifteen days without loss of State pay, time or efficiency rating. If a longer leave is presently desired, since World War II has not been technically and legally terminated, it could be granted under the Act of June 7, 1917, which provides for unlimited military leave, without pay, for extended active duty in time of war or contemplated war.

²⁹ *Sawyer v. Lorenzen & Weise*, 127 N. W. (Iowa) 1091, 1093 (1910); *Harting v. Cebrian*, 51 P. (2d) (Cal.) 195, 198 (1935); 14 C. J. S. p. 114. See also: *Title G. & Tr. Co. v. Hildebrand*, 41 Pa. Super. 136, 140 (1909).

Harrisburg, Pa., March 23, 1948.

Honorable William H. Chesnut, Secretary of Labor and Industry,
Harrisburg, Pennsylvania.

Sir: You ask to be advised whether the practice of the Department of Labor and Industry is correct in requiring employes, who are members of the various reserve components of the United States Army, Navy and Marine Corps, and who undergo the annual two weeks' training period provided for such persons, to obtain military leave under the provisions of the Act of June 7, 1917, P. L. 600, rather than under the provisions of the Act of July 12, 1935, P. L. 677.

As this practice is not in accordance with Formal Opinion No. 559, dated March 13, 1947, this practice is incorrect. Formal Opinion No. 559 ruled on the question presented, namely, the allowance to State employes, members of the United States Army Officers' Reserve Corps, of a military leave of absence of three months to attend a reserve officer training course. The question of compensation was not presented or considered. According to Formal Opinion No. 559, this leave of three months could presently be granted under the Act of June 7, 1917, P. L. 600, as amended, 65 P. S. § 111 et seq. Upon the legal termination of World War II, a three months' military leave of absence could only be obtained on the basis of the Act of July 12, 1935, P. L. 677, 65 P. S. § 114, permitting a fifteen days' leave with pay, and Sections 222 and 709 (e) of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 82 and 249.

The Act of June 7, 1917, P. L. 600, as amended *supra*, originally provided in Section 2 for payment of one-half of the salary or wages of the employe during his leave in the military or naval service of any branch or unit thereof to certain dependents named in the act. However, this section providing for the benefits was declared unconstitutional in *Kurtz v. Pittsburgh et al.*, 346 Pa. 362 (1943), and therefore the Act of June 7, 1917, P. L. 600, as amended, *supra*, now provides only for military leave without compensation of any kind.

Section 1 of the Act of July 12, 1935, P. L. 677, 65 P. S. § 114, provides for leave of absence not to exceed fifteen days in any one year without loss of pay, time or efficiency rating, as follows:

All officers and employes of the Commonwealth of Pennsylvania, or of any political subdivision thereof, members, either enlisted or commissioned, of any reserve component of the United States Army, Navy, or Marine Corps, shall be entitled to leave of absence from their respective duties without loss of pay, time, or efficiency rating on all days not exceeding fifteen in any one year during which they shall, as

members of such reserve components, be engaged in the active service of the United States or in field training ordered or authorized by the Federal forces.

It is clear from the above that this act presently permits leave for a period not to exceed fifteen days in any one year without loss of pay, and that this is in addition to the regular annual vacation leave of absence with full pay as provided for under Section 222 of The Administrative Code of 1929, as amended, *supra*. Aside from the fact that this is the obvious intention of the legislature, to rule otherwise would make the 1935 act meaningless and this would be contrary to Section 52 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 552, as follows:

In ascertaining the intention of the Legislature in the enactment of a law, the courts may be guided by the following presumptions among others:

(1) That the Legislature does not intend a result that is absurd, impossible of execution or unreasonable;

(2) That the Legislature intends the entire statute to be effective and certain;

As indicated in Formal Opinion No. 559, both the Act of June 7, 1917, P. L. 600, *supra*, and the Act of July 12, 1935, P. L. 677, *supra*, are presently effective, the former provides for unlimited military leave without pay but with job security in time of war or contemplated war, the latter, the 1935 act, provides for fifteen days' leave of absence with pay and without loss of the regular vacation leave, and is intended to provide leave for military training each year in the United States reserve components in addition to any and all other leaves.

It is our opinion, therefore, that the Act of July 12, 1935, P. L. 677, 65 P. S. § 114, is presently effective, but such military leave is limited to a period of fifteen days without loss of State pay, time or efficiency rating. If a longer leave is presently desired, since World War II has not been technically and legally terminated, it could be granted under the Act of June 7, 1917, P. L. 600, as amended, 65 P. S. § 111 *et seq.*, which provides for unlimited military leave, without pay, for extended active duty in time of war or contemplated war.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

M. LOUISE RUTHERFORD,
Deputy Attorney General.

OPINION No. 581

Veterans—Deceased service personnel—Death overseas—Reburial in Pennsylvania—Liability of counties for cost—Failure to return for reburial—Liability to erect marker—General County Law of May 2, 1929, and First Class County Law of June 11, 1935, as amended.

Counties in Pennsylvania are required by The General County Law of May 2, 1929, P. L. 1278, as amended, and The First Class County Law of June 1, 1935, P. L. 326, as amended, to reimburse up to \$75 for funeral expenses incurred for the reburial of any deceased service person who was buried overseas and returned to Pennsylvania for reburial, or if the body of the deceased service person is not returned to Pennsylvania, they must have placed a headstone or marker in the family plot of the deceased service person.

Harrisburg, Pa., April 30, 1948.

Honorable Frank A. Weber, Adjutant General, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: You request advice concerning the payment of funeral expenses for reburial of returned deceased veterans who died overseas. In addition, you desire to be advised whether it is mandatory upon the county commissioners to place a marker upon the family plot of the deceased service person in the event the body is not returned to the United States for reburial.

Since your request involves counties it is necessary to review the existing legislation pertaining to all classes of counties on this subject. This is contained in the First Class County Law which pertains to counties of the first class and The General County Law which pertains to counties of the second, third, fourth, fifth, sixth, seventh and eighth classes. We will answer your questions in the order you have presented them.

The General County Law, Act of May 2, 1929, P. L. 1278, at Section 421 as last amended by Act of April 10, 1945, P. L. 178, and at Section 422 as last amended by the Act of May 21, 1943, P. L. 286, 16 P. S. §§ 421 and 422, provide in part as follows:

421. Definitions.

The term "deceased service persons," as used in this act, shall be defined and construed to mean and include:

(1) Any deceased person who, at the time of his or her death, was serving (whether or not in a combat zone) in the Army, Navy, Marine Corps, Coast Guard, or any women's organization officially connected therewith, during any war in which the United States has been, is now or shall hereafter be engaged, or who, at the time of his or her death, was serving in a zone where a campaign or state or condition of war then existed, in which the United States was, is or shall be a participant. * * *

* * * * *

The term "legal residence" as used in this act, shall be construed as synonymous with "domicile" and is hereby defined as actual residence, coupled with intention that it shall be permanent, or a residence presently fixed with no definite intention of changing it, or of returning to a former residence at some future period. Legal residence is to be determined by abode of person and his or her intention to abandon his or her former domicile and establish a new one. The legal residence of a deceased service person shall be *prima facie* in the county where he or she made his or her abode at the time of his or her death.

422. Sum to be spent.

The county commissioners of each county are hereby authorized and directed to contribute the sum of seventy-five dollars (\$75) towards the funeral expenses of each deceased service person in the cases enumerated below, where in each case application therefor is made within one year after the date of his or her death, and where the total expenses of the funeral does not exceed four hundred dollars (\$400.00): Provided, That in the case of any deceased service person who died while in the service, application need not be made within one year after the date of his or her death, but may be made at any time thereafter. Payments shall be made under the following circumstances:

(1) Where the deceased service person at the time of his or her death had his or her legal residence in the county, whether or not he or she died in the county, and whether or not he or she was buried in the county. It is hereby declared to be the intent of the General Assembly that every deceased service person having a legal residence in this Commonwealth at the time of his or her death shall be entitled to the benefits of the section, regardless of where he or she may have died or where he or she may be buried, and that the liability therefor shall be on the county, where such deceased service person shall have had his or her legal residence at the time of his or her death.

The same amendments were inserted in the First Class County Law, being Sections 1 and 2 of the Act of June 11, 1935, P. L. 326 as last amended by the Act of May 21, 1943, P. L. 294, 16 P. S. §§ 2118 and 2119. The language in both acts is identical with reference to this subject. The county commissioners of all counties are directed to contribute the sum of "seventy-five dollars (\$75) towards the funeral expenses of each deceased service person in the cases enumerated below".

Subparagraph (1) of Section 422 of The General County Law which corresponds with subparagraph (1) of Section 2 of the First Class County Law sets out in no uncertain language a clear intention of the

legislature to cause to be paid the funeral expenses of deceased service persons. The appropriate language of that Section reads:

*** every deceased service person *** shall be entitled *** regardless of where he or she may *** be buried,

Obviously, this language was not meant to exclude the situation where a body is returned to the States. A duty is imposed upon the commissioners to defray a portion of the funeral expenses.

This conclusion is fortified by reading the remaining portion of Section 422 of The General County Law and Section 2 of the First Class County Law which waives the necessity of making a claim for such reimbursement within a year after the date of death if the deceased service person died in the service. Certainly this act meant to apply to soldiers who died away from home, whose dependents did not have the opportunity of obtaining the body until the hostilities had ceased. To construe these sections of the act otherwise would not, in our opinion, carry out the desires of the families of deceased veterans to have the remains of their kin returned to their homes.

Your second question pertains to the duty of county commissioners to place a marker upon the family plot of the deceased service person in the event the body is not returned to the United States for burial.

The third paragraph of Section 426 of the Act approved May 2, 1929, P. L. 1278 as last amended by the Act of April 24, 1947, P. L. 66, reads in part as follows:

It shall also be the duty of the county commissioners of each county in this State, *** to cause a headstone or bronze memorial tablet to be placed at the head of or on the grave of each such deceased service person. Such headstone shall contain his or her name *** In the event the body of any deceased service person, either cannot be or will not be returned to the United States of America, it shall be the duty of the county commissioners to cause a headstone to be placed in the family plot of such deceased service person. Said headstone shall have inscribed thereon, (a) the name, rank and organization of such deceased service person, (b) the name of the country, location or manner in which such person lost his or her life, and (c) the cemetery or location in which the body, if buried, was finally laid to rest. *** Provided, however, That the expense shall not exceed the sum of seventy-five dollars (\$75) for each headstone ***

This language is identical to that contained in the third paragraph of Section 5 of the Act of June 11, 1935, P. L. 326 as last amended by the Act of April 24, 1947, P. L. 64. This language is self-explanatory.

tory and needs no further interpretation. A duty is imposed upon the counties to place markers or headstones in accordance with the provisions of said act.

It is our opinion that counties in Pennsylvania are required to reimburse up to seventy-five dollars (\$75) for funeral expenses incurred for the reburial of any deceased service person who was buried overseas and returned to Pennsylvania for reburial. Furthermore, if the body of the deceased service person is not returned, there is a duty imposed upon the various counties to have placed a headstone or marker in the family plot of the deceased service person.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

H. ALBERT LEHRMAN,
Deputy Attorney General.

OPINION No. 582

Incompetents—Patients in State hospitals—Application of shock therapy—Necessity for consent.

Superintendents of State mental hospitals, in their sound discretion, may administer to patients of State mental hospitals, electric shock and such other treatments, which in the exercise of reasonable skill and judgment, are indicated, after observation and diagnosis, as being necessary and proper for the patients' best welfare, without first obtaining written permission for such treatments from such patients, their friends, relatives, guardians or other persons who may be legally entitled to give such consent on behalf of such patients; while such consent may be desirable in some cases, it is not essential under the laws of this Commonwealth.

Harrisburg, Pa., May 18, 1948.

Honorable Charlie R. Barber, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice is in receipt of your request for an opinion regarding the legality of State mental hospital superintendents proceeding with certain specific psychiatric therapies on patients committed to their custody, without first obtaining properly witnessed written permissions from the patients' nearest responsible relatives. In support of your request, you furnish the following information, stated substantially in the language of your request.

The specific therapies referred to are the so-called "shock" treatments of various types and the use of malaria fever. In the interests of prompt treatment of mental patients, some of said superintendents feel that the prerogative of using reasonable skill and judgment may permit them to proceed, when written consent is not immediately available, with specialized therapies which have become recognized as standard procedure in medical practice, and which have long since been proven clinically as effective and necessary for certain mental disorders.

Malaria fever therapy is one of the most effective treatments for certain types of mental illness caused by syphilitic infection of the brain and central nervous system. This specific treatment has been recognized since 1918, and especially indicated in cases of general paresis. Complications in selected cases are of less than one per cent incidence. Fatalities are practically negligible. The treatment by malaria fever does not cause loss of consciousness.

The "shock" therapies came into prominence more than fifteen years ago, when the use of insulin was introduced to produce coma in certain mental diseases. Other types of shock treatments were rapidly developed, but are becoming obsolete, except for the extensive more practical use of electroshock therapy, which has been widely recognized in the past ten years. These so-called shock treatments produce unconsciousness, and are frequently associated with convulsions. The electroshock is now accepted as specific for mental illnesses showing extreme agitation and mental depression. The insulin coma treatment has a place in certain types of dementia praecox or schizophrenia. Fatalities in shock therapies are practically unknown, and complications, such as fractures, have been reduced to less than one-half of one per cent incidence.

Although relatives are routinely advised regarding the nature and implications of the treatment, difficulties sometimes ensue, in that there may be a delay of weeks or months required for relatives to investigate to their own satisfaction before signing such a permit. Furthermore, uninformed lay advice, ignorance, and general prejudice, especially from uncooperative families may deprive a patient of a definite chance for improvement or recovery.

Consequently, months and even years of additional care, at the expense of the Commonwealth, have resulted for large groups of patients to whom specific treatments were denied. Depression cases have committed suicide, disturbed cases have continued with unnecessary violence, and among such untreated patients, there has been a definite contribution toward the secondary problems of overcrowding and difficult management.

