You have not requested information concerning the status of the Essington Rifle Range and the Middletown Aviation Depot regarding the operation of canteens or post exchanges for the sale of intoxicating liquors. However, we respectfully suggest that inasmuch as these are Federal military reservations within the Commonwealth, the Commanding General of the National Guard of Pennsylvania should issue specific orders that no sale of intoxicating liquors be permitted under any circumstances during the summer encampments upon these Federal reservations.

Therefore, we are of the opinion, and you are advised:

1. That the acts of Congress that prohibit the sale of beer, wines and liquors at post exchanges and canteens upon the premises used for military purposes by the United States, are in full force and effect, but they are not applicable to the State military reservations at Indiantown Gap and Mt. Gretna when used by the Pennsylvania National Guard in their summer encampments.

2. That it is now unlawful for licensees in Pennsylvania to sell intoxicating liquors to members of the National Guard while in uniform because of the present regulations of the Pennsylvania Liquor Control Board. However, the Pennsylvania Liquor Control Board may lawfully amend its present regulations and permit the lawful sale by licensees in Pennsylvania to members of the National Guard while in uniform. If and when these regulations are amended or supplanted, it will be legal for licensees in the Commonwealth to sell intoxicating liquors to members of the National Guard of Pennsylvania while in uniform.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 171

Magistrates—Summary conviction—Review—Certiorari—Appeal—Necessity for special allowance—Constitution, Art. v, Sec. 14—Fish Law of May 2, 1925, Sec. 278—Right to waive hearing and enter bail for appeal.

1. A summary conviction before a magistrate can be reviewed only in one of two ways: (1) by certiorari to the court of common pleas, in which proceeding only the record of the magistrate is subject to review, and (2) by appeal to the court of quarter sessions, upon special allowance by a judge thereof, in which proceeding the case is heard de novo.

2. Section 278 of The Fish Law of May 2, 1925, P. L. 448, is to be construed as providing for an appeal from a summary conviction for violation of the statute only upon special allowance by a judge of the court of quarter sessions, since any other construction would render it unconstitutional as violative of Art. v, Sec. 14, of the Constitution, prohibiting the legislature from providing for an appeal from a summary conviction as a matter of right.

3. It is improper for a justice of the peace to allow defendants charged with violation of The Fish Law of 1925 to plead guilty, waive a hearing and appeal to the court of quarter sessions; but he should proceed to hear the case and discharge them if they are not guilty or fine them if they are guilty, in which latter contingency they may enter bail to apply for an appeal to the court of quarter sessions under section 278 of the act.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., May 21, 1935.

Honorable O. M. Deibler, Commissioner of Fisheries, Harrisburg, Pennsylvania.

Sir: We have your communication of recent date relative to J. H. Hall, Seneca, Pennsylvania, who arrested three men for snatching suckers. You state that when they were brought before the justice of the peace, they pled not guilty, waived a hearing, and appealed the case to court. You inquire as to this procedure.

I presume that the justice of the peace was confused with the provision of The Vehicle Code, which permits a waiver of hearing and appeal to court. There is no such provision in The Fish Law of 1925, section 278 of which reads as follows:

> "Sentence. Bail. Appeal. If convicted such person shall be sentenced to pay the fine provided in this act for such violation, together with the costs of suit. The person so convicted shall on failure to pay such fine be sentenced by such alderman, magistrate, or justice of the peace, to undergo imprisonment in the county jail of the county in which such conviction takes place * * *, unless specifically otherwise provided by this act, or unless the person so convicted shall give notice of an intention to procure a writ of certiorari or appeal, in which case such person shall be permitted to enter into good and sufficient recognizance to appear before such justice, alderman, or magistrate on or before the expiration of five days, if such appeal or certiorari is not taken by them, or on the final determination of the same if it be not sustained, for execution of sentence."

A summary conviction before a magistrate can be reviewed only in one of two ways:

1. By a writ of certiorari to the common pleas court. This writ issues as of right, but in this proceeding only the record of the magistrate is brought up and reviewed. From an inspection of the record

the regularity of the proceedings is passed upon and if the record is technically correct, the conviction is sustained. See *Commonwealth* v. *Congdon,* 74 Pa. Super. Ct. 286 (1920).

2. By an appeal, which, however, must be specially allowed by the judge of the court of quarter sessions.

The proceeding by which appeals are taken is regulated by the Act of April 17, 1876, P. L. 29, section 1, as finally amended by the Act of April 1, 1925, P. L. 98, section 1 (19 PS sec. 1189). This statute, as amended, provides:

> "In all cases of summary conviction in this Commonwealth, before a magistrate or court not of record, either party, even though any fine imposed has already been paid, may, within five days after such conviction, appeal to the court of quarter sessions of the county in which such magistrate shall reside or court not of record shall be held, *upon allowance of the said court of quarter sessions or any judge thereof, upon cause shown;* and either party may also appeal from the judgment of a magistrate or a court not of record, in a suit for a penalty, to the court of common pleas of the county in which said judgment shall be rendered, upon allowance of said court, or any judge thereof, upon cause shown: Provided, That pending the taking of an appeal by either party, or the allowance or refusal thereof by the court or judge, the fine, or penalty, and costs imposed by the magistrate, or court not of record, need not be paid if bail is entered with one or more sufficient sureties in double the amount of such fine, or penalty, and costs for the payment thereof, on the refusal of such appeal; or if allowed, on the final disposal of such appeal. If the defendant pays the fine or penalty and costs imposed and wishes to take an appeal under the provisions of this section he shall give bail in double the probable amount of costs that may accrue in the final disposition of the appeal." (Italics ours)

