OFFICIAL OPINIONS

OF

THE ATTORNEYS-GENERAL

OF THE

Commonwealth of Massachusetts.

PUBLISHED BY THE

ATTORNEY-GENERAL.

VOLUME I.

FROM 1891 TO 1898 INCLUSIVE.

BOSTON:
WRIGHT & POTTER PRINTING COMPANY, STATE PRINTERS,
18 POST OFFICE SQUARE.
1899.

THIS VOLUME CONTAINS

THE OPINIONS OF ATTORNEYS-GENERAL

ALBERT E. PILLSBURY, 1891-1895.

HOSEA M. KNOWLTON, 1894-1895.

ALSO TABLES OF STATUTES AND CASES

CITED, AND AN INDEX DIGEST

PREFACE.

The report of the Attorney-General for the year 1891 was the first that was accompanied with copies of the opinions submitted during the year. The fact was referred to therein as follows: —

"The frequent inquiry which is made for the official opinions of the Attorney-General, and the difficulty of procuring them even from the files of this department, in which they can be found if at all only by searching through voluminous correspondence, and other reasons which need not be stated, lead me to believe that we may adopt with advantage the custom of other States, to print such part of them as may be of public interest or importance or useful for future reference; and I have accordingly appended copies of such to this report"

Since that year the practice of annexing copies of the opinions of the Attorney-General to his annual report has been uniform. Inasmuch, however, as they are not indexed, and are scattered through numerous volumes, the opinions have become of little value for purposes of reference. To meet this difficulty, the Attorney-General was authorized, by Resolves of 1898, chapter 95, "to collect and publish in a volume, properly indexed and digested, such of the official opinions heretofore published as an appendix to the annual reports of the Attorney-General as he may deem to be of public interest or useful for reference." The present volume is issued in execution of the authority conferred by that resolve.

Mr. Arthur W. De Goosh, Assistant Attorney-General, has rendered valuable assistance in the preparation of this volume.

HOSEA M. KNOWLTON,
Attorney-General.

Boston, December, 1899.

Table of Statutes cited or referred to in This Volume.

United States Constitution.

Constitution of the Commonwealth.

Acts of Congress.

United States Revised Statutes.

Statutes of the Commonwealth.

STATUTES OF THE COMMONWEALTH — *Con.*

STATUTES OF THE COMMONWEALTH — *Con.*

STATUTES OF THE COMMONWEALTH — *Con.*

STATUTES OF THE COMMONWEALTH — *Con.*

STATUTES OF THE COMMONWEALTH — *Con.*

Statutes of the Commonwealth — *Con.*

Resolves.

Revised Statutes.

General Statutes.

Public Statutes.

PUBLIC STATUTES — *Con.*

PUBLIC STATUTES — *Con.*

Table of Cases cited in This Volume.

OPINIONS

OF

ALBERT E. PILLSBURY, ATTORNEY-GENERAL.

INSURANCE, — ADMISSION OF FOREIGN COMPANY.

The Insurance Commissioner has authority to admit a corporation chartered under the laws of another State to this State to do the business of insurance, although by its charter it is authorized to do the business of insurance and other business, which is not insurance, in its own State.

To the Insurance Commissioner. 1891 February 5.

I have considered your communication of January 24, submitting the question whether a corporation chartered by another State to transact the business of insurance and other business recognized as insurance by the laws of its own State, and other business which is not insurance, is entitled to admission to Massachusetts to transact here a class of business recognized by our law as insurance, while it is transacting in other States business not permitted here as insurance.

Confining the inquiry, as I presume you intended, to the legal question whether such a company as you describe can lawfully be admitted to do business in Massachusetts as above stated, or, in other words, whether the Insurance Commissioner has power under the statutes to admit such a company to do such business, it must, in my opinion, be answered in the affirmative.

INSURANCE, — FRATERNAL BENEFICIARY ORGANIZATION, — RESERVE FUND, — DEPOSIT.

The Treasurer of the Commonwealth is authorized to receive the deposit of the reserve fund of a fraternal beneficiary organization in lawful money in case such deposit must be drawn upon so soon that its conversion into the securities prescribed and their reconversion into cash would be difficult or impracticable.

To the Treasurer. 1891 February 27.

The statute referred to in your inquiry of the 26th inst., concerning the deposit of the reserve fund of certain fraternal beneficiary organizations (St. 1890, c. 341, § 1), must be

taken as designed to insure to the members of these associations an income upon their funds, as well as safety in their investment; and so to require their investment in the specified interest-bearing securities, so far as possible. But in such a case as you describe, in which a deposit must be drawn upon so soon that its conversion into the prescribed securities and their reconversion into cash would be difficult or impracticable, the necessity of the case seems to require some modification of the rule; and by a reasonable construction of the statute you are, in my opinion, authorized to receive such deposit in lawful money, but not in a certificate of deposit, even of a State depositary, unless you choose to take it at your own risk. So far as I am aware, these are depositaries only of "the public moneys." Pub. Sts., c. 16, § 55. The funds here in question do not seem to be "public moneys" in the sense of the statute. They belong to the members of these associations, and are held by you in trust for them; and as you are authorized to receive money only from the necessity of the case, and only so far as the necessity extends, if you take a certificate of deposit you may be held to account for it as money in any event.

RAILROAD STOCK HELD BY COMMONWEALTH, — EXERCISE OF VOTING POWER.

The Governor and Council, or such committee as they may appoint, may exercise the power of the Commonwealth to vote upon any railroad stocks held by it.

To the Governor. 1891 March 20.

In reply to your inquiry concerning the voting power upon the stock of the Fitchburg Railroad held by the Commonwealth, I have to say, that the right is limited by article 5 of the Articles of Consolidation of the Fitchburg Railroad Company and the Troy & Greenfield Railroad and Hoosac Tunnel, dated January 5, 1887, of which a copy is printed in the annual report of the Fitchburg Railroad Company, ending September 30, 1887, a copy of which article 5 is as follows: —

ARTICLE 5. The common stock shall have no voting power until it shall have received dividends for two consecutive years amounting to

not less than four per cent. per annum, excepting that it shall have the right to vote on an equality with the preferred stock upon any question of issuing more preferred or common stock, and also upon any question of leasing any part of the consolidated road, or of hiring or uniting with any other road.

The voting power upon any railroad stocks held by the Commonwealth may properly be exercised by the Governor and Council, or such committee as they may appoint; and I understand that this has been the usual custom.

STATE DIRECTOR, — FITCHBURG RAILROAD.

A director of Boston & Maine Railroad may be State director of Fitchburg Railroad Company.

In reply to your inquiry under date of March 24, I have to say that in my opinion there is no legal incompatibility between the offices of director of the Boston & Maine Railroad and State director of the Fitchburg Railroad Company.

To the Governor. 1891 March 25.

AUSTRALIAN BALLOT LAW, — INSERTING NAMES OF CANDIDATES UPON AND MARKING OFFICIAL BALLOTS, — POWER OF HOUSE OF REPRESENTATIVES.

If a voter pastes on the official ballot at the end of the list of candidates a printed slip bearing the name of a candidate, and makes the × mark in the space at the right of such name, the ballot should be counted for the candidate whose name is thus pasted on.

Where the official ballot bears only one name, and some official ballots are cast bearing such name and none other, but without the × or other mark thereon, they are to be counted for such candidate. So also if there is no × mark in the proper place, but × marks are made in various other places on the face of the ballot.

Where the official ballot bears only one name, and a printed slip bearing another name is pasted thereon, and no × or other mark is made on the ballot, it cannot be counted for either candidate. In case there are more candidates than one, the voter must indicate his choice by the × mark.

Where the official ballot bears only one name, and the printed name of another candidate is pasted in the space with such name, but not covering it, and the × mark is placed in the space to the right of both names, such ballot can be counted for either candidate according to the voter's choice, if that can be determined. If the printed name pasted on covers the other

name, and the × mark is in the proper place, the ballot can be counted for the candidate whose name is thus affixed. If it only partially covers the other name, the ballot can be counted for the voter's choice, if that can be determined.

Affixing a name to a ballot is competent evidence that the voter intended to vote for the person whose name is thus affixed.

The House of Representatives has absolute power under the Constitution to "judge of the returns, elections and qualifications of its own members."

It can count ballots found in the ballot box and marked "cancelled," when it appears from the marks upon the ballots that they have been through the official registering ballot box.

To the Speaker of the House of Representatives. 1891 March 31.

In compliance with the request of the honorable House of Representatives in its order of March 23, I return my opinion upon the ten questions of law submitted in the order: —

First. — A voter can legally "insert" or "fill in," in the space left at the end of the list of candidates on the official ballot, the name of the candidate for whom he would vote, by pasting thereon a printed slip bearing the name of such candidate and making the X mark in the space to the right of such name so pasted on the official ballot, and such ballot should be counted for the candidate whose printed name is thus pasted on. The blank space is as appropriate to the reception of a pasted slip as of a written name, and the language of the statute, to "insert" or "fill in" the name, applies as well to the one case as to the other; and it must be presumed that the Legislature was aware of the general use of "pasters," so called, and did not intend to forbid their use by provisions which, taken as they read, clearly permit it.

Second. — At a special election for Representative to the General Court, where the official ballot bears only one name, and some official ballots are cast bearing such name and none other, but without any X or other mark on such ballots, the ballots so cast can be counted for such candidate. In such a case, which would very rarely arise, there is no "choice" of the voter, in the sense of the statute, to be indicated by the statutory mark. "Choice" implies a selection of one out of two or more names; and if the ballot bears but one name there is nothing upon which this right of choice is to be exercised. Any other construction would deprive the act of the voter in such a case of all significance or legal effect, and this result

is to be avoided if possible. But in my opinion, as will appear below, this applies only to a ballot bearing but a single name.

Third. — At a special election for Representative to the General Court, where the official ballot bore only the name of one candidate, and the printed name of another candidate had been pasted in the blank space left at the end of the list of candidates, but without an X mark or other mark in the space at the right of either name (or elsewhere upon the ballot, as I understand the question), such ballot cannot be counted for either candidate. This involves the important and difficult question how far the statutory requirement of the mark, as the means of designating the voter's choice, is mandatory. The form of the provision (St. 1889, c. 413, § 23), that the voter "shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice," does not settle the question; as such language, though in form mandatory, may be and often is construed as directory, and doubtless is to be so construed in various other provisions of this act. But there are other general considerations which seem to determine the matter. The great purpose of the act is, unquestionably, to promote the purity of the ballot, by insuring a free and intelligent expression of the voter's choice, in secret and on the spot; and the intent of the act, so far as it concerns the question now under consideration, seems clearly to be that he shall indicate his choice by the affirmative act of marking the ballot, under the circumstances of secrecy and security against interference or molestation with which the act surrounds him at the polls; and, while it is a general rule of election law that statutes in derogation of the right to vote are ordinarily to be construed liberally in favor of the exercise of the right, it is also a settled rule that a statute is to be construed, so far as may be, in the light and in the direction of its leading and obvious purposes. It is to be observed also that the act imposes many other express restrictions upon the right to vote which are obviously peremptory, and which, though in derogation of the right, the Legislature must be supposed to have considered essential to the main purposes of the act.

There is no direct judicial authority, so far as I am aware, upon the question whether the requirement of the mark is mandatory; but in the cases in our House of Representatives, in the English cases under the ballot act of 1872, the material provisions of which are substantially like our own, in the Scotch and Canadian cases, and all others which have come to my notice, it seems to be assumed that the requirement of a mark of some sort, sufficient to indicate the voter's choice, is a peremptory requirement, though there is considerable liberality of construction as to the position and character of the mark. An argument to the contrary may perhaps be drawn from § 26, which contains the only express prohibitions in the act against counting ballots, among which it is provided that, "if a voter marks more names than there are persons to be elected to an office, or if 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." It might be said that this makes the possibility of determining the voter's choice, by any means, a test of the validity of the vote; but this construction would open the door to many irregularities which the act seems carefully designed and intended to prevent and to forbid; and under an act of this general character it does not necessarily follow, and it does not seem a reasonable construction, that every vote shall be counted if it is possible by any method to determine the voter's choice, for the single reason that the statute forbids a vote to be counted if it is impossible to determine the voter's choice; especially as there are many other cases to which this language may be applied consistently with the strict observance of the requirement to mark the ballot. And the argument from § 26 appears to me to be met by the provision of § 23, that, even when a voter inserts the name of a candidate which is not printed upon the ballot, thereby, as it would seem, indicating unmistakably his choice for that office, the X mark is still to be made opposite the name so inserted. From this it is clear that the act does not make or intend to make the possibility of determining the voter's choice the sole or sufficient test of the validity of the vote. It appears to me a more reasonable construction, keeping in view the general

intent of the act, to hold that this provision was intended to mean only that the vote is not to be counted if it is impossible to determine the voter's choice by the means and in accordance with the methods prescribed by the act.

Fourth. — At a special election for Representative to the General Court, where the official ballot bears only one name, and some ballots are cast bearing such name and none other, and there is no X mark in the proper place but X marks are made in various other places on the face of the ballot, such ballots so marked can be counted for such candidate, for the reasons above stated in answer to the second question; as in such a case the person whose name alone is on the ballot must be taken to be the voter's choice, irrespective of any mark. I understand this to cover also the second branch of the fourth question. But of a mark on the back or outside of a ballot it is sufficient to say that such mark is not a mark upon the ballot in the sense of the act, nor is it easy to see how such a mark can possibly determine the voter's choice.