From one of the best State mental hospitals; which routinely required written permission before instituting such special therapies, but which now no longer exacts formal permission, because of confidence in their technique and results, the following comparative statistics are submitted:

Discharged from hospital in less than 1 year's treatment

	1930-1932	1940-1942
(Malaria fever)		
Syphilis of central nervous system	12.9%	26.7%
(Electroshock)		
Manic Depressive	59.2%	68.7%
(Insulin and/or Electroshock)		
Dementia Praecox	35.6%	46.1%
(Electroshock)		
Involutional	39.3%	52. %
		(75. % in 1944-5)

The foregoing statement of facts, which you furnished, raises the question whether, in cases where patients are committed for care and treatment, to State mental hospitals, the power and duty to give such patients the necessary, proper and indicated standard treatment should be prevented or impeded by the unavailability, or the occasional lack of cooperation, of some relatives who might later retaliate by law suits, on the basis that explicit permission to administer such treatments was never given.

The original request for an opinion relates particularly to shock treatments and malaria fever treatments. We are informed that the closest approach in importance to shock treatments is the use of malaria fever for syphilis of the brain; and that in the latter cases, it is not customary to request permissions to use the treatments, because they have become part of the general standard procedure.

The request deals principally with electric shock treatments, and we have since been informed that no special consideration need be given to malaria fever treatments. Therefore, what is hereinafter discussed principally concerns only electroshock therapy. Furthermore, the subject of general surgical operations upon mental patients of State hospitals of this Commonwealth is not within the scope of the purposes of this opinion.

The electric shock treatment herein referred to consists of weak electric currents (115 volts, 1 ampere), applied to the temples; due to the sudden convulsion which usually occurs at the beginning of the treatment, sometimes there is a fracture of the arm or shoulder, but rarely have there been any such incidents in State mental hospitals.

We understand that shock treatments have been used by the State mental hospitals of this Commonwealth since 1939, and that during this time, there have been no deaths from the use of these treatments. There is at present, a patient population in State mental hospitals of about 35,000; depression cases in which shock treatment is indicated amount to about one-third of the above total.

Mental patients are generally legally, mentally and medically incapable of giving consents to methods of treatment or other matters relating to their care and maintenance; therefore, it may be necessary to attempt resort to friends or relatives, who may prove unavailable, or unwilling to cooperate.

There is an indeterminate minimum of about five per cent of patients with whom difficulty is experienced in obtaining consents. Obviously, it is desirable to avoid the necessity of obtaining such consents, if possible, especially since such consents are generally considered unnecessary, because the treatments now constitute a recognized established procedure.

There are many other forms of treatments in use in the State mental hospitals in which consents are not considered necessary as follows: infra red rays, ultra violet rays, insulin, drugs—orally and by needles, and hydrotherapy—wet packs, tubs, etc.

If written consent is necessary in any form of treatment, where is the line to be drawn?

Since superintendents of State mental hospitals throughout the Commonwealth differ in their views and practices concerning the question whether consents in such cases are necessary, it is advisable to establish a uniform practice. In order to do so, careful consideration must be given to the necessity, nature and beneficial results of such treatments.

Treatment of mental diseases by artificially inducing convulsions with electricity began in Italy in 1938; since then it has accomplished remarkable results, and has proved to be so satisfactory that it is now generally used. This treatment is discussed in an article entitled, "Shock Therapy Saves Minds," in *Hygeia, The Health Magazine*, published by the American Medical Association, July, 1947, at pages 516-517, wherein it is stated, *inter alia*, as follows:

The presently accepted procedure for shock therapy involves the passing of about 115 volts of alternating electric current through the patient's head for a period of about three-tenths of a second. The machine by which this shock is administered is designed to prevent the delivering of more than one ampere of current and to shut off automatically as

soon as the current has passed for the desired length of time. Thus it is impossible for the patient to receive such a heavy shock as to endanger his life.

* * * * *

The first effect on the patient, as the current passes through his brain, is to cause him to lose consciousness. Thus the patient is entirely unaware of the convulsion through which he passes and retains no memory of the treatment.

And at pages 550-552:

One psychiatrist has already administered 35,000 shock treatments with only one death and this death was the direct result of coronary disease.

The over-all mortality rate from shock therapy during the few years it has been in use in the United States averages about one death for every two thousand cases treated. In view of the fact that many cases have received numerous individual treatments, this mortality rate is surprisingly low. In fact, it is even lower than in many types of surgery.

The violent muscle contraction which occurs as soon as the current passes through a patient's brain has been, in some cases, the means of causing an injury to the patient's bones. Recent improvements in technique have materially reduced the number of such complications. Furthermore, the seriousness of these skeletal injuries is minimal compared with the psychic benefits to be derived from electric shock therapy.

* * * * *

To date, it is the most effective, the most beneficial, and the most easily administered therapeutic agent for the functional psychoses. It is not a cure-all but in properly selected cases and in competent hands it benefits about 80 per cent of the cases, producing a practical cure in approximately half of these. * * *

From the foregoing article, two facts are noticeable: one, that the mortality rate from shock therapy during the years it has been in use in the United States averages about one death for every 2,000 cases treated, which is a surprisingly low mortality rate, even lower than in many types of surgery; and the other, that it is the most effective, the most beneficial, and the most easily administered therapeutic agent for the functional psychoses.

In "Shock Treatments and Other Somatic Procedures in Psychiatry," (1946), by Lothar B. Kalinowsky, M. D., and Paul H. Hoch, M. D., page ix, it is stated, inter alia, as follows:

The shock treatments today are indispensable tools of psychiatric therapy; * * *

Generally, electroshock treatments are not considered emergency treatments; however, in such cases the public demands prompt treatment, and that is what the Commonwealth aims to provide, especially since, in many cases, the need for shock treatments is urgent.

In the Journal of the American Judicature Society, Volume 31, August, 1947, Number 2, pages 47, 48, in an article entitled, "Improved Legal Procedure for the Care of the Mentally Ill," by Arthur E. Moore, Judge of the Probate Court for Oakland County, Pontiac, Michigan, it is stated:

A lady needed shock treatment for mental illness short of insanity. Neither the writer nor the head of the State Hospital could convince her family of the need. Not being insane she could not be hospitalized and treated against her will. Three days later she murdered a man.

Concerning the question whether electric shock treatments are considered standard medical practice, The Pennsylvania Medical Journal, January, 1948, Volume 51, Number 4, page 405, 408, states in part:

* * * The use of insulin and other drugs in shock therapies has opened a number of new avenues of therapeutic approach, and together with the electroshock method constitutes a procedure that has spread all over the world. * * *

The first question which logically presents itself is whether shock treatments, or any other specific forms of treatment, are expressly authorized by statute in this Commonwealth.

The care and treatment of mental patients is governed by The Mental Health Act of 1923, the Act of July 11, 1923, P. L. 998, as amended, 50 P. S. § 1, et seq., which is a revision and codification of previous legislation with respect to insanity, and which, in conjunction with related laws, furnishes a complete method of procedure for the care, treatment and maintenance of mental patients.

The terms, "mental illness," "mental patient," "mental hospital," "hospital for mental diseases," and "care," are defined by Section 103, as amended, of The Mental Health Act of 1923, supra, 50 P. S. § 3, and are as follows:

"Mental illness," "mental disease," "mental disorder" shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The term shall be construed to include "lunacy," "unsoundness of mind," and "insanity."

"Mental patient" shall mean any person who is or is thought to be mentally ill, mentally defective, epileptic, or inebriate, or who is or has been an inmate of any hospital, school, or place for such persons or for whom admission thereto is being sought.

"Mental hospital" shall mean any State, semi-State, or licensed hospital, institution, school, or place, public or private, for the care of mental patients.

"Hospital for mental diseases" shall mean any State, semi-State, or licensed hospital, house, or place for the treatment and care of persons mentally ill.

* * * * *

"Care" shall include reception, detention, custody, care, treatment, maintenance, support, segregation, education, culture, training, discipline, improvement, occupation, employment, medical and surgical treatment and nursing, food, and clothing.

From the foregoing definitions, it will be observed that an essential characteristic of "mental illness" is the necessity for control of the patient; and that the "care" of mental patients is predicated largely upon custody, detention and discipline; therefore, the rules and practices for the care and treatment of mental patients must not be confused with those governing the voluntary confinement of patients in medical and surgical hospitals.

This situation is reflected in Section 303 of The Mental Health Act of 1923, *supra*, as amended, relating to admissions to mental hospitals, which provides, in part, as follows:

* * * The superintendent of said hospital shall receive the said patient, and may *detain him therein until said patient shall have recovered, or shall be removed according to law.* (Italics ours.)

This section clearly precludes the patient's exercising any voluntary control over his confinement in a mental hospital.

While an examination of the foregoing statutes fails to reveal any express authority for the use of shock treatments, or other specific forms of treatments, that authority may be implied from the quoted definitions of mental illness, care, etc., and the inherent concepts of custody, control, detention, etc., to be exercised "until said patient shall have recovered or shall be removed according to law." (Section 303, *supra*, 50 P. S. § 43.)

It may be stated generally that admission to a hospital for mental diseases may be made upon voluntary application, upon application of relatives or friends, or others, and upon order of court.

Under the provisions of Section 303, as amended, of The Mental Health Act of 1923, supra, 50 P. S. § 43, the form approved, adopted and used by the Department of Welfare, for the commitment of mental patients to State-owned institutions contains, inter alia, the following language:

* * * the person named therein be committed to the * * * State Hospital *there to remain until* he shall have *recovered* or shall have been *removed according to law*; and this shall be sufficient warrant for said commitment. (Italics ours.)

Under Section 304, as amended, of said act, 50 P. S. § 44, the form of the order for the commitment to other than State-owned institutions, contains, inter alia, the following language:

* * * *to be detained and treated as a mental patient until he shall have recovered* or shall have been *removed according to law*; and this shall be sufficient warrant for said commitment. * * * (Italics ours.)

In accordance with Section 307, as amended, of said Act, 50 P. S. § 47, the form of the order to be made when the court commits a person for observation, diagnosis and treatment upon an application made to the court by the guardian, committee, or any relative or friend contains, inter alia, the following language:

* * * be committed to the * * * Hospital *to be detained for observation, diagnosis and treatment* * * * and this shall be sufficient warrant for said commitment. (Italics ours.)

The theory of the forced detention of mental patients is referred to in the Yale Law Journal, Volume 56, August, 1947, Number 7, page 1181, wherein it is stated, inter alia, as follows:

* * * In the commitment process, as provided for by state statute, therefore, a mentally ill person may have to be taken to a hospital and detained against his will by an exercise of power authorized by law.

There is nothing in the form of the foregoing commitments, which gives a mental patient, or his friends, relatives, guardian, or other person, the right to determine what methods of treatment, either with or without written consent thereto, may be administered in his particular case, during his detention in a mental hospital. Ordinarily, except in cases of guardians of the persons of minors, there is no authority vested in a patient's friends, relatives, guardian or other persons which entitled such persons to give such consent on behalf of such patient, which would be binding upon the patient and protecting to the Commonwealth and its officials, except possibly, by estoppel.

The powers and duties of the boards of trustees of State institutions, and the superintendents thereof, are defined in the several sections, relating thereto, of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, as amended, 71 P. S. § 51, et seq.

Under Section 2318, as amended, of said code, 71 P. S. § 608, the board of trustees of each State institution has general direction and control of the property and management of such institution; under section 2318 (a), the superintendent of the institution, subject to the authority of the board, shall administer the institution in all its departments; and under section 2318 (d), subject to the approval of the Secretary of Welfare, the board has the power to make bylaws, rules and regulations for the management of the institution.

Under the foregoing provisions, either the superintendent, or the board of trustees, of a State mental hospital has the implied authority, in the first instance, to determine the policy and procedure of the institution in the care and treatment of mental patients, including the treatment by electric shock therapy, or other treatment, and whether such treatments may be given without the consent of the patient, his friends, relatives, or others. The care and treatment of patients must be within the sound discretion of the duly appointed authorities of the institution.

That the Department of Welfare has the implied authority to determine whether or not the within mentioned therapies may be used in State mental hospitals, and without express written permission therefor, appears from Section 2307 of The Administrative Code of 1929 as amended, supra, 71 P. S. § 597, which is as follows:

The Department of Welfare shall have the power, and its duty shall be, from time to time, to recommend and bring to the attention of the officers or other persons having the management of the State and supervised institutions such standards and methods as may be helpful in the government and administration of such institutions and for the betterment of the inmates therein, whereupon it shall be the duty of such officers or other persons to adopt and put into practice such standards and methods. (Italics ours.)

The rights of mental patients, relating to communication with counsel, etc., religious freedom, employment, sale of products, written communications, habeas corpus, discharges and medical attention are set forth in Section 601 of The Mental Health Act of 1923, as amended, supra, 50 P. S. § 171, and are as follows:

Every mental patient in any institution or place for mental patients, within the jurisdiction of the department, shall have the right—

(a) To communicate with his counsel and with the commissioner, and to be alone at any interview with his counsel or commissioners or representative of the department;

(b) To religious freedom and to be visited by any minister of any religious denomination: Provided, That the religious services rendered by such minister shall be personal to the mental patient desiring the same, and shall not interfere with the established order of religious services in such institution or place;

(c) To be employed at a useful occupation in so far as the condition of such patient may permit, and the institution or place is able to furnish useful employment to the patient;

(d) In the discretion of the physician in charge, to sell articles, the product of his individual skill and labor, and the produce of any small individual plot of ground which may be assigned to and cultivated by him, and to keep or expend the proceeds thereof or send the same to his family;

(e) To be furnished with writing materials, and reasonable opportunity, in the discretion of the physician in charge, for communicating, under seal, with any person or persons outside of such institution or place, and such communications shall be stamped and mailed;

(f) To a writ of habeas corpus to determine whether or not he is properly detained as a mental patient, and the respondent in any such writ shall be required to pay the costs and charges of the proceedings unless the judge shall certify that, in his opinion, there were sufficient grounds for detaining the patient and putting him to his writ;

(g) To be discharged as soon as, in the opinion of the medical attendant of such institution or place, he shall be restored to reason and competent to manage his own affairs;

(h) To be visited and examined, at all reasonable hours, by any medical practitioner designated by him, or by any member of his family or "near friend," with the sanction of a judge of a court of record of the county in which such mental patient resided prior to his commitment to such institution or place; and, with the consent of the patient and of the physician in charge of such institution or place, such medical practitioner may attend such patient for all maladies, other than mental illness, in the same manner as if the patient were in his own home. (1923, July 11, P. L. 998, art. VI, § 601; 1925, April 27, P. L. 337, § 3.)

