OPINION NO. 51.

Appropriations — Preferred Appropriations — Non-Preferred Appropriations — Abatements—General Appropriation Bill—Violation of Art. IX, Sec. 4 by the "Talbot Act," Extraordinary Session of 1931, P. L. 1503—Supreme Court Opinion, Commonwealth v. Liveright et al May Term 1932, No. 16.

1. Items in the General Appropriation Act, its amendments and supplements, are either in the preferred class or void. They cannot be abated.

2. The only preferred appropriations made by the regular and special sessions of 1931, other than those made by the General Appropriation Act, its amendments and supplements, are those made by the Talbot Act, Act No. 19-A, the Act of June 12, 1931, P. L. 575, the Act of June 25, 1931, P. L. 1376, and Act No. 1-E. All other appropriations made at the regular and special sessions of 1931 must abate proportionately.

3. In determining the amount of money available for the present biennium, the Auditor General and State Treasurer must be governed by the estimate of the Budget Secretary, presented to the Governor after the adjournment of the regular session of the Legislature of 1931, upon the bassis of which the Governor acted in approving appropriation acts.

4. The abatement of appropriations must be made as of the effective date of the Talbot Act—December 28, 1931—except that the abatement cannot affect appropriations actually expended prior to that date, and that the abatement cannot in any case disturb contracts lawfully and validly executed prior to the decision of the Supreme Court in the Talbot Act Case.

Department of Justice,
Harrisburg, Pa., May 23, 1932.

Honorable Charles A. Waters, Auditor General, Harrisburg, Pennsylvania; Honorable Edward Martin, State Treasurer, Harrisburg, Pennsylvania.

Gentlemen: We have your joint request to be advised concerning the effect of the opinion of the majority of the Supreme Court in Commonwealth *v.* Alice F. Liveright, et al., May Term, 1932, No. 16, sustaining as constitutional the so-called "Talbot Act," which became effective December 28, 1931, (Pamphlet Laws, page 1503).

Your inquiry arises out of that part of Mr. Justice Kephart's opinion dealing with the question whether the Talbot Act violated Article IX, Section 4, of the Constitution. That section reads as follows:

> "No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed in the aggregate, at any one time, one million dollars; * * *."

Mr. Justice Kephart said:

"* * * The balance of estimated revenue for the biennium, after the regular session of the legislature, was $192,915,000, and the authorized appropriations were $192,394,000. At the special session, prior to the Talbot bill, $716,000 was appropriated; with it the appropriations of that session totaled $10,716,000. Defendants contend that since the appropriation made by this bill with prior appropriations already made, exceeded the estimated revenues for the biennium, the excess appropriations were invalid.

"The court below held that though strict constitutional limitations were imposed on municipalities in the creation of debts, this was not so with respect to the sovereign state; that there was no limitation to the debt the latter might incur except when created to supply deficiencies in revenue. This conclusion is erroneous. * * * Under the constitution, neither the legislature, the officers or agents of the State, nor all combined, can create a debt or incur an obligation for or on behalf of the State except to the amount and in the manner provided for in the fundamental law. This section was intended to restrict legislative acts which incurred obligations or permitted engagements on the credit of the State beyond revenue in hand or anticipated through a biennium, and establishes the principle that we must keep within current revenue and $1,000,000. There can be no such thing as a floating debt created through appropriations in excess of revenues and $1,000,000. Such debt may not be directly incurred by statute, nor through an appropriation in excess of current revenue for a gratuity or any purpose. * * *

"Among constitutional requirements is the provision (Art. IX, Sec. 12) that 'The monies of the state, over and above the necessary reserve, shall be used in the payment of the debt of the State, either directly or through the sinking fund,' and by Art. IX, Sec. 13, 'The monies held as necessary reserve shall be limited by law to the amount required for *current expenses.*' * * * A survey of the Constitution would indicate that the ordinary current expenses of government would be the expenses of the executive, judicial, and legislative departments of government, and of public schools, as provided for in that instrument. It was the intention of the framers of the fundamental law to safeguard and protect these ordinary expenses that the government might exist as such. Therefore, they have a preferenee or prior claim on all moneys of the Commonwealth over all other expenditures, expenses, debts, or appropriations. * * * The Constitution requires a reserve to be set up sufficient to take care of these preferred claims, and that such reserve be limited by law; but if the legislature fails to so limit it, it is the

duty of the fiscal officers to safeguard the ordinary current monthly expenses of government.