Fifth. — At a special election for Representative to the General Court, where the official ballot bears only one name, and the printed name of another candidate is pasted, not in the space at the end of the list of candidates, but in the space where the name of the regularly nominated candidate is printed on the official ballot but not covering such name, and the X mark is placed in the space to the right of both names, such ballots can be counted for either candidate, according to the voter's choice, if it is possible to determine his choice; and it is a settled rule of election law that the writing or otherwise inserting or affixing a name to or upon a ballot is competent evidence to show that the voter intended to vote for the person whose name is so inserted or affixed.

Sixth. — At a special election for Representative to the General Court, where the official ballot bears only one name, and the printed name of another candidate is pasted, not in the space at the end of the list of candidates, but over the name of the regularly nominated candidate, with the X mark in the proper space, such ballot can be counted for the candidate whose name is thus affixed to such ballot, under the circum-

stances and for the reasons above stated in the answers to the first and fifth questions.

Seventh. — At a special election for Representative to the General Court, where the official ballot bore only the name of one candidate, and the printed name of another candidate is pasted, not in the space at the end of the list of candidates, but in the space wherein the name of the regularly nominated candidate appears, and such name of such regularly nominated candidate has been thereby partially obliterated, but the X mark is in the proper space, such ballot can be counted for the candidate of the voter's choice, if that can be determined, under the circumstances and for the reasons last above stated.

Eighth. — The provision of law with reference to the marking of the ballot by the voter is so far mandatory as to require some mark upon the face of the ballot sufficient to make it possible to determine the voter's choice among several candidates for the office in question. This follows from the answer to the third question. The provision as to "insertion" or "filling in" of the name of any candidate whose name is not upon the official ballot for whom the voter wishes to cast his ballot, in the blank space at the end of the list of candidates, is not mandatory. The blank space is provided for the convenience of the voter; and there is no express requirement of the act, and in my opinion there is none to be derived from it by construction, making the use of the blank space compulsory in such a case.

Ninth. — The House of Representatives, or its election committee, subject to the approval of the House, has power to determine the evident intent of the voter from an inspection of the ballot, where the strict letter of the law as to affixing or filling in the name or marking the ballot has not been complied with; as by the Constitution, c. 1, § 3, art. 10, the House of Representatives "shall be the judge of the returns, elections and qualifications of its own members;" which provision is held to give the House absolute power over the subject. But it may be proper to add that the House of Representatives of Massachusetts has been accustomed in such cases to follow the rules of law.

Tenth. — The House of Representatives, or its election committee, subject to the approval of the House in the exercise of its constitutional power, can count ballots found in the ballot box and marked "cancelled," when it appears from the marks upon the ballots that they have been through the official registering ballot box. But, if the question is intended to be whether such ballots can lawfully be counted without resort to the arbitrary powers of the House under the Constitution, it calls for further answer. I assume that the question refers only to ballots which would be entitled to be counted except for the mark "cancelled." There is no express prohibition in the act against counting a ballot marked "cancelled," but this mark indicates some irregularity about the ballot which should make it a subject of further inquiry. It is a settled rule of election law that mistake or fraud of the election officers shall not invalidate a vote lawfully and regularly cast; and this is a salutary rule, in the interest of the public no less than of the voter. As it is difficult to suppose that the mark "cancelled" would be put upon the ballot by the voter himself, and as the reasonable inference, therefore, is that, if the ballot was regularly cast, the mark was placed upon it by the mistake or fraud of some election officer, in which case it is entitled to be counted, the case calls for further investigation into the regularity of the ballot, and the circumstances under which the mark of cancellation was placed upon it.

PRISONER, — COMMUTATION OF SENTENCE.

Pub. Sts., c. 222, § 20, authorizes the commutation of the sentence of a prisoner sentenced for different terms in different institutions on the basis of the aggregate of the sentences.

To the Governor. 1891 April 17.

In compliance with the request of Your Excellency and the Honorable Council for my opinion upon the questions submitted in the vote of April 15, I have the honor to say that in my opinion the sentence of a prisoner in a house of correction, who is, upon the expiration of the sentence he is then serving, to be committed to another institution to serve an additional

sentence, can be commuted upon the basis of the aggregate of the sentences; and that the same is true of a sentence to a house of correction awarded by the court to take effect on and after the expiration of a previous sentence to another institution. The language of Pub. Sts., c. 222, § 20, is broad enough to include the case of sentences to different institutions; and the reason of the statute seems to apply with as much force to that case as to the case of several sentences to the same institution; and the history of the legislation on the subject indicates that the provision was intended to apply to both.

Hours of Labor in State Institutions, — Teachers.

St. 1890, c. 375, does not prohibit the employment of labor in State institutions for more than nine hours a day, if such labor is contracted for and paid for by the hour.

A teacher is neither a laborer, workman nor mechanic, within the meaning of the statute.

The words "laborers, workmen and mechanics" are used in a technical and restricted sense in the statute, and do not apply to persons having powers and duties of an official character, distinct from ordinary employment or service.

To the Governor. 1891 April 24.

In compliance with the request of Your Excellency and the Honorable Council in the vote of April 22, I return my opinion upon the three questions therein submitted: —

First. — St. 1890, c. 375, does not prohibit the employment of labor in State institutions for more than nine hours a day, if such labor is contracted for and paid for by the hour. An examination of all the legislation upon this and kindred topics leads to the conclusion that the purpose and effect of this statute are to make nine hours' labor in a day by the persons therein named a compliance with an ordinary contract for labor by the day or by longer periods. This conclusion is strengthened by the fact that the statute contains no express prohibition against employment or service for more than nine hours a day under any circumstances, such as is found in other recent statutes relating to the hours of labor; and that it can have

comparatively little application to women or minors, to whom alone this prohibitory legislation has thus far been applied.

Second. — Persons employed in instructing boys or girls, educationally or industrially, do not come under the act. They are teachers, and a teacher is neither a laborer, workman nor mechanic, in the sense in which these words are used in the statute.

Third. — Upon such inferences as I can draw from the form of this question as to the actual employment and duties of the various officers or employees referred to therein, it seems clear that the statute does not apply to any of them, except possibly to the carpenter, engineer, watchman and assistant farmer. They are all styled "officers;" and if they are in fact officers of the institution, having powers or duties of an official character distinct from ordinary employment or service, the statute does not apply to any of them, as it clearly is intended to apply to labor rather than to official service. But, if the carpenter is employed merely as a working mechanic, the statute, in my opinion, applies to him. The engineer I take to be the man in charge of an engine, and not a professional civil engineer. If the latter, the statute clearly does not apply to him; nor, in my opinion, does it apply to him in the former capacity; nor, for the same reasons, to the watchman. If the assistant farmer is, as I presume, the deputy of the head farmer, having in his absence or by delegation from him or otherwise, duties of supervision, oversight or control, and is not merely a farm hand, the statute does not apply to him. The words "laborers, workmen and mechanics" have acquired to a certain extent in recent legislation a technical meaning; and while all persons engaged in any kind of labor may broadly be called laborers, and all persons engaged in mechanical labor mechanics, and while any mechanic is in this broad sense a workman and a workman a laborer, it is clear that the words were used in the statute in a more restricted sense, to distinguish these particular classes from each other and from other classes of labor; and that the statute should not be construed to apply to persons rendering service which does not naturally fall within the description of the words so used.

It may be added, also, that any other construction would be likely to lead to practical difficulties in the application of the statute, which the Legislature probably did not intend.

CONTRACT, — CLAIM AGAINST COMMONWEALTH, — APPROPRIATION, — CHAMPERTY, — LOBBYING.

On the facts disclosed, the claim of Theodore E. Davis against the Commonwealth for a compensation of two per centum of the amount received by the Commonwealth from the United States as repayment of the direct tax imposed upon Massachusetts by the United States under the act of Congress of August 5, 1861, is valid, and may be paid from the amount received without any further appropriation or action by the Legislature.

Claims which are not and are not to be the subject of litigation, or of suit in court, are not within the rule against champerty, and contracts for the prosecution of such claims for a percentage of the amount collected are not void for champerty.

The legislative lobbying which is contrary to public policy is the bringing to bear upon members of the Legislature of personal, secret, sinister or corrupt influences or inducements, to control or affect their official conduct.

To the Governor. 1891 May 20.

In compliance with the request of Your Excellency and the Honorable Council, I return my opinion upon the various questions submitted to me, arising out of the claim of Theodore E. Davis upon the Commonwealth for a compensation of two per centum of the amount received by the Commonwealth from the United States as repayment of the direct tax imposed upon Massachusetts by the United States under the act of Congress of August 5, 1861.

The first question submitted is whether, under Res. 1888, c. 39, and the contract in pursuance thereof made between the Governor and Council and the claimant February 5, 1890, the auditor has a right to allow and the Governor and Council to approve the payment of the claim except out of the amount received by the Commonwealth from the United States.

The resolve provided that the "Governor and Council are hereby authorized to employ the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress, approved August 5,

in the year 1861," and of certain other claims, "also to fix his compensation, which shall be paid out of any amount received therefrom." Under the authority of this resolve the Governor and Council, under date of February 5, 1890, passed the following order: —

"*Ordered*, That Theodore E. Davis of Washington, D. C., agent of the Commonwealth for the prosecution of war claims against the United States, be and he is hereby authorized to prosecute also the claim of the Commonwealth for a refund of the direct tax, paid under act of Congress approved August 5, in the year 1861; and that his compensation be two per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom and paid into the treasury of the Commonwealth, the same to be in full for compensation and expenses on account of said claim. This order is adopted under the authority of chapter 39 of the Resolves of 1888."

As the resolve contemplates, and the contract provides, that the compensation of the claimant shall be paid out of the proceeds of the claim of the Commonwealth against the United States, and as the Legislature has made no other provision for payment of his compensation, I am of opinion that, in the present state of the case, the auditor has no right to allow or the Governor and Council to approve the payment except out of the amount received by the Commonwealth from the United States.

The next inquiry is, "whether such payment is not expressly forbidden by the trusts imposed by the act of Congress, and accepted by the Commonwealth in its resolve of 1891; and whether, therefore, if the claim of Davis is to be paid, it does not require an appropriation or further action by the Legislature."

The act of Congress referred to is the act of March 2, 1891, refunding to the States the amount of the direct tax; which provides in § 3 that "where the sums or any part thereof credited to any State, Territory or the District of Columbia have been collected by the United States from the citizens or inhabitants thereof, or any other person, either directly or by sale of property, such sums shall be held in trust by said State,

Territory or the District of Columbia for the benefit of those persons or inhabitants from whom they were collected, or their legal representatives." It further provides that the money shall not be paid to any State until its Legislature shall have accepted by resolution "the sums herein appropriated and the trusts imposed," in satisfaction of its claims against the United States on account of the tax, "and shall have authorized the Governor to receive said money for the use and purposes aforesaid;" and that "claims under the trust hereby created shall be filed with the Governor of such State or Territory, and the commissioners of the District of Columbia respectively, within six years after the passage of this act; and all claims not so filed shall be forever barred, and the money attributable thereto shall belong to such State, Territory or the District of Columbia, respectively;" and, further, that "no part of the money shall be paid out by the Governor of any State or Territory, or any other person, to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and any attorney or agent." The Commonwealth received the payment under Res. 1891, c. 46, providing that "the Commonwealth further accepts all trusts imposed upon it by the provisions of said act, and the Governor is hereby authorized to receive the money for the use and purposes aforesaid."

The direct tax was imposed by the act of Congress of August 5, 1861, upon real estate in the several States, for the purpose of raising the sum of $20,000,000 for the use of the government; and the act provided for a system of assessment and collection of the tax by officers of the United States, for which purpose each State was to be divided into assessment and collection districts, and the real estates therein were to be valued and the tax apportioned, assessed, collected and paid into the treasury of the United States directly by officers of the United States to be appointed under the act, which apportioned to Massachusetts as its share of the tax the sum of $824,581.33.

But the act never had this operation in Massachusetts. By Res. 1862, c. 98, the Legislature appropriated out of the

treasury the entire amount due from Massachusetts under the act of Congress, and paid it directly to the United States in commutation of the tax imposed upon the real estate in the Commonwealth; so that the individual owners of real estate in Massachusetts were never assessed the tax under the act, and never had occasion to pay and never paid it.

It is clear, therefore, that the trust imposed upon the States by the act of Congress of March 2, 1891, to hold the money in trust for the citizens or inhabitants who paid the tax, and their representatives, for the term of six years, during which they might file with the Governor their respective claims therefor, does not attach to this fund. The Commonwealth, having paid the entire tax out of the public treasury, received the repayment and holds it to its own use. The act of Congress expressly provides that any part of the fund not absorbed by claims of citizens shall belong to the State. And it seems that the Legislature entertains this view of the subject, as, by St. 1890, c. 335, the Legislature appropriated to the school fund any moneys thereafter to be received from the United States "the disposition of which is not otherwise provided for;" and, while this act was passed in advance and of course without knowledge of the terms of the act of Congress, March 2, 1891, the Legislature has taken no action toward any other disposition of the money; and it is not suggested in any quarter, so far as I am aware, that any other disposition is necessary, or that there is any doubt of the right of the Commonwealth to allow it to stand appropriated to the school fund, as provided by the act of 1890.