There is nothing in the above quoted section, either expressed or implied, which gives to a mental patient the right to, or places the duty upon the Commonwealth to secure, the consent of the patient or of someone legally authorized to give it for him, before proceeding with any specific methods of treatment; accordingly, it may be inferred

that the mental patient does not have such right; and that, therefore, the Commonwealth is not required to obtain such consents.

An insane person has no constitutional or statutory right of liberty in the ordinary and conventional sense of that term. Accordingly, the right to restrain an insane person is not precluded by the general law which provides that no one shall be deprived of life, liberty, or property, without due process of law. It is not disputed that *the commitment of insane persons to appropriate institutions for confinement and care, when reasonably necessary for the protection of the public or of the person so afflicted, is a proper exercise of the police power of the state.* * * * 28 Am. Jur. Section 26, pp. 672, 673. (Italics ours.)

* * * *Insane persons are considered as wards of the state; and the state as parens patriæ may make provisions for their protection, provided they are not in contravention of constitutional provisions. Statutes to this effect are liberally construed to the end that their purpose may be effectuated.* * * * 32 C. J. Section 162, page 627. (Italics ours.)

It must be borne in mind that the care, treatment and maintenance of mental patients is a governmental function (Chester Co. etc., et al., *Aplnts. v. Com. et al., Aplnts.*, 341 Pa. 49, 57 (1941)); and that the basic consideration in this function is to serve the best welfare of the patient; and that this function is best carried out by the authorized agencies of the Commonwealth, uncontrolled by the dictates of the patient, his friends, relatives or others.

The jurisdiction assumed to be inherent in a State over that unfortunate class of persons within its limits, who are deprived of the use of their mental faculties may be said to rest upon two grounds—First: Its duty to protect the community from the acts of those who are not under the guidance of reason, and, secondly, its duty to protect them, as a class incapable of protecting themselves, * * * Matter of Colah, *supra* [quot. Bliss v. Bliss, 133 Md. 61, 104 A. 467, 471]. 32 C. J. Section 162, page 627 n. 94.

There is a dearth of Pennsylvania decisions on the subject; decisions in other jurisdictions are conflicting; and, therefore, not conclusive.

In the Opinion of the Attorney General of the State of Vermont, dated March 29, 1945, it was stated:

The Superintendent of a State hospital for the insane is entitled to have operations and medical treatment to patients, when in the Superintendent's judgment it is necessary, even though life may be endangered, and *it is not necessary to consult the relatives of the inmate.* (Italics ours.)

Somewhat analogous situations have arisen in cases where treatments and operations, employed upon certain individuals, such as sterilization, compulsory vaccination, asexualization, treatments for venereal disease, etc., were done pursuant to statutes. In such cases, the courts have held that the states, pursuant to their police powers, had authority by law to impose upon such persons, the compulsory examinations and treatments.

In the article in the Journal of the American Judicature Society, *supra*, it is further stated:

In many instances the Courts have protected the public and the patient by provisions for mandatory care, viz., under contagious disease statutes and venereal disease laws. In addition many states have provided for compulsory care of sexual psychopaths. (*Minnesota v. Pearson*, 60 S. Ct. 523; *Dittrich v. Brown*, 9 N. W. (2d) 510, 158 A. L. R. 1228.) We have also protected society through sterilization statutes. (*Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. Ed. 643.)
* * *

In 1921-22 Op. Atty. Gen. 320, it was expressly stated:

Prisoners in penal institutions cannot object to examinations and treatment for venereal diseases as provided by the Act of April 26, 1921, P. L. 299.

We are constrained to certain views expressed in the opinion of the Attorney General of the State of Vermont to the Vermont State Hospital at Waterbury, dated March 29, 1945, in which it is stated, *inter alia*, as follows:

There is a general rule of law that strictly public institutions, created, owned, and controlled by the state, such as state asylums for the insane, are not liable for the negligence of their agents. It is stated in 26 Am. Jur. at pages 594 and 595:

* * * They are held to be governmental agencies brought into being to aid in the performance of the public duty of protecting society from the individual unfortunate or incompetent in mind, body, or morals, and the rules applicable to municipal corporations and public officers generally are applied. This seems to be the rule whether the action is against the state, a county, a municipal corporation, or a hospital corporation created by the state to act as its agent in the case of those physically or mentally unwell. There seems to be no dissent from the rule wherever applied to a case in which an injury to the person is considered, whether the injured person is a stranger, a patient, an employee or servant, or an invitee on the hospital premises. * * *

Such general rule, I believe, applies to Vermont and the Vermont State Hospital by reason of the fact that *this in-*

stitution is an instrumentality of government, and the employees therein are agents of the government in the performance of a public duty.

In case a person has been lawfully committed to your hospital (this excludes the private patient), the law requires such person to be kept until he is lawfully paroled or discharged.

We do not have any statutory rules defining the methods of treatment, administration of medical aid, etc. In the absence of statutory definition, the care and treatment of inmates must be discretionary in the duly appointed officers of the institution. It has been many times held by the Vermont Supreme Court that where an officer is entrusted with a duty which requires the exercise of his judgment and discretion, he is entitled to proceed in such duty without judicial interference. One of the most recent cases, where this rule is succinctly stated is that of *Nadeau v. Marchessault*, 112 Vt. 309, where it is stated at page 311:

Where a public officer performs a judicial function involving the exercise of judgment and discretion, and acts within the limits of his authority, he is not liable for negligence in the execution of his duty at the suit of a private individual claiming to have been injured thereby.

Basing my conclusions upon the authorities above mentioned, it is my belief that you may administer in your own sound discretion such treatment to an inmate of the institution as is indicated after diagnosis as being necessary or proper for his welfare.

As to the matter of securing the consent of the inmate's relatives, it is my belief that such is not necessary as a matter of law, but where it can be obtained, it is my feeling such a course is one to be commended. (*Italics ours.*)

The increasingly popular use of electroshock treatments is indicated in the syndicated column entitled, "That Body of Yours," by James W. Barton, M. D., in *The Patriot*, Harrisburg, Pennsylvania, Thursday, February 19, 1948, showing the extent to which electroshock treatments are now given in physicians' offices, which is, in part, as follows:

It will come as a pleasant surprise to patient and family to learn that electric shock treatment, which is more popular with physicians and patients than insulin or matrazel shock treatments, now can be given in the physician's office with no embarrassment to anyone.

In the *Journal of Nervous and Mental Diseases*, New York (*The Journal of Nervous and Mental Disease*, an Educational Journal of Neuropsychiatry, founded in 1874, July, 1947, Volume 106, No. 1, page 1, in an article entitled, "The

Efficacy of Electroshock Therapy in Preventing or Shortening Hospitalization") Dr. E. F. Kerman reports the results obtained by 242 patients treated in his office by electric shock. * * *

* * * * *

Being able to avoid commitment to a mental institution, by electroshock treatment in the physician's office, is of real benefit to the patient. (Parentheses ours.)

In "The Journal of Nervous and Mental Disease," supra, it is stated, inter alia, page 2, as follows:

* * * Only a few words of explanation will be given here since *the technic of shock therapy is well standardized.* * * * And at pages 8 and 9:

Commitment to a state hospital usually means, at best, several months of treatment. * * *

* * * * *

The history of our American mental hospitals indicates that originally the mentally ill were cared for in jails, workhouses and almshouses. Later these were gradually replaced by mental hospitals, but even today many patients reach the State hospital after having spent a variable period of time in jail, and many others are accompanied to hospitals by members of the police force. The reason for this is obvious, since the primary motive behind such action is to remove from society an individual whose behavior is either aggressive or potentially so, or a person whose productions are bizarre to the point of constituting a public nuisance or embarrassment to his family or a patient who is considered suicidal. *If aggressive behavior of the patient, directed either toward society or toward himself, may be modified rapidly by the extramural administration of electroshock, so that the patient becomes comfortable and the even tenor of social activities is not disturbed, one may see that some good has been accomplished.* (Italics ours.)

Treatments by electric shock are less uncomfortable and less dangerous to the patient than insulin or metrazol shock treatments.

The fact, concerning which there can be no doubt, must be stressed that electroshock therapy has become recognized as standard procedure in mental health practice, as set forth in conjunction with numerous phases of the discussion throughout this opinion.

Although the term, "care," as defined by The Mental Health Act, supra, includes "surgical treatment," nevertheless, and as hereinbefore stated (page 10), surgical operations are not within the scope of this opinion. Furthermore, electroshock therapy is distinct from surgery or surgical operations.

"Therapy" is the treatment of disease, and "surgery" is therapy of a distinctly *operative* kind." 40 W. & P. Perm. 851.

A "surgical operation" begins *when opening is made into the body and ends when this opening has been closed* in a proper way after all appliances necessary to the successful operation have been removed from the body, and after patient has been duly cared for according to condition, and in interest of safety." 40 W. & P. Perm. 853. (Italics ours.)

In electroshock therapy, herein discussed, there is no use made of surgical instruments, nothing is taken away from the patient, such as removal of organs or tissue, and there is no cutting whatever, even of the skin of the patient.

There can be no doubt that electroshock treatments may be given to State mental patients, although consent is either not obtained, or is refused. Under its police power, the State provides for the confinement of persons mentally ill—it may be for the duration of their lives. This is well established, although such confinement may be the most serious interference with personal liberty. It has also been held that, under the police power, the legislature may require compulsory treatment for the prevention or treatment of incurable diseases.

In *Jacobson v. Massachusetts*, 197 U. S. 11 (1905), the Supreme Court of the United States sustained the constitutionality of the Massachusetts statute which provided that the Board of Health of the town might require the vaccination of all inhabitants thereof if, in his opinion, such were necessary for the public health or safety.

The state court had excluded all offers of the defendant to prove the injurious effects of vaccination, and took judicial notice of the fact that vaccination was a preventive of smallpox.

In the opinion, Mr. Justice Harlan stated (p. 31):

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. * * *

In *Minnesota v. Probate Court*, 309 U. S. 270 (1940), the Supreme Court of the United States sustained a statute of Minnesota which

authorized the confinement of a person proved to be of a "psychopathic personality".

The Supreme Court of the United States accepted the interpretation of the Supreme Court of Minnesota that a "psychopathic personality" included (p. 273):

* * * those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the object of their uncontrolled and uncontrollable desire.
* * *

In *Buck v. Bell*, 274 U. S. 200 (1927), the Supreme Court of the United States sustained a Virginia statute which provided for the sterilization of mental defectives.

It appeared that the mother and grandmother of the defendant had also been mental defectives. In the opinion of the court, Mr. Justice Holmes stated (p. 207):

* * * We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11. Three generations of imbeciles are enough.

We are of the opinion, therefore, that the superintendents of State mental hospitals, in their sound discretion, may administer to patients of State mental hospitals, electric shock and such other treatments, which in the exercise of reasonable skill and judgment, are indicated, after observation and diagnosis, as being necessary and proper for the patients' best welfare, without first obtaining written permission for such treatments from such patients, their friends, relatives, guardians or other persons who may be legally entitled to give such consent on behalf of such patients; while such consent may be desirable in some cases, it is not essential under the laws of this Commonwealth.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 583

Veterans—Preference—Act of May 22, 1945—Applicability to members of volunteer port security force of United States Coast Guard Reserve.

A civil service employe of the Pennsylvania Liquor Control Board who performed part-time services with a volunteer port security force of the United States Coast Guard Reserve under the provisions of the Act of February 19, 1941, 55 Stat. at L. 11, as amended, is not entitled to veterans' preference under the Act of May 22, 1945, P. L. 837.

Harrisburg, Pa., July 8, 1948.

Honorable Frederick T. Gelder, Chairman, Pennsylvania Liquor Control Board, Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice as to whether a civil service employe in the Liquor Control Board who was enrolled as a temporary member of the United States Coast Guard Reserve during World War II and who received a certificate of honorable disenrollment, is entitled to veterans' preference under the Act of May 22, 1945, P. L. 837, as amended, 51 P. S. § 492.1 et seq. The title of the Act of 1945, *supra*, reads:

AN ACT

Providing for and requiring in certain cases preference in appointments to public position or on public works for honorably discharged persons who served in the military or naval service during any war in which the United States engaged; and in certain cases for the widows and wives of such persons.

Section 8 of the act, 51 P. S. § 492.8 reads as follows:

This act shall be construed as being the exclusive law applying to the Commonwealth, and its political subdivisions, in giving preference to soldiers in appointment or promotion to, or retention in, public position or on public works.

The word "soldier" is defined in Section 1 of the act, 51 P. S. § 492.1, as follows:

The word "soldier" as used in this act, shall be construed to mean a person who served in the armed forces of the United States, or in any women's organization officially connected therewith, during any war in which the United States engaged, and who has an honorable discharge from such service.

