Commonwealth of Pennsylvania

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

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FOR THE YEARS

1951 and 1952

ROBERT E. WOODSIDE, Attorney General

OFFICIAL OPINIONS
1951-1952

OPINION No. 621

Decedents' estates—Transfer inheritance tax—Escheatable funds—Refund.

The transfer inheritance tax imposed by the Act of June 20, 1919, P. L. 521, as amended, should not be collected by registers of wills on escheatable funds going to the Commonwealth either by escheat under the Act of May 2, 1889, P. L. 66, as amended, or without escheat under section 1314 of The Fiscal Code of April 9, 1929, P. L. 343, or of an heir under section 3 of the Intestate Act of April 24, 1947, P. L. 80, but refunds of such funds to persons or corporations are subject to inheritance tax at the rate fixed by law.

Harrisburg, Pa., January 15, 1951.

Honorable Otto F. Messner, Secretary of Revenue, Harrisburg, Pennsylvania.

Sir: You have requested this department to advise you if Registers of Wills should collect inheritance tax on escheatable funds coming to the Commonwealth from decedents' estates.

Escheatable funds of decedents come to the Commonwealth either by escheat under the Act of May 2, 1889, P. L. 66, as amended, 27 P. S. § 41 et seq., or without escheat under Section 1314 of The Fiscal Code of 1929, the Act of April 9, 1929, P. L. 343, 72 P. S. § 1314, or as an heir under Section 3 of the Intestate Act of 1947, the Act of April 24, 1947, P. L. 80, 20 P. S. § 1.3. In each case the funds initially come to the Commonwealth, although in any case they may be subject to refund. Where the funds are had under the Escheat Act of 1889, the adjudication may be opened within three years under Section 22, 27 P. S. § 91, and the funds paid to the rightful owner. Where the Commonwealth takes under the Intestate Act of 1947, refund may be had within seven years under § 13, 20 P. S. § 1.13. Where the Commonwealth takes under The Fiscal Code, supra, refund may be made at any time under Section 504, 72 P. S. § 504; Rhodes and Hannebauer Estates, 71 D. & C. 330 (1950); Davis Estate, 365 Pa. 605 (1950).

Section 1 of the Act of June 20, 1919, P. L. 521, as last amended by the Act of May 11, 1949, P. L. 1083, 72 P. S. § 2301, reads, in part, as follows:

> A tax shall be, and is hereby, imposed upon the transfer of any property, real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases:
>
> (a) When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth, whether the property be situated within this Commonwealth or elsewhere.

It is to be noted that the inheritance tax is imposed only where there is a transfer of property "to persons or corporations."

That such language in a statute does not include the Commonwealth of Pennsylvania is made abundantly clear by Deputy Attorney General Keitel in Formal Opinion No. 304, dated November 13, 1939, to the Pennsylvania Liquor Control Board, 1939-1940 Op. Atty. Gen. 122, where many cases to this effect are cited, starting with Commonwealth v. Yeakel, 1 Woodward 143, 144 (1863), where the rule is stated as follows:

> * * * In a general law passed in order to regulate the rights and duties of citizens, the sovereign is not embraced unless included in the express terms of the statute. * * *

Until then, escheatable funds are about to pass into the hands of individuals or corporations, under the refund provisions of the acts above indicated, there is no tax due.

We are of the opinion that inheritance tax should not be collected by Registers of Wills on escheatable funds going to the Commonwealth, either by escheat, without escheat or as an heir. Refund of such funds to persons or corporations are, however, subject to inheritance tax at the rate fixed by law.

Yours very truly.

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

RALPH B. UMSTED,
Deputy Attorney General.

OPINION No. 622

Veterans—Bonus—Deceased veteran—"Minor child"—Adopted child—Stepchild—Illegitimate child.

The term "surviving minor child or surviving minor children" as used in section 6 of the World War II Veterans' Compensation Act of June 11, 1947, P. L. 565, defining persons to whom bonus payments shall be made on behalf of a deceased veteran, means natural child or children or adopted child or children of the deceased veteran at the time of his death, but does not include stepchildren or illegitimate children.

Harrisburg, Pa., January 17, 1951.

Honorable Clyde E. Rankin, Director, World War II Veterans' Compensation Bureau, Department of Military Affairs, Harrisburg, Pennsylvania.

Sir: You request advice on the interpretation of the words "surviving *minor child* or surviving *minor children*" as contained in Section 6 of the World War II Veterans' Compensation Act, being the Act of June 11, 1947, P. L. 565, 51 P. S. § 455.1 et seq. You state several claims have been presented to you and it becomes necessary for you to decide whether the following classes of children are entitled to bonus payments:

(1) Adopted children.

(2) Stepchildren.

(3) Illegitimate children.

The act does not define "child" or "children." It is, therefore, incumbent upon us to interpret said words.

Section 6 of the World War II Veterans' Compensation Act, supra, provides in part as follows:

> Section 6. Persons to Whom Payments Shall be Made in Case of Death or Mental Incapacity. Whenever, prior to the date of distribution of compensation * * * payment shall be made by the Adjutant General * * *
>
> * * *
>
> (b) In the case of death to the following persons in the order named: * * * or surviving minor child, or surviving minor children, share and share alike, * * *

Section 7 of said act also provides in part as follows:

> Section 7. Applicant to Designate Beneficiaries.— * * * If all persons, designated herein as entitled to compensation

> shall die before payment thereof, the right to the compensation shall cease and determine. * * *

The term "child" or "children" as used in statutes generally, has different meanings depending upon the nature of the legislation.

In addition to determining the interpretation of the word "child" or "children" it is necessary that we also fix the date when the interpretation of said words apply. The World War II Veterans' Compensation Act, supra, was passed in 1947 but was conditioned upon passage of a constitutional amendment which was not approved by the voters until 1949.

Many cases have arisen with veterans who were killed during actual hostilities in World War II (1941-1945). In many instances children born during said period have since been adopted by new parents. In some instances minor children have passed the age of majority before payment of the bonus will be made; and, in still other instances minor children have died prior to passage of the "Bonus Act."

In Busser v. Snyder, 282 Pa. 440 (1925), the Supreme Court of Pennsylvania at page 449 said:

> * * * Pensions or gratuities * * * are in the nature of compensation for a special and highly honored service to the State, implying the idea of a moral obligation on the part of the government; * * *

Such moral obligation should not be violated by the sovereign through indirection.

Courts of other states hold that a bonus payment is to be treated as different from compensation in the ordinary sense. In State ex rel. Atwood v. Johnson, 176 N. W. 224, 170 Wis. 251 (1920), the Supreme Court of Wisconsin in upholding the constitutionality of the State's Educational Bonus Law said at page 225 of its opinion:

> Nor is the gift here made an extra compensation for services rendered, though it must be admitted that a pure gratuity is sometimes called extra compensation. * * * A gift like this rests upon no such foundation. Its purpose is not to make the soldier financially whole, but to express gratitude and stimulate love of country in those that give, in those that receive, and in the public at large, to the end that an impressive object lesson in patriotism may be engraved in the hearts of all.

Since the object of the World War II Veterans' Compensation Act, supra, was to give a gratuity to patriotic veterans, the act should be

interpreted liberally. In our opinion, beneficiaries named in the act who are to receive the monies upon the death of the veteran should not be technically limited if an interpretation of the whole act indicates an intention to benefit them.

It is our opinion that the act described the class "surviving minor child or surviving minor children" is a descriptive form. These beneficiaries are to be entitled to the bonus payment if, at the time of the death of the veteran as set out in section 6, they were legally a "surviving minor child or surviving minor children" of the veteran. There is no need, in our opinion, that they continue to remain a "surviving minor child or surviving minor children" until the time of payment. However, the fair interpretation of section 7 does require such beneficiaries to be alive at the time of the payment since the act specifically indicates the heirs of the beneficiaries are not to be entitled to any of its benefits. The term "child" is a word of purchase and not a word of limitation and has been so determined in the case of Reiff v. Peto, 290 Pa. 508 (1927).

We turn now to your first inquiry on whether an "adopted child or children" are included within the meaning of the act.

The Statutory Construction Act, being the Act of May 28, 1937, P. L. 1019, 46 P. S. § 501 et seq., provides at section 601:

> § 601 Definition
>
> The following words and phrases when used in any law hereafter enacted, * * * shall have the meanings ascribed to them in this section:
>
> * * *
>
> (21) "Child" or "children" includes children by birth or adoption.

Obviously, by applying the Statutory Construction Act, supra, all natural minor children at the date of the veteran's death, as well as legally adopted minor children at the date of his death are included in the class.

Turning to your next inquiry—what is the status of stepchildren? In the absence of manifest intention in the statute to the contrary, stepchildren are *not* generally included within the term "child."

The Statutory Construction Act, supra, limits such an interpretation since the World War II Veterans' Compensation Act, supra, was passed after 1937.

In several workmen's compensation cases arising in Pennsylvania, stepchildren have been held to be entitled to the benefits of said act. See Shimkus v. Phila. & Reading C. & I. Co., 280 Pa. 88 (1924), and Decker v. Mohawk Mining Co., 265 Pa. 508 (1920), wherein stepchildren who were receiving compensation under the Workmen's Compensation Act, being the Act of June 2, 1915, P. L. 736, as amended, 77 P. S. §§ 1 et seq., because of the death of their natural father were entitled to benefits through the death of their stepfather upon whom they were dependent. Section 307 of the Workmen's Compensation Act, supra, relating to awards of children of deceased employes specifically contains the following language:

> The terms "child" and "children" *shall* include stepchildren and adopted children and children to whom he stood in loco parentis, if members of decedent's household at the time of his death, * * * (Italics ours)

In the case of Morris et al. v. Glen Alden Coal Co., 136 Pa. Superior Ct. 132 (1939), the court in interpreting this section stated at page 135 as follows:

> * * * When the legislature decided, in its wisdom, to enlarge one of the classes of persons normally dependent upon a deceased employee, and described in the opening paragraph of the section as "child or children," by admitting thereto "stepchildren and adopted children and children to whom he stood in loco parentis," it had the right, and obviously intended, to stipulate that none of such "children" should be entitled to compensation unless he or she was actually living with the decedent at the time of his death. Only those so situated would be deprived of maintenance by reason thereof.

The legislature must have realized that there were many families in in which boys and girls as stepchildren lived and were, for all practical purposes, members of the household. Their failure to specifically enlarge the term in the present World War II Veterans' Compensation Act, supra, is indicative that they did not intend such an interpretation to apply to this type of benefit.

We turn now to your inquiry if illegitimate children are included within the meaning of the term "child."

Generally, the word "child" as used in a statute, deed or will means *legitimate* child only. This is especially true when we consider that the term "child" in its ordinary legal sense implies the idea of a marriage relation and not one obtained by being born out of lawful wedlock. The legal construction generally placed upon the word

"children" is confined to legitimate children. See 1 Bouvier's Dictionary, 3rd Revised Edition, page 479. It has been held that a gift to children in a will includes legitimate children only, unless it appears that illegitimate children were clearly intended. See Appel v. Byers, 98 Pa. 479. In Overseers v. Overseers, 176 Pa. 116 (1896), which dealt with the construction of poor statutes relating to the indigent, it was held " 'child' in legislative enactments, as in legal parlance generally, means only and exclusively a legitimate child."

In the case of Gierak v. L. and W. B. Coal Co., 101 Pa. Superior Ct. 397 (1931), it was held a posthumous, illegitimate child, is not within the contemplation of Section 307 of the Workmen's Compensation Act, supra.

We are not unmindful that for purposes of benefits under the Federal Veterans Administration Act the term "child" in many instances includes an illegitimate as well as stepchild. See Vets. Reg. No. 10, par. VI (as amended July 13, 1943, chap. 233, § 7, 57 Stat. 556), 38 CFR, § 2.1042 (9 Fed. Reg. 7835); 38 CFR, 1943 Supp § 5.2515(b), adopting by reference § 5.2514(c). The same definition was adopted in 38 USC, § 735 (December 14, 1944, chap. 581, § 6, 58 Stat. 801). See also Am Vet Section 38.

A distinction might be pointed out between the administration of the Federal Veterans Administration Act and the State Bonus Act in that the Federal Government attempts to supervise, over a period of years, the payment of funds to the various child beneficiaries. Agencies of the Federal Veterans Administration exist in every State of the union and they can readily check upon the proper application of monies paid to such beneficiaries. The serious problem of administration of our act arises in attempting to administer broad interpretations on identity of beneficiaries who may reside now in remote portions of the world. This may have been a specific reason why the legislature did not enlarge the definition of the word "child" or "children" to include illegitimate child or children. The weight of authority under various Workmen's Compensation acts indicates that illegitimate children are not interpreted within the meaning of "child." See 24 A. L. R. 565.

It is our opinion, that the term "surviving minor child or surviving minor children" means natural child or children or adopted child or children of the deceased veteran at the time of his death and that such persons are entitled to bonus payments under Section 6 of the World War II Veterans' Compensation Act, supra, providing they are alive at the time payment is made.

It is our further opinion, that stepchildren or illegitimate children are not entitled to the benefits of the World War II Veterans' Compensation Act, supra.

Very truly yours,

DEPARTMENT OF JUSTICE,

CHARLES J. MARGIOTTI,
Attorney General.

H. ALBERT LEHRMAN,
Deputy Attorney General.

OPINION No. 623

Foods and beverages—Milk—Use of formula method for establishing price for class 1 milk—Necessity for hearing before adopting formula—Right to apply for revision—Necessity for hearing before applying prices in accordance with formula.

1. The Pennsylvania Milk Commission has legal authority to adopt a formula method of pricing for class 1 milk, providing such formula at all times complies with the requisites of price fixing outlined in section 801 of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, as amended, but it is not obliged to use such a method.

2. The Pennsylvania Milk Control Commission may not adopt a formula method of establishing a price for class 1 milk until it has first afforded interested parties the right to be heard, nor can its action in so doing abrogate the right of the commission or of any interested party to apply for a new hearing to set prices by formula or otherwise, but it is not necessary to hold a hearing before applying prices determined by a formula which has been placed in effect after hearing.

Harrisburg, Pa., May 24, 1951.

The Milk Control Commission, Telegraph Building, Harrisburg, Pennsylvania.

Gentlemen: You requested this department to advise you as to the legality of adopting a formula method of establishing a price for Class 1 milk under the Pennsylvania Milk Control Law, the Act of April 28, 1937, P. L. 417 as amended, 31 P. S. § 700j-101 et seq.

In this connection, no question is raised as to whether the Commission should or must fix prices by the formula method, but only whether it can do so within the body of the law.

In order fully to understand the problem, it should be stated that since the earliest days of the control of milk prices by states and later by the Federal government there have been two methods in force by which the exact dollar price at any given time to be paid to a producer was fixed. The first and simplest of these methods was to fix an exact dollar price for a class of milk. For example, Class 1 milk (for human consumption as milk) would be priced f.o.b Philadelphia at $4.84 per cwt.

The other method was to insert in the order a formula which, by applying the factors of the formula, could at any given moment be translated into an exact dollar price. These formulae in the case of Class 2 and Class 3 milk were usually based upon a combination of factors. These factors included such items as the open market quotations for a 40 quart can of 40% butter-fat content sweet cream, the average quotations for hot roller processed dried skimmed milk, the market price of 92 score butter at New York, etc. The practice has been for the Commission to, from time to time, send out notices of exactly what the dollar price was under these formulae.

Section 801 of the Milk Control Law deals with "requisites of orders fixing price of milk." The first four paragraphs of section 801 read:

> Requisites of Orders Fixing Price of Milk.—The commission shall ascertain, after a hearing in which all interested (parties) persons shall be given reasonable opportunity to be heard, the logical and reasonable milk marketing areas within the Commonwealth, shall describe the territorial extent thereof, shall designate such areas by name or number, and shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein.
>
> The commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer, (and) which return shall not be less than the cost of production and a reasonable profit to the producer, and a reasonable return to the milk dealer or handler. In ascertaining such returns, the commission shall utilize a cross-section representative of the average or normally efficient producers and dealers or handlers in the area.
>
> The commission shall file at its office, with each order issued, a general statement in writing of the findings of fact in support of, and the reasons for such order.

> The commission may, upon its own motion or upon application in writing, from time to time, alter, revise or amend an official order defining milk marketing areas or fixing prices to be charged or paid for milk. Before making, revising or amending any order defining milk marketing areas or fixing prices to be charged or paid for milk, the commission shall hold a hearing, after giving reasonable (notice thereof) opportunity to be heard to interested persons, of whom the commission has notice, and, in the case of any order affecting the public, after giving reasonable notice thereof to the public in such newspaper or newspapers as, in the judgment of the commission, shall afford sufficient notice and publicity: Provided, however, That (upon) after such hearing, there shall be a further hearing or conference before the commission on any proposed order, and notice of such further hearing or conference shall be given to the parties represented and heard at the previous hearing. Upon application in writing from a person aggrieved by an order of the commission hereunder, filed within fifteen (15) days after the issuance of the order complained of, or upon its own motion, the commission may, within twenty (20) days after the effective date of such order, issue an order revising or amending such order without a further hearing, if such revision or amendment is based on the record of the hearing held prior to the issuance of such order.