It remains to consider whether payment of the claim is forbidden by the provision of the act of Congress above quoted, that no part of the money shall be paid to any attorney or agent. In considering this, it is to be observed at the outset that "the use and purposes aforesaid," for which the act of Congress provided that the money shall be paid, and for which the Governor shall receive it and has received it under the act and our resolve of 1891, are only the reimbursement of the direct tax to the States, and the satisfaction of all claims upon the government on account of it; and, therefore, that the pay-

ment of any part of it to an attorney or agent, or any other disposition which the Commonwealth may make of it consistent with the satisfaction of its claims and the claims of its citizens upon the government, is entirely consistent with the express uses for which the United States paid and the Commonwealth received the money.

It is, to say the least, doubtful whether this provision is one of "the trusts imposed" by the act under which the Commonwealth accepted the payment; as this expression naturally refers to the express trusts imposed upon the fund for the benefit of the citizens and inhabitants who paid the tax, as above stated. The provision forbidding payment to any attorney or agent is not, in form, a trust, nor appropriate to create a trust; and, if Congress it to be taken as having meant to include this provision as one of "the trusts imposed," it may well be for the single reason that, as the fund was repaid for the benefit of the citizens who originally paid it, and as their claims might absorb the entire fund, no part of it should be devoted to any other purpose unless and until the claims of the citizens were first fully satisfied. But, inasmuch as there are no citizens of Massachusetts who have any claim upon it, and as, therefore, there is no trust in the fund for their benefit, as pointed out above, this purpose of the provision forbidding payment to any attorney or agent is as fully satisfied as the purpose of the express trust imposed upon the fund for the benefit of the citizens. I do not think the act of Congress should be construed to interfere with the disposition of the fund in the possession of the States further than is reasonably necessary to the purpose for which it was repaid to them; and, whether or not the provision against payment to any attorney or agent may be deemed to lay any moral obligation upon the Commonwealth, which is not for me to determine, it has, in my opinion, no legal effect, under the circumstances of this case, to forbid or prevent any disposition of any part of the fund which the Commonwealth sees fit to make. I am informed that other States have already put this construction upon it, and have paid their agents out of the fund without doubt or question. And, as the resolve of 1888,

under which the contract with the claimant was made, and the contract itself, expressly provide that his compensation shall be paid out of the proceeds of the collection; and as the Legislature, in appropriating the money to the school fund by St. 1890, c. 335, expressly reserved any amounts "otherwise provided for," I am of opinion that the payment of the claim does not require any further appropriation or action by the Legislature.

It becomes necessary, therefore, to inquire into the validity of the contract with the claimant and the legality of his claim, which is the subject of the other inquiry submitted by Your Excellency and the Council, It is suggested that the contract is or may be void for champerty. It is by no means certain that the rule against champerty can be or ought to be applied to the contract of a sovereign State, which clearly is not within the mischief against which the rule is directed. But I do not deem it necessary to consider this question, as in my opinion the rule does not apply to a contract for the prosecution of such a demand as that of the Commonwealth against the United States in this case. The offences of champerty and the maintenance of suits are of ancient origin, and are correlative to each other; and the principle out of which they arise is that it is contrary to public policy, as tending to speculation and to vexation and oppression of debtors, that litigation should be maintained or promoted for a share of the proceeds, by those who have no other interest in it. But this relates to suits in court; and an examination of the multitude of reported English and American cases on the subject shows that the doctrine has been applied only to judicial litigation, and discloses no case in which it has been applied to the prosecution of a claim of such character as that which was the subject of this contract. Here there was no suit, and no prospect or possibility of a suit. The tax was laid and collected by the United States in the exercise of its sovereign power, and no legal claim resulted to any person or to any State for the repayment of it. The distinction between claims which are or may be the subject of litigation, and other claims, is well recognized in the champerty cases; and it is held that claims which are not and are

not to be the subject of litigation, or of suit in court, are not within the rule against champerty, and that contracts for the prosecution of such claims are not open to this objection.

The further question is raised whether the contract between the Commonwealth and the claimant may not be unlawful and void, or his claim invalid, within the doctrine of *Trist* v. *Child*, 21 Wallace, 441, as contemplating or involving services in the nature of lobbying. It is a novel suggestion that the agent and representative of a sovereign State, appointed by her highest executive authority, in pursuance of an act of the Legislature passed for this sole purpose, to look after her interests before the Congress of the United States, is under any circumstances to be regarded as a lobbyist. But, without considering whether he can be so regarded, or whether there is any warrant for the imputation which the suggestion puts upon the Legislature which authorized this contract, or the Governor and Council who made it, it will be sufficient to state the law applicable to the contract here in question. It is recognized in all intelligent discussion of the subject, in the courts and elsewhere, that the mischief involved in the operations of a legislative lobby is the bringing to bear upon members of the Legislature of personal, secret, sinister or corrupt influences or inducements, to control or affect their official conduct. This is against public policy, and a contract or claim for such services cannot be enforced at law. It need not be said that this rule rests on the highest considerations of the public welfare, for the protection of the public against corruption of the sources of law, and it is to be maintained and enforced; but it is equally well recognized and settled that the proper prosecution of a claim or other legitimate interest before a legislative body is neither improper nor unlawful. It requires but little power of discrimination to distinguish between the open and proper communication of legitimate information respecting subjects of legislation, by those whose character and relation to the subject are fully disclosed, which must often be essential to intelligent action, and the influencing of legislation by personal appeal on personal grounds, or by deceit, or by other secret, sinister or corrupt influences. The

judicial decisions that go furthest in support of the rule that a contract for lobbying services is unlawful and cannot be enforced, including the cases of *Trist* v. *Child* and *Frost* v. *Belmont*, 6 Allen, 152, expressly recognize the propriety and legality of the proper prosecution of claims before Congress or other legislative bodies, and the validity of a contract therefor; and the result of the cases seems to be that the test of the validity of the contract and the legality of the service, in any case, is in the methods pursued or contracted for.

The contract of the Commonwealth with the claimant, who is said to be a member of the bar, and who was then and had been for several years the accredited agent of the Commonwealth at Washington for the prosecution of its claims against the United States, was "to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress approved August 5, in the year 1861." It cannot be said that the prosecution of this claim by proper and legitimate means was unlawful, and therefore it cannot be said that the contract, upon its face, is invalid. If the claimant exceeded or departed from his contract, and resorted, in the prosecution of the claim, to any of the methods or practices justly stigmatized by the law as contrary to public policy and illegal, he cannot enforce his claim to compensation. But the questions of fact which may affect the validity of the claim are not for me to consider, nor do the papers submitted to me by Your Excellency appear to furnish sufficient materials for a correct determination of them.*

Insurance Company, — Increase of Capital.

St. 1891, c. 195, does not require a life insurance company to increase its capital on engaging in the business of accident insurance, if its capital already equals or exceeds the sum of the two capitals required in the two classes of business respectively.

To the Insurance Commissioner. 1891 May 25.

I reply to your inquiry as to the effect of St. 1891, c. 195, upon the application of the Ætna Insurance Company for authority to engage in the business of accident insurance, at more length than would otherwise be necessary, in view of

* Affirmed in *Davis* v. *Commonwealth*, 164 Mass. 241.

some expressions of two of my predecessors upon a similar, though not the same, question.

The statute of 1891, so far as material to the present case, re-enacts St. 1887, c. 214, § 80, forbidding a foreign insurance company to do more than one kind of business within the Commonwealth, and St. 1889, c. 356, providing that a foreign or domestic accident insurance company may take up employers' liability insurance "by increasing its capital to the amount now required by law as the capital of such employers' liability insurance company;" and adds a new provision, that any foreign or domestic company doing only life insurance within the Commonwealth may take up accident insurance "by increasing its capital to the amount now required of two separate companies engaged in either one of these two classes of business;" and re-enacts the concluding provision of the statute of 1889, that "no company now or hereafter admitted shall be allowed to transact any two of such classes of business, unless it possesses an aggregate capital equal to that required of two separate companies engaged in either of these classes of business."

The present question is, whether a life company, having at the time of its application a capital equal to or exceeding the sum of the two capitals required in its original business, and in the business of accident insurance which it desires to add, respectively, must actually increase its capital upon taking up the new business, or whether the law is satisfied by its original possession of a capital equal to the sum of the two separate capitals, so that no actual increase is necessary.

Taking the provision for increase of capital literally, it cannot be intelligibly applied to the case of a company having at the time of its application a capital equal to or exceeding the sum of the two capitals required in the two classes of business respectively. The requirement is that the capital shall be increased "to the amount now required of two separate companies engaged in either one of these two classes of business;" and this requirement cannot be applied to the company in question, as it needs no increase of its capital to carry it up "to the amount now required of two separate companies," etc.,

and any increase of its capital would necessarily carry it beyond that amount. Another difficulty is immediately encountered in undertaking to apply the requirement to such a company, as the statute gives no measure of the required increase of capital, except that it shall be "to the amount now required of two separate companies," etc., which plainly calls for no increase at all by a company having already a capital equal to the sum of the two separate capitals. If it must necessarily increase its capital at all, there is no means of knowing what amount should be added. If it were possible to read the requirement thus, "by increasing its capital *by* the amount now required of the two separate companies," etc., as in my opinion it is not, but which would have to be done in order to get at any measure of the required increase in such a case, we should be involved in the difficulty, which amounts to an absurdity, of requiring a company having at the time of its application a sufficient capital for the one class of business, to add on taking up the other class the amount required of both. That is to say, a life company having a capital of $200,000, upon taking up accident insurance, for which the requirement is $200,000, would have to add $400,000, making it necessary for such a company to have a capital of $600,000, to do the business which two separate companies can do upon an aggregate capital of $400,000. This is not a reasonable construction, and is not to be adopted if another reasonable construction is open; and the concluding provision of the statutes of 1889 and 1891 clearly indicates the purpose of the Legislature to require only that a company transacting the two classes of business shall possess a capital equivalent to the sum of the two capitals required for each respectively. This concluding provision of the two acts is designed to require the companies to keep up permanently the amount of capital which they are required by the previous provisions of the two acts to have, or to acquire, on taking up the additional business; and it seems sufficiently clear, from this provision and from the considerations suggested above, that the purpose of the Legislature was, and the effect of the act is, only to require the possession of the aggregate capital at the time of beginning and throughout the continuance of the new

business, and not to require an actual increase by a company possessing a capital equivalent to the two capitals at the time of its application. The other construction would give the statute a very unequal operation, as illustrated above; and it may be still further illustrated by the case of the present applicant, whose capital is $1,250,000, but which would be required, if it must actually increase its capital, to have a permanent capital in excess of that amount, as a condition of doing the business which other companies may do upon a capital of $400,000.

The only suggestion which has been made or has occurred to me which even appears to be inconsistent with this construction, is that the Legislature may have considered that a company engaged in one kind of business, with the capital required for that business, may have or is liable to have outstanding as many risks of that class as ought to be carried against that amount of capital, and so must be taken to have required an actual addition to the capital upon taking up a new class of business. But this suggestion appears to me to be fully met by the fact that there is no necessary legal relation or proportion between the amount of capital and the amount of risks, and that all insurance companies, doing whatsoever business, are required to have and to keep up a reserve or guaranty fund, whatever it may be called, which must bear a definite proportion to the risks, and which must be increased as the risks increase, and which is really the fund relied on by the law to meet liabilities.

You have called my attention to the fact that in 1879 Attorney-General Marston ruled that, under St. 1873, c. 182, a fire company desiring to add marine insurance must actually increase its capital. I must take that ruling as made only in view of the particular case then in question, the facts of which are not disclosed; as Mr. Marston says in the same opinion that the requirement of the statute of 1873 does not apply to companies whose capital was originally fixed at $300,000 or more, which was the amount of the increased capital required by that act; and this statement indicates that he would have taken the same view of the statute now in question as that which I have

stated above. If the opinion of Attorney-General Waterman, of January 29, 1890, is to be taken as indicating a contrary view, which is not clear, I cannot follow it.

All the reasons of the statute appear to be satisfied by construing it to require only that a company doing the two kinds of business shall possess an aggregate capital equal to the sum of the two capitals required by the two kinds of business respectively; and, as this construction is more readily open upon the terms of the statute itself, and furnishes an intelligible and uniform rule, and as any other would lead to great practical difficulties and inequalities of operation, I am of opinion that it is to be so construed, and that the company whose application is now in question is not required to increase its capital in order to engage in the business of accident insurance.

The history of the legislation on the subject confirms this conclusion. The earlier statute of 1873 was undoubtedly drawn in contemplation of the fact that, by St. 1872, c. 375, to which it referred, the required capital of a fire company was less than the required capital of a marine company; and it was, therefore, natural to use the expression "shall have increased its capital" in providing in 1873 for the addition of marine business to fire business, and this expression has probably been borrowed from the earlier statute in the statutes of 1889 and 1891, without much thought of its necessity or appropriateness to the purpose in view. But it is clear that the statute of 1873 intended to require nothing more than that a company doing marine business should possess the larger capital required for that business as a condition of entering upon it, whether it was doing also a fire business or not, as the statute of 1872 permitted any company to do both kinds of business, if it possessed the larger capital necessary to marine business.

