Moreover, in practice it has been customary to fill vacancies in the Supreme Court or the Superior Court at municipal as well as general elections. Thus, in 1929 Judge Thomas J. Baldrige was elected at a municipal election to fill a vacancy in the Superior Court, and in 1931 Justice James B. Drew was elected at a municipal election to fill a vacancy in the Supreme Court.

Accordingly, you are advised that any person appointed by you as Justice of the Supreme Court to fill a vacancy in that office caused by the death of an incumbent, will hold such office until the first Monday of January next, succeeding the first municipal or general election, as the case may be, occurring three or more months after the happening of such vacancy, at which election such vacancy should be filled by the electorate.

Respectfully submitted,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 179

Courts—Supreme Court—Candidates to bee nominated by each political party—Constitution, Art. v. Sec. 16; Art. xiv, Sec. 7 as amended.

A political party may nominate only one candidate for the office of justice of the Supreme Court where two vacancies in said office are to be filled at the same election.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., July 30, 1935.

Honorable David L. Lawrence, Secretary of the Commonwealth, Harrisburg, Pennsylvania.

Sir: You have requested to be advised concerning how many candidates may be nominated by each political party at the primary election for the office of justice of the Supreme Court when two existing vacancies are to be filled at the succeeding November election.

Article V, section 16 of the Constitution of Pennsylvania provides, in part, as follows:

> "Whenever two judges of the Supreme Court are to be chosen for the same term of service each voter shall vote for one only * * *; candidates highest in vote shall be declared elected."

This provision unequivocally restricts the voter from voting for more than one candidate in the situation where two judges of the Supreme Court are to be chosen for the same term. It does not differentiate

between those voters who cast their ballots at November elections and those who vote at primary elections.

In section 11 of the Primary Election Law of July 12, 1913, P. L. 719, the legislature provided that:

> "Primaries shall be conducted in conformity with the laws governing the conduct of general elections, in so far as the same are not modified by the provisions of this act or are not inconsistent with its terms: * * *"

A careful examination of the Primary Election Law does not reveal any provision which permits voters to vote for more than one judge of the Supreme Court where two are to be chosen. Therefore, the general laws governing the conduct of general elections, as represented by the above quoted section of the Constitution, are incorporated by reference into the Primary Election Law. Consequently, that law prohibits voters at primary elections from voting for more than one candidate whenever two judges of the Supreme Court are to be chosen at the subsequent November election.

Moreover, since the voters may not vote for more than one candidate, it follows that only one candidate may be nominated for each party at the regular primary election. This interpretation is in conformity with the manifest intention of the Constitution to accord minority representation upon the Supreme Court where more than one justice is to be elected at the same election.

The same intent is evidenced in the constitutional provision in article XIV, section 7, as amended, requiring minority representation among county commissioners, as follows:

> "* * * in the election of said officers [county commissioners] each qualified elector shall vote for no more than two persons, and the three persons having the highest number of votes shall be elected; * * *"

The same provisions are contained in Article III, section 101 of the County Code of May 2, 1929, P. L. 1278.

Since the Act of April 10, 1867, P. L. 62, minority representation in the election of jury commissioners has also been required. Section 1 of that act provides:

> "* * * That each of said qualified electors shall vote for one person only as jury commissioner; and the two persons having the greatest number of votes, for jury commissioner, shall be duly elected jury commissioners for such county."

These provisions are supplemented by Article III, sections 291-293 of the County Code.

Likewise, the Constitution establishes limited voting in the election of Philadelphia magistrates in article V, section 12, and in the election of election inspectors in article VIII, section 14.

In *Commonwealth ex rel.* v. *Reeder,* 171 Pa. 505, 518 (1895), the Supreme Court of Pennsylvania said concerning the provisions in the Constitution establishing limited voting:

> "* * * But the limited voting plan was recognized and adopted in the constitution because it was deemed wise that as to offices non partisan in character, or which at least should be, *the minority party ought to have representation,* and this could only be attained by limited voting. * * *" (Italics ours)

In this case it was held that the provision in the Act of June 24, 1895, P. L. 212, establishing the Superior Court, that "* * * no elector may vote, either then or at any subsequent election, for more than six candidates upon one ballot for the said office," was constitutional, even though there were seven judges to be elected.

To permit each political party to nominate two candidates for justices of the Supreme Court, where only two are to be elected, would contravene the spirit of the Constitution, because it would present an opportunity for a strong majority political party to elect both of its nominees merely by dividing the votes of its electors between them. Thus, the minority party would be deprived of all representation in an office which the Supreme Court has characterized as "nonpartisan" in character, and the intent of the Constitution would be defeated.

Ever since the institution of the direct primary election system, it has been the practice of all political parties to nominate two candidates for the office of county commissioner and one candidate for the office of jury commissioner, even though there are three county commissioners and two jury commissioners to be elected. This practice has obviously been based on the principle that the number of nominees should be restricted by the number of votes to be cast by each voter, and this principle has received universal acquiescence and sanction.

