

OPINIONS TO THE GOVERNOR

Railroad policemen—Act of Feb. 27, 1865—Qualification—Dual capacity—Private employe and public officer—Removal—Constitution, art. vi, sect. 4—Incompatible offices—Constable.

1. A railroad policeman appointed by the Governor under the Act of Feb. 27, 1865, P. L. 225, has a dual capacity, in that he is at the same time an employe of a private corporation and a public police officer, with the authority of a policeman in a city of the first class; the liability of the railroad as his principal is dependent upon whether the act complained of was performed by him as its employe or in the discharge of his public duties as a police officer.

2. A railroad policeman cannot begin to function as such until he has been commissioned by the Governor and has taken the constitutional oath of office, although he is employed and paid by the railroad.

3. A railroad policeman is a public officer within the meaning of article vi, section 4, of the Constitution, and may be removed by the Governor at pleasure.

4. The duties of a constable and of a railroad policeman are so similar as to make it difficult to determine in which capacity particular acts are performed, and it is highly improper for a constable, during his term of office, to serve as a railroad policeman; under such circumstances, the Governor may remove him from the latter office.

Department of Justice,

Harrisburg, Pa., March 25, 1930.

Honorable John S. Fisher, Governor of Pennsylvania, Harrisburg, Pennsylvania.

Sir: We have your letter requesting us to advise you whether you should take any action by reason of the following circumstances.

A railroad policeman, commissioned by the Governor, also holds a constable's commission, and is at the same time acting as a constable and as a railroad policeman.

Your Secretary for Industrial Police feels that the two offices are incompatible and has submitted the facts to you for such action as you may see fit to take.

Railroad policemen are appointed under the provisions of the Act of February 27, 1865, P. L. 225. This act provides that any railroad corporation operating in Pennsylvania may apply to the Governor to commission such persons as the corporation may designate to act as railroad policemen; and that the Governor upon such application, "may appoint such persons or so many of them as he may deem proper to have and shall issue to such person or persons so appointed, a commission to act as such policeman."

Persons appointed railroad policemen must take and subscribe the constitutional oath of office, which must be filed with the Secretary of the Commonwealth and recorded in every county in which the policeman is to act, have the power of policemen of the City of Philadelphia, and are required to wear badges containing the words "Railroad Police," which must be in plain view, except when the policemen are employed as detectives.

Compensation is paid by the companies for which the policemen are appointed.

There is no provision in the act for the removal by the Governor of policemen commissioned by him thereunder; and the only provision relative to the termination of the commission is that contained in Section 6, which provides that whenever any railroad shall no longer require the services of a policeman appointed under the act, it shall file a notice to that effect in several offices where the commission of the policeman has been recorded, this notice to be noted by the recorders of deeds upon the margin of the record where the commission is recorded and, thereupon, the power of such policeman shall cease and be determined.

The act authorizing the Governor to commission these policemen does not empower him to remove them, nor is there any other Act of Assembly which specifically authorizes the Governor to revoke commissions issued by him under the Act of 1865. If, therefore, the Governor has any power to remove a railroad policeman it is conferred upon him by Article VI, Section 4, of the Constitution, which provides, among other things, that "Appointed officers, other than judges of the courts of record, and the Superintendent of Public Instruction, may be removed at the pleasure of the power by which they shall have been appointed." This section clearly applies only to public officers. If railroad police are public officers appointed by the Governor they may be removed under the constitutional provision quoted. If they are not public officers the Governor does not have any power of removal, because the power is not conferred upon him by any constitutional or statutory provision.

Railroad police have a dual capacity. They are at the same time employes of a private corporation and public police officers, having the authority of municipal policemen.

Thus, when acting as employes of the railroad for which they are appointed, their actions may justify the recovery of damages against the railroad, *Tufshinsky vs. Pittsburgh, etc. Railroad Company*, 61 Pa. Superior Ct. 121 (1915); but in making an arrest in the discharge of their public duties as police officers they are not regarded as employes of the railroad in such a sense as to sustain a verdict against the rail-

road for false arrest, *Bunting vs. Pennsylvania Railroad*, 284 Pa. 117 (1915), and *Knaugle vs. Pennsylvania Railroad Company*, 83 Pa. Superior Ct. 528 (1924).

In the *Bunting Case*, Mr. Justice Frazier, speaking for the Supreme Court, said at page 121:

“* * * under the charge of forgery and embezzlement made at the instance of one in no manner connected with the defendant company, it must be presumed the officer, in making the arrest and also in the subsequent conduct in having plaintiff held to bail, was not acting for and on behalf of defendant company but as a *public police officer*. * * *”

Similar language was employed by the Superior Court in the *Knaugle Case*.

It is true that railroad policemen are paid by the railroads, but it is also true that they cannot begin to function as such until they have been commissioned by the Governor and have taken the constitutional oath of office, and that in the discharge of their duties they have the same authority which is conferred by law upon police officers in cities of the first class. Accordingly, while these officers are anomalous in that they are charged with the performance both of public and of private duties, nevertheless, we are clearly of the opinion that they are public officers within the meaning of Article VI, Section 4, of the Constitution and may be removed by the Governor at pleasure.

Should a railroad policeman be removed because he is also a constable?

There is no constitutional or statutory provision specifically declaring incompatible the offices of railroad policeman and constable. However, a constable is an elected public officer, whose duties are in a large measure police duties. The work of a constable and of a railroad policeman is work of a similar character; and when the same person is acting in both capacities we cannot conceive that it would be possible clearly to distinguish at all times between the duties he was performing as constable and the duties he was performing as a railroad policeman. There should be no ground for suspicion that, in the performance of his duties, an elected public officer of any grade is subject to the directions of a private corporation, and it seems to us that it is highly improper for a constable to serve during his term of office as such, also as a railroad policeman. This, however, is not a conclusion required by any constitutional or statutory provision or any adjudicated case.

Whether a constable should be permitted to function as a railroad policeman is, in the last analysis, a question of policy which you alone have jurisdiction to determine.

Very truly yours,

DEPARTMENT OF JUSTICE,

WM. A. SCHNADER,

Special Deputy Attorney General.

Notaries public—Term of office—Computation—Re-appointment.

1. The four year's term of a notary public is to be computed to exclude the date of his confirmation.

2. On re-appointment, the notary's new term will be computed from the date of the expiration of the previous commission and will expire at midnight of the day of the fourth anniversary of the date of the commission.

Department of Justice,

Harrisburg, Pa., March 31, 1930.

Honorable Frank J. Gorman, Secretary to the Governor, Harrisburg, Pennsylvania.

Sir: In your letter of February 14 you request the opinion of this Department concerning the method to be employed in ascertaining the date of commencement and the date of expiration of the term of a notary public appointed by the Governor under the provisions of the Act of April 4, 1901, P. L. 70.

Section 1 of the Act of 1901 provides that notaries public appointed by the Governor during the recess of the Senate shall each receive a commission that shall expire at the end of the next session of the Senate. There seems to be no uncertainty as to the meaning of this section. The term of a notary public appointed by the Governor during the recess of the Senate expires at midnight of the day upon which the session of the Senate has ended. The law knows no fraction of a day.

Section 2 provides that when notaries public appointed by the Governor during the session of the Senate, and those appointed under the provisions of the first section of the Act of 1901, are duly confirmed by the Senate, they shall each be entitled to receive a commission for the term of four years, to be computed from the date of such confirmation.

The question arises as to when a commission issued to a notary becomes effective and when it expires,