It is the opinion of this department that the Milk Control Commission has legal authority to adopt a formula method of pricing for Class 1 milk *providing* such formula at all times complies with the requisites of price fixing outlined in Section 801 above. That is to say that providing the formula applicable to a given marketing area, at any given time, establishes a price which is (a) most beneficial to the public interest, (b) best for the milk industry of the Commonwealth, (c) insures a sufficient quantity of pure and wholsesome milk to the inhabitants, (d) considers all conditions affecting the milk industry, (e) yields a reasonable return (not less than costs of production and reasonable profit) to the producer, and (f) a reasonable return to the milk dealer or handler.

It should be understood that the power to set the price of Class 1 milk under a formula method in no way obligates the Commission to use this method. It is merely one method that the Commission may use providing such a method complies with all other requirements embodied in section 801 supra.

It should also be understood that the voluntary establishment of a formula pricing, subject to a hearing, could not abrogate the rights of the Commission or any interested person, as defined under paragraph 4 of section 801, to apply for a new hearing to set prices by

formula or otherwise. The right of hearing, as set forth in the said section remains inviolate; first, to determine the formula, second, to alter, revise or amend the formula, third, to apply for a new hearing to set prices for a new formula or otherwise, as above stated, and fourth, if necessary, to suspend the formula.

This, however, does not mean that the hearing must be held before a price determined by formula is applied. To so hold, would render the formula unnecessary. What it does mean is that, under section 801 supra, the Commission may adopt and use a formula in fixing the price of milk, but such formula could not be made the exclusive test, and consideration will still have to be given to special facts or conditions which arise at different times or in different areas.

We are impressed with the statement made by the report of the Philadelphia Class 1 Milk Price Commission, issued in June 1949, excerpts of which are as follows:

> The Committee recommends a combination of hearings and a formula to determine Class 1 prices * * *. It also recommends that Class 1 prices be adjusted seasonably as an incentive for more uniform production than has existed during recent years.
>
> The formula would serve two purposes. The first of these would be as a mechanism for making price changes promptly, whenever needed, between two regularly scheduled hearings. The second would be to indicate prices to be considered at hearings.
>
> The hearings would be used to determine the level of the price at which the formula would start, to check the formula price at regularly scheduled intervals and to alter the formula as experience in its use and more information makes possible a better selection and weighting of formula components.

The word "price" is defined in Section 103 of the act which reads:

> "Price" includes the amount paid or to be paid and the proceeds returned or to be returned, whether the transaction be one of purchase, sale, consignment, sale or return, accounting, or otherwise.

There is no magic in the above definition. Said price may be set by formula or otherwise providing section 801 is complied with. In sections 301 and 302, the legislature granted to the Commission broad plenary powers:

> Regulation of Milk Industry.—The commission is hereby declared to be the instrumentality of the Commonwealth for

> the purpose of administering the provisions of this act and to execute the legislative intent herein expressed, and it is hereby vested with power to supervise, investigate and regulate the entire milk industry of this Commonwealth, including the production, transportation, disposal, manufacture, processing, storage, distribution, delivery, handling, bailment, brokerage, consignment, purchase and sale of milk and milk products in this Commonwealth, and including the establishment of reasonable trade practices, systems of production control and marketing area committees in connection therewith: Provided, however, That nothing contained in this act shall be construed to alter, amend or repeal any of the laws of this Commonwealth relating to the regulation of public utilities, or to the public health or to the prevention of fraud and deception, except as herein otherwise specifically provided. (As amended 1941, July 24, P. L. 443.)
>
> Specific Powers not Impairment of General Powers.—The operation and effect of any provision of this act conferring a general power upon the commission shall not be impaired or qualified by the granting to the commission by this act of a specific power or powers.

The legislature authorized and directed the Commission to act as the regulatory agency of the entire milk industry. The above two sections make it quite clear that the legislature intended to give and did give the Commission complete and absolute regulatory powers within the milk industry.

The constitutionality of Milk Control legislation was tested in the case of Rohrer v. Milk Control Board, 322 Pa. 257 (1936). This case was followed by Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15 (1938). The Colteryahn Case has been since that time a sage guide to the Milk Control Commission in the methods of administering the law. The case grew out of an appeal from Official Order No. A-18 concerning the Pittsburgh Milk Marketing Area. In this order, the Commission had divided milk into the following classes: Class 1—milk for human consumption as milk; Class 1A—milk used in cream for human consumption; Class 2—milk utilized for manufacturing purposes; Class 3—milk used in butter; Class 4 through 7—milk used for various other manufacturing purposes.

In this Official General Order a formula (in contradistinction to a dollar and cent per hundredweight price) was used for the pricing of all classes with the exception of Class 1. These formulae in the various classes differed in their nomenclature but in any case the entire formula procedure for price setting came before the Pennsyl-

vania Supreme Court. Mr. Chief Justice Kephart, specifically used the word "formula" when he said, at page 33:

> The Commission's reports or statements accompanying its orders discussed the different classifications of milk, and the prices for class 1 and 1-A, with a certain price *formula* for other classes. It did not set forth sufficiently the basis upon which these prices were fixed, except possibly for the market prices of the lower grades. Nor do we find in the evidence data upon which producers' return could be legally predicated. We assume that the various prices were fixed on the basis that all grades were interdependent, and upon inadequate information before the Commission as to the dealers' position. Without the assistance of the dealers in helping to solve this problem the Commission was no doubt embarrassed. We have read with interest its report on this feature, and it must be understood in the future that neither dealers nor producers can withhold from the Commission any books, record or assistance which will aid it in reasonable price-fixing.

There can be no doubt but that Justice Kephart was cognizant and appreciative of the fact that the Commission had used a "formula" in setting and determining all prices other than Class 1. The Supreme Court remanded the entire record to the Commission for taking of further evidence but in no place in the entire exhaustive opinion did Judge Kephart find fault with the formula method of price fixing. Since this time the Commission has regularly in all milk marketing areas used a formula method of pricing for other than Class 1 milk. There is nothing distinctive in Class 1 (in contradistinction to the lower classes) to prevent the use of a formula, providing said formula complies at all times with the other requirements of the Milk Control Law.

Section 802 of the Pennsylvania Milk Control Law deals, inter alia, with "retail prices". In this section, the legislature *directs* the Commission to fix minimum wholesale and retail prices and *authorizes* the Commission to fix maximum wholesale and retail prices. The Commission could without undue hardship set minimum retail prices, on a formula basis or on a dollar basis, with alternative retail schedules moving up or down with the fluctuations of the formula. The Commission has in times past carried on a "seasonal pricing program". By this program the Commission, subsequent to a single hearing, has issued one Official General Order covering two, three or four quarters of a succeeding twelve calendar months. One schedule or prices in the order designated the wholesale price for January, February, and March, another schedule fixed the prices for April, May and June,

etc. There is no reason why this same system could not be carried further in a joint arrangement between wholesale and retail formula pricing.

In conclusion, it seems clear that the legislature empowered the Commission to use a formula pricing plan, but also vested in the Commission the power to use its judgment as to the merit of establishing prices by a formula.

We are therefore of the opinion, that the Milk Control Commission has legal authority for adopting a formula method of establishing a price for Class 1 milk, in accordance with the provisions of the Pennsylvania Milk Control Law, provided, of course, it has first afforded all interested parties the right to be heard.

The hearings thus afforded should consider all questions and items—

(a) most beneficial to the public interest;

(b) best for the milk industry;

(c) a guaranty of a sufficient quantity of pure and wholesome milk to the inhabitants;

(d) conditioned upon everything affecting the milk industry;

(e) capable of yielding a reasonable return to the producer;

(f) capable of yielding a reasonable return to the milk dealer or handler.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

SAMUEL M. JACKSON,
Deputy Attorney General.

OPINION No. 624

Courts—Jurisdiction—Juvenile courts—Mentally defective ward—Consent to elective surgical operation—Protests of natural parent—Juvenile Court Law of June 2, 1933.

Since, under the Juvenile Court Law of June 2, 1933, P. L. 1433, the juvenile court with regard to its wards stands in the place of the parent from whose

custody the ward has been removed, that court may properly authorize an elective surgical operation to be performed upon a minor, mentally handicapped ward who has been duly committed by that court to the custody of a State institution for mental defectives, in the interest of his physical welfare and improvement, notwithstanding the lack of consent and protests of the natural parent.

Harrisburg, Pa., October 8, 1951.

Honorable William C. Brown, Secretary of Welfare, Harrisburg, Pennsylvania.

Sir: The Department of Justice is in receipt of your letter requesting us to clarify the extent of authority and jurisdiction of a juvenile court, acting as a substitute parent, of its ward where the natural parents are still alive and available.

You state that your question arises out of the case of a twenty year-old mental defective of moron grade who was declared a dependent child by the Juvenile Court of Bedford County, housed in the County Home, and subsequently committed to Polk State School for care and training as a mental defective; and that it developed that the patient has an inguinal hernia which is of opportune condition for surgical correction and repair, in order to restore the patient's physical condition and ability, but that this condition of hernia is as yet uncomplicated, and not a matter of life and death, but only a matter of restoring physical health to its best possible condition.

You further state that the father, who has been deprived of the custody of his son, and who protested the admission of his son to the institution, absolutely refused to grant permission for the operation; and that the juvenile court, on being approached in behalf of the boy, stated:

> This boy is a ward of the Juvenile Court. If you think he should have an operation for hernia, I see no reason why you need the father's consent. You may consider this letter as authority to proceed.

You further inquire whether the juvenile court, whose ward is a minor, and mentally handicapped, and an inmate duly committed by that court to the custody of a State institution for mental defectives, may consent and authorize an elective surgical operation to be performed upon its ward in the interest of his physical welfare and improvement, notwithstanding the lack of consent and the protest of the parents; and if so, whether the superintendent and an attending surgeon are relieved of any and all liability in any subsequent legal action instituted by the parent.

It is an elementary principle of the law of torts that any touching of the person whatever, without his consent, constitutes a battery. Clearly, a surgical operation would fall within this definition; the following statement appears in Bonner v. Moran, 126 F. 2d 121, 122 (1941):

> We think there can be no doubt that a surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied consent by the patient; or, stated somewhat differently, the surgeon is liable in damages if the operation is unauthorized. * * *

It is likewise well-settled that should the person involved be a minor or otherwise incapable of giving consent, the consent of his parent or guardian should be obtained. Section 59 of the Restatement of Torts is as follows:

> (1) If a person whose interest is invaded is at the time by reason of his youth or defective mental condition, whether permanent or temporary, incapable of understanding or appreciating the consequences of the invasion, the assent of such a person to the invasion is not effective as a consent thereto.
>
> (2) The assent of a parent, guardian or other person standing in like relation to one described in Subsection (1) has the same effect as though given by the person whose interest is invaded, if such parent, guardian or other person has the power to consent to the invasion.

The principal question presented is whether such consent may be given by a person or agency other than the parent.

By definition, the adjudication as a dependent child constitutes a finding that the parent is incapable of exercising the ordinary parental functions. The term "dependent child" is thus defined in Section 1 (6) of The Juvenile Court Law, the Act of June 2, 1933, P. L. 1433, 11 P. S. § 243 as follows:

> (6) The words "dependent child" include:
>
> (a) A child who is homeless or destitute, or without proper support or care, through no fault of his or her parent, guardian, custodian or legal representative;
>
> (b) A child who lacks proper care by reason of the mental or physical condition of the parent, guardian, custodian or legal representative.

In such case, the State provides for the performance of certain parental functions; the following statement appears in Commonwealth ex rel. Children's Aid Society v. Gard et ux., Appellants, 162 Pa. Superior Ct. 415, 421 (1948):

> * * * the Commonwealth is the paramount guardian (parens patriae) and will look to the interests of the minor and to the interests which the sovereign has in the proper care and training of children upon which it is to depend for its future existence. * * *

Accordingly, through the medium of The Juvenile Court Law, supra, this duty is delegated to the juvenile court. The juvenile court, with regard to its wards, stands in the place of the parent from whose custody the ward has been removed. It is stated in Commonwealth v. Jordan, Appellant, 136 Pa. Superior Ct. 242, 251 (1939) inter alia, as follows:

> Every statute which is designed to give protection, care and training to children, as a needed *substitute for parental authority* and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. (Italics ours.)

Since the court's authority is substituted for that of the parent, the court's consent should be sufficient to authorize the operation herein mentioned.

We are of the opinion, therefore, that the juvenile court, whose ward is a minor, mentally handicapped, and an inmate duly committed by that court to the custody of a State institution for mental defectives may consent, and authorize an elective surgical operation to be performed upon its ward in the interest of his physical welfare and improvement, notwithstanding the lack of consent and the protest of the parent.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROBERT E. WOODSIDE,
Attorney General.

ROBERT M. MOUNTENAY,
Assistant Deputy Attorney General.

H. J. WOODWARD,
Deputy Attorney General.

OPINION No. 625

Salaries—State Reporter—Assistant State Reporter.

The State Reporter shall receive only such salary as is provided by statute. As to the Assistant State Reporter, he should be paid as is indicated in this opinion.

Harrisburg, Pa., October 15, 1951.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg, Pennsylvania.

Sir: Reference is made to your request of February 26, 1951 regarding the salaries of the State Reporter and the Assistant State Reporter.

You call attention to the following facts: The Act of May 6, 1909, P. L. 433 provides for the payment to the reporter of the decisions of the Supreme Court, a salary in the sum of Five Thousand Dollars per annum, and to the Assistant Reporter, a salary of Three Thousand Dollars per annum. In the 1943 Session of the General Assembly Nine Thousand Six Hundred Dollars was appropriated in the General Appropriation Act for the payment of the salary of the Assistant Reporter. The Appropriation Act of 1949, Act No. 89-A, appropriated the sum of Ten Thousand Dollars for the payment of the salary of the Assistant Reporter and Fifteen Thousand Dollars for the payment of the salary of the State Reporter for the biennium. During the current biennium, these officials have submitted pay rolls at the rate of Five Thousand Dollars per annum, and Seven Thousand Five Hundred Dollars per annum which have been approved by your Bureau of Disbursements on the theory that the salaries were increased because of the appropriations in the 1949 Session of the General Assembly. A bill was introduced in 1949 by Senator Tallman, Senate Bill No. 324, Printer's No. 550, to amend the Act of May 6, 1909, P. L. 433, by fixing the salary of the Reporter at Seven Thousand Five Hundred Dollars per annum and the salary of the Assistant Reporter at Five Thousand Dollars per annum. This bill passed the Senate but was defeated in the House on final passage.

You ask whether the salaries of these officials remain as provided in the aforesaid Act of May 6, 1909, P. L. 433, or have they been increased by the Appropriation Act.

Our examination of the law reveals that Section 1 of the Act of June 12, 1878, P. L. 201, 17 P. S. § 1691, authorizes the Governor by

and with the consent of the Senate to appoint a reporter of the decisions of the Supreme Court for a term of five years. Section 6 of said act, 17 P. S. § 1699, fixes the salary of the reporter at Three Thousand Dollars.

Section 10 of said act, 17 P. S. Section 1705 reads:

> The state reporter shall receive no other compensation than is provided by this act, and all fees which are now payable to the state reporter shall be paid into the treasury of the Commonwealth.

The Act of June 24, 1895, P. L. 212, created the Superior Court, and Section 6 thereof provided for the decisions of the court to be reported by the State Reporter and authorized him to employ an assistant at a salary of not more than Two Thousand Dollars per year.

The General Assembly amended Section 6 by the Act of May 6, 1909, P. L. 433, Section 1 of which reads:

> From and after the twenty-first day of March, Anno Domini one thousand nine hundred and ten, the salary of the reporter of the decisions of the Supreme Court shall be five thousand dollars per annum.

Section 2 of the Act of 1909, supra, increased the salary of the assistant reporter from and after March 21, 1910 to Three Thousand Dollars per annum.

An examination of the appropriation acts covering the years from 1911 to 1943 reveals that the General Assembly appropriated the sum of Ten Thousand Dollars for the Reporter and Six Thousand Dollars for the Assistant Reporter for these bienniums.

In 1943, the General Assembly appropriated Nine Thousand Six Hundred Dollars for the payment of the salary of the Assistant State Reporter for the biennium, but it did not by statute change the salary.

In 1945, the General Assembly appropriated Ten Thousand Dollars for the State Reporter, and Nine Thousand Six Hundred Dollars for the Assistant State Reporter for two years, but did not by statute amend the salaries of either Reporter or Assistant.

