

## Resume of Opinions by the Attorney-General of the State of New York

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## RESUME OF OPINIONS BY THE ATTORNEY-GENERAL OF THE STATE OF NEW YORK <sup>1</sup>

In recording the page of law to be drawn from recent opinions of the Attorney-General, the continuing effort to adopt the law of peace to war needs stands out. The impact of the war is felt even in fields seemingly beyond its influence, such as guardianship and adoption and highway control. Survey finds a rich vein of thought in advanced views on criminal law, while progressive views for the regulation of vitamin sales, for the use of photostats, and for an attorney's securing of a broker's license, keep the courts abreast of the times. The war opinions deal with aspects of such current problems as the care of children of enlisted folk or war-workers, decisions relating to the serviceman's right to vote, and also the relaxation of rules concerning depositions. All these give testimony that the Attorney-General is attempting to cope with the difficulties of war.

As for the care of children of warriors and war-workers, the State War Council, which is the machinery employed, is allowed a free hand in spending, and may not only allocate the money to localities but may expend funds directly, particularly where the locality does not act, and where the need is great.<sup>2</sup> In securing to servicemen the right to vote, controversial issues have been settled. Persons receiving a Blue Discharge from the Service, which is neither an honorable nor a dishonorable one, are barred from the war ballot and may vote only as civilians.<sup>3</sup> In furtherance of the campaign against divulging military information, it has been decided that, since publication of military unit addresses of servicemen is not essential in obtaining a war ballot, the information will not be published.<sup>4</sup> The war ballot is also denied to members of the Merchant Marine on the ground they are not part of the Military Forces of the United States, to whom the war ballot is limited by the State Constitution.<sup>5</sup> Absentee registration is denied civilian federal employees by Constitution and statute.<sup>6</sup> The courts themselves have relaxed many regulations to facilitate the conduct of the war. Thus, a plaintiff in a divorce

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<sup>1</sup> Opinions rendered by Hon. Nathaniel L. Goldstein, Attorney-General of the State of New York.

<sup>2</sup> WAR EMERGENCY ACT § 7(5-9a); STATE FINANCE LAW §§ 11, 53, 121; STATE DEPARTMENTS LAW § 134; 42 U. S. CODE, c. 9, subchap. III (6/22/44).

<sup>3</sup> N. Y. CONST., Art. III, § 4; ELECTION LAW, Art. 12, as added by L. 1944, c. 183; *id.* c. 151 (Inf. op. 5/20/44).

<sup>4</sup> ELECTION LAW, Art. 12, §§ 300, 302, 305, 316 (6/14/44).

<sup>5</sup> N. Y. CONST., Art. II, § 2; N. Y. WAR BALLOT ACT; 14 U. S. CODE § 1 (7/20/44).

<sup>6</sup> N. Y. CONST., Art. II, §§ 1, 2, 5; 8 U. S. CODE § 501; N. Y. ELECTION LAW §§ 117-122, 153-a, 302(3) (6/21/44).

action who is in military service may be allowed to give testimony by deposition even if he is within continental United States, and the case may be reserved for the duration on the military suspense calendar.<sup>7</sup> Time requirements have also been adopted to a society at war. Both the twenty-four hour waiting period between acquisition of a marriage license and ceremony, and the three-day period between a seriological test and ceremony, may be waived for servicemen, but in the second case additional proof is required that the public interest will be promoted, or that delay will work irreparable injury or great hardship.<sup>8</sup> In the same spirit of liberality, transportation privileges, indispensable in war, are accorded the Services. The right to free passage on toll bridges is granted to members of the New York Guard in the course of military duty.<sup>9</sup> A measure in the transformation from a peacetime to a wartime society is the holding that the title of temporary local elective officers replacing regular officeholders away in the service, should reveal the nature of the incumbency.<sup>10</sup>

Many opinions in criminal law yield ripe fruit for our harvest. Vital social problems are decisively dealt with, such as the character of escape and rescue, apportionment of quotas to institutions, inspection of records of youthful offenders and consent to operations on child inmates.

The rule is reiterated, as to the New York State Vocational Institution, that escape therefrom is a crime of the same seriousness as that for which sentence had been imposed. If that offence was a felony, the escape is, too, and if a misdemeanor, the escape is of the same character. Indictment for the escape must state the character of original sentence.<sup>11</sup> As to the records of those tried as youthful offenders under Section 252(c) of the Code of Criminal Procedure, the social interest requires that the State Police simply be entitled to know as of right that they were so tried, and inspection of the record may be permitted only in the discretion of the court.<sup>12</sup> Passing on an issue impact with social significance, the Attorney-General ruled that consent to a major surgical operation on a child inmate may be given by the Superintendent of a state training institution if the child's health would otherwise be seriously jeopardized, and where there is no parent available for consent.<sup>13</sup> The method of apportioning inmates to institutions under the statute is illustrated in the determination that quotas for admission shall be set up by the Department of Social Welfare based upon the ratio of each county to the state population. These quotas are for the guidance of judges and other committing institutions.<sup>14</sup>

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<sup>7</sup> CIV. PRAC. ACT § 288 (Inf. op. 7/10/44).

<sup>8</sup> DOMESTIC RELATIONS LAW §§ 13-a, 13-b, 13-c (Inf. op. 4/25/44).

<sup>9</sup> MILITARY LAW § 237, as amended by L. 1944, c. 326 (5/27/44).