"The provision relative to the sinking fund state debt requires only $250,000 annually to be paid, and the transfer of a part of the revenue to that fund, that part, of course, being in the discretion of the legislature. But the ordinary expenses of government and the sinking fund payment are not the only preferred claims on revenues thus established and first entitled to payment. Art. III, Sec. 17, permits moneys to be given to charities and normal schools, money for charities if passed by a two-thirds vote. Money given to normal schools has priority on the general fund over an appropriation to charities, etc.; McLeod v. Central Normal School Association, 152 Pa. 575, 589. The balance of the general revenue, subject to constitutional limitations, is in the absolute and complete control of the General Assembly. It follows that it may create preferential appropriations for any purpose which, in its judgment, it deems necessary in the interest of government, and such appropriations would have a claim on this surplus prior to other appropriations not so favored. * * * Any appropriation which embodies an intention to pay the amount therein stated before any other appropriation made at the same session of the legislature or any appropriation which stipulates the time at or within which it must be paid, will take rank as an appropriation next to the ordinary expenses of government. Priority is a question of intention and prior claims rank equally unless there is an intention shown to the contrary or expressed through the Constitution.

"The fiscal officers of the Commonwealth are required to treat such appropriations as having such priority, provided always, that at the time payment is directed, there are funds available in the treasury to meet such payment above all requirements for the current expenses of government. No administrative custom or scheme of payments under unpreferred appropriations will avoid these consequences or that of a deliberate legislative act in preferring an appropriation. If other appropriations are compelled to suffer because of this preference, the complete answer is that it is the legislative will, and as the sovereign people have thus spoken through their designated agent, no one can complain. If appropriations for other charities and hospitals, equally as meritorious and perhaps some more deserving, are made to suffer because of insufficient revenue, the fault lies with the legislature in not providing means when it had the opportunity. If there are ample funds on hand, of course, or if funds later become available, no difficulty will be experienced.

"The Talbot bill, known as Act 7-E, specifically appropriates $10,000,000, to the Department of Welfare, and contains a mandatory direction to the State Treasurer to

pay certain sums at fixed periods; $1,000,000, in December, 1931, $2,000,000, in each of the succeeding four months, and the remaining and final $1,000,000 in May, 1932. The amount, the time, and the purpose of payment, are thus definitely stated in the Act. The legislature intended these payments to take priority over other payments at the times mentioned, and the purpose stated in the Act furnishes a reasonable basis for such action. When we as judges consider this mandate it is of no moment to us acting in a judicial capacity that other appropriations may suffer. To effectuate its purpose, it was not necessary for the legislature to expressly state, 'this appropriation shall take precedence over all other appropriations;' that is done by the Act's mandatory provisions, which accomplish the same result. We assume the legislature must have considered the possible revenues when it issued its mandatory decree to the State Treasurer to pay this money as it directed, and that it also considered the condition of the treasury.

"But, it is urged, that notwithstanding this preference, the legislature had already appropriated all the estimated revenues at the general session, and that as there were no funds or anticipated revenues against which this appropriation could be preferred, it is void. But this contention wholly overlooks the fact that under our financial scheme of government, while the receipts of revenue come in daily or yearly, our fiscal period is biennial, and revenues for that period are the subject of legislative distribution. This can only be made from revenue accruing during the biennium, and any other available cash assets on hand that may be used for that purpose. From this sum all appropriations, whether made at a general or special session must be met. An appropriation does not speak from the date of approval of the measures, but from a consideration of that appropriation and other appropriations during the same biennium, and the estimated revenue; and if there is a shortage of revenue beyond $1,000,000, it is not a given appropriation, the last one made, that is singled out for rejection by the fiscal officers, but all must suffer alike and abate proportionately. If the budget is not ballanced by the Governor, then all appropriations must suffer proportionately except those in the preferred class. There is no priority among appropriations of the same class in any one biennium. * * * Therefore, appropriations made at a special session must be considered in connection with and in relation to appropriations of the general session just as new revenue is included in and is a part of the general revenue for the two year period.

