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Formal Opinions of the Attorney-General: Digest of Opinions Rendered During January, February, March, 1943, by Hon. Nathaniel L. Goldstein, Attorney-General of the State of New York

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FORMAL OPINIONS OF THE ATTORNEY-GENERAL

DIGEST OF OPINIONS RENDERED DURING JANUARY, FEBRUARY, MARCH, 1943, BY HON. NATHANIEL L. GOLDSTEIN, ATTORNEY-GENERAL OF THE STATE OF NEW YORK*

* Grateful acknowledgment for leave to print the opinions herein is made to Hon. Nathaniel L. Goldstein, Attorney-General of the State of New York. They do not embrace all opinions rendered and received but only those which are deemed of special interest to the readers of *St. John's Law Review.*

(1/6/43) EDUCATION LAW § 1066

Determination of residence of students as to payment of tuition:

To qualify for exemption from payment of tuition fee to State University or College pursuant to Section 1066 of Education Law, a student must be "a *bona fide* resident of New York State."

Domicile and residence are distinguishable. The former can be only singular, while the latter may be multiple. Domicile is the place where one has his home and to which he intends ultimately to return after a temporary absence. Residence requires actual presence and may exist independently of domicile.

Courts construe provisions dealing with educational privileges dependent upon residence broadly, but do not favor residence of a temporary nature solely to obtain such privilege.

Voting not necessarily a criterion of *bona fide* residence, as other requirements may disqualify; lack of citizenship, insufficient length of residence, etc. The privilege should be extended only to those whose stay within the state is of such a character and duration as to constitute them a part of the community. Each case will depend, of necessity, on its own peculiar facts. Ownership of property standing by itself, however, an insufficient criterion.

(1/18/43) BANKING LAW § 602

Merged banks succeed to all right of administration exercised by the original bank:

In view of the language of § 602 of the Banking Law and ruling of the court in *O'Rourke v. Standard Wood Turning Co.,* 204 App. Div. 658, the merged bank simply by the merger, and without any further proceeding, may exercise all the rights and powers of administration of the original merged bank and may as fiduciary seek to take possession of funds belonging to a decedent.

(1/26/43) WORKMEN'S COMPENSATION

Mutual Self-Insurance Plan Adopted by County Under Section 50, subdivision 3-a of W. C. L., Coverage and Applicability—Volunteer Firemen

Section 50 of Workmen's Compensation Law provides methods of coverage; the liability, however, of a municipality to its employees is created by Section 3, subdivision 1—Group 17 of the Law, where the hazards involved fall within the classifications embodied in groups 1–16.

There is no distinction made in so far as coverage is concerned between elective and appointed municipal employees (last sentence of Group 19 of Section 3, subdivision 1 of W. C. L.), provided however, that those employees properly classified as executives may under Section 54, subdivision 6 of the W. C. L., waive coverage.

Volunteer Firemen are covered by the law under Section 2, subdivision 4 and subdivision 5 of the W. C. L., and an injured volunteer firemen's compensation would properly be secured under subdivision 3-a of Section 50 of the W. C. L. even when his injury occurs outside the limits of the participating municipality, providing he was performing his duty under the direction or authority of said participating municipality.

(2/1/43) PRESIDENT'S EXECUTIVE ORDER NO. 8389; GENERAL LICENSE NO. 42

Comptroller is under no duty to determine status of applicant for refund, unless some facts indicating that applicant might be a blocked national are called to his attention.

Refunds of security deposits under Section 94-E of the Vehicle and Traffic Law do not impose a duty upon the Department of Audit and Control to ascertain affirmatively whether applicants for such refunds are blocked nationals as defined in President's Executive Order No. 8389. The above order was liberalized on February 23, 1942, by General License No. 42, issued by the Treasury Department and which amended the same to the extent that licensing of persons, corporations, associations, etc., as generally licensed nationals applies to such individuals as resided in the United States on February 23, 1942.

The purpose of this order is to allow any and all individuals residing within the United States to do business as though they were citizens of the United States unless they are specifically prohibited by other clauses in the general license. Reliance is made in arriving at such construction upon a press release issued by the Treasury Department which accompanied this order to the effect that persons dealing with residents of the United States after February 23, 1942,

may assume that such residents are not blocked unless they are affirmatively on notice to the contrary.

It follows, of course, that if something is specifically brought to the attention of the Department which would indicate that the particular individual to whom a refund is to be made may be a blocked national, it would be its clear duty to thereupon determine the status of the applicant.