Section 2 of the act, 51 P. S. § 492.2 reads as follows:

When any soldier shall take any civil service appointment or promotional examination for a public position under the Commonwealth, or under any political subdivision thereof,

he shall be given credit in the manner hereinafter provided; for the discipline and experience represented by his military training and for the loyalty and public spirit demonstrated by his service for the preservation of his country. * * *

The documents attached to your request reveal that the civil service employe of your Board was enrolled in the United States Coast Guard Reserve under date of July 26, 1943, as a seaman first class, and he was disenrolled under honorable conditions on September 30, 1945, after having served on part-time duty without pay as a member of the Volunteer Port Security Force. Your employe's part-time duty in that branch of the armed forces of the United States amounted to a service of about twelve hours per week and, in the performance of that service, it was not necessary for him to relinquish his position with the Liquor Control Board nor to change his residence.

The United States Coast Guard Reserve was established and created by Section 201 of Chapter 8, Title II, of the Act of Congress of February 19, 1941, 55 Stat. 11, as last amended by Section 1 of Chapter 327 of the Act of July 25, 1947, 61 Stat. 449, 14 USCA Section 301, which provides as follows:

There is created and established a United States Coast Guard Reserve (hereinafter referred to as the "Reserve"), the purpose of which is to provide a trained force of officers and men which, added to regular personnel of the Coast Guard, will be adequate to enable that service to perform such extraordinary duties as may be necessitated by emergency conditions.

Section 204 of the Act of Congress, supra, 14 USCA Section 304 provides:

The Reserve shall be a *military organization* administered by the Commandant, under the direction of the Secretary of the Treasury, and the Commandant shall, with the approval of the Secretary of the Treasury and the concurrence of the Secretary of the Navy, prescribe such regulations as may be necessary to effectuate the purposes of this subchapter. (Italics ours.)

Section 205 of the aforesaid Act of Congress, supra, 14 USCA Section 305 provides:

Any member of the Reserve may be ordered to active duty by the Commandant in time of war or during any period of national emergency declared by the President to exist and be required to perform active duty throughout the war or until the President declares that such national emergency no longer exists; but in time of peace, except for disciplinary purposes as provided in section 309 hereof, no such member shall be ordered to or continued on active duty without his

consent: Provided, That the Commandant may release any member from active duty either in time of war or in time of peace. *Members of the Reserve while engaged on active duty shall be vested with the same power, authority, rights, and privileges as members of the regular Coast Guard of similar ranks, grades, or ratings.* In time of peace members of the Coast Guard Reserve may, with their consent, be given additional training or other duty either with or without pay, as may be authorized by the Secretary of the Treasury. When authorized training or other duty without pay is performed by members of the Reserve they may, in the discretion of the Secretary of the Treasury, be furnished with transportation to and from such duty, with subsistence and transfers en route and, during the performance of such duty, be furnished subsistence in kind or commutation thereof at a rate to be fixed from time to time by the Secretary of the Treasury. (Italics ours.)

We have been unable to find any decision of a Pennsylvania court which answers the question you have proposed. However, the case of *Mitchell v. Cohen*, 333 U. S. 411 (1948), is analogous and applicable. In that case the question was raised as to whether or not service with a Volunteer Port Security Force of the United State Coast Guard Reserve entitled one to veterans' preference in Federal employment under the Veterans' Preference Act of 1944. The Veterans' Preference Act of 1944, 58 Stat. 387, as amended, 5 USCA Section 851, et seq., established preference in government employment for those ex-service men and women who have served in active duty in any branch of the armed forces of the United States during any war and have separated therefrom under honorable conditions.

On page 417 of its opinion, the Supreme Court said:

Respondents claim that their service with the Volunteer Port Security Force brings them squarely within this statutory provision, hence entitling them to veterans' preference. It is undisputed, of course, that they did serve part-time on active duty in a branch of the armed forces of the United States during World War II and that they were separated therefrom under honorable conditions. The crucial question is whether they thereby are "ex-servicemen" within the meaning of this particular statute. On that score, respondents urge that this term must be given its ordinary and literal meaning so as to refer to all those who performed military service. The length or continuity of active duty and the presence or absence of compensation become immaterial from respondents' point of view; the mere performance of some type of military service is thought to be sufficient. Since respondents concededly did perform military service while on intermittent active duty with the Volunteer Port Security Force, the conclusion is reached that they are "ex-servicemen"

within the contemplation of this statute. Resort to the legislative history and other secondary sources is said to be unwarranted, so clear and obvious is the meaning of that term.

In our opinion, however, the term "ex-servicemen" has no single, precise definition which permits us to read and apply that term without help from the context in which it appears and the purpose for which it was inserted in the statute. Ex-servicemen are indeed those who have performed military service. And they may include those who have served on active duty only part-time and without compensation. But this designation may also be confined to a more definite and narrow class of individuals who performed military service, to those whose full time and efforts were at the disposal of military authorities and whose compensation included military pay and allowances. Such ex-servicemen are those who completely disassociated themselves from their civilian status and their civilian employment during the period of their military service, suffering in many cases financial hardship and separation from home and family. They formed a great bulk of the regular armed forces during World War II. In the popular mind, they were typified by the full-fledged soldier, sailor, marine or coast guardsman. Our problem, of course, is whether Congress used the term "ex-servicemen" in the broad or narrow sense when it enacted the Veterans' Preference Act. And the answer to that problem is to be determined by an examination of the statutory scheme rather than by reliance upon dictionary definitions.

* * * * *

Throughout the legislative reports and debates leading to the birth of this statute is evident a consistent desire to help only those who had sacrificed their normal pursuits and surroundings to aid in the struggle to which this nation had dedicated itself. It was the veterans or ex-servicemen who had been completely divorced from their civilian employment by reason of their full-time service with the armed forces who were the objects of Congressional solicitude. Reemployment and rehabilitation were considered to be necessary only as to them.

There is nothing to indicate that the legislative mind in this instance was directed toward granting special benefits or rewards to those who performed military service without interference with their normal employment and mode of life. As to them, assistance in reemployment and rehabilitation was thought unnecessary. Their civilian employment status remained unchanged by reason of their military service. And since their civilian life was substantially unaltered, there was no problem of aiding their readjustment back to such a life. Indeed, to have given them preference rights solely because of their part-time military service would have been inconsistent with the professed aims of the statutory framers. Such preference would have diluted the benefits conferred on those ex-servicemen who had made full-scale sacrifices; and it would

have been inequitable to the many civilians who also had participated voluntarily in essential war and defense activities but who had not been directly connected with a branch of the armed forces.

The Supreme Court held that part-time service with a Volunteer Port Security Force of the United States Coast Guard Reserve did not entitle one to veterans' preference in Federal employment. The reasoning of the Supreme Court with regard to the Federal act applies with equal force to the Pennsylvania act.

The Pennsylvania act is limited to soldiers and a soldier is defined in Section 1 as " * * * a person * * * who has an honorable discharge * * *". In this respect the Pennsylvania act is more specific than the Federal act. As the employe of the Pennsylvania Liquor Control Board possessed a certificate of disenrollment, and not an honorable discharge, he does not meet the requirements of the Pennsylvania act.

We are, therefore, of the opinion, and you are accordingly advised, that a civil service employe of the Pennsylvania Liquor Control Board who performed part-time service with a Volunteer Port Security Force of the United States Coast Guard Reserve is not entitled to veterans' preference under the Act of May 22, 1945, P. L. 837.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 584

Schools—Religious instruction—Constitutional law—Instructions during regular sessions—Use of public school building after hours—Reading of Holy Bible—Act of May 20, 1913—Released time program—Dismissed time program—Religious history.

1. Religious instructions may not be given to public school pupils in public school buildings during a time when the public schools are in regular session.

2. Public school buildings may not be used for religious instruction or religious services by any one, or by groups of individuals, including public school pupils, when the schools are not in session.

3. The reading of the Holy Bible without comment by a teacher of the public school system in compliance with the Act of May 20, 1913, P. L. 226, is not the type of religious exercise or sectarian service which comes within the prohibition of our Constitution.

4. A released time program adopted under the provisions of section 1615 of the School Code, added by the Act of May 17, 1945, P. L. 629, is not violative of either the State or the Federal Constitution, if it does not involve the use of school buildings for religious purposes.

5. School directors may not close regular sessions at an earlier hour on certain days of the week in order to permit a dismissed time program.

6. The public schools may include in their curricula a study of the development of religion or church history as a part of a general course conducted by a public school teacher, taught objectively and not for the purpose of propagating particular religious doctrines or beliefs.

Harrisburg, Pa., July 23, 1948.

Honorable Francis B. Haas, Superintendent of Public Instruction,
Harrisburg, Pennsylvania.

Sir: You have requested our advice on a number of specific questions regarding religious education in the public school system of Pennsylvania in view of the decision of the United States Supreme Court in the case of *People of State of Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill., et al.*, decided March 8, 1948, 333 U. S. 203, 68 Sup. Ct. 461, 92 L. Ed. 451, hereinafter referred to as the Champaign Case.

The facts in the Champaign case may be stated briefly as follows:

The school directors of the Champaign District had participated in a voluntary program with interested members of the Jewish, Roman Catholic and Protestant faiths, by which religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for sectarian teaching, and then, and there, for a period of 30 minutes substituted their religious teaching for the secular education provided under the compulsory education law of Illinois. This program was not expressly authorized by statute. It was entirely voluntary. Students who did not choose to take the religious instruction were not released from public school duties. They were required to leave their classrooms and to go to some other place in the school building for the pursuit of their secular studies. Attendance at religious classes was required of pupils only with the consent of their parents. The petitioner charged that this program violated the First and Fourteenth Amendments of the United States Constitution, and the charge was sustained by the court.

In condemning this practice, the opinion of the court states (333 U. S. 209-211):

* * * * *

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property

for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*, 330 U. S. 1. There we said: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa.

* * *

Turning now to the Constitution of our State, we find that it includes several provisions which are relevant. Article I, Section 3, provides:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship.

Article X provides for the establishment and maintenance of a public school system within the Commonwealth and, Section 2 thereof provides:

No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

This prohibition against the use of public funds for sectarian religious purposes also appears in Article III, Section 18, which provides:

No appropriations, * * * shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association.

We answer the questions in the order presented:

I.

I. MAY RELIGIOUS INSTRUCTION BE GIVEN TO PUBLIC SCHOOL PUPILS IN PUBLIC SCHOOL BUILDINGS AT A TIME WHEN THE PUBLIC SCHOOLS ARE IN REGULAR SESSION?

The facts of the Champaign case squarely presented the situation in which religious instruction was given to public school pupils in public school buildings at a time when such schools were in regular session.

The decision of the Supreme Court, in the excerpt quoted above from the opinion, ruled directly that such practice involved "the use of tax-supported property for religious instruction" and was in violation of the Fourteenth Amendment of the Constitution of the United States.

Amendment I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

This provision, as interpreted by the Supreme Court of the United States, is the supreme law of the land and is binding upon the courts and the people of this Commonwealth.

We are, therefore, of the opinion that the practice suggested in question I would be in violation of the First Amendment of the Federal Constitution and question I must be answered in the negative.

II.

II. MAY PUBLIC SCHOOL BUILDINGS BE USED FOR RELIGIOUS INSTRUCTION OR RELIGIOUS SERVICES BY ANYONE OR GROUPS OF INDIVIDUALS, INCLUDING PUBLIC SCHOOL PUPILS, WHEN THE SCHOOLS ARE NOT IN SESSION?

In *John Hysong et al. v. Gallitzin Borough School District et al.*, 164 Pa. 629 (1894), the lower court upon a bill in equity filed by taxpayers enjoined the school district from permitting the school rooms to be used *after school hours* by teachers in imparting Catholic religious instruction.

On appeal, the Supreme Court of Pennsylvania expressed itself in full accord with the following portion of the opinion of the court below:

The use of the public school building in imparting religious instruction after school hours, in the manner detailed by us in our conclusions of fact, is not only a violation of the fundamental law of the state in that the instruction, being purely and essentially sectarian in its character, is prohibited, but the directors exceeded their authority in permitting any such use to be made of the building. It is very clear to us that the prohibition of the appropriation of money raised for the support of public schools to sectarian schools includes the use of the public school buildings, erected by such money, for any sectarian purposes. But there is a further reason for restraining the use of the public school building for this purpose, as well as for any other purpose foreign to public school instruction; and that is that, the building having been erected for a particular corporate purpose, the corporate authorities cannot authorize its use for any other, and any diversion is illegal, and must be restrained when complained of. * * * (649)

In *Bender v. Streabich*, 182 Pa. 251 (1897), the Supreme Court of Pennsylvania held broadly that the school directors had no authority to permit public school buildings to be used for sectarian religious instruction or for other than school purposes.

In the opinion, Mr. Justice Fell said:

* * * This question, in so far as it relates to their use for religious meetings, is fully answered by the decision in *Hysong v. School District of Gallitzin Borough*, 164 Pa. 629. * * * (252-253) (Italics ours.)

These decisions were modified in part by Section 627 of the Act of May 18, 1911, P. L. 309, as amended, known as the School Code, 24 P. S. § 773, which permits the use of school buildings for certain purposes:

The board of school directors of any district may permit the use of its school grounds and buildings for social, recreation, and other proper purposes, under such rules and regulations as the board may adopt, and shall make such arrangements with any city, borough, or township authorities for the improvement, care, protection, and maintenance of school buildings and grounds for school, park, play, or other recreation purposes, as it may see proper, and any board of school directors may make such arrangements as it may see proper with any official or individuals for the temporary use of school property for schools, playgrounds, social, recreation, or other proper educational purposes, primaries and elections. * * *

The words "park, play, or other recreation purposes," and "playgrounds, social, recreation, or other proper educational purposes, primaries and elections" are specific and in our opinion would not include "religious" purposes.

In view of the repeated rulings of the Supreme Court of Pennsylvania, that public school buildings may not be used after school hours for religious purposes, we believe that if the legislature had intended to permit such use it would have included the word "religious" in the statutory language just quoted, and that the words "other proper purposes" and "other proper educational purposes" were advisedly used to conform with those rulings.