"To give effect to the Talbot bill it was not necessary that there should be a specific repeal of any particular prior appropriation. The Act itself effected a repeal of

so much of other appropriations not in its class as would be necessary to make good this express mandate of the legislature. The result is that a debt is not and cannot be created by merely making appropriations which direct expenditures in excess of anticipated revenue, and the legislature cannot make it so. Appropriations in excess of estimated revenues and $1,000,000 are simply ineffective; they incur no liability or obligation on the part of the State, they simply abate pro rata to be within the biennium receipts and cash in hand.

"* * * An appropriation may contain in it all the elements of a contract which, when carried through, may of itself create a debt. On the other hand, where the appropriation authorizes the payment of a gratuity, it is not a debt within the meaning of the Constitution, if there is not sufficient revenue provided to meet it, and a debt must not be created either by issuing warrants, lending credit, borrowing or otherwise to meet it, such appropriation, or such part of it that cannot be met, simply falls. It is invalid.

"The record shows that on June 1, 1931, the State had cash in the bank amounting to more than $49,000,000, and since that date up to December 31, 1931, when this first payment was due under the Talbot bill, revenue had been collected up to another $49,000,000 or a total of $98,000,000, more than half of the anticipated revenue for the biennium. It is apparent there was a prima facie right on the part of the appellees to have their claim paid, and it follows that no objection could successfully be made against this appropriation on account of Art. IX, Sec. 4."

In your communication you say:

"We are satisfied that sufficient moneys will not be available to pay all the appropriations made by the regular and special sessions of the Legislature of 1931, and it, therefore, becomes our duty in authorizing and paying non-preferred appropriations to consider the proportionate amount of such appropriations which should be abated. In determining this question, the following problems are presented:

"1. Should all items in the General Appropriation Bill be considered by us as ordinary expenses of the government to be paid before any other appropriation?

"2. Which of the appropriations not included in the General Appropriation Bill should be treated as preferred appropriations under the decision of the Supreme Court?

"3. In determining the amount of money to be available for the present biennium, is the estimate by which we should be governed the estimate of the Budget Secretary, as presented by him to the Governor after the adjournment of the regular session, and upon which the General Appropriation Bill was approved.

> "4. As of what date should the proportionate abatement of non-preferred appropriations be determined. In other words, if the State must keep within current revenue and one million dollars, is it the duty of the fiscal officers to withhold payment of non-preferred appropriations, except in amounts as the changing fiscal picture might indicate from time to time?"

We shall discuss your inquiries in the order in which you state them.

I

Should all items in the General Appropriation Act be treated as ordinary expenses of the government to be paid before other appropriations?

Article III, Section 15, of the Constitution provides that:

> "The general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative and judicial departments of the Commonwealth, interest on the public debt and for public schools; all other appropriations shall be made by separate bills, each embracing but one subject."

In discussing "ordinary expenses" of municipal government, the Supreme Court said, in Brown, et al. *v.* City of Corry, 175 Pa. 528 (1896), at 531:

> "* * * Any expense that recurs with regularity and certainty, and is necessary for the existence of the municipality or for the health, comfort and perhaps convenience of the inhabitants, may well be called an ordinary expense."

This statement is equally applicable to "ordinary expenses" of the State government. It was thus regarded by Attorney General Bell in an opinion rendered to the Auditor General on November 11, 1913. 62 Pittsburgh Legal Journal 77.

The title of the General Appropriation Act of 1931 (Act No. 15-A. Appropriation Acts, p. 16) is:

> "An act to provide for the ordinary expenses of the Executive, Legislative, and Judicial Departments of the Commonwealth, interest on the public debt, and the support of the public schools * * *."