MUNICIPAL INDEBTEDNESS ACT, — TREASURER OF COMMONWEALTH.

The Treasurer of the Commonwealth should not loan money to a city on an application which does not clearly show that the city has complied with all the requirements of Pub. Sts., c. 29, relative to municipal indebtedness.

To the Treasurer. 1891 July 21.

Upon your request to be advised upon the application of the city of Holyoke for a loan, it does not appear to me that you have such information as you need. The municipal indebtedness act (Pub. Sts., c. 29) prohibits the incurring of any debts by cities and towns "except in the manner of voting and within the limits as to amount and time of payment" therein prescribed. Section 8 limits the time within which certain municipal debts shall be payable, and I understand that this case is within the ten-year class. It is reasonably evident, from § 14, cl. 2, from § 23, and from other provisions of the act, that the limitation is intended to run from the original contraction of the debt, and not to be extended by renewal. The copy of the order sent you by the treasurer does not show that it was adopted by "two-thirds of all the members of each branch," or that it was approved by the mayor, as required by § 7; and, while it shows upon its face that the new notes are or may be issued in renewal of former notes, it does not show for what purposes or in what amounts or at what times the original indebtedness was incurred. And it does not seem to me, for several reasons, that the letter of the treasurer is sufficient to meet this difficulty.

It is provided by § 16 that "the restrictions of the preceding sections shall not exempt a city or town from liability to pay debts contracted for purposes for which it may lawfully expend money." But the debt now sought to be contracted is a debt for borrowed money; and, under the very strict construction put upon the act by the supreme court in the case of *Agawam Bank* v. *South Hadley*, 128 Mass. 503, it seems to be necessary to the validity of such a debt that all the requisites to the borrowing power established by the act be strictly complied with; and this view seems to be affirmed in the latter case of *Smith* v. *Dedham*, 144 Mass., p. 179. If it is not

absolutely necessary, it is certainly desirable, that it shall appear on the face of the order that they have been complied with; and it is unsafe to make a loan under circumstances which indicate, as in this case, that some of the requirements may not have been fulfilled.

If the new notes are renewals of former loans, it is not clear that they are within the prescribed limit of time. If they are new debts, as indicated by *Abbott* v. *North Andover*, 145 Mass. 484, all the conditions of the borrowing power must be strictly fulfilled, to make the lender safe under the doctrine of the court. And it is legally possible that they may be subject to the requirements applicable to both.

It is hardly necessary to say that these suggestions do not imply any doubt of the good faith of the city in this case, or any doubt that the city will pay any money which it may borrow from the Commonwealth; but, proceeding as you must under the law without reference to any such considerations, it does not seem to me that you have the information which you ought to require before making the loan.

CONTRACT, — RE-INSURANCE, — SINGLE HAZARD.

St. 1887, c. 214, § 20, prohibiting a company from insuring in a single hazard a larger sum than one-tenth of its net assets, is not to be construed as allowing it to take a larger risk in the first instance and reinsure it so far as to bring the net amount retained by the company, within the prescribed limit.

To the Insurance Commissioner.
1891
July 29.

Upon the question arising, under St. 1887, c. 214, § 20, whether the prohibition against insuring in a single hazard a larger sum than one-tenth of the net assets of a company is met by reinsuring such hazard so far as to bring the net amount at risk within the prescribed limit, I have heard, at their request, the representatives of the company in whose case it arises. It is urged that the general understanding and practice of insurers are that the amount may be so reduced; that the insurance department treats reinsurance as reducing the amount of insurance of any particular company for the

purpose of taxation; and also that, in the similar prohibition in § 56, the Legislature expressly recognizes and permits reinsurance as reducing the amount of insurance to the prescribed limit. But it is competent to permit this reduction for one purpose or for various purposes, while refusing or omitting to allow it for other purposes; and it may be said of § 56, with perhaps equal force, that, as the Legislature has allowed reinsurance to reduce the amount of insurance for the purposes of that section, but has not expressly extended the same privilege to the case provided for by § 20, it has thereby indicated its purpose not to permit it in the latter case; and it is to be observed also that, in the last expression of the Legislature upon the subject, in St. 1891, c. 368, the Legislature, while dealing with the subject of reinsurance, has re-enacted the prohibition of § 20 without any express qualification.

The history of this provision sheds some light upon its construction. From St. 1817, c. 120, in which it seems to have originated, through several re-enactments down to the insurance act of 1887, the prohibition was that a company should "never *take*" or "hold" (the latter word also appearing in St. 1856, c. 252, § 15) more than the limited amount in one risk. This is somewhat stronger against the claim of reduction by reinsurance than the language in which the provision was re-enacted in the statute of 1887; and in view of § 112 of that act, and as there is no apparent reason to suppose that any modification or change of legal effect was intended in adopting the word "insure" in the re-enactment in place of the words "take" or "hold," I do not think it is to be inferred that any such change was intended, but that the re-enactment is to be taken as a continuation of the original prohibition. In view of these considerations, it is open to construe the clause of § 20 literally, as an absolute prohibition against insuring more than the limited amount in one hazard, regardless of reinsurance. This is the safer construction, for the security both of the public and the insurance companies; and it conforms to the ordinary rule of construing a grant of corporate power strictly as against the grantee. Another reason of some weight

for following it now is, as I understand, that, in the only cases hitherto known to your department of violation of this provision so construed, a fine has been imposed and paid; so that a contrary construction would reverse the rule of the department, so far as any rule is established, and lead to inequality of treatment and apparent injustice, as between the various companies involved.

REGISTRATION OF CRIMINALS, — BERTILLON SYSTEM OF MEASUREMENT, — UNITED STATES PRISONERS.

St. 1890, c. 316, requiring measurement of prisoners by the Bertillon system, applies to United States prisoners at the Massachusetts Reformatory.

To the Governor. 1891 August 18.

In reply to your request for my opinion upon the question whether United States prisoners at the Massachusetts Reformatory are included in the requirement for measurement by the Bertillon system, under St. 1890, c. 316, I have the honor to say that, as the Legislature undoubtedly has power to apply the requirement to such prisoners, and as they are not expressly excepted from the operation of the act, and as I find nothing in it to indicate any purpose of the Legislature that they should be excepted, it is, in my opinion, to be applied to them. This conclusion is strengthened by the fact that, in other statutes bearing upon the confinement of United States prisoners in our prisons, they have sometimes been made the subject of express exception, and the absence of any such expression in this case has some tendency to indicate the purpose of the Legislature to make no such exception.

MILITARY AID, — HONORABLE DISCHARGE OF SOLDIER.

A man who enlisted in Massachusetts during the war of the rebellion and was honorably discharged is entitled to military aid under St. 1889, c. 279, § 2, par. 3, notwithstanding that previously to his enlistment in Massachusetts he had been dishonorably discharged from a Rhode Island regiment.

To the Auditor. 1891 August 18.

In reply to your inquiry as to the legality of the payment of military aid to a man enlisted in Rhode Island in the war of the rebellion and dishonorably discharged, and thereafter re-

enlisted in Massachusetts and honorably discharged, I have to say that, as the re-enlistment was not unlawful, and was regarded by the War Department as permissible, as I am informed, an honorable discharge from the service under such re-enlistment in my opinion satisfies the requirement of St. 1889, c. 279, § 2, par. 3; and the fact that the applicant was dishonorably discharged from the Rhode Island regiment does not disqualify him to receive aid under the statute.

Legacy Tax Act, — Pending Cases.

St. 1891, c. 425, imposing a tax on collateral legacies and successions, does not apply to cases pending at the time of its taking effect, but only to cases arising after the time of its taking effect.

To the Treasurer. 1891 September 2.

In reply to your request to be advised upon the question whether St. 1891, c. 425, imposing a tax on collateral legacies and successions, applies to cases pending at the time of its taking effect, I have to say that, in my opinion, it is not to be applied in such cases, but only to cases in which the death of the decedent occurs thereafter. The language of the act appears to be capable of either construction, and there seems to have been no judicial determination of the question under the English statutes or those of other States. But, in view of some expressions which indicate the understanding, if not the actual purpose, of the Legislature, that it was not to apply to pending cases, and in view of the practical inconvenience of applying it to such cases, which application would raise numerous doubtful questions, and would be likely to lead to inequality and inequity among different persons or classes of persons taking from the same estate, I am led to the conclusion above stated, — that the act should be construed to begin with cases arising after the time of its taking effect.

MILITIA, — ENLISTED MEMBER, — COMMISSIONED OFFICER.

An enlisted member of the militia, who is elected a commissioned officer, continues liable to the duties and is entitled to the privileges of his original position until he is actually commissioned in pursuance of such election.

To the Adjutant-General. 1891 September 2.

In reply to your inquiry under date of the 1st instant, concerning the status of an enlisted member of the militia who is elected a commissioned officer, during the interval between such election and his assignment to duty, and whether such officer-elect during such interval is liable to duty and eligible to participate in regimental competitions and continues to be a member of his company, I have to say that, in my opinion, the status of an enlisted man is not changed merely by his election to a commissioned office, but that, until he is actually commissioned in pursuance of such election, and no longer, he continues liable to the duties and entitled to the privileges of his original position. It seems extraordinary, unless there are sufficient military or other reasons for it, that the statute should require an elected officer to be commissioned before his qualifications for the office are ascertained, and before it can be known whether he can ever lawfully exercise it; and this apparent anomaly renders the statute more difficult of construction than it might otherwise be; but, in my opinion, the proper construction under the circumstances is that above stated.

MILITIA, — DISCHARGE OF OFFICER, — CONSTITUTIONAL LAW.

When an officer has been discharged from the militia under St. 1887, c. 411, § 64, the law does not require the Governor to take any further action in the case. St. 1887, c. 411, § 64, is constitutional.

To the Governor. 1891 October 12.

In reply to your request for my opinion whether the law requires any further action on your part in the case of Capt. S. Thomas Kirk, and upon the constitutional question said to be raised in Captain Kirk's letter to Your Excellency, I have the honor to say that, in my opinion, the law does not require

any further action in the case on the part of the Commander-in-Chief, unless he chooses in his discretion to make further inquiry; and that there is, in my opinion, no doubt of the power of the Legislature, under art. 4 of the amendments to the Constitution, to enact the St. 1887, c. 411, § 64, under which he appears to have been discharged. As to the regularity or validity in other respects of the proceedings which led to his discharge, I can say nothing further than that, upon the papers transmitted to me by Your Excellency, I see no reason to doubt their validity.

LEGACY TAX ACT, — EXECUTOR'S DUTY, — STATE TREASURER'S DUTY.

St. 1891, c. 425, § 5, makes it the duty of executors, administrators and trustees, in cases of articles of personal property specifically devised, to collect the tax before delivering the property.

The statute does not make it the duty of the Treasurer of the Commonwealth to institute inquiry as to the existence of estates subject to the tax.

To the Treasurer. 1891 October 29.

In reply to your inquiries as to your duty under the legacy tax act (St. 1891, c. 425), I have to say that, in my opinion, it is plain from § 5 that, in the case of articles of personal property specifically devised, it is the duty of the administrator, executor or trustee to collect the tax, based on the appraisal provided for by § 9 or § 13, before delivering the article to the legatee; and that, in the case of such a specific legacy in common to two or more persons, the tax is to be collected from each in proportion to their respective interests. I see no reason why this rule should not apply to every such case, and why you should not so inform any person having occasion to ask.

As to your duty to make special inquiry, etc., in my opinion, the statute intends that sufficient information as to estates subject to the tax, or the existence of such estates, will reach you through the provisions of §§ 9, 10 and 11, and the other provisions of the act, and that it does not require you to institute inquiry as to the existence of such estates. The Legislature seems to have proceeded upon the assumption that all deceased

estates pass through the probate courts, and to have assumed that sufficient information for your purposes will reach you through that channel under the provisions of the act. If any other case should come to your knowledge, you have power under § 15 to apply for administration; and in any case in which the original appraisal of the property is not satisfactory to you, you have power to secure a special appraisal under § 13; but, in the absence of anything tending to show that the original appraisal is erroneous, you are, in my opinion, justified in resting upon it.

INSURANCE COMMISSIONER, — DUTIES.

The Insurance Commissioner is not required to determine the legal titles of officers of endowment orders.

To the Insurance Commissioner. 1891 October 30.

In reply to your inquiries under date of 24th inst., as to the title of the officers of the Mutual One Year Benefit Order, and under date of 27th inst., as to the title of the officers of the Order of the Fraternal Circle, I have to say that, in the former case, upon the statement presented, I see no reason to doubt that the officers are properly qualified, and, in the latter case, that the indications are to the contrary; but that this case will probably be so disposed of as to give you no further trouble, under a suggestion made by me to the counsel of the corporation, who has called upon me in reference to this question.