Questions III to VI were not raised by the facts of the Champaign Case nor decided by the Court.

Four separate opinions were filed in which the opinions of the Justices were independently asserted.

While the language of the several opinions might throw some light upon questions III to VI, propounded by you, it is our judgment that none of them was presented to or actually decided by the Supreme Court of the United States. Any attempt of ours to apply the language of the Justices to these questions would only amount to "a forecast, rather than a determination". *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 104 (1944).

In the Champaign Case, Mr. Justice Jackson said (p. 327):

The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error. While I agree that the religious classes involved here go beyond permissible limits, I also think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself.

It is, therefore, our opinion that questions III to VI should be determined by the law of Pennsylvania until and unless the Supreme Court of the United States, in interpreting Amendment I of the Federal Constitution, decides differently.

III.

III. WHAT EFFECT, IF ANY, DOES THE CHAMPAIGN CASE HAVE ON THE ACT OF MAY 20, 1913, P. L. 226?

The Act of May 20, 1913, P. L. 226 provides:

* * * * *

Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school-days; therefore, be it resolved,—

Section 1. Be it enacted &c., That at least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each and every public school, upon each and every school-day, by the teacher in charge: * * * (24 P. S. Section 1555)

This statute was enacted by the legislature in the interest of good moral training and of good citizenship, to bring to the attention of public school children the fundamental lessons of morality.

The government of the Commonwealth, and its legal system, is based on the moral precepts of Christianity. This premise received early recognition in *Commonweath v. Wolf*, 3 S. & R. 48, 51 (1817), wherein the court said:

“Laws cannot be administered in any civilized government unless the people are taught to revere the sanctity of an oath, and look to a further state of rewards and punishments for the deeds of this life. * * *”

Also, in *Updegraph v. The Commonwealth*, 11 S. & R. 394 (1824), it was held in an elaborate opinion that Christianity is part of the common law of Pennsylvania. The Supreme Court of Pennsylvania said on page 400:

Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, William Penn; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men. * * *

Based on this decision, Justice Story in *Vidal v. Girard's Executors*, 2 How. 127, 200, 11 L. ed. 205 (1844), in discussing the famous provision in Girard's will excluding ecclesiastics, and by implication, instruction in the Christian religion, from the college therein created, asks:

* * * Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? * * *

Girard's declared intention was to prevent children of tender years from being exposed to sectarian religious disputes.

Justice Story's questions have not come before the appellate courts of the state. They have been, however, the subject of several lower court cases. In *Hart v. School District of Sharpville*, 2 Lanc. Rev. 346 (1885), (C. P. Mercer), the plaintiffs complained that the defendant school directors had authorized the reading of King James Version of the Bible and the singing of Protestant gospel hymns in the public schools. No comment was made upon the Bible, and Catholic children were permitted the use of a separate room during this exercise. The court dismissed the bill, but observed that our theory of law is based on Christian principles; that public schools must educate for the public good; that the morality of the State is based on the Bible and that the King James Version was *not proved* to be a sectarian version within the meaning of Article X, Section 2, of the Constitution, citing *Vidal v. Girard's Executors*, supra.

A similar question arose in *Stevenson v. Hanyon, et al.*, 7 Dist. 585 (1898), (C. P. Lacka.), wherein it was complained that the principal of the public school conducted religious exercises during school hours in the Methodist Episcopal form and read from the King James Version of the Bible. The bill was dismissed on the grounds that the King James Version is not a sectarian book. Also, in *Curran v. White*, 22 Pa. C. C. 201 (C. P. Wayne, 1898), there are dicta to the effect that Bible reading as part of the opening exercise of the public schools is not in contravention of our Constitution.

The question whether the Bible or the King James Version of the Bible is a sectarian book has been the subject of numerous cases in other jurisdictions. It has been held that the mere reading of selections from the King James Version in public schools without comment does not violate any of the constitutional prohibitions against sectarianism or interference with religious freedom.¹ Some courts have

¹ *People ex rel. Vollmar v. Stanley et al.*, 81 Colo. 276, 255 Pac. 610 (1927); *Kaplan v. Independent School Dist. of Virginia et al.*, 171 Minn. 142, 214 N. W. 18 (1927); *Lewis v. Board of Education of City of New York*, 157 Misc. 520, 285 N. Y. S. 164 (1935); app. dis., 276 N. Y. 490, 12 N. E. (2) 172 (1935); *Hackett v. Brooksville Graded School Dist. et al.*, 120 Ky. 608, 87 S. W. 792 (1905); *Donahoe, prochein ami v. Richards, & als.*, 38 Me. 379 (1854); *State ex rel. Freeman v. Scheve et al.*, 65 Neb. 853, 91 N. W. 846 (1902); *Moore v. Monroe and another*, 64 Iowa 367, 20 N. W. 475 (1884); *semble, Evans v. Selma Union High School Dist. of Fresno County et al.*, 193 Cal. 54, 222 Pac. 801 (1924) (King James version is non-sectarian).

gone farther, permitting not only Bible reading but also the singing of hymns, the recital of prayers, the recital of the Ten Commandments, or psalms.²

It has also been held in other states that resolutions of the public school authorities requiring or permitting the Bible to be read in the schools is not necessarily a violation of any constitutional provision if done merely for the purpose of inculcating morality, and not for the purpose of sectarian religious instruction.³

However, the authorities of other States are not in agreement. A number of jurisdictions have held that reading the Bible in the public schools constitutes sectarian instruction, and violates the constitutional right to religious liberty, especially when the reading is combined with prayers or hymn singing.⁴

The use of the Bible as a *textbook* in the public schools has been held to be a violation of the constitutional provisions in question, even when used in a course, attendance at which was optional, but the use of texts founded upon the Bible do not violate the prohibitions.⁵

The reading of the Holy Bible without comment by a teacher of the public school system, in compliance with the act of 1913 and for the purposes thereof, is not, in our opinion, the type of religious exercise or sectarian service which comes within the prohibitions of our constitution.

IV.

IV. WHAT EFFECT, IF ANY, DOES THE CHAMPAIGN CASE HAVE ON THE ACT OF MAY 17, 1945, P. L. 629, REFERRED TO ABOVE, RELATING TO *RELEASED* TIME FOR RELIGIOUS EDUCATION?

² *Pfeiffer v. Board of Education of City of Detroit*, 118 Mich. 560, 77 N. W. 250 (1898); *Com. ex rel. Wall v. Cooke*, 7 Am. L. Reg. (Mass.) 417 (1859); *Moore v. Monroe and another*, 64 Iowa 367, 20 N. W. 475 (1884); *North v. Board of Trustees of University of Illinois*, 137 Ill. 296, 27 N. E. 54 (1891); *Hackett v. Brooksville Graded School Dist. et al.*, 120 Ky. 608, 87 S. W. 792 (1905); *Wilkerson et al. v. City of Rome et al.*, 152 Ga. 762, 110 S. E. 895 (1922).

³ *Com. ex rel. Wall v. Cooke*, op. cit. supra; *Spiller v. Woburn*, 12 Allen (Mass.) 127 (1866); *Nessle v. Hum*, 1 Ohio N. P. 140 (1894); see also *McCormick v. Burt*, 95 Ill. 263 (1880); and see *Church et al. v. Bullock et al.*, 104 Tex. 1, 109 S. W. 115 (1908).

⁴ *People ex rel. Ring et al. v. Board of Education of Dist. 24*, 245 Ill. 334, 92, N. E. 251 (1910) (hymn included); *Herold et al. v. Parish Board of School Directors et al.*, 136 La. 1034, 68 So. 116 (1915) (King James Version); see also *State ex rel. Weiss et al. v. District Board of School Dist. No. 8 of the City of Edgerton*, 76 Wis. 177, 44 N. W. 967 (1890); *State ex rel. Freeman v. Scheve et al.*, op. cit. supra.

⁵ *State ex rel. Weiss et al. v. District Board of School Dist. No. 8 of the City of Edgerton*, supra; *State ex rel. Dearle et al. v. Frazier*, 102 Wash. 369, 173 Pac. 35 (1918); *Pfeiffer v. Board of Education of City of Detroit*, op. cit. supra.

Section 1414 of the School Code, 24 P. S. § 1421 provides:

Every child having a legal residence in this Commonwealth, as herein provided, between the ages of eight and sixteen years, is required to attend a day school in which the common English branches provided for in this act are taught in the English language, and every parent, guardian, or other person, in this Commonwealth, having control or charge of any child or children, between the ages of eight and sixteen years, is required to send such child or children to a day school in which the common English branches are taught in the English language; and such child or children shall attend such school continuously through the entire term, during which the public elementary schools in their respective districts shall be in session: * * *

Section 1605 of the School Code, 24 P. S. § 1533 provides:

The board of school directors of each school district shall fix the date of the beginning of the school term, and, unless otherwise determined by the board, the daily session of school shall open at nine ante meridian and close at four post meridian, with an intermission of one hour at noon, and an intermission of fifteen minutes in the forenoon and in the afternoon.

Section 1601 of the School Code, 24 P. S. § 1531, prescribes a minimum school year term of 180 days.

An opinion by Deputy Attorney General J. W. Brown, dated May 7, 1924 (1923-1924 Op. Atty. Gen. 325), 5 D. & C. 137, held that school directors might not excuse pupils during legal school hours for the purpose of attending denominational classes to receive religious instruction.

Subsequently, the legislature by the Act of May 17, 1945, P. L. 629, added Section 1615 to the School Code, 24 P. S. § 1563, as follows:

Any board of school directors of any school district shall have power to enter into suitable arrangement with a religious group, or organization of responsible citizens resident in the school district, who are interested in organizing part-time weekday religious education for school pupils. In such cases the board of school directors shall have power to adopt such rules and regulations for the *release* from school sessions of those pupils whose parents, or surviving parent, or guardian, or other person having legal custody of such pupil, desires to have them attend a class to receive religious education, in accordance with their religious faith for not more than one hour a week, subject, however, to such conditions and the keeping of such records of attendance at such classes and other records for the inspection of school authorities as the board shall deem proper. No part of the cost and expense of such religious instruction shall be paid out of public school funds. (*Italics ours.*)

This last statute provided for the so-called "released time".

It is to be kept in mind that Section 1615 providing for so-called "released time"⁶ is not mandatory but is an enabling provision under which any board of school directors may or may not adopt "released time" with latitude given to the board, to promulgate the details of any plan or program which it may establish thereunder.

In his concurring opinion in the Champaign Case, Mr. Justice Frankfurter states on page 231:

We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; *others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid "released time" program.* * * * (Italics ours.)

Section 1615, added to the School Code by the Act of 1945, like all legislation, is presumed to be constitutional and the plan or program adopted by a school district under its provisions supplies the subject for constitutional test.

The Champaign Case definitely ruled that "released time" for religious instruction of pupils during school hours in public school buildings offended the United States Constitution.

The difficulty in answering the question now being considered is that it does not present to us any specific program or plan adopted under the authorization given by Section 1615.

Therefore, you are advised that released time plans should be permitted to continue unless (1) the plan adopted is substantially similar to that involved in the Champaign Case; or (2) the plan conflicts with the principles expressed in our answers to questions I or II; or (3) you are advised that the plan is in violation of the State or Federal Constitution.

⁶"Released time" religious education conducted off of school premises but during school hours has been adopted by schools in at least 34 States: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wisconsin, and Alaska, and Hawaii. In New York State, this type of plan was upheld as constitutional by the Court of Appeals in a suit by an atheist (*People ex rel. Lewis v. Graves*, 245 N. Y. 185), and later embodied in the State's education law (Section 3210 (1)). See Vol. 34, American Bar Association Journal, page 483.

V.

V. MAY SCHOOL DISTRICTS COOPERATE WITH LOCAL MINISTERIAL GROUPS OR OTHERS TO THE EXTENT OF CLOSING THE REGULAR SESSIONS OF SCHOOL AT AN EARLIER HOUR ON CERTAIN DAYS OF THE WEEK, IN WHAT IS KNOWN AS "DISMISSED TIME PROGRAM" AS DISTINGUISHED FROM A RELEASED TIME PROGRAM REFERRED TO IN QUESTION NO. 4 ABOVE, IN ORDER TO PERMIT THEIR PUPILS TO OBTAIN COURSES IN RELIGIOUS INSTRUCTION?

Section 1605 of the School Code, 24 P. S. Section 1533, provides that the daily session of the schools shall open at 9:00 a. m. and close at 4:00 p. m. We do not believe that the words "until otherwise determined by the board" are intended to permit a shortening of the school day such as would be required by the adoption of the plan of dismissed time.

Inasmuch as the School Code confers express authority upon the board of directors to adopt a plan of released time, and does not confer any similar authority to adopt a plan of dismissed time, it is our opinion that school directors are not permitted to adopt the latter.

You are accordingly advised that under the provisions of the School Code, school directors may not close regular sessions of schools at an earlier hour on certain days of the week in order to permit a dismissed time program.

VI.

VI. WHAT EFFECT, IF ANY, DOES THE DECISION IN THE CHAMPAIGN CASE HAVE ON THE QUESTION OF INCLUDING A STUDY OF THE DEVELOPMENT OF RELIGION OR CHURCH HISTORY AS A PART OF A GENERAL HISTORY COURSE; THE INSTRUCTION TO BE GIVEN BY A REGULARLY CERTIFIED TEACHER?

We find no provision in the school laws of this Commonwealth relating to the inclusion of such a course of study in the school curricula.

It is our opinion that so long as a course relates to the development of religion or the history of the church, as a part of a general history course, and is taught objectively and for the purpose of showing the effect of the same upon mankind, and not for the purpose of propagating or examining into the merits of particular religious doctrines or beliefs, no prohibition is found in the Constitution or laws of the Commonwealth of Pennsylvania.

You are, therefore, advised that the public schools may include in their curricula a study of the development of religion or church history as a part of a general course conducted by a public school teacher.