While the allowance of an appeal is distinctly a matter of discretion on the part of the court of quarter sessions or the judge thereof, after the appeal is once allowed a hearing of the parties on the merits of the case follows. The appeal is not a mere certiorari reviewing the record of the justice of the peace, but is a hearing de novo without a jury, and the court must render a distinct and unequivocal judgment upon the facts and the law applicable to the facts. *Commonwealth* v. *Congdon,* 74 Pa. Super. Ct. 286 (1920).

It follows, therefore, that the procedure of the justice of the peace in permitting the three men to waive a hearing and appeal was irregular. He should have refused to permit them to waive a hearing. He should have held a hearing and if they were not guilty, discharged them. If they were guilty, he should have imposed the fine. Then

if they desired to enter bail to apply for an appeal in the quarter sessions court within five days, they had that privilege.

If the court allowed the appeal, as above indicated, there would have been a rehearing. If the court declined to allow the appeal, the execution of the magistrate's judgment of conviction would necessarily follow.

In case it may be thought that the language quoted from The Fish Law of 1925, namely section 278, should be interpreted as allowing an appeal of right, I may say that it has been held that it is beyond the power of the legislature to change the mandate of the Constitution because of section 14 of article V thereof, which provides:

> "In all cases of summary conviction in this Commonwealth, or of judgment in suit for a penalty before a magistrate, or court not of record, either party may appeal to such court of record as may be prescribed by law, *upon allowance* of the appellate court or judge thereof upon cause shown." (Italics ours)

Thus, the previous Act of April 22, 1905, P. L. 284, purporting to regulate appeals from summary convictions before a magistrate, was held unconstitutional and in violation of section 14 of article V because it attempted to dispense with the constitutional requirement that an appeal from a summary conviction shall be only upon special allowance and upon cause shown. See *Commonwealth* v. *Weiler,* 31 C. C. 550, 15 Dist. 396; *Commonwealth* v. *Light,* 4 Just. 121; *Commonwealth* v. *Luckey,* 31 Pa. Super. Ct. 441.

It is a settled principle of construction that if a statute may be interpreted so as to avoid it being held unconstitutional, such interpretation should be adopted. Consequently, it is our opinion that the section of The Fish Law of 1925 quoted should be interpreted in conformity with the general practice governing appeals from summary convictions, namely, that they must only be on allowance.

Section 1204 of The Vehicle Code of 1929 is not to be considered as a guide. That act expressly provides for a waiver of hearing, entry of bail, and an appeal. Such provision is constitutional because there is no conviction before the justice of the peace.

The Fish Law of 1925 contains no such provision. Consequently, the procedure of the justice of the peace was improper and irregular. There was no warrant in law for him to permit a waiver of hearing and an appeal. Your fish warden should be instructed to see the magistrate and have him bring back the offenders and proceed with hearing according to law.

Very truly yours,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 172

Insurance—Issuance by fraternal benefit society—Benefit certificates providing for single or instalment payments at maturity—Designation as "endowment" certificates.

A fraternal benefit society, organized under the Act of May 20, 1921, P. L. 916, has power and authority to issue certificates providing for the payment of benefits which mature for payment to the member at not under 60 years of age in a single payment or in instalments, but it should not designate such certificates as "endowment" certificates, since the term is technically inaccurate.

DEPARTMENT OF JUSTICE,

Harrisburg, Pa., May 22, 1935.

Honorable Owen B. Hunt, Insurance Commissioner, Harrisburg, Pennsylvania.

Sir: You have requested our opinion relative to the power and authority of a fraternal benefit society, organized and existing under and in pursuance of the provisions of the Act of May 20, 1921, P. L. 916, to issue to members benefit certificates providing for the payment of benefits, which mature for payment to the members at not under sixty years of age, in single cash payments or in instalments, which certificates are called endowment certificates.

Our attention is called to our formal opinion dated February 28, 1928, addressed to one of your predecessors, the Honorable Matthew H. Taggart. That opinion had to do with the power and authority of a fraternal benefit society to issue to its members benefit certificates in the nature of twenty-year endowment certificates. The conclusion reached was as follows:

> "You are therefore advised that, in our opinion, the classes of benefit certificates which a fraternal benefit society organized and existing under the above Act of May 20, 1921, is authorized to issue are restricted to those classes enumerated in section 8 of the act; that the classes enumerated do not include endowment insurance; and that therefore such fraternal benefit society has no authority or power to issue a twenty-year endowment benefit certificate."

The pertinent sections of the Act of May 20, 1921, P. L. 916, are sections 5 and 8, which read as follows:

> "Section 5. Every such society shall provide for the payment of death benefits, and may provide for the erection of monuments to mark the graves of its deceased members. It may also provide for the payment of old age benefits which mature for payment to the member at not under sixty years of age, and for permanent and temporary disability payments. It may provide that a member, when permanently