The facts submitted by you are insufficient to determine the validity of the title of the officers in either case, a correct determination of which might involve a critical examination of all the proceedings of the respective organizations from their beginning; and, in my opinion, the statute does not require you to determine the legal title of these officers. It would in many cases be practically impossible for you to do it with the means at your command. If their title is in question, and is so doubtful that you do not feel justified in endorsing a requisition, you are justified in declining to endorse it; leaving the parties in interest to proceed against you or to have the title

of the officers tried and settled in court, where alone it can be conclusively determined, with full protection in the mean time to all the interests involved.

LEGACY TAX ACT, — RETROSPECTIVE STATUTE.

St. 1891, c. 425, does not apply to a case in which the testator died before the act took effect, though his will was not admitted to probate until after it took effect.

To the Treasurer. 1891 November 14.

In reply to your inquiry whether St. 1891, c. 425, imposing a tax upon collateral legacies and successions, applies to a case in which the testator died before the act took effect, though his will was not admitted to probate until after it took effect, I have to say that such a case is within my former opinion, and the statute does not apply to it. A will takes effect in law as of the time of the testator's death, and such a case as you describe was pending, in contemplation of law, at the time when the statute took effect; and therefore, in my opinion, as formerly given you, is not affected by it.

STATE TREASURER, — SECURITIES DEPOSITED BY FRATERNAL BENEFICIARY ORGANIZATIONS.

St. 1890, c. 341, does not require the Treasurer of the Commonwealth to accept any security, the value and character of which may be open questions which he may find it difficult or impossible to determine.

To the Treasurer. 1891 November 30.

In reply to your inquiry of this date, relating to certain mortgages assigned to you in trust under St. 1890, c. 341, I have to say that, in my opinion, you are not required to accept under that statute a mortgage given wholly or in part to secure future advances. While such a mortgage is a valid security for the sums actually advanced in the absence of any intervening lien or incumbrance, it is not valid, as against any such intervening lien or incumbrance, as to any advances thereafter made. Under such a mortgage, therefore, the amount for which it is actually a valid and enforceable security is always an open question, and this is a question on which you might frequently be unable to ascertain the facts, and which you ought

not to be required, and, in my opinion, are not required, to determine.

The fact that the date of a mortgage note does not correspond with the date of the mortgage, does not invalidate the security, if the note actually represents the debt which the mortgage was given to secure; but such a discrepancy, as in the other case, raises a question of fact which you would have to determine before you could safely accept the mortgage, and which might be a subject of dispute thereafter; and, in my opinion, you are not required to accept a note and mortgage between which such a discrepancy appears.

There is, indeed, room for doubt whether the Legislature, with the exceeding liberality which has characterized its action on the subject of this statute, has not authorized these corporations to unload upon you anything which they claim to be within the description of the statute as "securities in which insurance companies are allowed by law to invest their capital;" and whether it has authorized you to make any examination of the securities, or given you any power to determine what shall be received. But the statute expressly gives you power to determine the "value and character" of any of the securities which may be exchanged or offered in exchange; and, in view of this provision, I think it reasonable to construe the statute as not requiring you to accept originally any security, the value and character of which may be open to questions which you might find it difficult or impossible to determine.

INSURANCE, — NATURE OF CONTRACT, — ADVERTISEMENT.

A contract made under an advertisement by a newspaper to pay a certain sum to the next of kin of any person dying by accident with a copy of the paper on his person is a contract of insurance.

To the Insurance Commissioner. 1891 December 2.

I see no reason to doubt that a contract made under and according to the terms of the advertisement transmitted to me in your letter of November 30 would be a contract of insurance, within the description of St. 1887, c. 214, § 3.

NOTE. — The newspaper advertised to pay $250 to the next of kin of any person dying by accident with a copy of the paper on his person. See p. 77 *post*.

GOVERNOR, — ASSISTANT CLERK OF COURT, — APPOINTMENT.

The Governor has no power to appoint an assistant clerk of the Municipal Court of the Roxbury district.

To the Governor. 1891 December 5.

I acknowledge receipt of your request for my opinion as to your power to appoint an assistant clerk of the Municipal Court of the Roxbury district; and I have no doubt of the correctness of your view that the power of appointment to that office does not lie with the Executive.

FIRE INSURANCE, — MASSACHUSETTS STANDARD POLICY, — EXPLOSION.

Under St. 1887, c. 214, § 60, cl. 7, companies authorized to insure against fire in Massachusetts may insert in the Massachusetts standard policy a clause providing that, "in the event of an explosion, fire ensuing, the company shall pay the loss on the portion so injured by fire at the value thereof before the explosion;" but after the clause is inserted, the policy is not a Massachusetts standard policy, and is not to be so designated.

To the Insurance Commissioner. 1891 December 18.

In my opinion, there is nothing in the statutes, or in the general principles or policy of the insurance law, to forbid companies authorized to insure against fire in Massachusetts from inserting in their policies a clause providing that, "in the event of an explosion, fire ensuing, the company shall pay the loss on the portion so injured by fire at the value thereof before the explosion." It involves no violation of St. 1887, c. 214, § 57, if the policy is originally issued for an amount which, together with existing insurance, does not exceed the fair value of the property insured at that time; and, while such a clause is undoubtedly inconsistent with the prescribed stipulation of the Massachusetts standard policy that the liability of the company is "not to include loss or damage caused by explosion of any kind unless fire ensues, and then to include that caused by fire only," the seventh excepting-clause of § 60 of the insurance act expressly permits the insertion in policies of insurance, under certain conditions therein prescribed, of

"provisions adding to or modifying those contained in the standard form."

But the whole course of legislation concerning the Massachusetts standard policy, from its establishment by St. 1873, c. 331, through the successive additions to and re-enactments of that statute in St. 1880, c. 175, St. 1881, c. 166, Pub. Sts., c. 119, §§ 139, 140, and St. 1887, c. 214, § 60, clearly indicates the purpose of the Legislature that the standard policy shall contain no provisions in addition to or materially different from those prescribed in the statutory form, except such as are expressly permitted by the first, second, third, fourth and fifth excepting-clauses of § 60. The only one of these clauses which could be deemed to cover the provision here in question is the fourth, and that does not appear to me to cover it. It is designed rather to permit the insertion of such information and such formal statements, not likely to materially affect the substance of the contract, as the charter of the company, or the laws under which it is established, may expressly permit or require to be inserted. The only authority for the insertion of material provisions in addition to or materially different from those of the standard form seems to be in the seventh excepting-clause of § 60; and it is to be done only in the manner and upon the conditions therein prescribed; and a policy issued under this clause is not the Massachusetts standard policy.

I am, therefore, of opinion that the clause in question cannot lawfully be inserted in the Massachusetts standard policy, and that a policy which contains it, while lawful and permissible if it is inserted in the manner prescribed in the seventh clause of § 60, is not the Massachusetts standard policy, and is not to be so designated.

MILITIA, — CONTINUOUS HONORABLE SERVICE, — SERVICE MEDALS.

Under St. 1891, c. 232, § 3, "nine years continuous honorable service" to be rewarded with a medal means nine consecutive years of service; and "additional five years like service" to be rewarded with a clasp or bar means five consecutive years of service immediately preceding or following the period of nine years.

To the Adjutant-General.
1892
January 26.

In reply to your request to be advised of the proper construction of St. 1891, c. 232, § 3, relating to service medals, I have to say that in my opinion the "nine years' continuous honorable service," which is to be rewarded with a medal, must be construed as nine consecutive years of service without interruption; and that the "additional five years' like service," which is rewarded with a bar or clasp, must also be five consecutive years of service without interruption, and must immediately precede or follow, without interruption, the period of nine years. The statute must be taken as designed to confer a distinction for continuous honorable service of not less than nine years; and the bar or clasp is not intended as a distinction to be conferred for five years' service by itself, but for that period of continuous service in addition to the other period.

HOUSE OF REPRESENTATIVES, — QUORUM, — CONSTITUTIONAL LAW.

A quorum of the House of Representatives under Amendment XXXIII. of the Constitution consists of a majority of all the members constituting that body.

The constitutional quorum is necessary for the permanent organization of the House. A less number may organize temporarily.

To the Speaker of the House of Representatives.
1892
February 1.

In compliance with the order of the honorable House of Representatives of January 27, requesting my opinion, "with reasons therefor," upon certain questions of the construction of amendment XXXIII. of the Constitution, establishing the quorum of the two branches of the Legislature, I respectfully submit the following: —

First. — The words "a majority of the members" mean, in my opinion, a majority of the whole membership established by the Constitution. The weight of authority as to bodies composed of a fixed number of members, especially legislative bodies, is in favor of this construction. The judicial decisions are comparatively few, but they are generally in this direction. Under the provision of the Constitution of the United States that a majority of each house of Congress shall constitute a quorum, it was there held almost without exception, from the foundation of the government, that a quorum consists of a majority of the entire Senate and House, until the pressure of public necessity at a critical period of the war led to a temporary departure from this rule. The writers of highest authority on parliamentary law express the same view. There are other reasons for it, of equal force, arising both from principle and convenience. It is important that the quorum be a fixed and certain number. If any other construction is adopted, the quorum varies from time to time according to a multitude of circumstances, depending on the chances of death, resignation, declination, ineligibility, failure to elect, or failure to qualify. It is not to be supposed that the Legislatures and the people, who enacted this change in the fundamental law, intended to introduce into it such elements of uncertainty and confusion, or to leave the number which may constitute a quorum at any particular time to depend upon questions of fact which may be doubtful or in dispute, and which it may often be difficult or impossible to correctly determine.

The constitutional amendment was drawn and enacted in view of the common rule that in the absence of any express provision a quorum consists of a majority of all the members constituting the body in question, which is often expressed in the language of this amendment. If it had been intended to change this rule, and to leave the quorum a variable number, depending on some or all of the contingencies above suggested, I think this intention would have been more clearly expressed; and that it is not to be inferred from the use of language which may be and is frequently, if not universally, taken to mean a majority of the whole membership.

It is worth remarking, also, that the reason commonly assigned for the requirement of a majority as a quorum is to prevent the existence at the same time of two bodies, each claiming to be the rightful body; and this reason of the rule can be absolutely satisfied only by construing a majority of the members to mean a majority of the whole membership.

It follows that, in my opinion, the second, third, fourth and fifth questions submitted by the honorable House, must be answered in the negative.

Sixth. — To the inquiry what constitutes a legal quorum, under the Constitution, for the organization of the House, I have to say that in my opinion such quorum for permanent organization, under the present Constitution, consists of one hundred and twenty-one members. The permanent organization of the House is, literally at least, "the transaction of business," and it seems to be so regarded both in the former constitutional provision and in the recent amendment; and as the amendment does not permit "the transaction of business" by a less number than a quorum, the effect of it is to require the constitutional quorum for permanent organization. But with reference to temporary organization the case is different. Prior to the adoption of the amendment, the constitutional provision was that "not less than one hundred members of the House of Representatives shall constitute a quorum for doing business, but a less number may organize temporarily, adjourn from day to day, and compel the attendance of absent members." The language of the amendment is: "a majority of the members of each branch of the General Court shall constitute a quorum for the transaction of business, but a less number may adjourn from day to day, and compel the attendance of absent members. All the provisions of the existing Constitution inconsistent with the provisions herein contained are hereby annulled." It is difficult to believe that this amendment was drawn without reference to the former provision, or that the words "organize temporarily" were omitted by inadvertence. The amendment, therefore, seems at first sight to deprive a number less than a quorum of the power which it formerly had to organize even temporarily. But some sort of temporary

organization is necessary to the exercise of the other powers which are expressly granted to a less number than a quorum, to "adjourn from day to day and compel the attendance of absent members"; and, in my opinion, from the necessity of the case, a less number than a quorum may affect such temporary organization as may be required for the exercise of the other powers expressly conferred.

I have submitted these reasons for my opinion, out of deference to the honorable House of Representatives, in compliance with the terms of its order. But I respectfully call the attention of the honorable House to the fact that the statute does not require the Attorney-General to state the reasons of his opinion; and that in some cases such a statement may be inconsistent with the public interests.

HARNESS-MAKING, — PRISON LABOR, — CENSUS.

Harness-making is not a classified industry in the census of 1880 within the meaning and for the purposes of St. 1888, c. 403, § 2. The employment of eighty-two men in that industry in the State Prison is not in violation of law.

To the Governor. 1892 February 13.

The answer to your inquiry whether the employment of eighty-two inmates of the State Prison in harness-making is in excess of the number allowed by law, depends upon the question whether the enumeration in the census of 1880 of persons engaged in the "saddlery and harness" industry is a sufficient classification of "the manufacture of harnesses" within the meaning and for the purposes of St. 1888, c. 403, § 2.

I understand that my predecessor expressed to the Governor and to a legislative committee the opinion that harness-making cannot be considered as classified in that census, and that this view has been acted upon by the Legislature and the prison authorities. Under these circumstances there is, in my opinion, no sufficient occasion to depart from the rule thus established. Doubtless "saddlery" may be and sometimes is taken to cover and include harnesses and harness-making. But it is equally true that the manufacture of harnesses is, to some extent at

least, a separate and distinct industry, as it is in the prisons; and the census does not disclose how many are engaged in this separate industry. If we assume that all the persons classified under the "saddlery and harness" head are engaged or are to be considered as engaged in harness-making, this assumption may lead us into the very difficulty which the statute is designed to prevent, which is the competition of prison labor with free labor, in the same industry, in any greater proportion than one-twentieth. Suppose the number classified under "saddlery and harness" to be three thousand, of whom but two thousand are in fact engaged in harness-making. If we assume this to be a classification of harness-making, it permits the employment in the prison of one hundred and fifty men in harness-making, which is more than one-twentieth of those so actually engaged outside. For this and other reasons the employment of eighty-two men in harness-making in the State Prison cannot, in my opinion, be said to be in excess of the number allowed by law.