In 1949, the General Assembly appropriated Fifteen Thousand Dollars for the payment of the salary of the State Reporter and Ten Thousand Dollars for the payment of the salary of the Assistant

State Reporter. A bill was introduced in the same year, known as Senate Bill No. 324, to amend the Act of May 6, 1909, P. L. 433, by increasing the salaries of the State Reporter and the Assistant State Reporter. The bill passed the Senate but was defeated in the House.

In 1951, the General Assembly passed House Bill No. 962, which became Act No. 283, having been approved by the Governor under date of August 16, 1951. This act fixed the salary of the State Reporter of the decisions of the Supreme Court at an amount not exceeding Seven Thousand Five Hundred Dollars, and a State reporter of the decisions of the Superior Court not exceeding Seven Thousand Five Hundred Dollars, with the provision that the Supreme Court and the Superior Court shall have the power to appoint the same person as State Reporter, thus putting a ceiling of Fifteen Thousand Dollars on the salary of the State Reporter, if one person should report the decisions of both courts. This act repealed the Act of June 12, 1878, P. L. 201 and the Act of May 6, 1909, P. L. 433.

The general rule relating to interpretation of statutes relative to the compensation of public officials is set forth in 67 C.J.S. Section 93, p. 338, as follows:

> * * * Statutes relating to the compensation of public officers must be strictly construed in favor of the government, and an officer is entitled only to that which is clearly given. * * *

It should be noted that the language in the General Appropriation Act is: "* * * the following sums, or *so much thereof as may be necessary,* are hereby specifically appropriated from the General Fund in the State Treasury to the * * *". The underlined portion of this excerpt from the General Appropriation Act would negate any intention to increase salaries. On the contrary, see the many bills and laws introduced and passed in the legislature which do nothing but increase salaries.

Under date of August 18, 1927, in an Informal Opinion to the State Treasurer, Special Deputy Attorney General William A. Schnader, in answer to a question concerning the Pennsylvania State Police, advised the State Treasurer that he could lawfully pay less but not more than the statutory amount of the salary to which any state employe was entitled.

In the Appropriations Acts of 1929, at page 233, in reference to an item for the payment of the salary of the assistant clerk of the Senate

in the sum of Four Thousand Two Hundred Dollars, Governor Fisher said:

> For the payment of the salary of the assistant clerk of the Senate, for the time employed during the recess periods in the two years ending May thirty-first, one thousand nine hundred and thirty-one, the sum of four thousand two hundred dollars ($4,200).
>
> I approve this item in the amount of three thousand eight hundred ($3,800) dollars. I withhold my approval from the remainder of the item because I am advised by the Department of Justice that the amount approved is all that can lawfully be expended for this purpose, in view of the fact that the salary of the assistant clerk of the Senate is definitely fixed by a statute which has not been amended to provide for the payment of compensation at the rate provided by the above item.

On the same page, supra, with reference to an item for the payment of the salary of the assistant clerk of the House of Representatives in the sum of Four Thousand Two Hundred Dollars, the Governor said:

> I approve this item in the amount of three thousand six hundred ($3,600) dollars. I withhold my approval from the remainder of the item for the reason which caused me to reduce the preceding item.

Having in mind the fact that the legislature did by statute increase the salary of the State Reporter and his assistant, and defeated a later attempt to increase the salary, and finally in 1951 did, by statute, increase his salary, we conclude that the State Reporter and his assistant are entitled only to those salaries which have been provided by statute.

There is another question which enters into this discussion and that is the constitutional provision set forth in Article III, Section 13, of the Constitution of Pennsylvania, which reads as follows:

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

The first question which arises in connection with this phase of the situation is, whether the Court Reporter is a public officer. The Supreme Court of Pennsylvania has said, in Finley v. McNair, Appellant, et al., 317 Pa. 278 (1935), at page 281:

> * * * In determining whether a position is an office or an employment, it is generally said that the "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 in the proper performance of them some of the functions of government, the officer charged with them is clearly to be regarded as a public one": Richie v. Phila., supra, at 515. Other elements in the problem are whether the duties are designated by statute, whether the incumbent serves for a fixed period, acts under oath, gives a bond, and the source or character of the compensation received.

The following have been held to be officers:

Treasurer, third-class school district
Chief of Bureau of City Property
City Clerk, third-class city
Borough Solicitor
Inspector of Weights and Measures
Assistant Clerk, Orphans' Court
Collector of Delinquent Taxes
Assistant County Superintendent of Schools
Troop Captain, State Police
Chief Deputy Sheriff
Registration Commissioners.

The following have been held not to be officers:

Policemen
Township Policemen
Medical Inspector, third-class school district
Counsel for Board of Registration
Commissioners.

For citations, see Finley v. McNair, supra, at page 281.

The office of State Reporter was created by statute. The reporter is appointed by the Governor, by and with the consent of the Senate, he gets a commission for a period of five years, he gives a bond, he takes an oath prescribed by the Constitution, and a further oath as prescribed by statute, which is filed with the Secretary of the Commonwealth.

Applying the tests prescribed by the Supreme Court, we conclude that the State Reporter is a public officer.

Of course, what we have said here does not apply to the State Reporter on and after August 16, 1951, since by virtue of Act No. 283, approved August 16, 1951, effective immediately, the Act of June 1878, 12, P. L. 201, and other acts are repealed, and the appointing power was placed with the Supreme and Superior Courts, so that

the old office of State Reporter was abolished and a new one was created. This is true also of the Assistant Reporter.

The present State Reporter was first appointed on December 11, 1942, the Senate not then being in session. On March 31, 1943, he was reappointed and confirmed for a term of five years from that date. In 1949, when the General Assembly appropriated Fifteen Thousand Dollars for the State Reporter, he was serving a term of five years which commenced March 31, 1948, so that the alleged increase came within the prohibition of the constitutional amendment.

You also call attention to the fact that Section 2 of the Act of May 6, 1909, P. L. 433, provides for the payment to the Assistant Reporter of a salary of $3,000 per annum, and that this was unchanged until 1943 when the Assistant Reporter was paid $4,800 per annum. However, this salary was made up of his statutory salary of $3,000 and $1,800 as his compensation for assistance he rendered the State Reporter. This latter compensation is authorized in Section 2 of the Act of March 28, 1889, P. L. 22, 17 P. S. 1901. In fact, he was paid by two checks during the period from 1935 to 1942, and this procedure was authorized by this Department in a letter addressed to the Assistant Auditor General March 31, 1936. Later, as a matter of convenience, these two salaries were combined in one check, and so paid. This procedure continued until June 9, 1949, when his salary was paid at the rate of $5,000. You do not state whether the increase of $200 per annum was an increase of his statutory salary of $3,000 or an increase in compensation paid him for services rendered the State Reporter. In the latter event, it would have been legal; in the former event, illegal.

In view of the above, we are of the opinion, that the State Reporter shall receive only such salary as is provided by statute, and that you shall continue to withhold payment of his present salary until the amount of the overpayments to him have been liquidated.

As to the Assistant State Reporter, you may apply the law as we indicate herein.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROBERT E. WOODSIDE,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 626

Pennsylvania Tax Anticipation Notes, Series JT, dated November 29, 1951, maturing on May 29, 1952. Legal status.

Harrisburg, Pa., November 29, 1951.

Honorable John S. Fine, Governor
Honorable Weldon B. Heyburn, Auditor General
Honorable Charles R. Barber, State Treasurer

Gentlemen: We have your inquiry as to the legal status of the $58,000,000 Pennsylvania Tax Anticipation Notes, Series JT (hereinafter referred to as "Notes") dated November 29, 1951, maturing on May 29, 1952.

We have examined the proceeding relative to the issuance by the Commonwealth of Pennsylvania of tax anticipation notes, Series JT, to the amount of $58,000,000. This issue was authorized by the General Assembly of this Commonwealth by an act approved September 29, 1951, being Act No. 433 of the 1951 Session. With respect to the passage of this act, we have satisfied ourselves, by an examination of the journals of both Houses and the original records on file in the office of the Secretary of the Commonwealth, that said act was duly and properly enacted and approved by the Governor. We have made a like examination with respect to certain appropriation acts aggregating $177,500,000.

The constitutionality of the issuance of tax anticipation notes has been upheld by the Supreme Court of Pennsylvania in the case of Kelly v. Baldwin et al., 319 Pa., 53 (1935). Act No. 433, supra, is similar to the act held to be constitutional in Kelly v. Baldwin, supra, and we believe it to be constitutional.

The act provides, inter alia, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest on the notes during such fiscal biennium, and that so much of said revenues as may be necessary are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31

of the second fiscal year of any current biennium, and shall not bear interest in excess of 4½% per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the act and are in due legal form, and that all necessary action has been duly taken.

We have examined notes number one in the following denominations $50,000, $10,000 and $5,000 in bearer form and find that the same are duly and properly executed and conform with the form approved by the Governor, the Auditor General and the State Treasurer.

In conclusion we have no hesitation in advising you that the $58,000,000 notes of the Commonwealth of Pennsylvania, Series JT, dated November 29, 1951, maturing on May 29, 1952, constitute legal obligations payable by the Commonwealth of Pennsylvania from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1953 and are secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said General Fund during said biennial period.

The appropriation acts are appropriations made for the current biennium by the General Assembly for the general purposes of the fiscal biennium and are appropriations of amounts that exceed the amount of the notes by more than three times.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at the times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROBERT E. WOODSIDE,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

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TO THE PURCHASERS November 29, 1951

Re: $58,000,000 Commonwealth of Pennsylvania Tax Anticipation Notes, Series JT, dated November 29, 1951, maturing in six months on May 29, 1952, bearing interest at the rate of 1.35% per annum; principal and interest payable at The Philadelphia National Bank, Philadelphia, Pennsylvania.

DEAR SIRS:

We have examined in your behalf the proceedings relative to the authorization and issuance of $58,000,000 aggregate principal amount of Commonwealth of Pennsylvania Tax Anticipation Notes, Series JT, dated November 29, 1951 (hereinafter called the "Notes").

The Notes are authorized by and have been issued pursuant to Act No. 433 of the 1951 Session of the General Assembly of the Commonwealth of Pennsylvania, approved September 29, 1951 (hereinafter called the "Act"), and certain determinations made and resolutions adopted by the Governor, the Auditor General, and the State Treasurer, pursuant to authority vested in them by the Act.

The Act provides that when the General Assembly has provided revenues for the general purposes of any fiscal biennium and the Governor, the Auditor General, and the State Treasurer determine that such revenues will not be available in large part for the current and other expenses of the State government, as a result of which the collectible revenues may not be sufficient to meet the current and other

expenses of the State government for such biennium as they fall due, such officials are authorized and directed to borrow from time to time on the credit of the current revenues of such current biennium a sum or sums of money not exceeding in the aggregate one-third of the moneys appropriated for such biennium by the General Assembly for the general purposes of such fiscal biennium.

The Act also provides that loans made thereunder shall be evidenced by notes of the Commonwealth which are declared by the Act to be tax anticipation notes; that such notes shall mature not later than May 31 of the second year of the fiscal biennium in which they are issued; that such notes shall be issued from time to time for such total amounts, in such sums, and subject to such terms and conditions, rates of interest, not in excess of four and one-half per cent (4½%) per annum, and time of payment of interest as the Governor, the Auditor General, and the State Treasurer shall determine and direct; and that such notes shall be offered for sale to the highest and best bidder after due public advertisement and open competitive bidding on such terms and conditions as said officials shall direct. The Act also provides that the manner and character of advertising and times of advertising shall be prescribed by the same officials.

The Act provides that the proceeds from the negotiation of loans under its provisions shall be paid into the General Fund of the State Treasury and shall be used for the payment of appropriations made from such fund to defray the current and other expenses of the State Government for the current fiscal biennium.

The Act provides, in effect, that any notes issued under its provisions shall be secured by the current revenues levied and assessed for revenue purposes of every kind or character accruing to the General Fund of the State Treasury during the fiscal biennium in which the notes are issued, and that such current revenues shall be pledged for the payment of the principal and interest on such notes. The Act also provides that such notes shall be paid only out of such revenues; specifically appropriates so much thereof as may be necessary for the payment of the principal of and interest upon such notes; and provides that the Department of Revenue shall allocate such appropriated current revenues accruing to the General Fund of the State Treasury to the payment of the notes.

The Notes are the first issue of tax anticipation notes to be made in the present biennium.

We have examined:

(a) The relevant provisions of the Constitution of Pennsylvania;

(b) The original records on file in the offices of the Chief Clerk of the House of Representatives, of the Secretary of the Senate, and of the Secretary of the Commonwealth as to the enactment of the Act by the General Assembly and its approval by the Governor;

(c) The original records on file in the offices of the Chief Clerk of the House of Representatives, of the Secretary of the Senate, and of the Secretary of the Commonwealth as to the enactment by the Gen-

eral Assembly of the first, second, and third interim General Appropriation Bills Nos. 6A, 29A, and 52A, the three interim Appropriations for Public Assistance, being Appropriation Acts 7A, 27A, and 63A, and Appropriation Act No. 51A appropriating moneys to the Department of Property and Supplies for the payment of rentals to the General State Authority. The aggregate of the appropriations made by said Acts (hereinafter called the "Appropriation Acts") is $177,500,000;

(d) Signed copies of the Preambles and Resolutions of the Governor, the Auditor General and the State Treasurer, adopted in accordance with the authority vested in them by the Act, which Preambles and Resolutions, among other things, make determinations as to the revenues provided for the current fiscal biennium, the times at which they will be received, the estimated amount of the current expenses of the State government, the times at which they fall due, fix the amount to be borrowed, authorize the issuance of the Notes, determine the form and denominations thereof, fix the time of payment of interest, prescribe the times, manner, and character of the public advertisement for bids, direct the terms and conditions of the open competitive bidding for the Notes, pledge certain current revenues accruing to the General Fund of the State Treasury in the fiscal biennium ending May 31, 1953, and direct the application thereof to the sinking fund prior to the payment of current expenses, adopt the Public Invitation for Proposals, Form of Proposal, and Proposed Official Statement used in connection with the sale of the Notes, fix the rate of interest, award the Notes to the bidder making the highest and best bid, and adopt the Official Statement used in connection with the sale of the Notes;

(e) The Public Invitation for Proposals, proofs of publication thereof, the proposal of the successful bidders, the Proposed Official Statement, and the Official Statement issued in connection with the sale of the Notes;

(f) Signed copies of the letter of the Department of Revenue executed by the Secretary of Revenue allocating to the payment of the principal of and interest on the Notes so much of the current revenues as are necessary for the payment thereof, and directing the payment of such revenues into a sinking fund for the Notes, and the approvals of the Governor, the Auditor General and the State Treasurer, all of which fix the amounts payable into the sinking fund as follows:

December 31, 1951	$391,500
January 28, 1952	1,000,000
February 25, 1952	1,000,000
March 31, 1952	1,000,000
April 28, 1952	25,000,000
May 26, 1952	$30,000,000;

(g) A Certificate of The Philadelphia National Bank as Loan and Transfer Agent of the Commonwealth as to the execution, the countersignature of the Notes, the delivery thereof and the receipt of payment therefor; and the receipt of the State Treasurer for the proceeds

of the Notes in the amount of the accepted proposal, being not less than par and accrued interest, and his direction that the proceeds derived from the sale of the Notes shall be paid into the General Fund of the State Treasury and shall be used only for the payment of appropriations made from such fund to defray the current and other expenses of the State Government for the current fiscal biennium;

(h) A fully executed Note of each authorized denomination; and

(i) Such other statutes, certificates, affidavits, documents, decisions, and all other proceedings and matters which we have deemed relevant or necessary in connection with the authorization, issuance, public offering and sale of the Notes, as a basis for expressing the opinion hereinafter set forth.

We have also attended the settlement held this day, at which time the Notes in the denominations and numbered as follows:

$5,000, Nos. VI to V222, inclusive,
$10,000, Nos. X1 to X319, inclusive,
$50,000, Nos. L1 to L1074, inclusive,

dated as of November 29, 1951, in bearer form, calling for the payment of interest at the rate of 1.35% per annum, payable at maturity, were delivered to the purchasers against payments therefor.

In our opinion:

1. The Act is valid and constitutional.

2. Existing tax laws passed by the present and by previous Sessions of the General Assembly provide revenues for the general purposes of the present fiscal biennium.

3. The Governor, Auditor General, and State Treasurer have, pursuant to the authority conferred by the Act, duly and validly determined that such revenue will not be available in large part for the current and other expenses of the State government, and such officials have duly and validly determined that as a result thereof the collectible revenues may not be sufficient to defray the current and other expenses of the State government as they fall due.

4. The Act confers full and adequate legal power upon the Governor, the Auditor General, and the State Treasurer to issue and sell the Notes, and the Notes have been validly authorized, issued and sold pursuant to proper and appropriate action of those three officials, in accordance with the Act.

5. The Notes are obligations of the Commonwealth valid and binding in accordance with their terms, limited to repayment from the current revenues of every kind and character accruing to the

General Fund of the State Treasury in the fiscal biennium ending May 31, 1953. The Notes are not direct and general obligations of the Commonwealth and the full faith and credit of the Commonwealth has not been pledged for their repayment.