<sup>10</sup> WAR EMERGENCY ACT, Art. X-A (105-b) (Inf. op. 6/20/44).

<sup>11</sup> PENAL LAW §§ 1690-1694 (Inf. op. 7/3/44).

<sup>12</sup> CODE OF CRIMINAL PROCEDURE §§ 252-b, 252-c (5/16/44).

<sup>13</sup> SOCIAL WELFARE LAW §§ 419, 429 (Inf. op. 7/6/44).

<sup>14</sup> SOCIAL WELFARE LAW §§ 411, 422(3), 427(2) (Inf. op. 7/12/44).

In a closely related field which is of equal social concern, that of hospital administration, the trend is toward guarding the interest of the patient. Thus it has been held that, under the 1944 amendment to the County Law, the Superintendent of a county tuberculosis hospital no longer has an option to return an indigent patient to the county of his settlement. He may, as formerly, only collect from that county for his maintenance.<sup>15</sup> Concerning the increasingly popular vitamin products, the Attorney-General has held that such are drugs, and their sale is restricted to pharmacies, drug and registered stores.<sup>16</sup> The law progresses with the arts in the holding that a photographic representation is to be accepted as an original, so that a record aging and losing its usefulness may be replaced by the photostat and discarded.<sup>17</sup> The judicial attitude of watchfulness in guarding the rights of infant wards is illustrated in recent opinions on guardianship and adoption. In this spirit it is held that a guardianship arising by parents' surrender under Section 384 of the Social Welfare Law, may not be transferred to another authorized agency, even with the parents' approval. The duties of guardianship are too personal to be delegated under the law.<sup>18</sup> This attitude also impels the courts to require that the formalities in adoption be strictly complied with despite wartime stress. The requirements that the parties personally appear and acknowledge the order before the judge, may not be relaxed even for members of the Armed Forces. However, as a last resort, when public interest favors indulgence, the question may be passed on by the court when it is raised by refusal of the Health Department to issue a new birth certificate;<sup>19</sup> also routine publication of birth information in newspapers or even by a private business may not be prohibited by rule of the Public Health Council, since such a rule would violate the policy of Article 20 of the Public Health Law. Regulation of birth certificates by the State Commissioner of Health must conform with the statutory policy; the only test of the statute is the propriety of the purposes of publication and it cannot be said, as matter of law, that these purposes are improper.<sup>20</sup>

Everyday local government in county and town would seem too commonplace for noting, but order, enlightenment and fresh viewpoint produces law worth attention. The dominating principle governing the use of town property for other than town purposes is that such use must be compensated. On this condition, rental by local water and school districts is permitted, but private cemeteries are not so favored. This would be the use of public property for a private purpose.<sup>21</sup> On the other hand, the use of county property by towns

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<sup>15</sup> COUNTY LAW § 40-a, as amended by L. 1944, c. 693 (Inf. op. 6/22/44)

<sup>16</sup> EDUCATION LAW § 1350(15) (6/22/44).

<sup>17</sup> PUBLIC OFFICERS LAW § 65-a (5/24/44).

<sup>18</sup> SOCIAL WELFARE LAW § 384 (Inf. op. 5/26/44).

<sup>19</sup> DOMESTIC RELATIONS LAW § 112(1, 5) (6/14/44).

<sup>20</sup> PUBLIC HEALTH LAW, Art. 20, §§ 370, 389, 391 (4/20/44).

<sup>21</sup> N. Y. CONST., Art. VIII, § 1; HIGHWAY LAW §§ 141, 142 (Inf. op. 6/5/44).

depends on whether it is authorized by act of the legislature. Since none can be found which sanctions the construction of concrete pipe by county highway employees for maintenance of town highways, such construction and sale is illegal.<sup>22</sup> Policy and necessity require that, under the statute, a city be permitted to assist a town in fighting a fire. However, responsibility for fire protection is on the town; it would be going too far to permit the town to contract with the city for such protection.<sup>23</sup>

Marking the limits of the spheres of proper action of state and federal governments is difficult. One marker fixing the boundary is the ruling that the state may properly regulate the prices charged by speculators of railway tickets. Here is no attempt to fix the prices of interstate transportation, but only the purely local function of controlling the sale of tickets at prices higher than the carrier charges.<sup>24</sup> The workings of the state machinery for flood control are brought into clear relief in an opinion published June 7, 1944, whereby the Superintendent of Public Works prepares a master map showing properties in which the required easements are sought, and then that chart is used as a basis for appropriations. It is held that the map must expressly reserve to the owner all non-interfering interests and uses which are not appropriated.<sup>25</sup> In the past, the right of an attorney to deal as a real estate broker had been veiled in obscurity. The rule is now definitely promulgated that an attorney may obtain a real estate broker's license without examination if he is in good standing; however, he is not so privileged, if he is in the real estate business.<sup>26</sup>

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<sup>22</sup> COUNTY LAW § 3 (Inf. op. 5/12/44).

<sup>23</sup> TOWN LAW §§ 2, 114, 184; GEN. MUN. LAW § 209(1,2) (Inf. op. 5/19/44).

<sup>24</sup> PENAL LAW § 1574 (Inf. op. 6/8/44).

<sup>25</sup> L. 1936, c. 862, as amended (Inf. op. 6/7/44).

<sup>26</sup> REAL PROPERTY LAW § 442-f (Inf. op. 5/18/44).