LEGACY TAX ACT, — EXECUTOR, — INVENTORY.

Under St. 1891, c. 425, an executor, administrator or trustee is obliged to file in the Probate Court an inventory of the whole estate, and not of such part only as is subject to the tax.

To the Treasurer. 1892 February 18.

In reply to your inquiry whether, under the legacy tax act (St. 1891, c. 425), an executor, administrator or trustee is obliged to file in the Probate Court an inventory of the whole estate, or whether he may file an inventory only of such part as is subject to the tax, I have to say that, in my opinion, the act requires him to file an inventory of the whole. This is evident from the express provisions of §§ 9 and 10, and from the further consideration that the statute cannot reasonably be taken to intend that the executor, administrator or trustee shall determine for himself what part of the estate is subject to the tax. It must be taken to require him, as the language clearly implies, to disclose the whole, for the examination of any party in interest and the action of the court upon any question which may arise.

TITLE INSURANCE COMPANIES, — BUYING AND SELLING MORTGAGES OF REAL ESTATE, — BANKING.

Title insurance companies organized under the general laws cannot engage in the business of buying and selling mortgages of real estate for profit, but may invest their capital or guaranty fund in such mortgages and sell the same when their interest requires.

Title insurance companies, under St. 1887, c. 214, § 62, and Pub. Sts., c. 106, § 51, may add to their original business the buying and selling of mortgages of real estate as brokers, which is a "lawful business" within the meaning of the statute. This does not permit them, however, to buy and sell such mortgages as dealers therein, or carry them as a stock in trade, which is "banking."

Such addition to their original business does not debar them from the business of title insurance.

To the Insurance Commissioner.
1892 February 18.

In reply to your inquiries of 15th inst., relating to the powers of title insurance companies, I have to say: —

First. — In my opinion, title insurance companies organized under the general laws cannot engage in the business of buying and selling mortgages of real estate for the purpose of profit, either by commissions thereon, or by increasing their business by examination of the titles to the mortgaged estates. But they may invest their capital or guaranty fund in mortgages of real estate, and of course they may sell any mortgage purchased for this purpose when their interest requires. The practical result is that, while they cannot engage in the business of buying and selling mortgages as an independent business, they may buy and sell mortgages up to the amount of their capital and guaranty fund, if such mortgages are actually purchased and held for and as part of these funds. And there is nothing to forbid them from making a proper charge for examination of the title to the mortgaged estates, as the practice is among savings banks and like institutions, if the parties in interest are willing to pay it.

Second. — As title insurance companies, under St. 1887, c. 214, § 62, have the privileges of other corporations under Pub. Sts., c. 106, and as one of these privileges, under Pub. Sts., c. 106, § 51, is the addition of any lawful business for which they could originally organize under that chapter, they may, in my opinion, by the proper proceedings under the

statute, add to the business for which they were originally organized the business of buying and selling mortgages of real estate as brokers, for the purpose of earning a commission upon such transactions, or of increasing their regular business by the examination of titles. The business of buying and selling securities as brokers merely has always been considered and treated by the department having charge of the organization of corporations, so far as I am informed, as a "lawful business" within the sense of Pub. Sts., c. 106, § 14, for which a corporation may be organized under the general law. But this will not permit them to buy and sell mortgages as dealers therein, or to carry mortgages as a stock in trade. Such dealing in negotiable securities has always been regarded and treated by the corporation department as a branch of banking, for which a corporation cannot be organized under the general law. If the construction of the word "banking" in the corporation act were a new question, it might require further consideration to determine exactly what it includes, but at present I see no occasion to depart from the rule established by the practice of the corporation department.

Third. — In my opinion, a title insurance company, by making such addition to its original business under Pub. Sts., c. 106, within the limits above indicated, is not thereby debarred from pursuing the business of title insurance.

LEGISLATURE, — TRAVELLING EXPENSES, — CONSTITUTIONAL LAW.

An allowance to a member of the Legislature of two dollars for every mile of ordinary travelling distance from his place of abode to the place of the sitting of the General Court is not in violation of the fourth clause of Art. 2, § 3, chap. 1 of the Constitution.

Doubt as to constitutionality of single provision of an act of Legislature does not require the Governor to interpose against a bill containing other independent provisions not open to question.

To the Governor. 1892 March 12.

In compliance with your request for my view of the constitutionality of § 4 of the legislative bill entitled "An Act concerning the use of railroad passes, and the compensation of

members of the Legislature," * I have the honor to say that, in my opinion, it is not in violation of the Constitution.

The first three sections of the bill are directed to prohibit the use of railroad passes by members of the Legislature and certain other public officers. Section 4 relates to the compensation of members of the Legislature, and provides that each member shall receive $750 for the session, "and two dollars for every mile of ordinary travelling distance from his place of abode to the place of the sitting of the General Court." The question is whether this latter provision is in violation of the fourth clause of Art. 2, § 3, c. 1 of the Constitution, providing, as to members of the House of Representatives only, that "the expenses of travelling to the General Assembly and returning home once in every session, and no more, shall be paid by the government out of the public treasury to every member who shall attend as seasonably as he can, in the judgment of the House, and does not depart without leave."

Upon a casual view of these provisions, they might appear to be inconsistent with each other. But upon further examination I am satisfied that the true purpose and effect of the constitutional provision are quite different from what they might at first sight appear to be, and that the present bill is not in conflict with it.

Under the original Constitution the Senate and House were bodies of widely different character. The senatorial representation was based upon taxable property, instead of population. The senators were chosen to be "councillors and senators," and the members of the executive council were selected from their number. They were elected by counties, and were required to have a property qualification of three hundred pounds real or six hundred pounds personal estate. On the other hand, the House of Representatives was made a popular body. It was declared to be "a representation of the people, founded upon the principle of equality." The basis of representation had reference only to population, and not to property. Every town of one hundred and fifty polls was given a representative, and the property qualification required of representatives was

* Enacted as St. 1892, c. 59.

much less than that of senators. No compensation for services is provided for either branch.

It was, in my opinion, in view of and with reference to this different character of the two branches of the Legislature that the Constitution provided for the allowance of the travelling expenses of members of the House, while making no such allowance to members of the Senate. It was designed to promote the attendance of the representatives. The next clause of the Constitution preceding that which provides for the travelling expenses of members of the House empowers the House to impose a fine upon towns which neglect to send representatives. The position and connection of these two clauses are significant. The purpose clearly was to promote the election and secure the attendance of a full representative body of the people; to which end it was deemed reasonable and expedient to provide for the payment of their travelling expenses out of the public treasury, so that representatives would be less likely to be prevented from attending by lack of means. The history of the period in which the Constitution was framed, and our historical knowledge of the situation and opinions of the men who made it, strengthen this conclusion.

In this view of the constitutional provision, it is clear that it must be taken as designed to ensure the allowance for travel, and not to limit the amount of it, except that, when fixed, it can be paid but once in each session; and that the true meaning is, that the expenses of travelling and returning home, as ascertained or fixed by the Legislature, shall be allowed to each member of the House once, and no more than once, in each session.

There are other reasons on which the constitutionality of the bill may be supported. The Legislature has undoubted power to provide for the compensation of its members, and if it sees fit to fix their compensation wholly or partially with reference to the distance which they are obliged to travel, this, in my opinion, cannot be said to be beyond its power. And, while the allowance of two dollars per mile seems to be an allowance for or in lieu of travelling expenses, the section is legally capable of the other construction, namely, that the Legislature

designed to fix a variable rate of compensation of members, with some reference to the distance of their homes from the place of session. This in effect, though in a different form, has been done before. See St. 1858, c. 2, §§ 1, 2 and Res. 1859, c. 130. But if the allowance of two dollars per mile is taken strictly as designed to provide for the travelling expenses referred to in the Constitution, it cannot be declared in excess of the legislative power. The "expenses of travelling" provided for by the Constitution must be ascertained and fixed by somebody, and there is no doubt that the Legislature may fix them for itself; and I see no reason to doubt that it may fix them in advance and in its own way. It is common knowledge that two dollars per mile is now much more than the ordinary cost of travel in Massachusetts, but the allowance seems never to have been limited to the actual cost of transportation. See Res. Oct. 19, 1781, c. 242; Res. Feb. 23, 1795 (Res. 1794, c. 74), Res. June 11, 1795, c. 18; Res. 1857, c. 68; since which there has been no change in the allowance for travel. It is to be remembered that all the legal presumptions are in favor of the propriety of the exercise of the legislative power, and all doubts are to be resolved, so far as possible, in its favor.

Perhaps I should also direct the attention of Your Excellency to another view of the bill. The first three sections, relating to railroad passes, are not affected by the constitutional question, and they are entirely separable and distinct from the fourth section. It is a familiar rule that, even if some provisions of an act of the Legislature are unconstitutional, other distinct and independent provisions may stand. There may be cases in which a single clearly unconstitutional provision in an act of the Legislature would call upon the Executive to withhold his approval from the act; but a doubt of the constitutionality of a single provision does not necessarily require the Executive to interpose against a bill containing other independent provisions which are not open to question.

MILITIA, — ELECTION OF FIELD OFFICER, — GOVERNOR.

If, after one adjournment of an election of a field officer, under St. 1887, c 411, § 45, there is a failure to elect, and the presiding officer without further adjournment declares the election dissolved and orders a new election, there is no authority for such new election, and it is the duty of the Governor to appoint to the vacancy under § 51.

To the Adjutant-General.
1892
March 16.

I have your communication of this date requesting my opinion upon this question: if, after one adjournment of an election of a field officer, under St. 1887, c. 411, § 45, there is a failure to elect, and the presiding officer without any further adjournment declares the election dissolved and orders a new election, must the Governor appoint to the vacancy, or can the electing body be again called together, under such new order, for an election?

I find no authority in the law for a new election under these circumstances. In my opinion, the dissolution of the meeting at the first adjournment, without any further adjournment, determines the authority of the electing body, and leaves the case in the same position as upon neglect or refusal to elect after a second adjournment; whereupon it becomes the duty of the Governor, under § 51, to appoint a suitable person to the vacancy.

In Gen. Sts., c. 13, § 45, and prior thereto, it was provided that the division commander might, if necessary, order a new election under such circumstances, unless notified by the Commander-in-Chief of his intention to make an appointment. The omission of this provision in the later re-enactments of the militia law in St. 1878, c. 265, in Pub. Sts., c. 14, and in St. 1887, c. 411, indicates the purpose of the Legislature to require that the Commander-in-Chief shall appoint to any vacancy which the electing body neglects or refuses to fill at an election held in accordance with the provisions of § 45; and under that section the authority of the electing body is limited to two successive adjournments of the original election.

CORPORATION, — HUSBAND AND WIFE, — CONTRACT.

Husband and wife cannot lawfully join in an agreement of association for the purpose of forming a corporation under the general laws.

To the Commissioner of Corporations. 1892 March 19.

Upon your reference to me of the question whether a husband and wife can lawfully join in an agreement of association for the purpose of forming a corporation under the general laws, I have to say that I see no sufficient reason for changing what I understand to have been the uniform practice of your department, to decline to accept a husband and wife toward making up the necessary number of associates, on the ground that the agreement is a contract between each subscriber and all the others, and that a husband and wife cannot lawfully make such a contract with each other.

FOREIGN INSURANCE COMPANY, CERTIFICATE OF ADMISSION, — FIRE INSURANCE, — MARINE INSURANCE.

A foreign insurance company admitted to this Commonwealth in 1872 under a certificate which mentions only fire insurance may add to the business of fire insurance that of marine insurance, if it possesses the qualifications required by law for both classes of business.

St. 1887, c. 214, § 80, does not apply to a foreign company admitted before the enactment of St. 1879, c. 130.

The certificate and licenses of a foreign company are designed only to furnish evidence of the right of the company and its agents to transact the business of insurance in the Commonwealth, not to limit the class or classes of business which may be transacted thereunder.

To the Insurance Commissioner. 1892 April 1.

I acknowledge the receipt of your inquiry whether the St. Paul Fire and Marine Insurance Company, admitted in October, 1872, to transact fire insurance in Massachusetts, and now and ever since doing that business here under licenses which mention only fire insurance, can now add to that business the business of marine insurance in this Commonwealth; or, if it cannot add the business of marine insurance under its present authority, whether, in this state of things, it can demand licenses to transact marine as well as fire insurance. I assume, of course, that the company possesses the qualifications required by our law for both classes of business.

The provision of St. 1887, c. 214, § 80, that no foreign insurance company hereafter admitted to the Commonwealth shall be authorized to transact more than one class of insurance therein, does not apply to this company; as it was admitted before the original enactment of that provision, in St. 1879, c. 130. It is plain that this statute recognized the fact that there were then foreign companies doing or authorized to do more than one class of business here, and that the restriction to one class was not intended to apply to foreign companies already established here.