6. The issue and sale of the Notes is not prohibited by Section 4 of Article IX of the Constitution of the Commonwealth of Pennsylvania, as the Notes are not debts of the Commonwealth within the meaning and intent of the Constitution.

7. The Notes, and notes of any other series issued under the authority of the Act during the fiscal biennium, are equally and ratably secured by the current revenues of every kind and character accruing to the General Fund of the State Treasury during such fiscal biennium.

8. Pursuant to authority conferred by and the specific appropriation contained in the Act, the Department of Revenue has validly allocated to the payment of the Notes so much of the current revenues as is necessary for the payment of the principal of, and interest on, the Notes and directed that the payments be made into a sinking fund for the Notes at the times and in the amounts indicated on the face of the Notes.

9. The Governor, the Auditor General, and the State Treasurer and the Department of Revenue have validly pledged the revenues so allocated for the payment of the Notes.

10. The allocations of moneys accruing to the General Fund of the State Treasury, and pledged for the payment of the Notes, are payable into and must be set aside in the sinking fund for the Notes in the amounts and at the times specified prior to all other expenditures, debts and appropriations, including current expenses payable from the General Fund.

11. The Official Statement which has been referred to accurately describes the Act and properly provides other relevant information with respect thereto, and with respect to the fiscal powers and duties of the Governor, the Auditor General and the State Treasurer, except that we express no opinion as to the financial information, estimates and statistics contained therein, which were furnished by representatives of the Commonwealth.

12. The Appropriation Acts are appropriations made for the current biennium by the General Assembly for the general purposes of

the fiscal biennium and are appropriations of amounts that exceed the amount of the Notes by more than three times, and the principal amount of the Notes is, therefore, within every debt and other limit fixed by the Act and the other laws of the Commonwealth of Pennsylvania.

13. Interest on the Notes is not subject to present Federal income taxes under existing statutes.

14. Under the Act, the Notes are exempt from taxation for State and local purposes in Pennsylvania, but this exemption does not include succession or inheritance taxes.

15. Under the Fiduciaries Investment Act of 1949 (Act of May 26, 1949 P. L. 1828, as amended), the Notes are authorized investments for fiduciaries as defined in that Act, within the Commonwealth of Pennsylvania.

16. The Notes are legal investments in Pennsylvania for savings banks, banks and trust companies, and insurance companies.

Very truly yours,

FAIRFAX LEARY, JR.,
FOR SCHNADER, HARRISON, SEGAL & LEWIS.

OPINION No. 627

Judges—Salaries—State judges—Methods of payment—Computation.

1. All judges are paid an annual salary provided by statute for an official or fiscal year which begins on the first Monday of January, and extends to the first Monday of January in the following calendar year, which salary is payable in 12 equal installments.

2. Judges taking office in January of 1952 should receive as their first salary check one twelfth of the annual salary set for each by the Act of January 5, 1952, P. L. 1821, without reduction to reflect the fact that they take office on January 7th, instead of on January 1st.

3. Retiring judges are not entitled to any January salary by reason of the fact that the first Monday in January, which is the date of their retirement, may fall on a date later than January 1st, unless they were improperly paid when they took office; since if they were properly paid, their full annual salary would have been paid in 12 equal installments.

4. All judges in office on January 7, 1952, should be paid one twelfth of their annual salary, as increased by the Act of January 5, 1952, P. L. 1821, as their first

check for the fiscal year started January 7, 1952, and ended January 5, 1953: they should not be paid at the old rate for six or seven days and at a new rate for the balance of January.

5. If a judge leaves or assumes office on a date other than the first Monday of the year, he should be paid the proportionate share of his annual salary based on the number of days he serves in the official or fiscal year in which he assumes or leaves office: the practice of dividing the annual salary by 12 and then taking the number of days served in the calendar month over the total number of days in the month to get the percentage of a monthly pay, is erroneous and not according to law.

6. Judges should requisition monthly for one twelfth of their annual salaries due for an official year from the first Monday of January in one year to the first Monday of January in the following year.

Harrisburg, Pa., January 7, 1952.

Honorable Weldon B. Heyburn, Auditor General, Harrisburg, Pennsylvania.

Sir: Although the law relating to the salaries of judges has been settled by judicial decision since 1885, there remains considerable confusion concerning it. The practice of the Auditors General for many years has been to pay most, although not all, as though their salaries were payable on a current monthly basis. This is not in accordance with law and results in overpayment in some cases and underpayment in others of as much as $300.00.

As the Governor has signed a bill increasing the salaries of all of the judges of the Commonwealth effective January 7, 1952, and as on that date, a number of new judges will take office and others retire, I think it is important that an effort be made to pay judges in accordance with the law even though it may require a change in your bookkeeping methods and possibly some adjustments in the salaries being paid to judges now serving.

In Commonwealth ex rel. v. Niles et al., 2 Chester 442, 443, and 2 Lancaster 187, 188 (1884), President Judge Simonton of the Court of Common Pleas of Dauphin County decided, "that the annual salary attached to the judicial office is for an official, and not for a calendar, year." In that case it appeared that Judge Yerkes became a Judge of the 7th Judicial District, on January 7th, the first Monday of January, 1884. When he applied for the first installment of his salary it was refused him unless he would consent to a deduction of $66.66 paid his predecessor for the six days in January of 1884 prior to the first Monday.

The Court said that to withhold this sum was error and stated, "that the official year runs from the first Monday in January of one year to the first Monday in January of the next year, without regard to the day of the month on which the first Monday may occur in either year. . . . By 'annual salary' in this act must be intended the salary for the official year from the first Monday to the first Monday, whether this be a few days less or more than a calendar year."

Act No. 484, (Senate Bill No. 187, Printer's No. 736) which the Governor has just signed fixes the annual salaries to be paid to the various judges.

Section 11 of this Act provides that these salaries shall be paid monthly by warrant of the Auditor General.

This is a reenactment of a similar provision in many previous acts.

Under authority of the above case the annual salary referred to is the salary for the official and not the calendar year.

The rule for payment of judges is as follows:

All judges are paid an annual salary provided by statute for an official or fiscal year which begins on the first Monday of January and extends to the first Monday of January in the following calendar year. The annual salary is payable in twelve equal installments. It is to be noted that most official years will have 52 weeks or 364 days, but approximately every fifth official year will have 53 weeks or 371 days.

Applying the principles set forth in the above case the following rules should be followed:

1. Judges taking office in January of 1952 should receive as their first salary check one-twelfth (1/12) of the annual salary set for each in Act No. 484, supra. Their pay should not be reduced because they take office January 7th instead of January 1st.

2. Judges retiring January 7, 1952 should not be paid salary in addition to the 12th installment of their last annual salary (their December check). In other words, they are not entitled to salary for the six or seven days they serve in January. Many of these judges, however, may be entitled to adjustment in their salaries because they were improperly paid when they took office.

3. All judges now in office should receive a check for one-twelfth (1/12) of the *new* annual salary as their first check for the official or fiscal year which starts January 7, 1952 and ends January 5, 1953. They should not be paid at the old rate for six or seven days, and at the new rate for the balance of January.

4. If a judge leaves or assumes office on a date other than the first Monday of the year he should be paid the proportionate share of his annual salary based on the number of days he serves in the official or fiscal year in which he assumes or leaves office. The practice of dividing the annual salary by twelve and then taking the number of days served in the calendar month over the total number of days in the month to get the percentage of a monthly pay is erroneous and not according to law.

5. Judges should requisition monthly for one-twelfth (1/12) of their annual salaries due for an official year from the first Monday of January in one year to the first Monday of January in the following year.

You are accordingly advised to follow the above rules.

Yours very truly,

DEPARTMENT OF JUSTICE,
ROBERT E. WOODSIDE,
Attorney General.

OPINION No. 628

(Recalled—See Opinion No. 633)

OPINION No. 629

State Art Commission—Philadelphia Art Jury—Conflict of jurisdiction as to the approval of design of buildings to be constructed by the General State Authority:

The State Art Commission rather than the Philadelphia Art Jury has the authority to pass upon the design of all buildings to be constructed by the General State Authority within the limits of the City of Philadelphia when such provision is made in the architectural contracts for the buildings involved.

Harrisburg, Pa., April 18, 1952.

Honorable Alan D. Reynolds, Secretary of Property and Supplies, Harrisburg, Pennsylvania.

Sir: We have before us your request for an opinion as to whether a conflict of jurisdiction exists between the Philadelphia Art Jury and the State Art Commission as to the approval of the design of buildings to be constructed by the General State Authority on land owned by the Authority and situated within the City of Philadelphia.

You inform us that all of the architectural contracts of the General State Authority contain the following provision:

> Architect shall obtain all approvals of preliminary drawings of the following agencies: (1) Department of Labor and Industry, and (2) Department of Health to the extent these two Departments have jurisdiction; (3) State Art Commission, as to design; (4) the Requesting Agency; and (5) Department of Property and Supplies, furnishing each agency, upon request, with one copy of such drawings.

You further state that the Philadelphia Art Jury is of the opinion that it, rather than the State Art Commission, should approve the design.

Turning our attention first to the provisions of the act creating the Philadelphia Art Jury, the Act of June 25, 1919, P. L. 581, we find in Section 11 [e] thereof, 53 P. S. § 2945, the following:

> * * * The approval of the jury shall also be required in respect to all structures or fixtures belonging to any person or corporation which shall be erected upon, or extend over, any highway, stream, lake, square, park, or other public place within the city except as provided in this act. * * *

It is by virtue of this section that the Philadelphia Art Jury seeks to exercise jurisdiction.

It is axiomatic that a statute is not presumed to deprive the State of any right or prerogative unless the intention to do so is clearly mainfest either by express terms or necessary implication: Pennsylvania Turnpike Commission, Appellant, v. Smith et al., Appellants, 350 Pa. 355, 363 (1944).[1] This principle was given specific application

[1] See Culver v. Commonwealth, Appellant, 348 Pa. 472 (1944); Commonwealth of Pennsylvania, State Employes' Retirement System v. Dauphin County et al., Appellants, 335 Pa. 177 (1939); Pittsburgh, Appellant, v. Sterrett Subdistrict School, 204 Pa. 635 (1903); The County of Erie v. The City of Erie, 113 Pa. 360 (1886).

in Baker et al., Appellants, v. Kirschnek, et al., 317 Pa. 225 (1935), where a local act had prohibited the sale of liquor by any person in the Borough of Media. Nevertheless, the Supreme Court, on the basis of the rule of sovereign immunity, held that the prohibition did not apply to the Pennsylvania Liquor Control Board.

Nor does the fact that the General State Authority is an entity distinct from the State deprive it of the benefit of this presumption. Both Pennsylvania Turnpike Commission, Appellant, v. Smith et al., Appellants, supra, and Baker et al., Appellants, v. Kirschnek, et al., supra, applied the rule to State instrumentalities engaged in purely proprietary functions. Indeed, the applicability of the presumption to the General State Authority itself was definitely established in Marianelli, Appellant, v. General State Authority, 354 Pa. 515, 516 (1946),[2] where the Court stated that the Commonwealth is exempt from the provision of general statutes:

> * * * and that governmental agencies engaged as the Authority was, are likewise exempt: * * *

It must follow, therefore, that the General State Authority, being a State agency, is not subject to the provisions of the Act of 1919, supra, and, accordingly, the Philadelphia Art Jury has no jurisdiction over structures erected by the Authority.

However, the parties to the architectural contract for the building in question submitted themselves to the jurisdiction of the State Art Commission. Is this provision of the contract effectual?

There are several statutory provisions relative to the State Art Commission which we should consider in making this determination. The first is the Act of May 1, 1919, P. L. 103, 71 P. S. §§ 1671 et seq., creating the Commission and vesting in it generally the authority to approve or disapprove the design and location of all public buildings. Section 8, however, 71 P. S. § 1673, states that the provisions of the said act should not apply to cities of the first and second class.

When The Administrative Code, the Act of April 9, 1929, P. L. 177, was enacted, Sections 2408 and 2411 thereof, 71 P. S. §§ 638 and 641, supplemented the Act of May 1, 1919 P. L. 103, to provide that the State Art Commission should approve the exterior design of *all*

[2] This case involved the first General State Authority created by the Act of June 28, 1935, P. L. 452. The act establishing the present General State Authority, the Act of March 31, 1949, P. L. 372, as amended, 71 P. S. Section 1707.1, however, is not substantially different.

structures erected under the supervision of the Department of Property and Supplies. In addition, Section 2414 of The Administrative Code, supra, 71 P. S. § 644, generally reembodied the provisions of the Act of May 1, 1919, P. L. 103, but required the Commission to approve the design and proposed location of all public buildings regardless of whether they were to be built with State funds, except those within the cities of the first and second class.

We do not attempt by means of the foregoing to demonstrate that the State Art Commission has a statutory obligation to pass upon the design of all buildings erected by the General State Authority in Philadelphia. However, the above cited provisions do manifest that the State Art Commission does have the facilities to render this service.

Pursuant to the provisions of Section 501 of The Administrative Code, supra, 71 P. S. § 181, the various departments, boards and commissions of the State government are authorized to coordinate their services. This section reads:

> The several administrative departments, and the several independent administrative and departmental administrative boards and commissions, shall devise a practical and working basis for cooperation and coordination of work, eliminating, duplicating, and overlapping of functions, and shall, so far as practical, cooperate with each other in the use of employes, land, buildings, quarters, facilities, and equipment. * * *

While the General State Authority is not strictly speaking a department, board or commission as set forth above, nevertheless, it is a State agency.[3]

In view of this, section 501 should afford adequate authority for the General State Authority to delegate to the State Art Commission in the interest of eliminating duplication of functions, the duty to pass upon the design of the building in question. Particularly is this true inasmuch as all the parties involved have contractually agreed to this procedure and inasmuch as the Philadelphia Art Jury, having no jurisdiction in the premises, has no standing to object.

We are of the opinion that the State Art Commission rather than the Philadelphia Art Jury has the authority to pass upon the design of all buildings to be constructed by the General State Authority

[3] Marianelli, Appellant, v. General State Authority, supra.

within the limits of the City of Philadelphia when such provision is made in the architectural contracts for the buildings involved.

Very truly yours,

DEPARTMENT OF JUSTICE,
ROBERT E. WOODSIDE,
Attorney General.

OPINION No. 630

Veterans' Compensation—World War II—Death of applicant before check is cashed—Last living beneficiary—Act of June 11, 1947, P. L. 565.

Payment of the World War II Veterans' Compensation shall not be deemed to have been completed until the check issued in payment thereof has been received by the proper applicant and cashed by him in his lifetime. Accordingly, in those cases where the applicant has died before cashing the check, and he is the last living beneficiary designated under the act to receive the compensation, the right to the compensation shall cease and determine and no payment thereof should be made to any person claiming the same.

Harrisburg, Pa., April 30, 1952.

Honorable Frank A. Weber, Adjutant General, Harrisburg, Pennsylvania.

Sir: You have requested advice as to whether or not you should pay the World War II Veterans' Compensation in those cases where the applicant, who was the last remaining person designated by the act as entitled to receive said compensation, dies before cashing the check issued in payment of such compensation.

Section 7 of the Act of June 11, 1947, P. L. 565, 51 P. S. § 455.7, provides, in part, as follows:

> * * * If all persons, designated herein as entitled to compensation, shall die before payment thereof, the right to the compensation shall cease and determine. * * *

In view of this provision, the single question determinative of the problem before us is when payment of the compensation may be deemed to have been effected.

In its legal sense, "payment" may be defined as the discharge of an obligation by the delivery and acceptance of money, or of something equivalent to money: 40 Am. Jur., Payment, Section 2; 70 C. J. S., Payment, Section 1.

Under this definition, none of the actions on the part of the Veterans' Compensation Bureau before the delivery and receipt of the compensation check may be treated as constituting payment as they do not involve the delivery and acceptance of money or its equivalent. Consequently, in any case where the applicant has died before receipt of the compensation check, payment has not been made, and, if such applicant was the last living beneficiary designated under the act, the right to compensation shall cease and determine in accordance with section 7 of the act.

In those cases where the compensation check was received by the applicant before his death, but was not endorsed and cashed by him prior to his death, the question is controlled by whether or not such check shall be deemed to have constituted payment of the compensation.

The general rule is that the acceptance or receipt of a check constitutes only a conditional payment and does not become absolute until the check is finally honored: Wendkos v. Scranton Life Insurance Company, Appellant, 340 Pa. 550, 553, 17 A. 2d 895 (1941); S. A. Gerrard Company of Philadelphia, Appellant, v. Tradesmen's National Bank and Trust Company, 318 Pa. 100, 103, 177 Atl. 760 (1935); Wedmore v. McInnes, Appellant, 69 Pa. Superior Ct. 220 (1918).