(2/1/43) DOMESTIC RELATIONS LAW § 7, subd. 5

Examinations by physicians of patient, pursuant to Domestic Relations Law, may be either joint or individual.

The procedure for examination of an allegedly incurably insane person for purposes of annulment is set forth in Section 7, subdivision 5 of the Domestic Relations Law. A reading of said section does not lead to an interpretation that the required examination which is to be done by three physicians who are recognized authorities on mental disease, must be jointly made, although it has become more or less customary for the examination of the patient to be a joint examination. If, in the judgment of any one of said three physicians a separate examination will enable him to reach a conclusion as to the sanity of the patient, he may make such independent examination.

(2/2/43) PENAL LAW §§ 1297 and 1941

An indeterminate sentence of not less than two and one-half or more than ten years, imposed upon a person convicted of grand larceny in the second degree as a second offender, is improper. The minimum of such sentence should be at least five years.

Section 1941 of the Penal Law which was amended by Chapter 700 of the Laws of 1942, and became effective May 8, 1942, changed the minimum sentence to be imposed thereafter upon second or third felony offenders. This section is construed to provide that in a conviction of grand larceny in the second degree as a second offender, the indeterminate sentence which is to be imposed falls within the *proviso* of Section 1941 above, which provides that the minimum of the indeterminate sentence to be imposed under said section for second or third felony offenders, shall, in no case, be less than five years. This crime does not fall within the exception that where the maximum punishment for a second or third felony offender is five years or less the minimum sentence must be not less than two years, in view of the fact that a second or third felony offender who has been convicted of grand larceny in the second degree, is punishable in the maximum by a sentence of more than five years.

(2/2/43) MILITARY LAW § 237

Toll Gates, Free Passage for Members of Military Forces of United States in Time of War—Necessity of Actual Duty

The right of free passage through toll gates applies to all members of military forces of the United States in time of war when in uniform, although not performing any assigned military task:

Section 237 of the Military Law applies to military forces of the United States only when the nation is at war because in war time members of the armed forces do not revert to an inactive status when they are not actually performing an assigned military duty. They remain on active duty at all times, even though periodically granted temporary leaves. Hence, Section 237 of the Military Law entitles members of the armed forces of the United States to free passage over all toll bridges within the state of New York, providing they are in uniform and regardless of whether they are performing a specific military duty, during the continuance of a state of war.

An informal opinion of the Attorney-General to the New York State Bridge Authority, dated September 12, 1933 (48 St. Dep't Reports 428) written in connection herewith, held that the statute applied only when persons in military service were on active duty at the time of passage through the toll gate. This opinion, together with other prior opinions, interprets said Section 237 primarily with reference to members of state military forces who, when not on ordered military duty, have a purely inactive military status and therefore do not come within the provisions of said section for free passage.

(2/3/43) TAX LAW § 4, subd. 6

Exemption from Taxation of Real Property of Corporations Organized Exclusively for Religious, Educational and Cemetery Purposes: Special District Taxes

The real property of corporations organized exclusively for religious, educational and cemetery purposes and used exclusively for carrying out thereupon one or more of such purposes, while exempt from taxes levied for the ordinary support of government, is not exempt from special district taxes levied to cover the expense of improvements that are specifically beneficial to the property.

There is a distinction to be observed between taxes levied for the ordinary support of government and those taxes or assessments which are levied in special districts to cover the expenses of improvements which are specifically beneficial to the property. Under the former the real property of corporations organized exclusively for religious, educational and cemetery purposes and used exclusively for carrying out thereupon one or more of such purposes, is exempt from the pay-

ment of such a tax pursuant to Section 4, subdivision 6 (formerly subdivision 7) of the Tax Law. On the other hand, as a result of *People ex rel. New York School for the Deaf v. Townsend,* 173 Misc. 906, *aff'd,* 261 App. Div. 841, the law now existing appears to be that those taxes or assessments which are levied and charged upon properties in proportion to the benefits received from local improvements must pay such assessments or taxes even though the properties in question may include those included within the classifications made by the aforementioned subdivision 7. This ruling applies whether the levies are what are commonly called special assessments or levies made upon properties in special districts for local improvements, which levies are made like ordinary taxes, in accordance with the assessed valuations of the properties.