The only question, therefore, of the authority of this company to do marine business, arises out of the form of its licenses, which mention only fire insurance. While it would doubtless be better, for some reasons, that the certificate or license should in every case express the class or classes of business which a foreign company is authorized to do here, the statute, in my opinion, does not warrant the exclusion of a duly admitted company, whatever may be the form of its certificate or licenses, from a class of business which it is qualified and may lawfully be authorized to do. The statute which provides for the certificate of admission (St. 1887, c. 214, § 78, cl. 5), describes it as a certificate that the company "has complied with the laws of the Commonwealth, and is authorized to make contracts of insurance." In the case, at least, of a company which is not confined to one class or kind of insurance, the statute does not require the certificate to express the class or classes of insurance which it may do. The provisions for licenses to agents are substantially the same in this respect. The statute, therefore, affords no express authority to restrict to a single class of business, by the form of the certificate or license, a company which may lawfully be authorized to do more than one class. I think the certificate and the licenses are designed to furnish evidence of the right of the company and its agents to transact the business of insurance in the Commonwealth; leaving the class or classes of insurance which may be transacted thereunder to be determined by the law, according to the qualifications of the company.

Accordingly, I am of opinion that the company in question,

under its present authority, may add to the business of fire insurance the business of marine insurance in this Commonwealth.

COMMISSIONERS OF STATE AID, — JURISDICTION.

The jurisdiction of the Commissioners of State Aid as a board of appeal is limited to "invalid pensioners" under St. 1889, c. 301, § 7, but under §§ 7 and 8 they may inquire into all questions on which legality of any payment of State aid may depend. Whether a woman whose husband has not been heard from for many years is "widowed" in the sense of the statute is a question of fact which the commissioners may determine on evidence.

To the Auditor. 1892 April 14.

I have your request for my opinion upon the question now before the Commissioners of State Aid, upon appeal from an adverse decision of the municipal authorities of Salem, whether the mother of a deceased soldier, whose husband, the father of the soldier, went to California about forty years ago and has never been heard from since that time or about that time and is supposed to be dead, can be regarded as a "widowed mother" in the sense of St. 1889, c. 301, § 1, so as to be entitled to aid thereunder.

I am of opinion that the commissioners have no jurisdiction of the appeal, and that for this reason the question is not at present before them for determination. By § 7 of the act the powers of the commissioners as a board of appeal seem to be limited to the case of "invalid pensioners," who under the act are a class by themselves, to which class the present applicant does not belong.

But under §§ 7 and 8 the commissioners have power to investigate all payments of State aid to claimants of any class, as preliminary to their allowance by the Auditor; and if the authorities of Salem should see fit to allow and pay the aid in this case, it would then be within the power of the commissioners, upon the certificate of such payment, to inquire into its legality, and to determine any question upon which its legality may depend, including the question whether the applicant is a "widowed mother," in the sense of the act. This is a question of fact, to be determined upon such evidence as may be had; and

in determining it various circumstances are material to be considered, such as the circumstances under which the husband disappeared or was last heard of, the distance and facilities of communication with the place where he was last known to be, his age and state of health, the length of time since he was last heard from, and any other material circumstances. The oath of the applicant, or the absence of such oath, is not conclusive proof either that the man is or is not dead. The board may also consider the legal presumption that a man is dead if absent and unheard of by his nearest friends or relatives for more than seven years. And if upon all the evidence they are reasonably satisfied that the missing man is in fact dead, they are at liberty to regard the applicant as a "widowed mother," in the sense of the statute, and to allow the payment.

REIMBURSEMENT OF TOWNS BY COMMONWEALTH, — CONSTITUTIONAL LAW, — INSANE PAUPERS.

An act authorizing the reimbursement by the Commonwealth of the expenses incurred by certain towns in the maintenance of insane paupers is constitutional.

To the Governor. 1892 May 3.

I acknowledge the receipt of your request for my opinion upon the constitutionality and other features of House Bill No. 334, entitled "An Act authorizing the reimbursement of expenses incurred by certain towns in the maintenance of the insane." * I regret that I am obliged to answer it in the midst of a capital trial, which necessarily engrosses my time, but upon such examination as I am able to make I see no reason to seriously doubt the constitutionality of the bill.

As to the other questions raised, it is clear that, under the bill, the Governor and Council must determine whether a town is entitled to reimbursement; in order to which they must first find that the taxable valuation of the town is less than $500,000, and that the town is lawfully charged with the maintenance of the person in question, by reason of his having a legal settlement in the town. As the bill stands, the Governor

* Enacted as St. 1892, c. 243.

and Council must also determine whether the reimbursement shall be in whole or in part. The act contemplates the reimbursement without any further legislation, and it provides no other tribunal for determining this question. In this particular, and also upon the question of what discretion, if any, is vested in the Governor and Council as to ordering the reimbursement in any case, the bill might be made clearer by amendment. As it stands it must, I think, be construed as I have stated above.

RAPID TRANSIT COMMISSION, — REPORT, — EXPENSES.

The expenses of the Rapid Transit Commission established under St. 1891, c. 365, reasonably incidental to the completion of its final report, may be allowed even though incurred after the time prescribed for the filing of such report by Res. 1891, c. 107. But no other expenses incurred after such time can be allowed.

To the Auditor. 1892 May 11.

I have your request for my opinion upon the question whether you can allow for payment any expenses of the Rapid Transit Commission, established by St. 1891, c. 365, incurred after the first Wednesday in April, 1892, the date to which the time for the final report of the commission was extended by Res. 1891, c. 107.

The act and resolve need not be construed as absolutely putting an end to all authority of the commission on the first Wednesday in April, 1892. If the commission had been for any reason unable to complete and present its final report within that time, there would be, I presume, no doubt of its duty or authority to complete and present it as soon thereafter as might be, and the Legislature would undoubtedly have received it when so completed and presented. In that case, the expenses of the commission might reasonably be allowed and paid, to the completion and presentation of its report. On the other hand, the act and resolve are not to be construed to continue the commission in office, with authority to incur expenses, for an indefinite time. The general rule is, that when a board is charged with a single specific duty, its official character and functions end with the performance of the duty. This rule may properly be

applied to the present case. I understand that the official report of the commission was completed and presented within the prescribed time, but that an additional or supplemental report of the engineer has been completed and presented within the past few days, and since the first Wednesday in April. I am not informed whether this supplemental report can be considered as part of the report of the commission, or as necessarily incidental to the completeness or completion of that report. If, as incidental to the completion and presentation of the final report of the commission within the prescribed time, or even beyond that time, the commission has necessarily or reasonably incurred expenses since the first Wednesday of April, such expenses may, in my opinion, be certified for payment; but only such as are reasonably necessary to the completion and presentation of the final report of the commission within the limited time or as soon thereafter as possible. Beyond this limit the commission has, in my opinion, no authority to incur expenses to be charged upon the treasury.

LEGACY TAX ACT, — EXECUTOR, — INVENTORY.

Under St. 1891, c. 425, the Treasurer of the Commonwealth has no legal authority to consent to the omission by an executor to file an inventory of the entire estate.

To the Treasurer. 1892 May 11.

I have your request to be advised whether you have legal authority to consent in advance to the omission by an executor to file an inventory of an entire estate of which a part is taxable under St. 1891, c. 425. I advised you, under date of February 18, 1892, that the law requires an inventory of the entire estate to be filed. The statute gives the Treasurer no express power or discretion to dispense with this requirement; on the contrary, it expressly requires him to prosecute for the penalty upon neglect or refusal to comply with it. In my opinion you have no legal authority to dispense with it, and your consent to the omission, or even a promise of immunity for it, would be of no legal effect to bind your successors, or to bar a prosecution for the penalty.

PROVINCE LANDS, — STATE AGENT, — LEGISLATURE.

Whether the Commonwealth should assert or defend its title or that of its grantees in the Province lands in Provincetown is a question of legislative policy, and until further action by the Legislature the State agent has no duty to assert or defend such titles.

To the Governor and Council. 1892 May 12.

I acknowledge the receipt of the order in council of April 27, referring to me the communication of David Ryder, agent of the Province lands, in Provincetown, and requesting that I advise with him as to his duty.

The duties of the agent are prescribed by St. 1869, c. 218, but these are so plain that they cannot be misunderstood; and I presume that what Mr. Ryder wishes to know is whether he has any duty in respect of the title of the Commonwealth, or its grantees, in the Province lands, or in relation to the defence of such title when drawn in question. In my opinion he has no such duty. The writ of entry to which he refers has been tried and disposed of, if I am correctly informed, and it is now too late to intervene in that case, if there were any occasion to intervene. I am informed also that the tenant in that action does not intend to prosecute his exceptions; and I know of no reason to suppose that the Commonwealth has any right to take the defence of the action out of his hands, or to interfere with his conduct of it.

The Province lands in Provincetown have been the subject of legislation from the earliest times. The title to them is understood to be still in the Commonwealth, and they are expressly excepted from Pub. Sts., c. 196, § 11, relating to the limitation of real actions by or against the Commonwealth. See also Gen. Sts., c. 154, § 12; St. 1854, c. 261; St. 1838, c. 151; Provincial Sts. 1714, c. 7, § 2; Provincial Sts. 1727, c. 11; Provincial Sts. 1779, c. 18; Provincial Sts. 1740, c. 15; Acts and Resolves, Massachusetts, Provincial, vol. 3, pp. 219, 220; St. 1786, c. 12; St. 1806, c. 21; St. 1807, c. 79; St. 1811, c. 92; St. 1826, c. 80; St. 1833, c. 143; St. 1835, c. 125; St. 1838, c. 151; St. 1853, c. 306; St. 1864, c. 77.

The question what, if anything, should be done toward

asserting or defending the title of the Commonwealth or its grantees in these lands, is, in my opinion, a question of legislative policy; and until further action of the Legislature the State agent has no duty in the premises, except the duties prescribed by the statute of 1869, above referred to.

FRATERNAL BENEFICIARY ORGANIZATION, — ATTORNEY-GENERAL.

The public has no legal interest in the funds of a fraternal beneficiary organization, or in a controversy over them; and the Attorney-General is neither required nor authorized to appear in court therein.

To the Insurance Commissioner. 1892 May 17.

I acknowledge the receipt of your letter of 14th inst., referring to the question raised upon the report of the receiver to the Superior Court, in the case of the Order of the Royal Ark.

In my opinion there is no public interest involved, in the legal sense, which calls for or authorizes my appearance in the case. The "general interests of the public" are not in question. The controversy is either between members of the corporation as among themselves, or between the members and various claimants of the funds. The public has no legal interest in the funds, and for this reason has no legal interest in the controversy which I can properly represent.

REGISTRATION OF VOTERS, — RIGHT TO VOTE, — CONSTITUTIONAL LAW.

The Legislature cannot impose upon a voter any qualifications as a condition of the right to vote beyond those prescribed by the Constitution.

The Legislature may provide reasonable and uniform regulations for the registration of voters, and for the exclusion from the right to vote of any not so registered.

An act favoring, in the convenience of registration, those who are assessed and have paid a tax, but leaving all free to register without reference to taxation, is not clearly unconstitutional. Whether such a regulation is reasonable is largely a question for the judgment of the Legislature.

To the President of the Senate. 1892 May 24.

In compliance with the request of the honorable Senate in its order of May 18, I return my opinion upon the constitutionality of Senate Bill No. 216, entitled "An Act relating to the

registration of voters." * I assume that the provisions of the bill which are principally in question are those of §§ 14 and 15, and of §§ 7, 8, 10 and 11 so far as they are incidental to the purposes of §§ 14 and 15.

The Legislature cannot impose upon the voter any qualification throughout as a condition of the right to vote, beyond those expressly prescribed by the Constitution. But it may provide, by reasonable and uniform regulations, for the registration of voters in advance of the election, and for the exclusion from the right to vote of any not so registered. The present bill does not impose, or attempt to impose, any additional qualifications upon the voter. The sections in question relate only to registration and to the ascertainment of the qualifications of the voter, for the purpose of registration; and the only question is whether they are reasonable and uniform regulations for this purpose.

The doubtful provision is that which requires the registrars to carry over to the register of the current year from that of the preceding year, without further inquiry, the names of all who paid a tax in the preceding year and are assessed for a poll tax in the current year, if identified. This has the effect to favor, in the convenience or facility of registration, those who are assessed and have paid a tax, although assessment and payment of a tax have ceased to be a qualification of the voter. Such a regulation can be sustained only if it is a necessary or reasonable regulation for the purpose in view; and this is largely a question for the judgment of the Legislature.