In the case of Diskin, Appellant, v. Philadelphia Police Pension Fund Association, 367 Pa. 273, 80 A. 2d 850 (1951), the question involved was whether a deceased member of the association had received his first pension payment, which would have defeated the claim of his beneficiary for a return of his contributions. The member had received a check covering his first pension payment during his lifetime, but had neither endorsed nor cashed it prior to his death. The Supreme Court held the receipt of this check did not constitute a payment of the pension saying, at page 276:

> It is elementary law that, where a note, draft or check is received by a creditor from his debtor for an existing debt, the presumption is, in the absence of an agreement to the contrary, that it is received as conditional and not absolute payment, * * *

In an opinion of the Attorney General of the United States, 19 Ops. Atty. Gen. 1 (U. S.), (1887), a ruling was requested in a situation similar to that at hand. The question there posed was whether a pension check, received and endorsed by the pensioner, but not cashed

before his death, constituted a payment to the pensioner during his lifetime which would pass to his personal representative. The Attorney General stated at pages 2-4:

> * * * The question is thus reduced to, what is a payment to a pensioner in his life-time? In the absence of special contract the presumption is that the payment of an obligation shall be made in money. This presumption applies to a pensioner as well as to any one else. Till he gets his money or that which in law is its equivalent, he is not paid nor is the Government discharged. If he receives a check but never transfers it nor gets the check cashed he has not received his money; for a "banker's check is not money" (Chitty on Bills, 399). * * *
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> * * * * * * * * *
>
> It is therefore concluded that the receipt of a check by a pensioner, which he has only indorsed but which has not been transferred by him in his life-time, is not a payment but is only one step in the process of payment. * * *

We see no reason why the general rule should not be applied in the situation at hand. Therefore, until a veterans' compensation check is cashed by the applicant, payment has not been completed and, should the applicant die before cashing same, said payment has not become part of his estate and his personal representative or heirs should not be permitted to cash said check nor are they entitled to collect the compensation.

We believe that such a holding is entirely in keeping with the intention of the legislature manifested in providing for the payment of the World War II Veterans' Compensation. Section 6 of the Act of June 11, 1947, supra, 51 P. S. Section 455.6, provides, in part, as follows:

> Whenever, prior to the date of distribution of compensation under the provisions of this act, a veteran entitled thereto shall have died, * * * payment shall be made by the Adjutant General without proceedings in this Commonwealth:
>
> * * * * * * * * *
>
> (b) In the case of death to the following persons in the order named: Surviving unremarried widow, * * * or surviving minor child, or surviving minor children, share and share alike, or surviving mother or surviving father. * * *

We have seen that section 7 of the act provides that should all designated persons die before payment of the compensation the right to the compensation shall cease and determine.

The apparent intention expressed in these two sections is that where the veteran, whose service to his country and this Commonwealth is being rewarded, has died, this gratuitous payment is to be restricted to a limited group of persons, who, due to their close relationship to the deceased veteran, might rightfully receive his compensation *to be enjoyed in their lifetime.* It was not intended that the compensation should become part of the estate of a beneficiary to be subject to payment of his debts or to pass to his heirs or devisees who may not have been intimately related to the deceased veteran.

For the foregoing reasons, it is our opinion that the payment of the World War II Veterans' Compensation shall not be deemed to have been completed until the check issued in payment thereof has been received by a proper applicant and cashed by him in his lifetime. Accordingly, in those cases where the applicant has died before cashing such check, and he is the last living beneficiary designated under the act to receive the compensation, the right to the compensation shall cease and determine and you should make no payment thereof to any person claiming the same.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

ROBERT L. RUBENDALL,
Deputy Attorney General

OPINION No 631

School Districts—State reimbursement of rentals paid to a municipal authority—Limitations—School Code of 1949 as amended by Act of January 21, 1952, P. L. 2195.

State reinbursement to a school district on account of rentals paid by the district to a municipal authority is limited to that portion of such rentals which represent the cost of the building. The cost of the building includes (a) The cost of the site, the expense of excavation, grading and landscaping the site and of constructing roadways and walks thereon, and the architectural fees; (b) The expenses incurred by the authority *after* its formation, such as attorneys' fees, advertising, printing, and financing charges, providing such expenses are incurred for the particular building leased.

The cost of the building does not include the expenses incurred in the organization of the authority, such as attorneys' fees, advertising, printing and filing fees.

Harrisburg, Pa., May 7, 1952.

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

Sir: We are in receipt of your letter of February 5, 1952, requesting to be advised, in construing the provisions of clause (b) of Section 2511.1 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by Act No. 627, approved January 21, 1952, 24 P. S. § 25-2511.1, as to whether or not rentals used for the purpose of State reimbursement under this act may, in addition to amortizing the actual cost of the building structure and equipment, amortize the cost of such items as:

(a) Cost of the site
(b) Cost of excavating, grading and landscaping the site
(c) Cost of building roadways, walks, etc.
(d) Cost of architects
(e) Expenses, incurred in connection with the forming of the Municipality Authority such as attorneys' fees, advertising, printing, etc.

The pertinent part of Section 2511.1, supra, is as follows:

> (b) The Commonwealth shall also pay, commencing with the school year one thousand nine hundred fifty-one-one thousand nine hundred fifty-two (1951-1952) and annually in each school year thereafter, to each school district which shall have entered into an approved lease with a municipality authority or with a non-profit corporation for the rental of a school building or buildings or providing education equipment, an amount to be determined (1) by multiplying the school district's standard reimbursement fraction by fifty one-hundredths (50-100) and by the rental or share thereof paid by the school district during the prior school year under its lease with such municipality authority or non-profit corporation, or (2) if the district's standard reimbursement fraction is greater than five thousand nine hundred ninety-nine ten thousandths (.5999), by multiplying the standard reimbursement fraction by itself and by the annual rental or share thereof paid by the school district during the prior school year under its lease with such municipality authority or non-profit corporation. * * *

Safeguards on the expenditure of the State funds are provided for in the Public School Code, supra, in section 790, by providing that the school district shall have power to act only upon the written approval of the Department of Public Instruction; and in section 2511.1, supra, by providing that no payment shall be made to any school district

unless the lease with the municipality authority is approved by the Department of Public Instruction. In the exercise of that safeguard the Department of Public Instruction will only give approval after satisfactory proof has been made to it that the expenses incurred are reasonable and not extravagant, and that the project is within the building program as set forth by the department.

Referring to the preceding subsection of section 2511.1, supra, such rentals are to reimburse the school districts for costs on account of *"erecting or sharing in the erection of a building or buildings"*.

The purpose and intendment of Act No. 627, supra, is to provide State reimbursement to those school districts that enter into a contract with an "authority" wherein the school district "rents" from the authority a school building which the school district itself could not build because of the lack of funds or having reached its maximum indebtedness of legal debt limit.

In 9 Am. Jur., Buildings, Section 2, pages 198-199, in the definition of a building we have:

> * * * As used in statutes, the meaning of the word generally depends on the particular subject and its connection with other words and varies in practically every case. In construing such statutes, the intention and purpose of the legislature as manifested in the enactment must control. * * *

It is necessary to consider each item separately to determine whether or not that item comes within the meaning of building and the cost of the building.

(a) *Cost of the site*

In 12 C. J. S. Building, page 379, we have:

> Inasmuch as a structure must of necessity consist of certain integral parts, the term "building" must, of itself, be broad enough to comprehend any or all of such integral parts. * * *

In State ex rel. Post v. Board of Education of Clarksburg School Dist. et al., 76 S. E. 127 (W. Va. 1912), the Court said:

> * * * Act 1911, c. 70, allows the board to "borrow money and issue bonds for the purpose of building, completing, enlarging, repairing or furnishing schoolhouses." Does the word "schoolhouse," used in the statute, mean land, include necessary land? * * * When the statute says that the money

> may be used to build houses, it means that it may be used to acquire land for schoolhouses. Necessarily so. It is a necessary implication, if the words do not per se mean land, as here used. Commanded to build schoolhouses, it is an incidental power because indispensable to attain the end. You cannot build a schoolhouse without land on which to build it.
>
> In view of the law above stated, and in view of the purpose which must have been in the minds of the legislators who enacted the bond section, we hold that the word "schoolhouses" includes land for schoolhouses. * * *

In 9 C. J., page 684, under the definition of "Building" in footnote (g), we have:

> As including the land on which it stands.—(1) The term "building" includes the real estate on which it is situated, unless the general meaning of the terms is modified by the language of the context. Gidley v. Lovenberg, 35 Tex. Civ. A. 203, 209, 79 SW 831. * * *

Section 790 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by Act No. 627, approved January 21, 1952, 24 P. S. Section 7-790, provides:

> (1) To sell, lease, lend, grant or convey to such municipality authority, individually or jointly, with or without consideration, any lands, easements or rights in lands which may be deemed necessary for the project, together with any buildings, structures or improvements thereon erected, as well as furnishings and equipment used or useful in connection therewith.

Where land or land and buildings are transferred to the municipality authority without consideration it must be excluded from the determination of the rental.

Accordingly, it is our opinion that the building and the cost of the building includes the site and the cost of the site.

(b) *Cost of excavating, grading and landscaping the site*

In 12 C. J. S. Building, page 379, we have:

> Inasmuch as a structure must of necessity consist of certain integral parts, the term "building" must, of itself, be broad enough to comprehend any or all of such integral parts. * * *

In 9 C. J., page 684, under the definition of "Building" in footnote (f), we have:

> As including foundations and cellar.—(1) The word "building" necessarily embraces the foundation on which it rests; and the cellar, if there be one under the edifice, * * * If there be a cellar, the word building includes it unaffected by the idea of its height above the foundation." Benedict v. Ocean Ins. Co., 31 N. Y. 389, 394. * * *

In 18 Words and Phrases, pages 604-605, it is stated:

> "Grading" includes filling as well as cutting, and technically means the reducing the earth's surface to a given line fixed as the grade and may include filling or excavating or both. Louisville & N. R. Co. v. State, 193 S.W. 113, 137 Tenn. 341.
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> * * * * * *
>
> Grading includes cutting as well as filling. Technically, it is the reducing of the surface of the earth to a given line fixed by the city as the grade, and may involve filling or excavating, or both, as shall be necessary to accomplish that object. Ryan v. City of Dubuque, 83 N.W. 1073, 1074, 112 Iowa, 284, citing Smith v. Washington City, 61 U. S. (20 How.) 135, 15 L. Ed. 858.

Landscaping is the laying out of or changing grounds to produce picturesque effects.

The excavating, grading and landscaping of the site are an integral part of the building.

(c) *Cost of building roadways, walks, etc.*

The roadways, walks, etc., designed and planned to provide an ingress and egress to the building and around it so as to make the building accessible, are a part of the building although not in actual contact with the building.

We are of the opinion that roadways, walks, etc., are essential for the completion and convenient use of the building and are a part of it.

(d) *Cost of architects*

It is necessary to employ an architect to form and devise plans and designs and to draw up specifications for the building and to superintend its construction. Much depends on his expert knowledge and skill.

It necessarily follows that the cost of an architect is included in the cost of the building.

(e) *Expenses incurred in connection with the forming of the Municipality Authority such as attorneys' fees, advertising, printing, etc.*

Subsection (b) of Section 2511.1, supra, provides:

> * * * no payment shall be made to any school district on account of any lease entered into with any municipality authority * * * unless such lease is approved by the Department of Public Instruction * * *

The wording of this subsection specifically provides that the municipality authority must be in existence before the school district can enter into an approved lease with it. A municipality authority can only be created by virtue of the provisions of the Municipality Authorities Act of 1945, the Act of May 2, 1945, P. L. 382, as amended, 53 P. S. § 2900z-1 et seq.

The expenses of incorporating the municipal authority should not be included in determining the amount of rental to be paid by a school district to the municipal authority.

Obviously the more important question is that of expenses after the formation of the authority and whether there may be included the expenses of attorneys' fees, advertising, printing, etc. The "etc." includes the expense of a bond issue, including the fee of a firm of attorneys whose certificate renders the bonds salable.

The Municipality Authorities Act of 1945, supra, provides in section 5 that a municipal authority shall have the power—(i) to borrow money and issue bonds in respect to any project constructed under agreement by the authority; (n) to do all acts necessary or convenient for the promotion of its business and the general welfare of the authority to carry out the power granted to the authority.

Financing charges and legal fees are a necessary expense in any loan which the authority may secure for the purpose of erecting a school building which will be leased to a school district, and these expenses should be reimbursed to the authority as part of the rentals paid by the school district to the authority. Such expenses are regarded as a necessary part of a construction project in private business and they are equally necessary in the case of a project by an authority.

Nothing in the statute prohibits a municipal authority from including such expenses in the calculation of the rental.

We are of the opinion that the State reimbursement to a school district on account of rentals paid by the district to a municipal authority is limited to that portion of such rentals which represents the cost of the building.

The cost of the building includes:

(a) The cost of the site, the expense of excavating, grading and landscaping the site and of constructing roadways and walks thereon, and the architectural fees;

(b) The expenses incurred by the authority *after* its formation, such as attorneys' fees, advertising, printing, and financing charges, provided such expenses are incurred for the particular building leased.

The cost of the building does not include the expenses incurred in the organization of the authority, such as attorneys' fees, advertising, printing and filing fees.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

ELMER T. BOLLA,
Deputy Attorney General.

OPINION No. 632

Support Laws—Responsibility of district attorneys to prosecute—Public assistance cases—Cooperation of the Department of Public Assistance:

Under the Act of May 3, 1850, P. L. 654 district attorneys of the various counties have the primary legal authority and responsibility to prosecute support cases under the Support Laws, and the Department of Public Assistance, as heretofore, should in public assistance cases give the district attorneys of the various counties the cooperation necessary to enforce support orders under the support laws against legally responsible relatives to the end that self-dependency and the desire to be good citizens and useful to society will be encouraged in accordance with Section 1 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended.

Harrisburg, Pa., July 3, 1952.

Honorable Eleanor G. Evans, Secretary of Public Assistance, Harrisburg, Pennsylvania.

Madam: This department is in receipt of your communication requesting advice on the legal responsibility of district attorneys of the various counties of the Commonwealth of Pennsylvania to prosecute support cases under the Support Laws of the Commonwealth. You inform us that for some years there has been a difference of opinion among district attorneys on the question of their legal responsibility to bring proceedings under the Support Laws now on the statute books. In those counties, where the district attorney held that such proceedings were not his responsibility but were rather civil actions, the work of the Department of Public Assistance has been hampered.

The office of District Attorney was created by statute, the Act of May 3, 1850, P. L. 654, 16 P. S. § 1691 et seq. The district attorney, unlike the Attorney General who is "clothed with the powers and attributes which enveloped the attorneys general at common law" (see Commonwealth ex rel. Minerd et al., Appellants, v. Margiotti, 325 Pa. 17 (1936)), is limited by the provisions of the statute creating the office.

The duties of a district attorney, as provided for in Section 1 of the Act of May 3, 1850, P. L. 654, supra, 16 P. S. § 3431, are as follows:

> The officer so elected shall sign all bills of indictment, *and conduct in court all criminal and other prosecutions in the name of the commonwealth, or when the state is a party,* which arise in the county for which he is elected, *and perform all the duties which now by law are to be performed by deputy attorney generals,* and receive the same fees or emoluments of office: * * * (Italics ours)

Note should be made of the fact that the district attorney thus becomes the chief law enforcement officer in the county.

The Act of May 3, 1850, P. L. 654, supra, creating the office of district attorney and defining his duties, was well interpreted in an excellent and comprehensive opinion by Brown, J., in Rotan's Petition, 23 Dist. R. 110 (1914). In this case the district attorney and the city solicitor both claimed to have the authority to prosecute support cases. The Support and Desertion Laws were reviewed and

considered and the court on the basis of the act of 1850, creating the office of district attorney, placed the responsibility of prosecuting support cases commenced by petition on the district attorney, as follows (pages 111-112):

> The Acts of March 31, 1812, 5 Sm. Laws, 391, and June 13, 1836, P. L. 539, originally vested the right to sue deserting husbands, etc., in the Guardians or Overseers of the Poor. In fact, the first act was passed for the purpose of creating the Board of the Guardians of the Poor, while the suit to be brought by them against a non-supporting husband, under certain circumstances, was but incidental thereto. The Act of June 13, 1836, P. L. 539, made the warrant returnable to the Court of Quarter Sessions. Under both of these acts, the City Solicitor appeared for his own clients, the "Guardians of the Poor." When the Act of April 13, 1867, P. L. 78, was passed, to the effect that any alderman, justice of the peace, etc., could issue a warrant for a deserting husband, etc., upon the information of any person, which should be returnable to the Court of Quarter Sessions, a radical departure was effected in the method of procedure in such cases. It then became the duty of the District Attorney to prosecute these cases, and not that of the City Solicitor. Especially was this so in view of the provisions of the Act of May 3, 1850, P. L. 654, creating the office of District Attorney. The language referred to is as follows: "The officer so elected (District Attorney) shall sign all bills of indictment and conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected."
>
> * * * * * * *
>
> In other words, by the very nature of the previous acts of assembly, by the abolition of the Board of the Guardians of the Poor, by the doing away with preliminary hearings (thus making the Act of April 9, 1872, P. L. 1004, nugatory), it became necessary for the legislature to indicate who should take charge of this class of cases. It did this by directing that the District Attorney should carry out the duties imposed upon his office by the Act of 1850.