Summarizing you are advised that:

I. Religious instruction may not be given to public school pupils in public school buildings during a time when the public schools are in regular sessions.

II. Public school buildings may not be used for religious instruction or religious services by any one, or by groups of individuals, including public school pupils, when the schools are not in session.

III. The reading of the Holy Bible without comment by a teacher of the public school system in compliance with the Act of May 20, 1913, P. L. 226, is not the type of religious exercise or sectarian service which comes within the prohibition of our Constitution.

IV. Released time programs should be permitted to continue unless (1) the plan adopted is substantially similar to that involved in the Champaign Case; or (2) the plan conflicts with the principles expressed in our answers to questions I or II; or (3) you are advised that the plan is in violation of the State or Federal Constitutions.

V. School directors may not close regular sessions at an earlier hour on certain days of the week in order to permit a dismissed time program.

VI. The public schools may include in their curricula a study of the development of religion or church history as a part of a general course conducted by a public school teacher taught objectively and not for the purpose of propagating particular religious doctrines or beliefs.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

JOHN C. PHILLIPS,
Deputy Attorney General.

OPINION No. 585

Insurance—Automobile, fire, theft, and collision insurance—Financed vehicle—Liquidation of insurance company—Obligation to replace—Motor Vehicle Sales Finance Act of June 28, 1947, sec. 17(b) and (g).

Policies of fire, theft, and collision insurance on motor vehicles sold on time payment plans on or after August 27, 1947, and canceled by reason of a decree of liquidation entered against the insurance company by which they were written, must be replaced at the expense of the sellers or their assignee finance companies or banks as provided in section 17 (g) of the Motor Vehicle Sales Finance Act of June 28, 1947, P. L. 1110, unless the insurance coverage was obtained by the buyer through an agent or broker or in an insurance carrier of his own free and unhampered selection, as permitted under section 17 (b), in which event the obligation would be upon the buyer of the motor vehicle to replace the canceled insurance with another insurance carrier acceptable to the seller.

Harrisburg, Pa., September 17, 1948.

Honorable D. Emmert Brumbaugh, Secretary of Banking, Harrisburg, Pennsylvania.

Sir: You have requested our opinion concerning an interpretation of subsection (G) of Section 17 of the Motor Vehicle Sales Finance Act, the Act of June 28, 1947, P. L. 1110, 69 P. S. §§ 601 et seq., as it applies to the cost of replacing policies of fire, theft and collision insurance written by the Paramount Mutual Insurance Company, on motor vehicles sold by certain dealers and financed through various finance companies and banks licensed to do business under that act.

The Paramount Mutual Insurance Company was dissolved and an order of liquidation entered December 3, 1947, by the Court of Common Pleas of Dauphin County as of No. 256 Commonwealth Docket, 1947.

The legal effect of the dissolution was automatically to cancel all outstanding policies of the dissolved corporation: *COMMONWEALTH ex rel., v. GUARDIAN FIRE INSURANCE COMPANY OF PENNSYLVANIA* (No. 1), 65 Pa. Superior Ct. 203, 205 (1916). And the specific question now arises whether its existing policies of insurance on financed motor vehicles at that date were cancelled "by the insurance company prior to expiration," within the meaning of subsection (G) of Section 17 of the Motor Vehicle Sales Finance Act, 69 P. S. § 617. The act became effective under its terms August 27, 1947, and Section 17 (G) reads as follows:

When the seller contracts to purchase insurance at the buyer's expense and such insurance is cancelled by the insurance company prior to expiration, the seller or subsequent holder shall place comparable insurance with another insurance company and furnish the buyer with a copy of the insurance policy, subject to the same requirements of this act applicable to the original policy. In the event the holder is unable to obtain such insurance in another insurance company, he shall immediately notify the buyer, who may then obtain such insurance from an insurance company, agent or broker of his

own selection and the holder shall be liable for any additional costs incurred by the buyer in rewriting such insurance for the unexpired period for which the original insurance was written. The holder under these circumstances shall also be liable to the buyer for any loss suffered by the buyer through negligence on the part of the holder in promptly advising the buyer of his inability to obtain replacement insurance. (*Italics ours.*)

If the legal effect of dissolution of the insurer can be said to constitute a cancellation of the policy, within the meaning of the aforesaid statutory provisions, then it is clear there is a duty on the part of the dealers, or their assignees as the case may be, to pay for the fire, theft and collision coverage necessary to supplant the coverage lost by the cancellation of existing policies.

This statement of the proposition before us very nearly in itself answers your question, because in the construction of a comprehensive statute it is presumed the legislature intended it to be effective in its entirety, and certain in its application: Section 52 (2) of the Statutory Construction Act of May 28, 1937, P. L. 1019, 46 P. S. § 552.

A further guide to the interpretation of Section 17 (G) of the Motor Vehicle Sales Finance Act is to be found in its preamble, which may legitimately be used in ascertaining intent and meaning under both Sections 51 and 54 of the Statutory Construction Act, *supra*, 46 P. S. Sections 551 and 554. The preamble, 69 P. S. § 602, reads as follows:

Section 2. Findings and Declarations of Policy.—It is hereby determined and declared as a matter of legislative finding:

(a) That an exhaustive study by the Joint State Government Commission discloses nefarious, unscrupulous and improper practices in the financing of the sale of motor vehicles in this Commonwealth which are unjustifiably detrimental to the consumer and inimical to the public welfare. Such practices prevail not only among some sellers, but also among some sales finance companies and some banks, which acquire contracts arising out of installment sales of motor vehicles, and which frequently influence the credit policies of sellers.

(b) That the agreement for the installment sale of motor vehicles in this Commonwealth has been generally cast in the form of the so-called "Pennsylvania Bailment Lease" contract, in which the seller is technically the lessor, and the buyer is technically the lessee. By the use of this fictional instrument in the installment sale of motor vehicles, the extension of credit to the purchaser has been so inextricably entwined with the alleged bailment of the motor vehicle as to deprive the consumer of the benefit of existing laws.

(c) *That consumers, because of these legal technicalities and because of their unequal bargaining position, are at the mercy of unscrupulous persons and are being intolerably exploited in the installment purchase of motor vehicles. Such exploitation is evident in the unfair provisions of the installment sale contract, exorbitant charges for credit, extortionate default, extension, collection, repossession and other charges, unconscionable practices respecting execution of contracts, refinancing of contracts, prepayment, refunds, insurance, repossession and redemption.*

(d) That practices enumerated, and others equally pernicious, have existed to such an extent that regulation of the installment selling of motor vehicles is necessary to the adequate protection of the public interest. Adequate regulation of installment selling must include control of the functions of selling and financing of motor vehicles, whether exercised by the same or by different persons.

Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the welfare of its inhabitants and to protect its citizens from abuses presently existing in the installment sale of motor vehicles, and to that end exercise the police power of the Commonwealth to bring under the supervision of the Commonwealth all persons engaged in the business of extending consumer credit in conjunction with the installment sale of motor vehicles; *to establish a system of regulation for the purpose of insuring honest and efficient consumer credit service for installment purchasers of motor vehicles; and to provide the administrative machinery necessary for effective enforcement.* (Italics ours.)

This declaration of intention by the legislature leaves no doubt that its attention was focused upon the plight of the consumer and its purpose, his protection. We do not consider it necessary in this opinion to draw extensively from the voluminous record of insurance practices by some snide finance companies and unscrupulous dealers, which were collected by the Joint State Government Commission in its study of the subject, preparatory to drafting this law. It should suffice here to refer to one practice which was prevalent, and with which those familiar with the subject should be cognizant—the practice of requiring installment purchasers of motor vehicles to pay for insurance on the vehicles, written by insurance companies from which certain dealers and finance companies, either directly or indirectly, acquired commissions or rebates.

This evil was met before. We discussed it in Formal Opinion No. 575, dated January 23, 1948, addressed to the Insurance Commissioner, and cite it here as cogent to the conclusion that the legislature intended to protect the consumer against duplicating premium payments where insurance cancellation occurred through no fault of his. The

words, "cancelled by the insurance company prior to expiration," used in section 17 (G) of the act, should be accordingly construed.

Viewed from a purely common sense point, the true intent and meaning of section 17 (G) is even less escapable. A court order of dissolution and liquidation under Section 502 of the Insurance Department Law of 1921, the Act of May 17, 1921, P. L. 789, as amended, 40 P. S. § 202, having the legal effect of cancelling outstanding insurance policies, must be predicated upon commissions or omissions of the insurance company itself. In such case it may properly be concluded that by its own actions the company itself has cancelled its policies.

The additional reason urged upon us for exonerating sellers and their assignees from payment for substituted insurance in these cases, that in many instances the purchaser originally constituted the dealer or subsequent holder of his paper his agent for obtaining the insurance, is without merit. Even in such instances the seller contracts to purchase insurance at buyer's expense, which meets the exact phraseology of section 17 (G). The rights of assignee, finance company or bank can rise no higher than those of the seller under the definition of "seller," supplied in paragraph 4 of section 3 of the 1947 act.

Where, however, the buyer avails himself of the privilege which section 17 (B) allows him, to purchase the insurance from his own agent or broker in a company acceptable to the seller, a different conclusion must be reached. For in such case the buyer has assumed responsibility for the stability of the insurance carrier, and, having called the tune must pay the piper.

Subsection (B) of section 17 of the 1947 act, reads as follows:

The buyer of a motor vehicle under an installment sale contract shall have the privilege of purchasing such insurance from an agent or broker of his own selection and selecting an insurance company acceptable to the seller: Provided, however, The inclusion of the cost of the insurance premium in the installment sale contract, when the buyer selects the company agent or broker, shall be optional with the seller.

In the phraseology of section 17 (B) no legislative intentment can be found to place obligations upon the seller other than the duty to accept the insurance of a responsible carrier selected by the buyer and the option to permit the cost of the insurance to be included in the total payable under the installment sale contract.

If the cost of the insurance in such case is not included in the installment sale contract, it is obvious, upon the necessity of replacing the risk, arising through no fault of the seller, that the expenditure

incident must be borne by the buyer. And were the rule different where the seller agreed to permit the initial insurance cost to be included in the contract, no seller would ever agree to include it.

But the words, "of his own selection," as used in this subsection must be strictly construed to meet the objects of the whole law. The acceptance by the buyer of an insurance agent, broker or carrier, in fact selected by the seller, will not suffice to shift from seller to buyer the obligation to pay for a necessary replacement of the insurance risk. "Of his own selection," means a free and unhampered selection, not one obtained by coercion of any sort.

We are of the opinion that policies of fire, theft and collision insurance on motor vehicles sold on time payment plans, on or after August 27, 1947, and written by Paramount Mutual Insurance Company, cancelled by reason of a decree of liquidation entered against that company December 3, 1947, must be replaced at the expense of the sellers or their assignee finance companies or banks as provided in subsection (G) of Section 17 of the Motor Vehicle Sales Finance Act, the Act of June 28, 1947, P. L. 1110, 69 P. S. § 617, unless the insurance coverage was obtained by the buyer through an agent or broker or in an insurance carrier of his own free and unhampered selection, as permitted under subsection (B) of section 17 of that act. In this event the obligation would be upon the buyer of the motor vehicle to replace the cancelled insurance with another insurance carrier acceptable to the seller.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 586

Weights and measures—Units attached to display cards—"Packaged"—Commodities Act of July 24, 1913.

Articles such as pins offered for sale and mounted on display cards are "packaged" within the meaning of the Commodities Act of July 24, 1913, P. L. 965, as amended, even though they are visible and may be counted by the purchaser before the sale, so that the number of the units attached to each card must be marked thereon.

Harrisburg, Pa., September 22, 1948.

Honorable William S. Livengood, Jr., Secretary of Internal Affairs,
Harrisburg, Pennsylvania.

Sir: This department is in receipt of your request for advice, in which you ask if manufacturers of various commodities that offer their products for sale on display cards and openly display more than one unit of any commodity, either vertically or horizontally, and in such a manner that they are visible and can be counted by the purchaser before sale, are packages as defined in Section 1 of the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. § 241, commonly known as the Commodities Act.

On inquiry of the Bureau of Standards, Weights and Measures in your department, it has been determined that particular examples of merchandise on which you have received inquiries, consist of items such as safety pins, hair pins, bobby pins and common straight pins which are attached to cards by inserting them through holes in the cards or fastening them by staples or other devices in lots of from one in the case of large safety pins, to lots of several hundred in the case of straight common pins.

These small cards are in turn sometimes mounted on larger cards for convenience of the retail merchant and more effective sales display.

The current price of materials and labor are determining factors in the manufacturers' or distributors' calculation of the number of items to be attached to the cards when the products are offered for sale. When the costs of steel and labor are high, a ten cent card may contain only twelve or fifteen bobby pins, while lower material and labor costs may persuade the manufacturer or distributor to attach twenty-five or thirty of the same quality and type of bobby pins to cards that retail at ten cents.

Some manufacturers and distributors of this type of merchandise object to printing the number of units of a particular product that is attached to each card, on the ground that the card with the product attached to it does not constitute a "package" within the meaning of the Commodities Act, and in addition, the purchaser can in some instances, readily count the number of individual bobby pins or other items attached to the card, before making the purchase.

The Commodities Act, as originally enacted in 1913, contained only one definition, and that was of the word "commodity" which was defined at Section 2 of the Act, as follows:

The word "commodity," as used in this act, shall be taken to mean any tangible personal property sold or offered for sale.

Since 1913, Section 1 has been amended, and the definitions of several other words used in the act added, so that the section now provides, *inter alia*, as follows:

The word "commodity," as used in this act, shall mean anything, goods, wares, merchandise, compound, mixture or preparation, products of manufacture of any tangible personal property, which may be lawfully kept, sold, or offered for sale.