Clearly, the items in this act are either for "ordinary expenses," and therefore valid, or not for "ordinary expenses" and therefore

unconstitutional. There is no middle ground. It would be impossible to abate them as unpreferred appropriations. If they are not for "ordinary expenses," they are void.

The Legislature has declared every item in the General Appropriation Act to be for "an ordinary expense" of the State government. The action of the Legislature is presumed to be constitutional. In the Talbot Act Case, Mr. Justice Kephart said, "A statute will be declared unconstitutional only 'when it violates the Constitution *clearly, palpably, plainly;* and in such a manner as to leave *no doubt* or hesitation' in the mind of the Court."

Applying this test to the items contained in the 1931 General Appropriation Act, all of them are presumptively for "ordinary expenses" of the State government; the Legislature has thus described them.

By Informal Opinion No. 96, dated May 21, 1932, we advised the Department of Public Instruction, that it could not expend the item appropriating $50,000 "for expenses incident to the observation of the Two Hundred Fiftieth Anniversary of the first landing of William Penn in America." This clearly is not an appropriation for an "ordinary expense" of the government.

We have examined the other items in the General Appropriation Act, its amendments and supplements (Act of December 23, 1931, P. L. 1499 and Act of January 26, 1932, P. L. 1511). With a very few exceptions, there is no doubt but that they cover "ordinary expenses" of the State government.

The doubtful items follow:

1. For the painting of portraits of Governor Fisher, Lieutenant Governor James, Secretary of the Commonwealth Johnson, and Secretary of Internal Affairs Woodward, each in the amount of $750.

2. Appropriations to the Department of Military Affairs:

(a) For the installation of sewerage, the disposal of sewage, and the making of improvements, additions, or repairs to existing buildings, roads, and utilities on the State Military Reservation in the sum of $119,500 and increased by amendment (Act No. 9-E, approved January 26, 1932) to $419,500;

(b) For the marking of graves and burial places of soldiers of the Revolutionary War and the War of 1812 in the sum of $5,000;

(c) For the preparation and compilation of statistics and records of the soldiers, sailors, marines, and nurses from Pennsylvania who participated in the World War and for the furnishing of assistance to any soldiers, sailors, marines, and nurses who served from Pennsylvania in any of the wars of the United States in prosecuting claims which they may have for assistance under Federal law, in the sum of $45,000, and

(d) After payment of the administrative expenses of the State Veterans Commission, to enable that agency to furnish funds to purchase the necessities of life for and to assist otherwise Pennsylvania veterans of any war or the widows or infant children or dependents of such veterans who are sick, disabled, or indigent, in the amount of $100,000, increased by supplement (Act No. 4-E, approved December 23, 1931) to $200,000.

3. An appropriation to the Pennsylvania State Police for installing, operating, and maintaining a teletypewriter system for disseminating and receiving police information in the amount of $400,000.

1. It has been the custom of the Legislature for many, many years at the close of an administration to appropriate funds for painting the portraits of the Governor, Lieutenant Governor, and certain other State officers. While it is doubtful whether these are ordinary expenses of the government, nevertheless, in our opinion, through long usage these items have come to be considered as within that classification. We cannot say that their inclusion in the General Appropriation Act clearly, palpably, and plainly violates the Constitution.

2(a) It is certainly an ordinary expense of the government to maintain an efficient National Guard. That being so, we cannot say that it is a clear violation of the Constitution to include within the General Appropriation Act an item for conditioning, ready for use, an addition to the State Military Reservation which is used solely for the purpose of training members of the National Guard.

2(b) While it may be a governmental function to mark the graves and burial places of soldiers of the early wars in which the United States participated, this cannot be regarded as an "ordinary expense" of the State government. The item for this purpose is, in our opinion, unconstitutional.

2(c) It is certainly a function and an ordinary expense of the State government to have on file for proper governmental purposes statistics and records of the soldiers, sailors, marines, and nurses, residents of Pennsylvania who participated in the World War. We cannot say that the inclusion of an appropriation for this purpose is a palpable violation of the Constitution.