Since the Constitution of 1874 there have been four instances where two judges of the Supreme Court were chosen at the same election. In 1919, Justices Alexander P. Simpson, Jr. and John W. Kephart were elected under the provisions of the Nonpartisan Ballot Law of July 24, 1913, P. L. 1001, now repealed. In *Winston* v. *Moore,* 244 Pa. 447 (1914), the Supreme Court upheld the constitutionality of the Nonpartisan Ballot Law, but it specifically refrained from deciding whether a primary election law came within the purview of the constitutional provisions. In 1900, when Justices S. Leslie Mestrezat and J. Hay Brown were elected to the Supreme Court, the election took place prior to the Primary Election Law of 1913. However, it

is noteworthy that while the nominations were made by the convention system, the two major political parties each nominated only one candidate. Similarly, each political party nominated only one candidate for justice of the Supreme Court in the election in 1888, when Justices J. Brewster McCollum and James T. Marshall were elected, and in the election of 1874, when Justices Edward M. Paxson and Warren J. Woodward were elected.

It has been the universal practice to nominate only so many candidates as are to be voted for by the individual elector. The practical interpretation of an ambiguous situation in the law by the administrative officials charged with its supervision is entitled to the highest respect, and if acted upon for a number of years, will not be disturbed except for very cogent and persuasive reasons. See *Commonwealth* v. *Mann,* 168 Pa. 290 (1895); *Garr* v. *Fuls,* 286 Pa. 137 (1926); *Commonwealth* v. *Quaker City Cab Co.,* 287 Pa. 161 (1926) (Reversed on another point in 277 U. S. 389, 1928); and *Reeves's Appeal,* 33 Pa. Super. Ct. 96 (1907).

Therefore, each political party should nominate only one candidate for the office of justice of the Supreme Court where two vacancies in such office are to be filled at the same election.

To determine this question in any other manner would operate to interfere with electors in voting a straight party ticket at any November election where two justices were to be elected to the Supreme Court, because only one vote could be cast for this particular office under article V, section 17 of the Constitution. Under the general provisions of section 27 of the Act of June 10, 1893, P. L. 419, as amended by section 4 of the Act of April 29, 1903; P. L. 338, a voter voting a straight party ticket would lose his vote as to the candidates for Supreme Court justice, because that act provides that:

> "If a voter has marked his ballot otherwise than as directed by this act, so that for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office; but the ballot shall be counted for all other offices for which the names of candidates have been properly marked."

While it cannot be stated that voters have a constitutional right to vote a straight party ticket in the November elections, nevertheless it would be most confusing to voters who customarily cast their ballots in that manner to require them to make a separate indication concerning the office of justice of the Supreme Court, either on the official ballot or by voting machine.

Therefore, we are of the opinion that a political party may nominate only one candidate for the office of justice of the Supreme Court where two vacancies in said office are to be filled at the same election.

Respectfully submitted,
DEPARTMENT OF JUSTICE,
CHARLES J. MARGIOTTI,
Attorney General.

OPINION NO. 180

Waters—Ownership of stream beds—Navigable rivers—Obstruction—Artificial navigability—Public service lines across streams—Licensing—Compensation to State—Administrative Code, Sec. 514.

1. The Commonwealth holds title to the beds of navigable waters and to the air above them and may therefore impose such terms or conditions for the use thereof as it chooses, subject only to the superior right of the Federal Government to insist that navigation be not impeded.

2. It seems that the Commonwealth gains title to the beds of streams made navigable artificially, but does not lose title to the beds of once navigable streams upon their becoming non-navigable.

3. It is the right and duty of the Water and Power Resources Board, under section 514 of The Administrative Code of April 9, 1929, P. L. 177, to exact of a public service company which it has licensed to cross a navigable stream bed, either by a submerged pipe line or by overhead wires, compensation therefor in such amount as it may, with the approval of the Governor, prescribe.

DEPARTMENT OF JUSTICE,
Harrisburg, Pa., August 13, 1935.

Honorable Thomas C. Buchanan, Chairman, Water and Power Resources Board, Harrisburg, Pennsylvania.

Dear Mr. Buchanan: This department is in receipt of your request to be advised whether the Water and Power Resources Board has authority to impose a reasonable charge upon public service corporations in granting permits to cross the stream beds of the waters of this Commonwealth, either by submerged pipe lines in the river bed or by electric lines crossing overhead.

So far as the public waters of the Commonwealth are concerned, we are of the opinion that you not only have the authority but it is your duty to do so under section 514 of The Administrative Code for the reasons herewith set forth.

The waters of the Commonwealth, generally speaking, fall into two classes—public and private. Public waters include the principal rivers and such streams and lakes as are navigable in fact. The non-navigable waters are private streams. In the former, the river beds be-