* * * * *

The word "package," as used in this act, shall mean everything containing one or more than one unit of any commodity, tied or bound together, or put up in box, bag, pack, bundle, container, bottle, jar, can or any other form of receptacle or vessel, not considered as an approved measure, except cases, cartons, crates, bundles, or bales used for bulk shipping or storage: Provided, That enclosed packages are marked as to weight, measure or numerical count.

The term, "commodity," as contained in the original act, included "any tangible personal property sold or offered for sale." The act, as amended, and now in effect, retains its broad application and has added a number of definitions of some of the words contained in its provisions.

Under the terms of the Commodities Act, weight, measure or numerical count must be made available or communicated to the buyer of all commodities, subject to reasonable variations and tolerances permitted by regulations of the Department of Internal Affairs, except for packages selling for five cents or less and containing less than one ounce liquid measure in the case of liquid commodities, or less than one ounce avoirdupois weight in the case of dry commodities.

The burden is on the seller either to communicate or make available the weight, measure or numerical count of the commodity sold or offered for sale.

Commodities such as hair pins, safety pins, bobby pins, or straight pins, attached to cards, are within the intent and definition of a "package," as clarified by Section 1 of the Act, since each card has attached to it or "contains" one or more than one unit of the commodity tied or bound together.

If such carded products were not considered as "packages," the seller would be under the duty of accompanying each purchase with a statement clearly indicating the weight, measure or numerical count, as held in Formal Opinion No. 547 of the Department of Justice; dated

June 11, 1946, or of counting, measuring or weighing the commodity in full view of the purchaser at the time of sale, as directed in Section 2.1 of the Commodities Act, 76 P. S. Section 242.1, which provides, as follows:

All commodities not considered as packages within the meaning of the act or labeled as to net contents at the time of sale, shall be counted, measured or weighed in full view of the purchaser at the time of sale, and on weighing or measuring devices as approved by the department and inspected as to accuracy by the several State, county and city inspectors of weights and measures; and statement of result of such count, measure or weight to be made to the purchaser by the person making the sale. (Italics ours.)

It is our opinion therefore, that commodities offered for sale and mounted on display cards so that they are visible and can be counted by the purchaser before sale, are within the definition of the word "package" as defined in Section 1 of the Commodities Act, the Act of July 24, 1913, P. L. 965, as amended, 76 P. S. § 241.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

RAYMOND C. MILLER,
Deputy Attorney General.

OPINION No. 587

Former State employees—Reinstatement—Independent contract for special technical services.

Upon the reinstatement of a former State employe who is receiving superannuation or retirement allowances, his or her annuity or allowances shall cease until subsequent retirement. Any department, board or commission of the Commonwealth may enter into an independent contract for the services of a former employe of the State who is receiving superannuation or retirement allowances provided the contract is for definite technical, professional or unique services, in a lump sum and for a definite period, without the discontinuance of superannuation or retirement allowances. The contracts should be made only with the approval of the Governor.

Harrisburg, Pa., September 29, 1948.

Honorable C. M. Morrison, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: We are in receipt of the request of the State Employees' Retirement Board for advice as to what action should be taken on the inquiry for a former State employe relative to an independent contract for special technical services with the Pennsylvania Turnpike Commission.

The facts of the situation are as follows:

On the twenty-first day of April, 1943, the employe retired as Engineer of Tests for the Pennsylvania Department of Highways, taking advantage of superannuation retirement, as provided by Section 13 of the Act of June 27, 1923, P. L. 858, as amended, 71 P. S. § 1743. On the fourteenth day of May, 1948, he made a request of the Retirement Board inquiring whether the Turnpike Commission could contract with him on a consulting basis and not require him to change his present status as a retired State employe, thereby permitting the continuance of his retirement allowance. (Employees of the Commission are members of the Retirement system.) The Board thereupon requested the former employe for additional information and on June 3, 1948, received a letter (part of which is quoted below) outlining the nature of his contract as follows:

* * * To contract with the Penna. Turnpike Com. for a lump sum, during a definite period, to act as Consulting Engineer to the Engineering Div. of the Commission advising them on (1) quality of materials to be used in construction, (2) on selection of soils for use in subgrades and embankments, (3) on design of mixes for concrete and bituminous pavements, and (4) other allied problems that may be encountered.

Stated in its briefest form, the question is: May a former State employe who has retired and is receiving superannuation retirement allowance, make an independent contract with a department, board or agency of the Commonwealth for technical or professional services and continue to receive superannuation allowances while so serving?

This department has issued several opinions, parts of which touch on this question, but owing to the various amendments of the law since these opinions have been rendered, they are of little value. The question, however, is of sufficient importance that we believe the whole body of the law pertaining to the reemployment or reinstatement of retired State employes receiving retirement allowances should be carefully examined. The various departments, boards and commissions whose employes are members of the State Employees' Retirement System should be properly apprised of the status, not only of

independent contractors who were former State employes, but also the employment of retired State employes who are receiving monthly allowances as provided by the act.

The roots of the answer to this question spring from the proviso (*italics below*) contained in subsection (2) of Section 11 of the Act of June 27, 1923, P. L. 858, as amended, 71 P. S. § 1741. In order, however, that a complete understanding may be had of the question, it is necessary to quote entirely subsections (1) and (2), of Section 11, which are as follows:

(1) Should a contributor, before reaching superannuation retirement age, by resignation or dismissal, or for any other reason than death or retirement upon disability under section twelve, or for superannuation under section thirteen, or by leave of absence without pay, cease to be a State employe, he or she shall be paid, on demand, from the fund created by this act, (a) the full amount of the accumulated deductions standing to his or her individual credit in the annuity savings account as of the termination of such service, or, in lieu thereof, should he or she so elect, (b) an annuity or a deferred annuity, beginning at superannuation retirement age, which shall be the actuarial equivalent of said accumulated deductions. His or her membership in the retirement association shall thereupon cease.

(2) Should a State employe, so separate from his or her service as State employe without retiring, return within ten years and restore to the State Employes' Retirement Fund, to the credit of the annuity savings account in such manner as may be agreed upon by the State employe and the retirement board, his or her accumulated deductions as they were at the time of his or her separation, the annuity rights forfeited by him or her at the time of separation from service shall be restored and his obligations as a member of the retirement association shall begin again; *but nothing contained in this clause shall limit the right of a State employe who has heretofore retired, or shall hereafter retire voluntarily or involuntarily to return to service as a State employe at any time, and to continue, from the time of reentry into State service, his rights as an original or new member as they existed at the time of retirement, and add to such rights by further service and by further payroll deductions. In any such case, his or her annuity or allowance shall cease upon reentry into State service until subsequent retirement.* (*Italics ours.*)

The portion of the foregoing provisions which we have italicized is the result of the amendment of the Act of 1923, *supra*, by the Act of June 3, 1933, P. L. 1463, § 2, 71 P. L. Section 1741. Prior to this time, it had been entirely possible for a retired State employe to return to State service on a per diem basis, and continue to receive

his or her retirement allowances. Indeed, the "Classification and Compensation System of Personnel Service" regulations, established by the Executive Board of the Commonwealth, effective September 1, 1933, contemplated such employment and provided:

When a person is retired for any cause and is re-employed, his salary under this classification, any other provision to the contrary notwithstanding, shall not exceed the difference between the regular annual salary for the position he occupies and the annual amount of retirement allowance payable.

This practice, therefore, continued and there are undoubtedly many instances of retired State employes having been reinstated on a per diem basis and at the same time receiving retirement allowances up to the present time.

In 1947, the legislature enlarged the definition of the term "State employe" provided by the amendatory Act of June 30, 1947, P. L. 1149, 71 P. S. § 1731:

The term "State employe" shall also include all State officers and employes regularly employed by the year or by the month at a fixed annual or monthly compensation when the General Assembly is not in session, but, who during a legislative session, instead of a fixed annual or monthly salary or compensation are paid upon a per diem basis or by a fixed salary or compensation from the legislative session.

An analysis of the sections hereinabove quoted admits of only the conclusion that a former State employe who is receiving retirement allowances and returns to State service shall relinquish his or her annuity or allowance until subsequent retirement and this is the case irrespective of whether the employe is reinstated upon a per diem or hourly basis or as a full time salaried employe.

This brings us to the question first stated, relative to an independent contractor. It may well be said as a broad general statement relative to employment of independent contractors, that the practice would lead inevitably to abuses which would be in effect a subterfuge and contrary to the provisions of the law. We believe, however, that the door should be left open to permit the Commonwealth to avail itself of necessary expert, technical, scientific or professional services which may not be obtained from other sources. The fact that the person with whom the Commonwealth wishes to contract is a retired State employe, receiving retirement allowances, should not preclude the Commonwealth from obtaining his or her services if they be special, necessary and of a technical or professional nature. Indeed, the former State employment of the contractor might make the services much more valuable. There is nothing in the law to prevent it. It is well known that the State Highway

Department has employed outside engineers to aid in the development of the State highway system. Engineers and technicians have been employed by independent contract for the development of the Schuylkill River Desilting Project. These are but several instances of the employment of independent contractors, and the budget office of the Commonwealth provides a separate classification whereby fees may be paid to independent contractors for services that are particular, unique, distinctive or unavailable elsewhere.

It is therefore, our opinion that: (1) Upon the reinstatement of a former State employe who is receiving superannuation or retirement allowances, his or her annuity or allowance shall cease until subsequent retirement, and

(2) Any department, board or commission of the Commonwealth may enter into an independent contract for the services of a former State employe who is receiving superannuation or retirement allowances provided the contract is for definite technical, professional or unique services, in a lump sum and for a definite period, without the discontinuance of superannuation or retirement allowances. In such cases, however, the contracts should be made only with the approval of the Governor.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

SAMUEL M. JACKSON,
Deputy Attorney General.

OPINION No. 588

State Council for the Blind—Responsibility for remedial eye care of the medically indigent school children of the Commonwealth.

The Department of Public Assistance is responsible for the medical and dental examinations, and the medical, dental and surgical treatment and care, as assistance, of the medically indigent and all other school children of the Commonwealth, and the State Council for the Blind is not responsible therefor, unless such school children are needy blind persons with impaired vision, and unless such medical treatment, surgical operations, eye glasses and other necessary aids or services, including transportation, are otherwise available.

Harrisburg, Pa., December 13, 1948.

Honorable Charlie R. Barber, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice is in receipt of your request for an opinion concerning the responsibility of the State Council for the Blind for remedial eye care of the medically indigent school children of the Commonwealth.

In order to carry out the provisions of the Act of July 7, 1947, P. L. 1440, with particular reference to subdivision (i), you request advise as follows:

1. Is the Pennsylvania State Council for the Blind totally responsible for the remedial eye care of the medically indigent school children of the Commonwealth of Pennsylvania?

2. Was it the intent of the 1947 Pennsylvania General Assembly that remedial eye care for the medically indigent school children of Pennsylvania be excluded from the provisions of the Act of July 5, 1947, P. L. 1301?

The Act of July 7, 1947, P. L. 1440, supra, further amends Section 2320 of The Administrative Code of 1929, the Act of April 9, 1929. P. L. 177, relating to the State Council for the Blind, subdivision (i) of which, 71 P. S. § 610, is as follows:

To furnish or make available medical treatment, surgical operations, eye glasses and other necessary aids or services, including transportation, *to needy blind persons or persons with impaired vision for the purpose of improving, conserving or restoring their vision.* These services and aids shall not be furnished unless they are otherwise unavailable, and in no case shall the total costs thereof exceed *two hundred fifty dollars (\$250) per person;* (Italics ours.)

It will be observed that the Act of July 7, 1947, P. L. 1440, supra, amends Section 2320 (i) of said Administrative Code of 1929, supra, by adding the word "conserving," to the purposes enumerated in that subdivision, and by increasing the total cost of the services to be furnished from \$100 to \$250 per person.

The Act of July 5, 1947, P. L. 1301, supra, amends the School Code, the Act of May 18, 1911, P. L. 309, as amended, Sections 1501-1516 of which, as amended, 24 P. S. § 1501 et seq., provided for the medical and dental examinations, and the medical, dental and surgical treatment of all children of school age of the Commonwealth.

Your request for advice raises the immediate question whether the provisions of the Act of July 7, 1947, P. L. 1440, supra, relating to the medical treatment, surgical operations, eye glasses and other necessary

aids of services to be made available to needy blind persons or persons with impaired vision contemplate total responsibility for the remedial eye care of all the medically indigent school children of the Commonwealth, under the provisions of the Act of July 5, 1947, P. L. 1301, *supra*, and related laws.

The health of school children is fully safeguarded by the provisions of the School Health Act, the Act of June 1, 1945, P. L. 1222, 24 P. S. § 1525.1 *et seq.*, and the School Code, the Act of May 18, 1911, P. L. 309, as amended, 24 P. S. § 1501 *et seq.*, and as amended by the Act of July 5, 1947, P. L. 1301, *supra*, 24 P. S. § 1216.2a *et seq.*

Section 1501.1 of the School Code, *supra*, as amended by the Act of June 1, 1945, P. L. 1226, 24 P. S. § 1501.1, provides that medical inspectors of school districts shall make sight and hearing tests of school children, outlines the methods therefor, and provides that the Superintendent of Public Instruction shall appoint a specialist for sight and hearing in his department, who shall assist medical inspectors in the several school districts in making sight and hearing tests of pupils of the public schools.

Section 1505 of the School Code, *supra*, as amended, repealed by Section 6 of the Act of July 5, 1947, P. L. 1301, *supra*, 24 P. S. § 1505, formerly required the medical inspectors carefully to test and examine all pupils in the public schools, giving special attention to defective sight, hearing, teeth, or other disabilities and defects.

Section 1503 of the School Code, *supra*, as amended, 24 P. S. § 1503, relating to school districts of the fourth class, provides for medical examination for all the pupils in the public schools by medical examiners, to be appointed by the Secretary of Health, at the expense of said department.