There is no question as to the responsibility of the district attorney to prosecute support cases brought under Sections 731 and 733 of The Penal Code, the Act of June 24, 1939, P. L. 872, as amended, 18 P. S. §§ 4731 and 4733.

See Commonwealth v. Widmeyer, 31 Del. 213 (1942), in which the court differentiates between the two sections of the Code, namely, section 731 which provides primarily for punishment of the deserting husband, and section 733 which provides for protection and maintenance of wives and children by the securing of support.

The Support Law, the Act of June 24, 1937, P. L. 2045, as amended, 62 P. S. § 1971 et seq., though it provides for commencement of action by petition, is more comparable to section 733 of The Penal Code, supra, since it provides for maintenance and support of husbands, wives, children and parents by legally responsible relatives.

Section 3 of The Support Law, as amended, supra, 62 P. S. § 1973, provides in part as follows:

> (a) The husband, wife, child, father and mother of every indigent person, whether a public charge or not, shall, if of sufficient financial ability, care for and maintain, or financially assist, such indigent person at such rate as the court of the county, where such indigent person resides shall order or direct.
>
> (b) The courts shall have power to hear, determine and make orders and decrees in such cases upon the petition of such indigent person, or of any other person or any public body or public agency having any interest in the care, maintenance or assistance of such indigent person;

In the enforcement of this Support Law of 1937, the State is the party concerned, and the district attorney represents the State in the various counties. In performing his duties under the act of 1850, supra, and the support laws, supra, he is assisting the State to fulfill a function of government, namely, the State's function to care for its indigent and also enforce support against legally responsible relatives to the end that the family unit may be kept intact and the taxpayer protected.

See Commonwealth ex rel. Schnader v. Liveright, Secretary of Welfare et al., 308 Pa. 35 (1932), that the care of the indigent is a governmental function.

See also Blum's Estate, No. 2, 38 D. & C. 594 (1940).

It should be noted that persons other than a husband or father were not charged with the duty of supporting indigent relatives until the duty was placed upon them by statute.

See 39 Am. Jur., Section 70, page 711:

> At common law an adult child is under no duty or obligation to contribute to the support of his parents. Whatever duty rests on him in this respect must be based upon either contract or statute.

Also, Commonwealth v. Morrisey, Appellant, 150 Pa. Superior Ct. 202, 204, 27 A. 2d 446 (1942).

And also, 41 Am. Jur., Section 9, page 687:

> * * * The procedure for compelling support of an indigent by one of his relatives designated by the poor laws is necessarily exclusively statutory. * * *

See Commonwealth v. Chiara, 60 D. & C. 547 (1947), for history of legislation dealing with this subject of support of parents by adult children.

The Support Law, supra, was designed to compel the "husband, wife, child, father and mother of every indigent person" in this Commonwealth to assist, either financially or to care for and maintain, said indigent person as the court of the county where such indigent person resides shall order or direct; subject, however, to the court's finding of financial ability of the person charged with the duty of supporting said indigent person to meet the court order. It is, therefore, evident that the person named in said act is now charged with a statutory duty of supporting said indigent person to the best of his or her financial ability to do so.

See Mattis et ux. v. Arcadia Coal Company et al., Appellants, 148 Pa. Superior Ct. 462, 465, 25 A. 2d 610 (1942).

As already pointed out, the duties of a district attorney call for him to:

> * * * conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected, *and perform all the duties which now by law are to be performed by deputy attorney-generals* * * * it imposed upon him the duty of conducting "all criminal or *other prosecutions,* which arise in the county for which he is elected." * * * (Slattery v. Hendershot, Appellant, 72 Pa. Superior Ct. 240, 244 (1919). (Italics ours)

See Commonwealth v. Lehman, Appellant, 309 Pa. 486, 496 (1932).

See also Margiotti Appeal, 365 Pa. 330, 346 (1950).

A cursory reading of the duties of the district attorney enumerated under the Act of May 3, 1850, P. L. 654, supra, and keeping in mind the language of the Court in Slattery v. Hendershot, Appellant, supra, and of the quotations from the cited cases that follow, would em-

phasize that the district attorneys of the various counties have the duty and responsibility under the support laws, supra, of prosecuting all support cases.

In The Commonwealth ex rel. Attorney-General v. Hipple, 69 Pa. 9 (1870), the Court, speaking of the duty of a district attorney, stated at pages 15-16:

> * * * He [district attorney] is bound to follow the business of the Commonwealth into whatever courts in the county that business is authorized by law to be tried. * * *

It is the duty of a district attorney to bring "all criminal or other *prosecutions*".

In Rotan's Petition, supra, the court interprets the meaning of the words "other prosecutions", as follows:

> It is impossible to give the use of the word "prosecution" in section 11 the narrow meaning of following a case in a criminal procedure only.
>
> In "Words and Phrases Judicially Interpreted," it is said: "To prosecute a suit is, according to the common acceptation of language, to continue a demand which has been made by the institution of process in the court of justice."
>
> In Burrough's Law Dictionary, vol. 2, "prosecution" is defined as being the following up or carrying on of a judicial proceeding; and, in a stricter sense, the carrying on of a judicial proceeding on behalf of a complaining party, as distinguished from defence; and in the strictest sense, the carrying on of a criminal proceeding on behalf of the state or government, as by indictment or information.
>
> We think that the word "prosecution," as used in the Act of July 12, 1913, P. L. 711, should not be used in the strictest sense, but merely to indicate the following up or the carrying on of an action or other judicial proceeding. *Indeed, this is the interpretation put upon the word by the legislature itself, for the Act of 1850 specifically refers to "criminal or other prosecutions," indicating that in the legislative mind there would be cases of other than a criminal nature of which the District Attorney should take charge.* (Italics ours)

In Commonwealth v. Allen, 15 D. & C. 731, 736 (1930), the court stated as follows:

> * * * It then became the duty of the district attorney to prosecute the cases. Especially was this so in view of the provisions of the Act of May 3, 1850, P. L. 654, creating the office of district attorney. The language referred to is as follows: "The officers so elected [District Attorney] shall sign all bills of indictment, and conduct in court all criminal

> or other prosecutions in the name of the commonwealth, or when the state is a party, which arise in the county for which he is elected."
>
> * * * * * * *
>
> We think that the word "prosecution" should not be used in the strictest sense, but merely to indicate the following up or the carrying on of an action or other judicial proceeding. Indeed, this is the interpretation put upon the word by the legislature itself, *for the Act of 1850 specifically refers to "criminal or other prosecutions,"* indicating that in the legislative mind there would be cases of other than a criminal nature of which the district attorney should take charge. (Italics ours)

On the basis of the Act of May 3, 1850, P. L. 654, and cited authorities, district attorneys of the various counties shall conduct in court all criminal or other prosecutions in the name of the Commonwealth or when the State is a party, and this includes all actions brought under The Support Laws, supra.

The Uniform Enforcement of Support Law, the Act of May 10, 1951, P. L. 279, 62 P. S. § 2043.1 et seq., makes no change in the prosecution of support cases but gives additional remedy to the district attorneys of the various counties to reach legally responsible relatives who have crossed State lines.

It is our opinion, therefore, that under the Act of May 3, 1850, P. L. 654, 16 P. S. § 1691 et seq., district attorneys of the various counties have the primary legal authority and responsibility to prosecute support cases under the Support Laws, and your department, as heretofore, should in public assistance cases give the district attorneys of the various counties the cooperation necessary to enforce support orders under the support laws against legally responsible relatives to the end that self-dependency and the desire to be good citizens and useful to society will be encouraged in accordance with Section 1 of the Public Assistance Law, the Act of June 24, 1937, P. L. 2051, as amended, 62 P. S. § 2501.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,

Attorney General.

ROBERT H. MAURER,

Assistant Deputy Attorney General.

M. LOUISE RUTHERFORD,

Deputy Attorney General.

OPINION No. 633

Parole—Recommitment and detention of parole violators—Application of Section 21.1, Act of August 6, 1941, P. L. 861, as added by Act of August 24, 1951, P. L. 1401.

1. Section 21.1 (b) of the Act of August 6, 1941, P. L. 861, as added by the Act of August 24, 1951, P. L. 1401, Section 5, 61 P. S. Section 331.21 (a) (P. P.), does not apply to a person who has been sentenced, paroled, absconded and recommitted prior to the effective date of the act.

2. The section does apply to a person sentenced, paroled and absconded, but not yet recommitted prior to the effective date of the act, provided the delinquency continued after the effective date, but in computing the back time its application is limited to the delinquency occurring after August 24, 1951.

3. The section does apply to a person sentenced, paroled, but not yet in abscondment prior to the effective date of the act.

4. The section does apply to an inmate sentenced, but not yet paroled prior to the effective date of the act.

Harrisburg, Pa., August 27, 1952.

Honorable Henry C. Hill, Chairman, Pennsylvania Board of Parole, Harrisburg, Pennsylvania.

Sir: Formal Opinion No. 628, dated April 18, 1952, is hereby recalled.

We have before us your request for advice concerning the application of Section 21.1 of the Parole Law, the Act of August 6, 1941, P. L. 861, as added by the Act of August 24, 1951, P. L. 1401, Section 5, 61 P. S. § 331.21 (a) (P.P.).

The new section relates to the recommitment and detention of parole violators, and in this regard you ask:

1. Does the section in question apply to persons sentenced, paroled, absconded and recommitted prior to the effective date of the act?

2. Does the section in question apply to persons sentenced, paroled and absconded, but not yet recommitted prior to the effective date of the act?

3. Does the section in question apply to persons sentenced, paroled, but not yet in abscondment, but who may abscond at some future time prior to the expiration of the maximum sentence?

4. Does the section in question apply to inmates now incarcerated who were sentenced prior to the effective date of the act?

Subsection (a) of section 21.1, relating to convicted violators makes no change in prior practice followed by the Board. Consequently, there will be no problem as to the time of application of this subsection and it need not be discussed further.[1]

Subsection (b) of section 21.1, relating to technical violators changes existing law. Originally, the Board of Parole, in the case of a technical parole violation, would, upon the parolee's arrest, compel him to make up the entire period of his delinquency on parole, even though such action might cause the inmate to be detained beyond the expiration date of his maximum sentence as originally computed. In the case of Commonwealth ex rel. Tate v. Burke, 364 Pa. 179 (1950), this practice was held to be improper because Section 14 of the Act of June 19, 1911, P. L. 1055, as amended, 61 P. S. § 309-310, required that delinquent time for technical violation be computed from the date of the parolee's arrest for such technical violation. Consequently, if he was not arrested until after the expiration of his maximum sentence as originally computed, even though he had been delinquent for the entire period of his parole, he could not be recommitted at all. In other words, the longer he eluded arrest following delinquency, the shorter the time he would have to serve upon recommitment.

This situation was remedied by subsection (b) of section 21.1, as added by the Act of August 24, 1951, supra, which reads as follows:

> Technical violators. Any parolee under the jurisdiction of the Pennsylvania Board of Parole released from any penal institution in the Commonwealth who during the period of parole violates the terms and conditions of his parole other than by the commission of a new crime of which he is convicted or found guilty by a judge or jury or to which he pleads guilty or nolle contendere in a court of record may be recommitted after hearing before the board to the institution from which he was paroled or to any other institution to which legally transferred as a parole violator. If he is so recommitted he shall be given credit for the time served on

[1] The Department of Justice ruled in Formal Opinion No. 449, dated February 26, 1943, that the Board had the power to reparole a convicted violator. This ruling was incorporated in the statutory law by the Act of 1951, supra. Since the Board could reparole immediately, the mandatory recommitment required by the Act of June 19, 1911, P. L. 1055, as amended, 61 P. S. § 305 (P. P.), became a useless and sometimes costly proceeding, and subsection (a) of Section 21.1 now places it within the discretion of the Board whether or not the return of a convicted violator will be ordered.

> parole in good standing but with no credit for delinquent time and may be re-entered to serve the remainder of his original sentence or sentences. Said remainder shall be computed by the board from the time his delinquent conduct occurred for the unexpired period of the maximum sentence imposed by the court without credit for the period the parolee was delinquent on parole and he shall be required to serve such remainder so computed from the date he is taken into custody on the warrant of the board. Such prisoner shall be subject to reparole by the board whenever in its opinion the best interests of the prisoner justify or require his being reparoled and it does not appear that the interests of the Commonwealth will be injured thereby.

This provision has the effect of enacting into law the practice followed by the Board of Parole prior to the Tate decision.

The first question to be determined is whether or not section 21.1(b) shall apply where all of the operative facts have taken place prior to the effective date of the act, viz., August 24, 1951.

Section 56 of the Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. §556, provides:

> No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature.

The amendment is a grant of authority to the Board of Parole to order certain recommitments and to compute a parolee's back time in a certain manner. The date of recommitment is the determinative factor. Where it has been made prior to August 24, 1951, section 21.1(b) can have no application, since to so apply it, would violate the prohibition against retroactive legislation.

The second question is what application does the section have where some, but not all, of the operative facts have taken place before the effective date of the act? In other words, when a man is released on parole does he acquire a vested right in the status of the law at that time?

In the case of United States ex rel. Forino v. Garfinkel, 166 F. 2d 887 (3rd Cir., 1948), the facts were that the General Assembly had repealed the Act of March 31, 1860, P. L. 382, which provided that the completion of the service of a sentence imposed for certain crimes would have the effect of an executive pardon. The relator argued that the repeal could not be effective as to him, but the Court answered this contention in the following language at page 889:

> * * * Under that law, as indeed under that of the other States and of the United States, a pardon is simply an act of grace. * * * This is true whether the pardon be granted by the executive or by the legislature. No one has or can acquire a vested right to a pardon. If the pardon be from the executive, it is by the will of the executive; if it be legislative, it is granted only under the terms of the applicable statute.

The fact that a pardon rather than a parole was there involved would seem to be immaterial.

Even if it is assumed that the parolee does acquire a right in existing law, retrospective laws are nevertheless constitutional unless they impair contractual obligations or are ex post factor: Lane et al. v. Nelson, 79 Pa. 407 (1875). It is true that a parole is often spoken of as a conditional release requiring the recommitment of the parolee if he violates the conditions thereof: Commonwealth ex rel. Wall v. Smith et al., 345 Pa. 512 (1942). This gives a parole some semblance of a contract, but, in fact, it is not, if for no other reason, because there is no consideration involved. On the contrary, a parole is an Act of grace and mercy.[1]

In Commonwealth ex rel. Banks v. Cain, 345 Pa. 581 (1942), the relator raised the objection that a change in the parole law makes it ex post facto. The Court said at page 588:

> The exercise of the power of parole being but an administrative function which does not impinge upon the judicial power of sentencing the accused in conformity with the law, it follows that the present act may constitutionally be applied to cases where sentences were imposed before its effective date. * * *

There is no Pennsylvania case directly in point, but in answer to the precise question as to the effect a change in the parole laws would have on one already on parole, California has decided in the case of In Re Etie, 167 P. 2d 203, 207 (Cal. 1946) that:

> * * * The petitioner had no constitutional guarantee against a change in the law relating to punishment for future offenses or violations of parole. *His rights under the facts were determined by the law in force at the time he committed the violation of his parole.* * * * (Italics ours)

[1] Commonwealth ex rel. Tate v. Burke, supra.
Commonwealth ex rel. Carmelo v. Smith, 347 Pa. 495 (1943).

This is a sound rule which should be applied to the situation at hand. Delinquency resulting from abscondment is a continuing violation. From August 24, 1951 on, each day in abscondment is a new violation. Thus, where a parolee absconded and became delinquent prior to the effective date of the act of 1951, supra, and avoided arrest until sometime after its effective date, he should be given no credit for delinquent time for the period between the effective date of the act and his recommitment, but he must be given credit for the period between the date he became delinquent and the effective date of the act. While the parolee has no vested right in the existing law, and the act of 1951, supra, will apply from August 24, 1951, the Tate decision controls prior to that date since, as has already been pointed out, an act cannot be construed to have a retroactive effect.

We are therefore, of the opinion, and you are accordingly advised that:

1. Section 21.1 (b) of the Act of August 6, 1941, P. L. 861, as added by the Act of August 24, 1951, P. L. 1401, § 5, 61 P. S. § 331.21(a)(P.P.), does not apply to a person who has been sentenced, paroled, absconded and recommitted prior to the effective date of the act.

2. The section does apply to a person, sentenced, paroled and absconded, but not yet recommitted prior to the effective date of the act, provided the delinquency continued after the effective date, but in computing the back time its application is limited to the delinquency occurring after August 24, 1951.