The effect of the decision in the *Townsend* case, *supra,* and *The Nuns of the Order of St. Dominic v. Town of Huntington,* 268 N. Y. 580, is to overrule the 1915 opinion of the Attorney-General which was to the contrary (Op. Atty.-Gen. 1915, Vol. 2, p. 44).

(2/23/43) TAX LAW § 219-c

Lien of Corporation Franchise Tax, Prior Mortgage, Merger with Fee

The question whether a merger of the mortgage and fee interests takes place upon the conveyance to the mortgagee of the fee, thus extinguishing the mortgage lien and establishing the corporation franchise tax as a primary lien upon the real property, depends upon the intention of the parties to the conveyance. The interest of the owner of the fee in keeping the mortgage alive must be considered upon the question of the intention of the parties:

Question as to whether, upon a foreclosure by a bank of a mortgage, a merger of the mortgage and fee interests took place at the time of the conveyance to the bank, in lieu of foreclosure, resulting in the wiping out of the mortgage lien and the establishment of the franchise taxes as primary liens upon the real property, pursuant to Section 219-c, subdivision 2 of the Tax Law, depends solely upon the intention of the parties to the conveyance.

It has long been a general rule that a lien may be kept alive against junior incumbrances if equity so determines or the parties so intend; courts do not favor merger and will presume against it wherever it will operate to the disadvantage of the parties (*Hennessy v.* King, 225 App. Div. 152, *aff'd,* 252 N. Y. 570).

The task of arriving at a correct conclusion in any particular case requires, as a condition precedent, information beyond the mere fact of acquisition by the mortgagee of the fee of the mortgaged premises, but the Tax Department, before granting any release under Section 219-c of the Tax Law, should require the bank (mortgagee) to

furnish satisfactory proof that the parties to the conveyance to the bank did not intend that the lien of the mortgage should be extinguished thereby.

(3/9/43) REAL PROPERTY LAW §§ 290, 300; GENERAL CONSTRUCTION LAW § 11

Acknowledgments by Persons in Military or Naval Service

Section 300 of the Real Property Law authorizing acknowledgments by persons in military or naval service to be taken before certain officers of the army or navy has application to a wide variety of instruments:

The certificate of acknowledgment so taken by an officer in military or naval service must contain the statement that the party or parties making such acknowledgment was, at the time of making the same, enlisted or commissioned in the military or naval forces of the United States and engaged in military or naval duties.

There must be attached to such a certificate of acknowledgment a certificate of the Secretary of War or Navy, or of an officer of the War or Navy Department having charge of the record of the commissions of officers in the Department that the officer taking the acknowledgment was duly commissioned and acting as such at the time that he took the same.

(3/16/43) LANDLORD AND TENANT—COVENANT TO FURNISH HEAT —MEASURE OF DAMAGES FOR BREACH OF COVENANT

Where lease contains specific covenant to furnish heat, state may recover from landlord for actual damages because of failure to furnish adequate heat, which damages may include the salaries of employees rendered idle by such failure, also salaries of employees required to work overtime, and all salaries of extra employees necessarily required because of such failure:

Upon facts given in inquiry, which establish that a landlord's failure to furnish heat, required by a covenant in a lease, was not occasioned by inability to obtain fuel, and further that such failure on the part of the landlord was substantial and not a temporary situation involving a few degrees of temperature, tenant would have a cause of action for the actual damages suffered by reason of the landlord's failure to furnish such heat.

Where the state was the tenant, and as the result of the landlord's breach of the covenant in the lease to furnish heat, the state was obliged to dismiss its employees and thereafter, on other days, hire extra employees, the state had two alternative remedies: (1) It could

treat the failure to furnish heat as a constructive eviction and move out (provided it moves while the failure to furnish heat continues) and thereafter recover damages, or (2) it could remain on the premises and either abate the rent or bring an independent action on the covenant. (*Bliss v. Clark,* 104 Misc. 543; *Jackson v. Paterno,* 128 App. Div. 474.)

In relation to the measure of damages, the state also has two alternatives: (1) The state could recover the difference between the rental value of the premises heated, and the value of the premises unheated, or (2) the state could recover the actual damages suffered, as may be fairly supposed to have been within the contemplation of the parties when they made the contract. (*Griffin v. Colver,* 16 N. Y. 489.) Such damages may include the salaries of the employees rendered idle by the cold, and the salaries of extra workers necessarily employed because of such breach on the part of the landlord, and any other actual damage resulting therefrom. (*Volga Realty Corp. v. Holt Co., Inc.,* 104 Misc. 581.)