2(d) The Legislature has created the State Veterans Commission and authorized it to engage in certain activities looking to the welfare of distressed veterans and their families. The Legislature having declared this to be a function of the government, we cannot say that an appropriation for the work of this commission is not for an "ordinary expense" of the government.

3. The installation, operation, and maintenance of a means of communication between the Pennsylvania State Police and other police

officers in Pennsylvania and elsewhere can certainly not be regarded as outside of the scope of the General Appropriation Act. Anything which enables the Commonwealth to perform well that part of the police activities of the State which it has assumed is clearly within the scope of the ordinary business of the State. In any event, the teletypewriter system has been fully installed and paid for.

Accordingly, we are of the opinion that none of the items in the 1931 General Appropriation Act, as amended and supplemented, is clearly unconstitutional and void, except the one which we have already held void in our Informal Opinion No. 96, and the small item for marking the graves of Revolutionary soldiers.

Therefore, it is our opinion that the entire amount included in the General Appropriation Act, less $55,000, must be treated as preferred within the meaning of the opinion of the majority of the Supreme Court in the Talbot Act Case.

The amount in which the Governor approved the act was $150,391,-967.62. Amendments and supplements passed by the special session of 1931 added $930,000 making the total for the regular and special sessions $151,321,967.62. Deducting $55,000, the amount of this act which must be treated as preferred is $151,266,967.62.

II

Which appropriations not included in the General Appropriation Act of 1931 should be treated as preferred appropriations under the decision of the Supreme Court?

Obviously, the appropriation made by the Talbot Act in the amount of $10,000,000 must be thus treated. The Supreme Court has specifically so ruled.

In addition, in our opinion, the following appropriations must be treated as preferred:

1. The appropriation made by Act No. 19-A, approved June 19, 1931 (Appropriation Acts, p. 82), for renovating, repairing or replacing the roof on the main capitol building, in the amount of $200,000. We cannot conceive any appropriation item which more fully comes within the classification, "expenses of the government," than this. Presumably the Legislature was convinced of the necessity for this expenditure; and necessary repairs to the roof of the building in which the seat of government is established are clearly such an expense as must be regarded as having a preferred status.

2. The appropriation made by the Act of June 12, 1931, P. L. 575, providing $250,000 for the Delaware River Joint Commission, which was to be available only if New Jersey made a like appropriation. New

Jersey did make a like appropriation with the result that the appropriations of both States are, in our judgment, bound by contract to remain unimpaired.

3. For like reasons, the appropriation made by the Act of June 25, 1931, P. L. 1376, must be treated as preferred. That act appropriated $50,000 to the Department of Labor and Industry to be used in conducting an experimental employment agency in Philadelphia. The appropriation was conditioned upon the donation by a private corporation, organization or foundation, of a like amount; and such a donation has been made by the Spelman Fund and accepted by the Commonwealth.

4. The appropriations made by the Act of December 1, 1931, P. L. 1495 (Act No. 1-E), for the payment of the expenses of the special session of the Legislature which convened on November 9, 1931. Their amount was $366,553.04.

These are the only items in addition to those contained in the General Appropriation Act and the Talbot Act, which in our opinion, may be treated as preferred. Their total is $866,553.04.

We have not overlooked the claims of certain other appropriation acts to be regarded as preferred.

The Legislature in 1931 established the Greater Pennsylvania Council. It is a governmental body, but it was not incorporated in the permanent structure of the State government, by including it in The Administrative Code. It is so to speak, an experimental agency which may later be permanently embodied in our governmental structure. Its work is not as yet essential work of the government. Therefore, we have adopted the view that its expenditures are not preferred and must abate.

The same situation exists respecting the work of all temporary governmental commissions.