3. The section does apply to a person sentenced, paroled, but not yet in abscondment prior to the effective date of the act.

4. The section does apply to an inmate sentenced, but not yet paroled prior to the effective date of the act.

Yours very truly,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

FRANK P. LAWLEY, JR.,
Assistant Deputy Attorney General.

OPINION No. 634

State Planning Board—Housing and Redevelopment Assistance Law, the Act of May 20, 1949, P. L. 633, construed.

Harrisburg, Pa., September 3, 1952.

Honorable Andrew J. Sordoni, Chairman, State Planning Board, Department of Commerce, Harrisburg, Pennsylvania.

Sir: We have your request of July 2, 1952, in which you request legal advice with regard to the "Housing and Redevelopment Assistance Law, the Act of May 20, 1949, P. L. 1633, 35 P. S. § 1661.

You ask the following questions:

1. Can the phrase "with the primary objective of creating suitable sites for housing", be interpreted to enable the State Planning Board to make capital grants to redevelopment authorities in the furtherance of slum clearance and redevelopment when the ultimate land use *cannot* be the direct provision of suitable sites for housing but will be for municipal, commercial, or industrial purposes, provided the community has created at least equal housing sites elsewhere in which persons displaced from the State-subsidized redevelopment area will receive a priority?

2. Can the phrase "with the primary objective of creating suitable sites for housing", be interpreted to enable the State Planning Board to make capital grants to redevelopment authorities in furtherance of slum clearance and redevelopment when the ultimate land use *cannot* be the direct provision of suitable sites for housing but will be for general municipal use and improvement, such as the creation of parking facilities and bus terminals, but will not be offered for re-sale to private commercial or industrial enterprises, provided that inhabitants of the area, if any, are suitably rehoused in other facilities.

3. Is the phrase "with the primary objective of creating suitable sites for housing", inconsistent with other sections, particularly section 14 of the Housing and Redevelopment Assistance Law, and inconsistent with the stated legislative policy with respect to redevelopment and, therefore, inapplicable to the award of redevelopment grants by the State Planning Board.

4. Could the directive which authorizes the State Planning Board "to make capital grants to redevelopment authorities in the furtherance of slum clearance and redevelopment with the primary objective

of creating suitable sites for housing" be interpreted as applying to the entire program of redevelopment being assisted by the State Planning Board rather than to the individual projects included in that program? (For example, the State Planning Board has made allocations of redevelopment funds provided by this appropriation to 16 projects or areas throughout the Commonwealth. As a large majority of these projects will result in "creating suitable sites for housing" could a small proportion of the projects be undertaken in the furtherance of slum clearance but with ultimate land use other than housing?"

Since the "Housing and Redevelopment Assistance Law" is so closely related to the "Urban Redevelopment Law", the Act of May 24, 1945, P. L. 991, as amended, 35 P. S. 1701, we will discuss the latter act as a preface to answering your questions. It is the law under which redevelopment authorities are created.

The title of the Urban Redevelopment Law, supra, reads in part as follows:

> An Act to promote elimination of blighted areas and supply sanitary housing in areas throughout the Commonwealth; by declaring acquisition, sound replanning and redevelopment of such areas to be for the promotion of health, safety, convenience and welfare; creating public bodies corporate and politic to be known as Redevelopment Authorities; authorizing them to engage in the elimination of blighted areas and to plan and contract * * * for their redevelopment; * * *

Section 2 of said act, 35 P. S. § 1702, reads:

> Findings and Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding—
>
> (a) That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or over-crowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open spaces, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses.
>
> (b) That such conditions or a combination of some or all of them have and will continue to result in making such areas economic or social liabilities, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby depreciating further the general community-wide values.

(c) That the foregoing conditions are beyond remedy or control by regulatory processes and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted, and that such conditions exist chiefly in areas which are so subdivided into small parcels and in divided ownerships that their assembly for purposes of clearance, replanning and redevelopment is difficult and impossible without the effective public power of eminent domain.

(d) That the acquisition and sound replanning and redevelopment *of such areas* in accordance with sound and approved plans for their redevelopment will promote the public health, safety, convenience and welfare.

Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the health, safety and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as Redevelopment Authorities, which shall exist and operate for the public purposes of acquiring and replanning such areas and of holding or disposing of them in such manner that they shall become available for *economically and socially sound redevelopment.* Such purposes are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain. (Italics ours)

Section 3 of said act, 35 P. S. § 1703, reads in part as follows:

(m) "Redevelopment."—The acquisition, replanning, clearance, rehabilitation or rebuilding of an area for residential, recreational, *commercial, industrial* or other purposes, including the provision of streets, parks, recreational areas and other spaces.

(n) "Redevelopment Area."—*Any area, whether improved or unimproved, which a planning commission* may find to be blighted because of the existence of the *conditions enumerated in section two* of this act so as to require redevelopment under the provisions of this act. (Italics ours.)

This law was interpreted by the Supreme Court in the case of Schenck v. Pittsburgh et al., 364 Pa. 31 (1950), at page 37, the Court, in speaking of this act, as well as the Housing Authorities Law of May 28, 1937, P. L. 955, said:

* * * "* * * . . . The fundamental purpose of both these acts was the same, namely, the clearance of slum areas, although the Housing Authorities Law aimed more particularly at the elimination of undesirable dwelling houses whereas the Urban Redevelopment Law is not so restricted." If the Urban Redevelopment Law were to be held to apply only to the clearing of blighted residential areas and the reconstruction of dwelling houses thereon there would have been

> no reason for its enactment since it would have added nothing to the Housing Authorities Law already in force. *On the contrary, the Urban Redevelopment Law was obviously intended to give wide scope to municipalities in redesigning and rebuilding such areas within their limits as, by reason of the passage of years and the enormous changes in traffic conditions and types of building construction, no longer meet the economic and social needs of modern city life and progress. Such needs exist, even if from a different angle, as well in the case of industrial and commercial as of residential areas.* It is to be noted that the Urban Redevelopment Law defines the term "redevelopment," as used in the act, as "The acquisition, replanning, clearance, rehabilitation or rebuilding of an area for residential, recreational, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces. (Italics ours)

In view of this decision and the definitions above cited, we believe that any redevelopment authority formed, under this act, could proceed in accordance with the act to take by eminent domain a blighted area and convert it into an area which could be used for commercial and industrial purposes.

We turn now to your questions and the Act of May 20, 1949, P. L. 1633, 35 P. S. § 1661, known as the "Housing and Redevelopment Assistance Law".

The title of the act is "An Act providing and regulating State assistance for housing, including slum clearance and redevelopment; and making an appropriation."

Section 2 of said act, 35 P. S. § 1662, reads in part as follows:

> Declaration of Policy.—It has been determined by the General Assembly of this Commonwealth:—
>
> * * * * * * *
>
> (d) That to induce the erection and maintenance of the housing needed for persons of limited incomes, it is essential that the Commonwealth assume a portion of the rental cost by paying for a portion of the construction costs of certain new housing projects;
>
> (e) That the governing bodies of political subdivisions may be of the opinion that their over-all housing need can best be met by the effective operation of redevelopment authorities; and
>
> (f) That the Commonwealth should recognize such a local determination, and give financial assistance to redevelopment authorities in order to effectuate the purposes of the Urban Redevelopment Law and of this act.

> Therefore, it is declared to be the policy of the Commonwealth of Pennsylvania to promote the health, morals, safety and welfare of its inhabitants by providing for State assistance to tenants of limited income through a contribution to the cost of housing projects to be erected and offered for occupancy at moderate rentals as a means of making such housing available to them at rentals within their ability to pay, *and by assisting* the communities of this Commonwealth in meeting their housing needs by making grants to redevelopment authorities." (Italics ours)

Section 3 of said act, 35 P. S. § 1663, defines "redevelopment authority" as a public body, corporate and politic, organized and existing by virtue of the Urban Redevelopment Law, the Act of May 24, 1945, P. L. 991.

This and the following section illustrates the close relationship above referred to between the Urban Redevelopment Law, and the Housing and Redevelopment Assistance Law.

Section 4 of the Act of May 20, 1949, supra, 35 P. S. § 1664, deals with the authorization of grants and reads in part as follows:

> Grant authorization.—The State Planning Board is hereby authorized, within the limitations hereinafter provided, (a) * * * (b) to make capital grants to redevelopment authorities in the furtherance of slum clearance and redevelopment with the primary objective of creating suitable sites for housing.

The phrase called "with the primary objective of creating suitable sites for housing" could be interpreted as a limitation upon the use of the grants to be made to redevelopment authorities.

Perhaps a study of the legislative history of the bill will be helpful. This act, Act No. 493, the Act of May 20, 1949, supra, was introduced in the House as House Bill No. 1055. Its title at that time read "An Act providing and regulating State assistance for housing for persons of limited income and making an appropriation". Its short title was "Housing Assistance Law" and declared the policy of the Commonwealth to be the promotion of the general welfare of the State by employing funds as appropriated by this act to alleviate the acute shortage of decent, safe and sanitary dwellings for families of limited income, thereby remedying so far as possible housing conditions which are injurious to the health, safety and morals of our people. A study of the bill, as introduced, leads to the conclusion that it was confined strictly to the providing of State assistance for housing.

The bill was amended in committee and the new title was "An Act providing and regulating State assistance including slum clearance and redevelopment and making an appropriation". Its new short title was the "Housing and Redevelopment Assistance Law". A new declaration of policy was inserted and the original declaration of policy was eliminated.

Section 4, 35 P. S. § 1664, dealing with grant authorizations was changed by the addition of clause (b), which reads:

> * * * (b) to make capital grants to *redevelopment authorities* in the furtherance of slum clearance and redevelopment with the primary objective of creating suitable sites for housing. (Italics ours)

Section 14 was inserted in the bill in place of the one appearing in the original bill and the numbering of the following sections was changed. Section 14 gives the governing body of a political subdivision the right to decide that the housing needs of the political subdivision may best be met through the expenditure of some or all of the State funds provided by the act on slum clearance and the redevelopment of blighted areas, rather than directly on subsidized construction of rental housing. This amendment, as well as all other amendments above referred to, introduced the word "redevelopment" in the bill for the first time. This amendment goes on to specify that the use of said funds shall be for the purposes set forth in section 4 (b) of this act. The bill passed the House without further amendments and went to the Senate where it passed second reading with amendments, which consisted of the insertion of the words "for housing" in the title between the words "assistance" and "including". A further amendment, at this time, in the Senate was the insertion of the following in section 7, "The total amount of all grants made by the State Planning Board for slum clearance and redevelopment, pursuant to section 4 (b) of this act, shall not exceed thirty per cent of the amount appropriated by this act". These Senate amendments were agreed to by the House and the bill passed finally with the amendments.

To summarize this legislative history, it may be said the bill was introduced as a bill for the provision and regulation of State assistance for housing for persons of limited income and was changed so that the subjects of the State assistance should include the additional objectives of slum clearance and redevelopment, with the final amendment putting a restriction on the amount of State assistance for these two added subjects.

A study of housing and redevelopment laws and the decisions of the courts interpreting them, both in this State and other states, leads to the conclusion that these two types of statutes are very closely related in their procedures and objectives. If we interpret the phrase in section 4 (b), as one of limitation upon the grants to redevelopment authorities, we are going to vitiate the effect of the amendments which were introduced in both branches of the General Assembly and which so materially changed its objectives as above discussed. If we take the position that the grants to the redevelopment authorities in the furtherance of slum clearance and redevelopment must be related to and connected with the granting of suitable sites for housing in the overall planning of the municipality, we believe we are making the only reasonable interpretation possible, taking into consideration all of the provisions of the bill.

The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, 46 P. S. § 501, et seq. enjoins us in section 51, that

> Every law shall be construed, if possible, to give effect to all its provisions.

The very fact that in the last amendment the Senate saw fit to restrict the amount of grants for slum clearance and redevelopment to thirty percent shows that they expected seventy percent to be spent under paragraph (a), which is confined strictly to housing, and not more than thirty percent for slum clearance and redevelopment. This allocation, in itself, assures that the primary objective continues to be housing in accordance with the intent of the bill when introduced.

More specifically, we are of the opinion, that (1) The State Planning Board may make capital grants to Redevelopment Authorities when the ultimate land use cannot be the direct provision of suitable sites for housing but will be for recreational, commercial and industrial purposes, including streets, parks, recreational areas and other open spaces, provided the community has created at least equal housing sites elsewhere in which persons displaced from the State-subsidized redevelopment area will receive a priority. (2) The State Planning Board may make capital grants to Redevelopment Authorities in furtherance of slum clearance and redevelopment when the ultimate land use cannot be the direct provision of suitable sites for housing, but will be for general municipal use and improvement such as the creation of parking facilities and bus terminals, since parking facilities and bus terminals come within the definition of commercial or industrial use, and it is understood the land in the area will not

be offered for resale to private, commercial or industrial enterprises, provided that inhabitants of the area, if any, are suitably rehoused in other facilities. (3) The phrase "with the primary objective of creating suitable sites for housing" is not inconsistent in the sense that it vitiates all other provisions of the law, but in the light of the legislative history, it is to be given due consideration from the overall objectives of the Urban Redevelopment Law and the Housing Redevelopment Assistance Law, supra, and the policies set forth in both laws, as well as the provision of Section 7 of the Housing and Redevelopment Assistance Law. (4) The directive which authorizes the State Planning Board "to make capital grants to Redevelopment Authorities in the furtherance of slum clearance and redevelopment with the primary objective of creating suitable sites for housing" must be interpreted as applying to the entire program of redevelopment and housing or overall pattern and not to segments of the pattern. This, however, is to be applied not on a State-wide basis as your example sets forth, but on a community or political subdivision basis.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E. WOODSIDE,
Attorney General.

HARRINGTON ADAMS,
Deputy Attorney General.

OPINION No. 635

Pennsylvania Tax Anticipation Notes, Series KT, dated October 14, 1952, maturing May 29, 1953.

Harrisburg, Pa., October 16, 1952.

Honorable John S. Fine, Honorable Weldon B. Heyburn, Honorable Charles R. Barber.

Sirs: We have your request for an opinion as to the legal status of eighty million dollars ($80,000,000) Tax Anticipation Notes, Series KT, dated October 14, 1952, maturing May 29, 1953.

We have examined the proceedings relative to the issuance by the Commonwealth of Pennsylvania of Tax Anticipation Notes, Series KT, to the amount of eighty million dollars ($80,000,000).

This issue was authorized by the General Assembly of this Commonwealth by the Act approved September 29, 1951, P. L. 1646. As stated in Formal Opinion No. 626, dated November 29, 1951, we are satisfied that the Act of September 29, 1951, supra, was duly and properly

enacted. We have examined the journals of both Houses and the original records on file in the office of the Secretary of the Commonwealth as to certain appropriation acts aggregating $676,214,000.

The constitutionality of the issuance of tax anticipation notes was upheld by the Supreme Court of Pennsylvania in the case of Kelly v. Baldwin, et al., 319 Pa. 53 (1935). Since the Act of September 29, 1951, supra, is simlar to the act held to be constitutional in Kelly v. Baldwin, supra, we believe it to be constitutional.

The Act provides, inter alia, that the current revenues for any biennial fiscal period accruing to the General Fund of the State Treasury shall be pledged for the payment of principal of and interest on the notes during such fiscal biennium, and that so much of said revenues as may be necessary, are specifically appropriated for such payment, the Department of Revenue being authorized to allocate such revenues to said payment. The Act authorizes the Governor, the Auditor General and the State Treasurer to determine the terms and conditions of the issue, rates of interest and time of payment of interest, provided that the notes shall not mature later than May 31 of the second fiscal year of any current biennium, and shall not bear interest in excess of 4½% per annum. The minutes of the meetings held by the Governor, the Auditor General and the State Treasurer, show that all proceedings taken relative to the issuance of the notes comply fully with the provisions of the Act and are in due legal form, and that all necessary action has been taken.

We have examined notes number one of the following denominations: five thousand dollars ($5,000), ten thousand dollars ($10,000) and one hundred thousand dollars ($100,000), in bearer form and find that the same are duly and properly executed and conform with the form approved by you.

In conclusion, we have no hesitation in advising you that the eighty million dollars ($80,000,000) notes of the Commonwealth of Pennsylvania, Series KT, dated October 14, 1952, maturing May 29, 1953, constitute legal obligations payable by the Commonwealth of Pennsylvania, from current revenues accruing to the General Fund of the State Treasury of the Commonwealth of Pennsylvania during the two fiscal years ending May 31, 1953, and are secured by the current revenues levied and assessed for revenue purposes of every kind and character accruing to the said General Fund during said biennial period.

The Appropriation Acts are appropriations made for the current biennium by the General Assembly for the general purposes of the fiscal

biennium and are appropriations of amounts that exceed the amount of the notes and of the Series JT Tax Anticipation Notes previously issued and paid in this biennium by more than three times.

