R.S. 24:10-6 makes it mandatory that the department be satisfied that the milk is of the standard and quality required by the statutes, see R.S. 24:10-15, 16, and by regulations of the department, before a permit is issued. This section does not demand inspection of any milk or plants.

R.S. 24:10-11 makes all milk imported into New Jersey "subject to inspection at its source of supply" and all plants handling it "likewise * * * subject to inspection to determine if * * * they meet the minimum requirements set forth in [R.S. 24:10-15, supra]." This section does not require that the department inspect, but is a grant of discretionary power to the department to inspect the milk and plants involved. If the department can fulfill its duty under R.S. 24:10-6 in some other manner, satisfying itself that the milk meets the prescribed standards, it need not inspect.

R.S. 24:10-9 authorizes the department to place reasonable reliance in fulfilling its duty under R.S. 24:10-6 on information supplied to it on reports of applicants. R.S. 24:10-9 permits the department to require reports which "may be necessary to ascertain * * * that * * * milk * * * is of the standard and quality required * * *."

The department may also take into consideration facts obtained from other sources including tests of random samples of the finished product.

R.S. 24:10-12 permits the State department to rely on inspections by health authorities in other States. *Cf. Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

In summary, sterilized whole milk in hermetically sealed containers may not be imported into New Jersey except where the plants into which the milk was assembled or collected hold permits issued by the department. The department has power to inspect such plants through its own personnel but need not if it can be satisfied by some other adequate method of inspection that the milk meets the prescribed standards.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

APRIL 16, 1958

MR. FREDERICK J. GASSERT, JR.
Director, Division of Motor Vehicles
State House
Trenton, New Jersey

FORMAL OPINION 1958—No. 6

DEAR DIRECTOR:

We have been asked whether, consistent with the rule of *State* v. *Laird*, 25 N.J. 298 (1957), a magistrate may resentence a motor vehicle offender in a case where he has previously prescribed a fine that is less than a mandatory minimum. If the magistrate has such power, and the Directors of the Division of Motor Vehicles becomes aware of the need for its exercise, either as a result of N.J.S.A. 39:5-42 or otherwise, it would seem appropriate in cases involving the Director's function under

N.J.S.A. 39:5-40 in the collection of fines payable to the State, for the Director to call the situation to the attention of the magistrate and request that the proper fine be imposed under R.R. 8:7-11.

In the *Laird* case the defendant was convicted for the second time of drunken driving. The statute made an increased penalty mandatory for offenses "subsequent" to the first. N.J.S.A. 39:4-50. However, the magistrate was not aware at the time of the trial that this was a "subsequent" offense, and so imposed a penalty as for a first offense.

The complaint did not charge a "subsequent" offense. See N.J.S.A. 39:4-50. Nor was the defendant notified in any other manner that he was subject to sentencing as a "subsequent" offender. That this was a subsequent offense was not proven on the record in the first trial. The Supreme Court held that in these circumstances resentence as a subsequent offender to the increased statutorily mandatory penalty was not permitted under R.R. 8:7-11.

R.R. 8:7-11 permits the correction of an illegal sentence at any time, without specifying whether the correction may result in increased penalty. The rule also permits the court to "reduce or change a [valid] sentence within 60 days from the date of judgment".

In *State* v. *Culver,* 23 N.J. 495 (1957), the court held that the State may initiate the correction of a sentence which is illegal because excessive on the ground that since the sentence originally imposed had no warrant in law, "[t]o hold otherwise would allow the guilty to escape punishment through a legal accident". 23 N.J. at 511. There is no case under R.R. 8:7-11 considering the correction of a sentence which was without warrant in law because less than a mandatory minimum. However, under the same provision of Rule 35, Fed. R. Crim. Proc., the Supreme Court of the United States has held that a sentence may be revised upward to satisfy a statutory minimum. *Bozza* v. *United States,* 330 U.S. 160 (1947). The court adopted precisely the same reasoning as the New Jersey court in the *Culver* case: "If this inadvertent error cannot be corrected in the manner used here by the trial court, no valid and enforceable sentence can be imposed at all . . . This court has rejected the 'doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence.'" 330 U.S. at 166. See also *Pollard* v. *United States,* 352 U.S. 481 (1957), permitting resentence as "in the first instance" for substantially the same term where the original sentence was void because imposed in the absence of defendant on the ground that the alternative would be to let defendant go free. The New Jersey Supreme Court in the *Laird* case expressly stated that its ruling there did not extend to a situation such as in *Bozza.* "[T]here is no occasion to pursue that inquiry; we are concerned only with the specific issue raised here." 25 N.J. at 313.

In *People* v. *MacKenna,* 298 N.Y. 494, 84 N.E. 2d 795 (1949), the record in the trial would have permitted an increased sentence under a statute so providing where the defendant carried a gun. The increase was not imposed originally. Later, on defendant's motion, the sentence imposed was vacated. Defendant had been sentenced as a second offender but an out-of-state offense which had been counted as the first offense was not of sufficient gravity under New York law. The court held that since the defendant had never been legally sentenced, even though he had been imprisoned, it was proper on resentencing to impose the increased penalty for carrying a gun.

The court in *Laird* emphasizes that "the sentence imposed at the outset was valid, by the record made * * * ." A first offense was all that the record showed.

"[T]he original sentence conformed to the statutory command for a first offense * * * ." 25 N.J. at 312. The court's holding is limited to instances in which a valid sentence has been handed down. The factual situation stated in your request for opinion is plainly distinguishable because of the illegal sentence imposing a fine less than the statutory minimum.

We therefore advise you that a magistrate, upon notice from the Director of the Division of Motor Vehicles, should correct a sentence imposing a fine to accord with the mandatory statutory minimum for the motor vehicle offense.

Very truly yours,

DAVID D. FURMAN
Acting Attorney General

By: WILLIAM L. BOYAN
Deputy Attorney General

APRIL 16, 1958

HONORABLE JAMES M. SULLIVAN
Chief, Consumer Credit Division
Department of Banking and Insurance
State House Annex
Trenton, New Jersey

FORMAL OPINION 1958—No. 7

DEAR MR. SULLIVAN:

You have asked for the opinion of the Attorney General as to whether the duty imposed by R.S. 8:2-38 and 39 upon the Department of Banking and Insurance to supervise and examine trust and special funds of "every cemetery association" applies to such funds of all cemetery associations or only to those of cemetery associations incorporated pursuant to the Rural Cemetery Act, presently embodied in R.S. 8:1-1 et seq.

R.S. 8:2-38 requires "every cemetery association" holding property in trust, or as a special fund, to file in the Department of Banking and Insurance, within 60 days after the close of each fiscal year of such association, a duly verified report of the principal and investments thereof. R.S. 8:2-39 requires the Department to inspect and supervise each fund at least once every two years.

Formerly, cemetery associations were created by special law or pursuant to the provisions of "An act authorizing the incorporation of rural cemetery associations," enacted in 1851. As part of the 1875 revision, the 1851 law was repealed and there was enacted "An act to authorize the incorporation of rural cemetery associations and regulate cemeteries." In 1918 there was enacted "A Supplement to an act entitled 'An act to authorize the incorporation of rural cemetery associations and regulate cemeteries, approved April ninth, eighteen hundred and seventy-five'" which, for the first time, required the Department of Banking and Insurance to supervise and examine the trust and special funds of "any cemetery association." The 1875 Act and 1918 Supplement were thereafter incorporated by the 1937 revision into what is presently R.S. 8:1-1 et seq., "Cemeteries."