We regret exceedingly our inability to treat as preferred the appropriation for mothers' assistance, for State-aided hospitals, for State-aided educational institutions, and for the State's payment to county and poor district homes for the maintenance of the indigent insane. All of them represent gratuities for most worthy purposes. But we cannot treat any of them as governmental expenses within the meaning of the majority opinion of the Supreme Court in the Talbot Act Case. Mr. Justice Kephart undoubtedly had this situation in mind when he said:

> "* * * No administrative custom or scheme of payments under unpreferred appropriations will avoid these consequences or that of a deliberate legislative act in preferring an appropriation. If other appropriations are compelled to suffer because of this preference, [that given

> to the Talbot Act] the complete answer is that it is the legislative will, and as the sovereign people have thus spoken through their designated agent, no one can complain. If appropriations for other charities and hospitals, equally as meritorious and perhaps some more deserving, are made to suffer because of insufficient revenue, the fault lies with the legislature in not providing means when it had the opportunity."

We have also considered most carefully Act No. 18-A, appropriating $9,646,010 for State welfare, educational and military buildings, Act No. 17-A appropriating $3,000,000 for the new Eastern State Penitentiary, and other building appropriations; but we have concluded that appropriations for new buildings are not to be treated as preferred expenses of the government.

To summarize, the preferred appropriations are:

Ordinary expenses of the State government, as set forth in the General Appropriation Act, its amendments and supplements	$151,266,967.62
Talbot Act	10,000,000.00
Act No. 19-A	200,000.00
Act of June 12, 1931, P. L. 575	250,000.00
Act of June 25, 1931, P. L. 1376	50,000.00
Act No. 1-E	366,553.04
Total	$162,133,520.66

III

In determining the amount of money available for the present biennium, should you be governed by the estimate of the Budget Secretary presented to the Governor after the adjournment of the regular session of the Legislature in 1931, and upon the basis of which the Governor acted in approving appropriation acts?

Under the law as it now exists the Department of Revenue is the agency of the State government primarily charged with the collection of revenues either directly or as agent for other departments, boards and commissions; it is charged with the responsibility for the collection of every penny of revenue flowing into the State Treasury, with the single exception that the State Treasurer himself is required to collect from State depositories interest on State deposits. The amount involved in this exception is so trivial as to be negligible.

In making collections from a number of the State's major sources of revenue, the Department of Revenue is obliged by law to obtain the approval of the Department of the Auditor General to tax settlements; but this approval is not required in the collection of revenues flowing into the treasury from many other major sources.

Thus while the Department of the Auditor General must approve settlements of capital stock and gross receipts taxes it has no function to perform in the collection of inheritance taxes or mercantile or any other license taxes.

It is an incontrovertible fact that the only agency of the State government which is in a position, from first-hand information and experience, to make a comprehensive estimate of the revenues which should be collected during any given period, is the Department of Revenue.

That this is so was argued at length in *Commonwealth v. Liveright et al.*, and apparently the majority of the Supreme Court endorsed the soundness of this position. That part of the opinion which we have quoted begins by stating that "The balance of estimated revenues for the biennium, after the regular session of the legislature, was $192,915,000." This was the estimate submitted to the Governor by the Budget Secretary at the close of the regular 1931 session of the Legislature. It included the estimate of revenue furnished by the Department of Revenue and the surplus on hand as calculated by the office of the Budget Secretary.

Therefore we are of the opinion that the only official estimate of revenue which can be recognized by the fiscal officers in the performance of their duties is that submitted to the Governor through the Budget Secretary by the Department of Revenue.

Can the estimates of revenue be reduced by the Budget Secretary and the Department of Revenue after the Governor has acted upon them in approving and vetoing appropriation legislation passed by the Legislature?

This question arises because the Secretary of Revenue is now of the opinion that the estimate of $192,915,000 is at least $5,000,000 too high.

Thus, stated differently, the question is whether $5,000,000 of appropriations which were valid when approved, can later be invalidated by a downward change in the budget estimates.