We are further of the opinion that the allocation of the moneys in the General Fund, which are specifically set forth on the face of the notes, made by the Department of Revenue, and approved by the Governor, the Auditor General and the State Treasurer, to provide a sinking fund for the payment of said notes, are payable into and shall be set aside in the sinking fund accounts, mentioned on the face of the notes in the amounts and at times specified, prior to all other expenditures, expenses, debts and appropriations, including current expenses, payable from the General Fund.

Very truly yours,

ROBERT E. WOODSIDE,
Attorney General

HARRINGTON ADAMS,
Deputy Attorney General

October 16, 1952.

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To the Purchasers:

Re: $80,000,000 Commonwealth of Pennsylvania Tax Anticipation Notes, Series KT, dated October 14, 1952, maturing in seven and

one-half months on May 29, 1953, bearing interest at the rate of 1½% per annum; principal and interest payable at The Philadelphia National Bank, Philadelphia, Pennsylvania.

Dear Sirs:

We have examined in your behalf the proceedings relative to authorization and issuance of $80,000,000 aggregate principal amount of Commonwealth of Pennsylvania Tax Anticipation Notes, Series KT, dated October 14, 1952 (hereinafter called the "Notes").

The Notes are authorized by and have been issued pursuant to the Act of the General Assembly of the Commonwealth of Pennsylvania, approved September 29, 1951, P. L. 1646 (hereinafter called the "Act"), and certain determinations made and resolutions adopted by the Governor, the Auditor General, and the State Treasurer, pursuant to authority vested in them by the Act.

Under the Act, when the General Assembly has provided revenues for the general purposes of any fiscal biennium and the Governor, the Auditor General, and the State Treasurer determine that such revenues will not be available in large part for the current and other expenses of the State government, as a result of which the collectible revenues may not be sufficient to meet the current and other expenses of the State government for such biennium as they fall due, such officials are authorized and directed to borrow from time to time on the credit of the current revenues of such current biennium a sum or sums of money not exceeding in the aggregate one-third of the moneys appropriated for such biennium by the General Assembly, for the general purposes of such fiscal biennium.

Under the provisions of the Act loans made pursuant thereto shall be evidenced by notes of the Commonwealth which are declared by the Act to be tax anticipation notes; such notes shall mature not later than May 31 of the second year of the fiscal biennium in which they are issued; such notes shall be issued from time to time for such total amounts, in such sums, and shall be subject to such terms and conditions, rates of interest, not in excess of four and one-half per cent (4½%) per annum, and time of payment of interest as the Governor, the Auditor General, and the State Treasurer shall determine and direct; and such notes shall be offered for sale to the highest and best bidder after due public advertisement and open competitive bidding on such terms and conditions as said officials shall direct. The Act also stipulates that the manner and character of advertising and times of advertising shall be prescribed by the same officials.

The Act requires that the proceeds from the negotiation of loans under its provisions shall be paid into the General Fund of the State Treasury and shall be used for the payment of appropriations made from such fund to defray the current and other expenses of the State government for the current fiscal biennium.

The Act provides, in effect, that any notes issued under its provisions shall be secured by the current revenues levied and assessed for revenue purposes of every kind or character accruing to the General Fund of the State Treasury during the fiscal biennium in which the notes are issued, and that such current revenues shall be pledged for the payment of the principal and interest on such notes. The Act also provides that such notes shall be paid out of such revenues; specifically appropriates so much thereof as may be necessary for the payment of the principal of and interest upon such notes; and provides that the Department of Revenue shall allocate such appropriated current revenues accruing to the General Fund of the State Treasury to the payment of the notes.

The Notes are the second issue of tax anticipation notes to be made in the present biennium. The previous issued of $58,000,000 Commonwealth of Pennsylvania Tax Anticipation Notes, Series JT was paid in full and retired on May 29, 1952.

We have examined:

(a) The relevant provisions of the Constitution of Pennsylvania;

(b) The Act and the original records on file in the offices of the Chief Clerk of the House of Representatives, of the Secretary of the Senate, and of the Secretary of the Commonwealth as to the enactment of the Act by the General Assembly and its approval by the Governor:

(c) The original records on file in the offices of the Chief Clerk of the House of Representatives, of the Secretary of the Senate, and of the Secretary of the Commonwealth as to the enactment by the General Assembly of Appropriation Acts Nos. 7A, 27A, 58A, 63A, 85A, 88A and 134A, appropriating moneys, among other things, for the general purposes of the current fiscal biennium. The aggregate of the appropriations made for the general purposes of the current fiscal biennium by said Acts (hereinafter called the "Appropriation Acts") is in excess of $676,214,000;

(d) Signed copies of the Preambles and Resolutions of the Governor, the Auditor General, and the State Treasurer adopted in accordance with the authority vested in them by the Act, which Preambles and Resolutions, among other things, make determinations as to (i) the

revenues provided for the current fiscal biennium, (ii) the times at which they will be received, (iii) the estimated amount of the current expenses of the State government, (iv) the times at which they fall due; and such Preambles and Resolutions also fix the amount to be borrowed, authorize the issuance of the Notes, determine the form and denominations thereof, fix the time of payment of interest, prescribe the times, manner, and character of the public advertisement for bids, direct the terms and conditions of the open competitive bidding for the Notes, pledge certain current revenues accruing to the General Fund of the State Treasury in the fiscal biennium ending May 31, 1953, approve the allocations by the Department of Revenue of such revenues to the payment of the Notes, irrevocably direct the application thereof to the sinking fund for the Notes prior to the payment of current expenses, require that the sinking fund accounts be held exclusively for the holders of the Notes, adopt the Public Invitation for Proposals, Form of Proposal, and Proposed Official Statement used in connection with the sale of the Notes, fix the rate of interest, award the Notes to the bidder making the highest and best bid, and adopt the Official Statement used in connection with the sale of the Notes;

(e) The Public Invitation for Proposals, proofs of publication thereof, the proposal of the successful bidders, the Proposed Official Statement, and the Official Statement issued in connection with the sale of the Notes;

(f) Signed copies of the letters of the Department of Revenue executed by the Secretary of Revenue allocating to the payment of the principal of and interest on the Notes so much of the current revenues as is necessary for the payment thereof, and directing the payment of such revenues into a sinking fund for the Notes, and fixing the amounts payable into the sinking fund as follows:

November 28, 1952	$ 750,000
December 31, 1952	1,500,000
January 29, 1953	1,500,000
February 26, 1953	1,500,000
March 31, 1953	11,500,000
April 30, 1953	20,000,000
May 28, 1953	44,000,000

(g) A Certificate of The Philadelphia National Bank as Loan and Transfer Agent of the Commonwealth as to the countersignature of the Notes, and the delivery thereof.

(h) The receipt of the State Treasurer for the proceeds of the Notes in the amount of the accepted proposal, being not less than par and accrued interest to the date of settlement, and his direction to the

fiscal officials of the State that the proceeds derived from the sale of the Notes shall be paid into the General Fund of the State Treasury and shall be used only for the payment of appropriations made from such fund to defray the current and other expenses of the State government for the current fiscal biennium;

(i) A fully executed Note of each authorized denomination;

(j) A Certificate of The Philadelphia National Bank as Loan and Transfer Agent of the Commonwealth as to the payment in full on May 29, 1952, of Fifty-eight Million Dollars ($58,000,000) aggregate principal amount of Commonwealth of Pennsylvania Tax Anticipation Notes, Series JT; and

(k) Such other statutes, certificates, affidavits, documents, decisions, and all other proceedings and matters which we have deemed relevant or necessary in connection with the authorization, issuance, public offering and sale of the Notes, as a basis for expressing the opinion hereinafter set forth.

We have also attended the settlement held this day, at which time the Notes in the denominations and numbered as follows:

$5,000, Nos. V1 to V166, inclusive,
$10,000, Nos. X1 to X507, inclusive,
$100,000, Nos. C1 to C741, inclusive,

dated as of October 14, 1952, in bearer form, calling for the payment of interest at the rate of 1½% per annum (calculated at 15/24ths of one year's interest) payable at maturity were delivered to the purchasers against payment therefor.

In our opinion:

1. The Act is valid and constitutional.

2. Existing tax laws passed by the present and by previous Sessions of the General Assembly provide revenues for the general purposes of the present fiscal biennium.

3. The Governor, Auditor General, and State Treasurer have, pursuant to the authority conferred by the Act, duly and validly determined that such revenues will not be available in large part for the current and other expenses of the State government; and such officials have duly and validly determined that as a result thereof the collectible revenues may not be sufficient to defray the current and other expenses of the State government as they fall due.

4. The Act confers full and adequate legal power upon the Governor, the Auditor General, and the State Treasurer to issue and sell the

Notes; and the Notes have been validly authorized, issued and sold pursuant to proper and appropriate action of those three officials, in accordance with the Act.

5. The Notes are obligations of the Commonwealth, valid and binding in accordance with their terms, limited to repayment from the current revenues of every kind and character accruing to the General Fund of the State Treasury in the fiscal biennium ending May 31, 1953. The Notes are not direct and general obligations of the Commonwealth and the full faith and credit of the Commonwealth has not been pledged for their repayment.

6. The issue and sale of the Notes is not prohibited by Section 4 of Article IX of the Constitution of the Commonwealth of Pennsylvania, as the Notes are not debts of the Commonwealth within the meaning and intent of the Constitution.

7. The Notes, and notes of any other series under the authority of the Act during the fiscal biennium, are equally and ratably secured by the current revenues of every kind and character accruing to the General Fund of the State Treasury during such fiscal biennium.

8. Pursuant to authority conferred by the Act and the specific appropriation contained therein, the Department of Revenue has validly allocated to the payment of the Notes so much of the current revenues as is necessary for the payment of the principal of, and interest on, the Notes and directed that the payments be made into a sinking fund for the Notes at the times and in the amounts indicated on the face of the Notes.

9. The Governor, the Auditor General, and the State Treasurer and the Department of Revenue have validly pledged the revenues so allocated for the payment of the Notes.

10. The allocations of moneys accruing to the General Fund of the State Treasury, and pledged for the payment of the Notes, are payable into and must be set aside in the sinking fund for the Notes in the amounts and at the times specified prior to all other expenditures, debts and appropriations, including current expenses payable from the General Fund.

11. The Official Statement, which has been referred to, accurately describes the Act and properly provides other relevant information with respect thereto and with respect to the fiscal powers and duties of the Governor, the Auditor General and the State Treasurer, except that we express no opinion as to the financial information, estimates and statistics contained therein, which were furnished by representatives of the Commonwealth.

12. The Appropriation Acts include appropriations made for the current biennium by the General Assembly for the general purposes of the fiscal biennium and make appropriations for such purposes of amounts that exceed by more than three times the aggregate principal amounts of the Notes, and of all other notes heretofore issued in the current biennium (which other notes have heretofore been paid in full). Therefore, the principal amount of the Notes is within every debt and other limit fixed by the Act and the other laws of the Commonwealth of Pennsylvania.

13. Interest on the Notes is not subject to present Federal income taxes under existing statutes.

14. Under the Act, the Notes are exempt from taxation for State and local purposes in Pennsylvania; but this exemption does not, in our opinion, include gift, succession or inheritance taxes, or any other taxes not levied directly upon the Notes or the receipt of the income therefrom.

15. Under the Fiduciaries Investment Act of 1949 (Act of May 26, 1949, P. L. 1828, as amended), the Notes are authorized investments for fiduciaries as defined in that Act, within the Commonwealth of Pennsylvania.

16. The Notes are legal investments in Pennsylvania for savings banks, banks and trust companies, and insurance companies, and are acceptable as security for deposits of funds of the Commonwealth.

Very truly yours,

FAIRFAX LEARY, JR.

For SCHNADER, HARRISON, SEGAL & LEWIS

OPINION No. 636

Parole—Inmates of House of Correction (Philadelphia).

The Pennsylvania Board of Parole does not have jurisdiction to parole persons committed to the House of Correction, Employment and Reformation for Adults and Minors, in the City of Philadelphia, except where there is a commitment from the Philadelphia County Prison to the House of Correction of a person over whom the Board of Parole does have jurisdiction, or a transfer to the House of Correction by authority granted to the Department of Welfare of the Commonwealth of Pennsylvania.

Harrisburg, Pa., December 16, 1952.

Honorable Henry C. Hill, Chairman, Pennsylvania Board of Parole, Harrisburg, Pennsylvania.

Sir: We have before us your communication requesting the advice of this department as to the authority of the Pennsylvania Board of Parole to parole inmates of the House of Correction, Employment and Reformation for Adults and Minors in the City of Philadelphia (hereinafter called the House of Correction).

Preliminarily, it should be observed that the general powers of the Pennsylvania Board of Parole are contained in Section 17 of the Act of August 6, 1941, P. L. 861, as amended, which section, 61 P. S. § 331.17 (P. P.), provides, in part, as follows:

> The board shall have exclusive power to parole * * * all persons heretofore or hereafter sentenced by any court in this Commonwealth to imprisonment in any prison or penal institution thereof, whether the same be a state or county penitentiary, prison or penal institution, * * * Provided, however, That the powers and duties herein conferred shall not extend to persons sentenced for a maximum period of less than two years * * * [1]

Since the above section limits jurisdiction to persons sentenced[2] to any penal institution of the State or county (Commonwealth ex rel. Banks v. Cain, 345 Pa. 581, 584 (1942)), it will be necessary for us to determine whether the House of Correction is such an institution.

The title of the Act of June 2, 1871, P. L. 1301, creating the House of Correction, provides as follows:

> To establish and maintain *for the city of Philadelphia,* a house of correction, employment and reformation for adults and minors. (Emphasis supplied)

Section 1 of the said act provides, in part, as follows:

> Be it enacted * * * That the managers of the house of correction, employment and reformation, for adults and minors, *elected under ordinance of the councils of the city of Philadelphia,* approved December twenty-ninth, one thousand eight hundred and seventy, and their successors forever, be

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[1] Assuming the Board otherwise has jurisdiction, it is only in a very limited class of cases that the authorized period of confinement in the House of Correction would come within this two year minimum: See Section 12 of the Act of June 2, 1871, P. L. 1301, 61 P. S. Section 681.

[2] For the purpose of this opinion, the words "sentence" and "commitment" are considered to be synonymous. See People v. La Sasso, 44 N. Y. S. 2d 93, 98 (1943).

> and they are hereby erected and *made a body politic and corporate, in deed and in law, by the name, style and title of the House of Correction, Employment and Reformation for adults and minors, in the city of Philadelphia,* and shall have full power to make improvements, maintain and control the said institution, buildings and grounds, * * * (Emphasis supplied)

The Philadelphia Home Rule Charter, approved by the electors April 17, 1951, Pamphlet Laws (1951-1952) page 2241, which became effective January, 7, 1952, provides in Chapter 7, Article 5 (Executive and Administrative Branch—Powers and Duties), that the board of trustees of each city institution within the Department of Public Welfare shall exercise certain powers. Section 5-701 specifically states at page 2285:

> The foregoing powers shall be exercised by the respective boards of trustees in the management of the following institutions:
>
> House of Correction, * * *

From the above provisions, it is clear that the House of Correction was created as a purely municipal institution, and remains as such under the Philadelphia Home Rule Charter. We conclude, therefore, that the House of Correction does not come within the purview of section 17, since it is neither a penal institution of the State nor of the county, but rather a municipal institution, and consequently, the power of the Board of Parole does not extend to persons committed to the House of Correction, except in the following instances:

Section 3 of the Act of 1781, supra, 61 P. S. § 672, provides that the inspectors of the county prison, may order commitments to the House of Correction of persons "who shall apply to them for such purpose". It is not clear just when, and under what circumstances this power could be exercised. If a person is sentenced to the county prison for a period of not less than two years, the Board of Parole would have exclusive jurisdiction to parole such person from that confinement. It would not lose jurisdiction because the inspectors of the county prison commit the inmate to the House of Correction. The same is true of transfers to the House of Correction from other institutions by authority granted to the Department of Welfare of the Commonwealth, by the Act of July 11, 1923, P. L. 1044, as amended, 61 P. S. § 72, and the Act of April 18, 1929, P. L. 542, 61 P. S. § 71.

We are of the opinion, therefore, that the Pennsylvania Board of Parole does not have jurisdiction to parole persons committed to the

House of Correction, Employment and Reformation for Adults and Minors, in the City of Philadelphia, except where there is a commitment from the Philadelphia County Prison to the House of Correction of a person over whom the Board of Parole does have jurisdiction, or a transfer to the House of Correction by authority granted to the Department of Welfare of the Commonwealth of Pennsylvania.

Very truly yours,

DEPARTMENT OF JUSTICE,

ROBERT E WOODSIDE,
Attorney General.

FRANK P. LAWLEY, JR.,
Assistant Deputy Attorney General.

ACTS CITED

CASES CITED

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DEPARTMENT OF JUSTICE