Section 1501 of the School Code, *supra*, as last amended by the Act of July 5, 1947, P. L. 1301, *supra*, 24 P. S. § 1501, relating to the school districts of the first, second or third class, provides for medical and dental examinations in accordance with the provisions of the School Health Act, *supra*, and the rules and regulations promulgated thereunder, as prescribed by the Secretary of Health; and further provides that where additional examination of the eyes is recommended by the medical examiners, and desired by the school boards, such additional examination may be made by ophthalmologists or optometrists.

Section 1515.1 of the School Code, *supra*, as amended by the Act of July 5, 1947, P. L. 1301, *supra*, 24 P. S. § 1512.2a, provides that if the record of the medical or dental examination of any child, examined under the School Health Act, *supra*, discloses a condition which re-

quires medical, dental or surgical treatment, the costs of such care will be provided by the Department of Public Assistance in the manner therein set forth, and is, in part, as follows:

*If the record of any medical or dental examination of any child, examined under the School Health Act, discloses a condition which requires medical, dental or surgical treatment and the parent or guardian states to the school authorities that he is financially unable to have a physician or dentist of his choice render such care, he shall be advised that the cost of such care will be provided if application is made to the appropriate county board of public assistance, which shall authorize payment for necessary medical, dental or surgical care as assistance, as defined in the standards, rules and regulations to be established by the Secretary of Public Assistance, in consultation with the Secretary of Health and the Superintendent of Public Instruction, and with the approval of the State Board of Public Assistance: * * * (Italics ours.)*

The act further authorizes the Department of Public Assistance to recover the amounts expended for such medical, dental or surgical care from the parent or guardian liable for the support of such school child, as provided in the support law.

It will be observed that the basis of the foregoing section of the School Code, as supplemented by the School Health Act, *supra*, as appears by the title, 24 P. S. § 1525.1, is that said act provides for the complete medical and dental examination "of all children of school age," of the Commonwealth.

In Formal Opinion No. 576, dated February 4, 1948, addressed to the Secretary of Public Assistance, it was stated, *inter alia*, as follows:

* * * with respect to those children who are dependents of a county institution district under the County Institution District Law, the Act of June 24, 1937, P. L. 2017, as amended, 62 P. S. Section 2201 et seq., and whose records of medical or dental examination under the School Health Act, the Act of June 1, 1945, P. L. 1222, 24 P. S. Section 1525.1 et seq., disclose conditions requiring medical, dental or surgical treatment, the cost of the same is payable by the Commonwealth, from the appropriation made to the Department of Public Assistance, upon the authorization of the appropriate county board of public assistance in accordance with the standards, rules and regulations made under, and the provisions of Section 5 of Act No. 522, approved July 5, 1947, * * *

An examination of the aforesaid opinion fails to disclose that remedial eye care for medically indigent school children is excluded from the provisions of the School Health Act, *supra*, and related laws.

The School Health Program which provides medical and dental examinations for school children is not inconsistent, nor to be confused, with the functions of the State Council for the Blind.

Under Section 2320 of The Administrative Code of 1929, *supra*, as amended by Section 1 of the Act of July 7, 1947, P. L. 1440, *supra*, 71 P. S. § 610, the State Council for the Blind has the power and duty, *inter alia*, as follows:

(a) To formulate a general policy and program *for the prevention of blindness, and for the improvement of the condition of the blind* in this Commonwealth. * * *

* * * * *

(c) * * * to prevent the loss of sight, *in alleviating the conditions of blind persons, and persons of impaired vision*, in extending and improving the education, advisement, training, placement, and conservation of the blind, and in promoting their personal, economic, social and civic well-being;

(d) * * * to procure an enactment of legislation regarding *the prevention of blindness, the improvement of the blind*, or the regulation of private agencies for the care of the blind;

(e) To collect, * * * information in regard to *blind persons and persons of impaired vision* in this Commonwealth, including their present physical and mental condition, the causes of blindness, and the possibilities of improvement of vision, their financial status and earning capacity, their capacity for education and vocational training, and any other relevant information looking toward the improvement of their condition;

(f) To refer cases of *blind persons*, or problems in relation to the blind, or prevention of blindness, to such agencies, * * *

* * * * *

(i) To furnish or make available medical treatment, surgical operations, eye glasses and other necessary aids or services, including transportation, to *needy blind persons or persons with impaired vision* for the purpose of improving or restoring their vision. *These services and aids shall not be furnished unless they are otherwise unavailable*, and in no case shall the total cost thereof exceed one hundred dollars (\$100) per person; (Italics ours.)

From the foregoing, it is obvious that the intent and purpose of the act was the prevention of blindness and the restoration of vision.

There is nothing in the quoted language which imposes upon the State Council for the Blind the responsibility for remedial eye care of all the medically indigent school children of the Commonwealth; nor the power and duty of providing eye examinations for school

children, as required by the School Health Act and related laws. Had the legislature intended such result, it could have manifested its intent in clear and unmistakable language.

We are informed that the majority of school children who require eye examinations and services, have impaired vision by reason of simple refractive errors. Under the provisions of Section 2320 (i) of The Administrative Code of 1929, *supra*, services are to be furnished only to needy blind persons or persons with impaired vision; however, persons who have simple refractive errors, but who, on the basis of visual acuity with best correction, have normal vision, cannot be classified as visually handicapped persons, or persons with impaired vision. The need for such services, indicated in said section, and the responsibility therefor, are not embraced within the foregoing provisions of the law governing the State Council for the Blind.

For the same reasons, the services enumerated in Section 2320 (i), *supra*, of The Administrative Code of 1929, which are furnished to needy blind persons or persons with impaired vision are not available to school children required to be examined under the School Health Act, and there is no authority, under said section, for the extension of services to the average seeing medically indigent school child.

It may be conceded that if a person possesses no congenital anomalies of the eye, no muscle imbalance involvements, no injury to the eye, or no pathological change in the eye, and simple refractive correction will give this person normal vision, such person does not possess impaired vision; and that most of the school children having ocular defects could not be considered children with impaired vision; therefore, only a minute number of the group might be considered for services by the State Council for the Blind, and even this number could not be considered at all, since the services are otherwise available through the Department of Public Assistance, under the provisions of the Act of July 5, 1947, P. L. 1301, *supra*.

It is significant that the services provided in subdivision (1) for the purpose of improving the economic conditions of the industrially blind, are to be made available to residents of the Commonwealth who have reached their sixteenth birthday, and who have a thirty percent or greater loss in visual functioning, and who are suffering from a static permanent employment handicap by reason of this loss of visual functioning. This language, obviously, was not intended to include school children.

Section 2320 (i) of The Administrative Code of 1929, *supra*, as amended by the Act of July 7, 1947, P. L. 1440, *supra*, provides that the total cost of the aids and services to be furnished to needy blind

persons or persons with impaired vision shall not exceed \$250 per person. While it may be conceded that this amount would not be sufficient in all cases, nevertheless, it must be apparent that the legislature did not intend that this amount should be spent upon that portion of over one and one half million school children in the Commonwealth who were medically indigent, and in need of eye care.

Were it possible to construe Section 2320 of The Administrative Code of 1929, *supra*, as originally enacted, to include medically indigent school children, any such intent of the legislature must have been superseded by the acts hereinbefore cited, in which repeated references are made to all children of school age of the Commonwealth.

It is significant to note that Section 2320 (i) of The Administrative Code of 1929, *supra*, provides that the enumerated aids and services shall not be furnished by the State Council for the Blind, "unless they are otherwise unavailable." It is obvious that such services are available through the Department of Public Assistance.

Similarly, under Section 2320 (k) (the Act of July 7, 1947, P. L. 1440, *supra*), the State Council for the Blind is not required to supply, where otherwise available, home instruction and training for educable blind persons.

The boards of school directors are authorized to establish, equip, furnish and maintain schools for blind for the education of persons between the ages of six and twenty-one years, by Section 401 of the School Code, as amended, *supra*, 24 P. S. § 331.

In addition, Section 2320 (1) makes the services enumerated available to residents of the Commonwealth who have reached their sixteenth birthday.

The foregoing legislation indicates the intention of the legislature to relieve the State Council for the Blind from the responsibility for services to children of school ages, since the services mentioned are otherwise available.

While Section 2320 (i), *supra*, also requires the State Council for the Blind to furnish eye glasses, if otherwise unavailable, the State Council is not obliged to furnish glasses to school children, because they are otherwise available.

We have been furnished with a copy of the School Medical Assistance Program, developed in accord with the provisions of Act No. 522 (the Act of July 5, 1947, P. L. 1301, *supra*) of the General Assembly of 1947 by the Secretary of Public Assistance in consultation with the Superintendent of Public Instruction and the

Secretary of Health and with the approval of the State Board of Public Assistance" (parentheses ours).

The Act of July 5, 1947, P. L. 1301, *supra*, fixes upon the Department of Public Assistance the responsibility for medical, dental and surgical treatment and necessary medical, dental and surgical care. This responsibility is recognized on page 3, Section 3760 of the School Medical Assistance Program, *supra*, wherein it is stated that the Act of July 5, 1947, P. L. 1301, *supra*, provides such treatment for school children who are referred to school authorities for the correction of defects discovered in school health examinations.

Under this authority, the Department of Public Assistance, in addition to furnishing extractions, fillings, X-rays, dental surgery and repairs of dentures, also furnishes dentures at prices set forth on page 18 of the School Medical Assistance Program, *supra*.

Since the Department of Public Assistance is obligated to furnish dentures for the correction of defects discovered in school health examinations, the same rules and regulations apply to the furnishing of eye glasses. This responsibility is fully recognized by the statement contained on page 4, Section 3761, paragraph 3, of the School Medical Assistance Program, *supra*, as follows:

* * * For school children, who are receiving assistance, treatment which is outside the scope of the Department's regular Medical Assistance program, will be charged against the earmarked \$500,000. (Appropriated by the Act of July 5, 1947, P. L. 1301, *supra*).

The foregoing rules and regulations of the Department of Public Assistance are based upon the statutory authority conferred by the Public Assistance Law, *supra*, Section 2, of which, as amended, 62 P. S. Section 2502, provides, *inter alia*, as follows:

"Assistance" means assistance in money, goods, shelter, medical care, work, relief or services * * * for indigent persons who reside in Pennsylvania and need assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living, * * * The word, assistance, shall be construed to include pensions for those blind persons who are entitled to pensions, * * *

It cannot be too strongly emphasized that the services which the State Council for the Blind is obligated to furnish, in addition to the imposed condition that they must be otherwise unavailable, are required to be furnished only to needy blind persons or persons with impaired vision.

As has been herein stated, this language excludes average seeing medically indigent school children, who have simple refractive errors,

but who, on the basis of visual acuity with best correction, may be restored to normal vision.

That there is no manifest obligation upon the State Council for the Blind for the remedial eye care of medically indigent school children is indicated by Section 1511 of the School Code, as amended, *supra*, 24 P. S. § 1511, which provides:

Any school district may provide for the care and treatment of defective eyes, ears, and teeth of all pupils of its public schools.

The Public Assistance Law of June 24, 1937, P. L. 2051, as amended by the Act of July 24, 1941, P. L. 473, relating to the powers and duties of the Department of Public Assistance, provides in Section 4 thereof, 62 P. S. § 2504, *inter alia*, as follows:

General Powers and Duties of Department of Public Assistance.—The Department of Public Assistance shall have the power, and its duties shall be:

* * * * *

(1) To take measures not inconsistent with the purposes of this act and, with the approval of the State Board of Public Assistance, to promote the rehabilitation of persons receiving assistance and to help them to become independent of public support, including measures designed to effect the fullest cooperation with other public agencies empowered by law to provide vocational training, rehabilitative and similar services.

It is evident that the intent of the legislature is that the responsibility for furnishing the necessary services to these persons must rest with the Department of Public Assistance, if that department is to effect the fullest cooperation with other public agencies empowered by law to provide vocational training, rehabilitative and similar services, under the provisions of Section 4 of the Act of July 24, 1941, P. L. 473, *supra*.

Were it the intent of the legislature to make the State Council for the Blind responsible for correction of ocular defects of all medically indigent school children, it has signally failed to manifest such intention. Without such authority, it would be useless for the State Council for the Blind to seek the necessary funds from the legislature. Since the legislature has indicated its intention to furnish such funds to the Department of Public Assistance, it is obvious that the interests of such children will be best conserved by allowing the Department of Public Assistance to remain entirely responsible for the care of ocular defects of all medically indigent school children under the provisions of the Act of July 5, 1947, P. L. 1301, *supra*.

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

1. The State Council for the Blind is not responsible for the remedial eye care of the medically indigent school children of the Commonwealth of Pennsylvania, under the Act of July 7, 1947, P. L. 1440, which further amends Section 2320 of The Administrative Code of 1929, the Act of April 9, 1929, P. L. 177, 71 P. S. § 610, relating to the powers and duties of the State Council for the Blind.

2. It was not the intent of the 1947 Session of the General Assembly that remedial eye care for the medically indigent school children of the Commonwealth should be excluded from the scope of the meaning of the provisions of the Act of July 5, 1947, P. L. 1301, which amends the School Code, the Act of May 18, 1911, P. L. 309, as amended, Sections 1501-1516 of which, as amended, 24 P. S. § 1501 et seq., provide for the medical and dental examinations, and the medical, dental or surgical treatment and care, as assistance, of all the pupils of the public schools of the Commonwealth.

3. The Department of Public Assistance is responsible, under the foregoing acts, for the medical and dental examinations, and the medical, dental and surgical treatment and care, as assistance, of the medically indigent and all other school children of the Commonwealth, and the State Council for the Blind is not responsible therefor, unless such school children are needy blind persons or persons with impaired vision, and unless such medical treatment, surgical operations, eye glasses and other necessary aids or services, including transportation, are otherwise unavailable.

Very truly yours,

DEPARTMENT OF JUSTICE,

T. McKEEN CHIDSEY,
Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

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