We are firmly of the opinion that the budget estimates as officially submitted to the Governor as a basis for his action on appropriation measures at the close of the regular biennial session of the Legislature must be treated as the inflexible test by which fiscal legislation is evaluated for the biennium. It is true that an estimate is not a fact but only a prediction, and that the prediction may fail by being either too high or too low. That, however, is an inescapable uncertainty in the administration of any budget system. An estimate of revenue can never be guaranteed as accurate. In times of prosperity it is almost certain to be too conservative and in times of depression it is almost certain to be the reverse; but we cannot believe that it was the intention of the framers of our Constitution and of the people who adopted

it, to provide a system under which an appropriation valid on the date of its approval could later be invalidated by the action of a single executive officer.

IV

As of what date should the proportionate abatement of non-preferred appropriations be determined? In other words, if the State must keep within current revenue and one million dollars, is it the duty of the fiscal officers to withhold payment of non-preferred appropriations, except in amounts as the changing fiscal picture might indicate from time to time?

We have already answered the second part of your question. The answer is, no.

The Talbot Act became effective on December 28, 1931. It is the passage of this act,—which a majority of the Supreme Court has held to be a valid act,—which requires the proportionate abatement of other appropriations made by the Legislature at the regular and special sessions of 1931. The court held that, "The Act itself effected a repeal of so much of other appropriations not in its class as would be necessary" to balance the budget. That repeal could occur only on the date when the Talbot Act became effective.

Therefore, the proportionate abatement which is required must be made as of December 28, 1931; and once made it will remain effective unless and until the Legislature by further enactments makes appropriations restoring the amounts which have been abated. This can be done under the decision of the Supreme Court only if and when revenue is rendered available equal in amount to the abatement which has been effected by the passage of the Talbot Act.

In this connection we call your attention to the fact that the abatement cannot be made proportionately with respect to all appropriations of the non-preferred class passed by the Legislature at its 1931 sessions.

If an appropriation theretofore made by the Legislature had been fully expended prior to December 28, 1931, it could, of course, not be abated by legislation which became effective on that date. Similarly, if more of the appropriation had actually been expended than the proportionate part which would be available under the abatement, the money already expended cannot be restored to the State Treasury. It is gone.

Again, if prior to December 28, 1931, binding contracts had been entered into under authority of law encumbering or obligating appropriations made prior to December 28, 1931, these contracts cannot be impaired by legislation effective on that date. The Constitutions both of the United States and of Pennsylvania forbid this. Therefore, no

appropriation can be abated to a point below the extent to which it has actually been encumbered by contract validly and lawfully entered into prior to December 28, 1931.

A complication arises from the fact that in certain instances contracts were entered into after December 28, 1931 and prior to April 7, 1932, when the Supreme Court rendered its decision in the Talbot Act Case. As there was no possible way of anticipating the conclusion reached by a majority of the Supreme Court,—as the formula which it adopted was not presented to it by any of the lawyers who were in the case,—it is our opinion that the contracts entered into during this period must be regarded as having been validly and effectively made. There is, therefore, no possible way of abating appropriations below the amounts for which they were obligated or encumbered by contracts entered into prior to April 7, 1932. Subsequent to that date, under instructions from this office, there have been no new contracts made.

Most of these cases have occurred in the expenditure of the appropriation made by Act No. 18-A (Appropriation Acts, p. 77) for various building projects. However for the purposes of this opinion, that appropriation must be treated as a single appropriation of $9,646,010. This total can be abated proportionately with other non-preferred appropriations. Within the lump sum of the appropriation as abated, the Department of Property and Supplies should endeavor to abate specific items as nearly as possible in the same proportion, but for the reason stated it will not be possible to make an absolutely proportionate abatement.

V

Summary

To summarize, we advise you that:

1. Items in the General Appropriation Act, its amendments and supplements, are either in the preferred class or void. They cannot be abated.

2. The only preferred appropriations made by the regular and special sessions of 1931, other than those made by the General Appropriation Act, its amendments and supplements, are those made by the Talbot Act, Act No. 19-A, the Act of June 12, 1931, P. L. 575, the Act of June 25, 1931, P. L. 1376, and Act No. 1-E. All other appropriations made at the regular and special sessions of 1931 must abate proportionately.

3. In determining the amount of money available for the present biennium, you must be governed by the estimate of the Budget Secre-

tary, presented to the Governor after the adjournment of the regular session of the Legislature in 1931, upon the basis of which the Governor acted in approving appropriation acts; and

4. The abatement of appropriations must be made as of the effective date of the Talbot Act,—December 28, 1931,—except that the abatement cannot affect appropriations actually expended prior to that date, and that the abatement cannot in any case disturb contracts lawfully and validly executed prior to the decision of the Supreme Court in the Talbot Act Case.

In conclusion we wish to say that the subject-matter of this opinion has been most carefully considered by all of the members of the Board of Finance and Revenue, consisting of the Auditor General, the State Treasurer, the Secretary of Revenue and the Attorney General, at several lengthy conferences.

Your request was the result of those conferences, and the advice herein rendered, while in form an opinion of this department, represents not only the judgment of the Attorney General and his deputies, but also of all of the other members of the Board of Finance and Revenue.

VI

Application of This Opinion

In conferring upon the questions discussed in this opinion, the Auditor General, the State Treasurer, and the Attorney General have agreed that the effect of the majority opinion in the Talbot Act Case, as herein interpreted, is as follows:

The total estimated revenues for this biennium as certified to the Governor by the Budget Secretary at the close of the 1931 regular session of the Legislature amounted to $192,915,206.22. To this amount there can be added, under the decision of the Supreme Court, $1,000,000. Therefore, the total valid appropriations for this biennium cannot exceed $193,915,206.22.

As we have already pointed out, the preferred appropriations for this biennium total $162,133,520.66.

The difference,—$31,781,685.56,—is the amount available for the payment of non-preferred appropriations.

The total of appropriations made by the regular and special sessions of the Legislature in 1931 was $203,690,570.49, which reduced by the $55,000 which we have ruled unconstitutional, amounts to $203,635,570.49. Deducting from this amount the aggregate of preferred appropriations, $162,133,520.66, we have a balance of $41,502,049.83, of non-preferred appropriations.

To apply to these appropriations there is available, as above stated, $31,781,685,56.

We are advised that non-preferred appropriations fully expended, or expended in excess of what would otherwise have been their abated amount on December 28, 1931, totaled $136,091.38. This figure must be deducted from both of the amounts just given. Also the total amount of non-preferred appropriations encumbered prior to April 7, 1932, by valid contracts in excess of the amounts of the abated appropriations. This total is $1,127,985.37. This figure includes $940,000 appropriated by Act No. 3-A (Appropriation Acts, p. 5) for buildings for State College, all of which was contracted for prior to April 7, 1932.

The result is that there will be $30,517,608.81 available to pay $40,237,973.08 of non-preferred appropriations.

Therefore, the abatement of every non-preferred appropriation must be 24.16 per centum of the amount appropriated for the biennium.

Very truly yours,

DEPARTMENT OF JUSTICE,
WM. A. SCHNADER,
Attorney General.

OPINION NO. 52

Public Schools—Minimum Salaries to Teachers—School Code May 18, 1911. P. L. 309, Sec. 1210 as amended.

The provisions of Section 1210 of the School Code of May 18, 1911, P. L. 309, as amended, which prescribed minimum basic salaries and required increments for teachers, are inseparable parts of a single salary schedule, and the increments are to be based only on the statutory basic minimum, irrespective of the actual salaries at which the teachers enter the employ of the districts.

Where a teacher enters the employe of a school district at a salary above the statutory basic minimum, the School Code does not require the district to increase her salary until the time at which she would have been entitled to a larger salary if she had entered the district at the statutory minimum.

Department of Justice,
Harrisburg, Pa., June 7, 1932.

Honorable W. M. Denison, Deputy Superintendent of Public Instruction, Harrisburg, Pennsylvania.

Sir: You have asked us to advise you whether, under clause 10 of Section 1210 of the School Code of May 18, 1911, P. L. 309, as last amended by the Act of May 23, 1923, P. L. 328, 24 P. S. 1173, a teacher who enters the employ of a school district at a salary higher