The Legislature may consider that different cases arising in registration may be or must be differently dealt with; that more evidence may reasonably be required of one voter than of another of whom more is known; that one who has paid a tax may reasonably be favored, to some extent, in the convenience of registration; that one of whom certain facts tending to establish citizenship appear by the public records may reasonably be excused from presenting himself before the registrars, while another, of whom these facts do not appear, may reasonably be required to establish his right; that the fact of assessment and

* St. 1892, c. 351, was enacted in substitution of this bill.

payment of a tax will aid the registrars, as evidence, in determining the identity and the domicile of the voter, which they must determine; or even that these facts may reasonably be declared to be sufficient *prima facie* evidence to warrant the keeping of a name upon the register, in the absence of objection. This is in line with § 23, which expressly provides that the registrars may receive a tax bill or collector's notice, or a certificate of assessment, as *prima facie* evidence of residence in the place and for the time required by law of a voter. The Legislature may also consider that, between the two extreme courses of carrying over the entire list from one year to the next, or wiping out the entire list at the end of each year, either of which it may regard as objectionable, but one of which must be done if all are to be treated exactly alike, there may be some middle ground on which the registrars may be reasonably required to go in determining what names shall be carried over; and it may consider that the rule prescribed by the bill is a convenient and reasonable rule. All these questions are for the consideration and judgment of the Legislature, but the legislative judgment must be reasonably exercised. It is to be remembered that some difference in the mode of dealing with different cases does not necessarily amount to discrimination, or violate the requirement of uniformity, in the legal sense. It is to be observed, also, that the bill does not make the assessment or payment of a tax a condition of the right to be registered, which would be clearly objectionable. It leaves any voter free to present himself and establish his right to be registered, without any evidence of or reference to taxation.

The provision which makes the payment of a tax an essential part of the evidence for keeping a voter upon the list must be said to approach, if it does not reach, the line of objectionable discrimination. But, taking the question as a bare question of legislative power, apart from any question of expediency, and with all presumptions in favor of the bill which the law requires to be made in favor of the acts of the Legislature, it cannot be declared in advance that these provisions for the regulation of registration are clearly in violation of the Constitution, or, in

view of the latitude which is permitted to legislative discretion, that they are clearly beyond the power of the Legislature to enact.

INSURANCE COMMISSIONER, — ASSESSMENT ENDOWMENT ORDER, — WITHDRAWAL OF FUNDS IN TREASURY.

The Insurance Commissioner may endorse a requisition for the withdrawal of the funds of an assessment endowment order deposited with the Treasurer of the Commonwealth, if the corporation is being wound up by any legal method although the full period of the certificates has not expired.

To the Insurance Commissioner. 1892 June 4.

In reply to your inquiry whether you are authorized to endorse a requisition of the officers of the Industrial Benefit Order for the withdrawal of the funds in the hands of the Treasurer of the Commonwealth for payment of matured certificates, the certificates having been issued for a term of five years which has not yet expired, I have to say that, in my opinion, the statute does not absolutely forbid the making of such requisition under any circumstances until the maturity of the certificates by expiration of the period specified. If the statute should be so construed, it might make it impossible to wind up the corporation, or liquidate its liabilities, within that time. I believe the funds of several of these orders have already been withdrawn, without question, to be applied, wholly or partially, to payment of certificates not matured by lapse of time. There are other events beside the expiration of the specified period, which, in my opinion, are fully within the reasons of the statute, and may be taken, for the purposes of a requisition upon the Treasurer, as equivalent to the maturity of the certificate. If the corporation is being properly wound up by any legal method, I see no reason why the funds may not be drawn for payment of the certificates, notwithstanding the period of the certificates has not expired.

St. 1890, c. 421, § 14, requires the requisition to set forth that the funds withdrawn are "to be used for the purposes of the trust;" which is broad enough to cover all purposes lawfully consistent with the uses to which the funds are held, and any event or state of things which may be taken as equivalent,

for purposes of payment, to the maturity of the certificates by expiration of the full period. I find also, on looking at one of the certificates issued by the order in question, that there is ground for regarding it as a matured certificate, in the sense of the statute, at least so far as the present inquiry is concerned.

INTERCHANGEABLE MILEAGE TICKETS, — CONSTITUTIONAL LAW.

An act requiring railroad corporations to provide mileage tickets which shall be accepted for passage and fare upon all railroad lines in this Commonwealth cannot upon its face be declared unconstitutional.

Under the reserved power of amendment, alteration or repeal, the Legislature may reasonably regulate charges for the carriage of passengers and provide the manner in which such charges may be enforced and collected.

To the President of the Senate. 1892 June 8.

As requested by the order of the honorable Senate, I respectfully submit my opinion of the constitutionality of the bill entitled, "An act to require railroad corporations to provide mileage tickets which shall be accepted for passage and fare upon all railroad lines in this Commonwealth."

So far as I am informed, no provision of the bill is questioned except that which requires each railroad corporation to accept, for passage upon its line, the mileage tickets of other roads.

It has been the law of Massachusetts since 1831 that all acts of incorporation shall at all times be liable to amendment, alteration or repeal, at the pleasure of the Legislature. It is no longer open to doubt that under this reserved power, if not independently of it, the Legislature may impose conditions or restrictions upon the exercise of a railroad franchise, within certain limits, which are broad enough to include the reasonable regulation of charges for the carriage of passengers, and the manner in which they may be enforced and collected. It has "the right to make any reasonable amendments regulating the mode in which the franchise granted shall be used and enjoyed, which do not defeat or essentially impair the object of the grant, or take away any property or rights which have become vested under a legitimate exercise of the powers granted." It is settled that, in the exercise of this power, the

Legislature may subject the corporation to additional burdens or expenses, without making or providing compensation for its reduced profits or the impaired value of its franchise.

The power does not extend so far as to include the absolute taking or destruction of property without compensation, nor does it extend so far as to require the corporation to serve the public without reasonable compensation. In determining what regulations or restrictions are reasonable, under particular circumstances, much is left to the discretion of the Legislature, with which, if reasonably exercised, the courts will not interfere.

If the requirement to carry passengers at a uniform rate of two cents per mile was in question, the validity of such a requirement might depend upon many facts which would be a subject of legislative inquiry. Such a requirment is, in my opinion, within the power of the Legislature, if two cents per mile is a reasonable rate under all the circumstances. I understand, however, that most, if not all, of the corporations to which the bill applies, are now and for some time past have been voluntarily issuing and selling mileage tickets at the price of twenty dollars for one thousand miles, and that the question at issue is only of the power of the Legislature to require each corporation to accept all these tickets for passage over its own line.

It is possible that this might in some cases result in compelling a corporation to carry passengers on the receipt of the tickets of another corporation which may be unable to redeem them, or whose credit or financial responsibility may be impaired; but it must be assumed that the Legislature has considered this, with the other circumstances of the case, and it may have become satisfied that neither this nor any other injury to the railroads is likely to result from the bill. I do not think it is to be assumed in advance that any such result will follow. Upon this point, as bearing upon the reasonableness of the requirment, the courts may properly consider the other provisions of the bill which are designed to protect the railroads against such consequences. The constitutionality of a legislative act is not necessarily to be tested by the most extreme

case, nor is it necessarily unconstitutional because it might, in some possible contingency, subject a corporation to some unusual burden or disadvantage. If this is a reasonable requirement, in the public interest and for the public benefit, under the circumstances which affect the case, it is not, in my opinion, beyond the power of the Legislature. I conclude, therefore, that upon its face the bill cannot be declared unconstitutional.*

WEAVING FINES, — CONSTITUTIONAL LAW.

An act to prohibit deduction of wages of employees engaged at weaving for imperfections not arising from their carelessness is unconstitutional, because it prevents an employer from protecting himself by contract against liability to pay for imperfect work the price of good work, howsoever the imperfections arise. The Legislature has power to make reasonable regulations of the exercise of the right of an employer to protect himself against consequences of imperfect work and to prohibit imposition of fines under any circumstances.

To the Speaker of the House of Representatives.
1892
June 9.

As requested by the honorable House, in its order of 7th inst., I respectfully submit my opinion of the constitutionality of House Bill No. 510, entitled "An Act to prohibit the deduction of the wages of employees engaged at weaving," † with the pending amendments.

In the light of the recent decision of the Supreme Court, under St. 1891, c. 125, in *Com.* v. *Perry*, 155 Mass. 117, it may be assumed that it is within the power of the Legislature to prohibit the direct imposition of a fine by an employer for imperfect work, and that it is beyond the legislative power to prevent an employer from protecting himself by contract against the liability to pay as much for imperfect as for perfect work.

Section 1 of the present bill appears to consist of three separate, or separable, propositions: first, the grading system shall not affect or lessen the weaver's wages unless the imperfection arises from his carelessness or wilful neglect; second, in no case shall the weaver's wages be affected, by fine or

* The statute (St. 1892, c. 389) was declared unconstitutional in *Attorney-General* v. *Old Colony Railroad*, 160 Mass. 62.

† Enacted as St. 1892, c. 410.

otherwise, unless the alleged imperfection is pointed out to him; and, third, no fine shall be imposed for imperfect weaving, unless the above provisions are complied with.

The first of these propositions is broad enough to forbid, and seems designed to forbid, any reduction or diminution of the weaver's wages, by contract or otherwise, except for imperfections due to his carelessness or wilful neglect. I find no ground in the recent decision of the court on which a distinction can be maintained between imperfections due to the weaver's carelessness or neglect, and those that may arise without carelessness or neglect. The court seems to hold that it is beyond the power of the Legislature to prevent the employer from protecting himself by contract against the requirement or the liability to pay for imperfect work the price of good work, without reference to the question how the defects in the work arise.

The second clause of the bill, taken by itself, does not interfere with the power of the employer to reduce or withhold the wages of the weaver, by fine or otherwise, except by annexing to its exercise the condition that the alleged imperfections in the work shall be pointed out to the weaver. This is merely a regulation, and apparently a reasonable regulation, of the exercise of the right of the employer to protect himself against the consequences of imperfect work.

The third clause, that no fine shall be imposed except under certain circumstances, appears to me to be free of doubt as to its constitutionality, as the Legislature may apparently prohibit the imposition of a fine under any circumstances.

In my opinion, therefore, that part of the bill which provides that the grading system shall not affect or lessen the wages of the weaver except in case of imperfections arising from his carelessness or wilful neglect, must now be regarded as open to objection on constitutional grounds. Except to this extent, I do not think the bill can be said to exceed the power of the Legislature.

EMINENT DOMAIN, — CONSTITUTIONAL LAW, — TRIAL BY JURY.

A special act, authorizing the taking by a church of tombs and rights of interment, which provides that the measure of damages for such taking shall be the cost of a lot and tomb in a particular cemetery, with the expense of removal and reinterment of the bodies therein, is unconstitutional, because it impairs the right of trial by jury.

To the Speaker of the House of Representatives.
1892
June 14.

I am requested by the order of this date of the honorable House to give my opinion of the constitutionality of the bill entitled, "An Act to authorize the Park Street Congregational Society in Boston to acquire all tombs and rights of interment under the meeting-house of said society, and to prohibit further interments therein." * I understand that the question arises out of that part of § 1 which provides that in the appraisal of the damages for the taking of the tombs and rights of interment by the society the measure of damages shall be the cost of a burial lot and tomb in Forest Hills or Mount Auburn cemetery, with the expense of the removal and reinterment of bodies therein.

In this, as in all cases of the taking of private property for a public use, or upon grounds of the public benefit, the property-owner is entitled to a trial by jury of the question of his damages. By express provision of Article X, of the Bill of Rights, he is entitled to "reasonable compensation," and by the general rule of law which governs the assessment of damages in such cases, he is entitled to the fair value of the property taken; and he is entitled to have this ascertained by and according to the judgment of the jury, under the rules of law. Otherwise he has only the form, without the substance, of trial by jury. The necessary effect of the bill, if allowed to operate, is to confine the jury, in assessing the damages for the taking of the property, to the cost of another piece of property, which is apparently treated by the bill as a substitute and equivalent for the rights and property taken, but which may be more or less. If the bill can be taken only as prescribing a rule for the assessment of damages, it prescribes a special rule for a single case, which of itself is objectionable. In my opinion,

* Enacted as St. 1892, c. 437.

the provision in question must be regarded as an impairment of the constitutional right of trial by jury, if it is not also a violation of the uniformity required in such legislation, and an invasion by the Legislature of the province of the judiciary.

MILITIA, — TARGET PRACTICE, — CITIES AND TOWNS.

Under St. 1887, c. 411, § 90, cities and towns are required to furnish, with the grounds for target practice, such targets and other structures as are reasonably necessary to the use of the place for that purpose.

To the Governor. 1892 July 2.

Upon the question raised by the communication of Maj. William A. Pew, Jr., to the Adjutant-General, referred to me by Your Excellency, I have to say that, in my opinion, cities and towns are required by St. 1887, c. 411, § 90 (formerly Pub. Sts., c. 14, § 92), to provide, with the grounds or places for target practice which that section requires them to furnish for the militia belonging within their respective limits, such targets and other structures as are reasonably necessary to the use of the place for that purpose. The policy of this section of the act is to make the local accommodation of the militia a local charge. The words "grounds or places for the parade, drill and target practice of the militia" may be construed to include such structures or other appurtenances as are necessary to the use of the grounds or places for the purposes for which they are provided; and, in my opinion, in view of the intent and purpose of the statute, they are to be so construed.

PASSAMAQUODDY INDIANS.

Upon a petition of the Passamaquoddy Indians, alleging a violation of their rights by the State of Maine under the act of separation, and a denial of such rights by the courts of Maine, the Executive Department of Massachusetts is under no obligation to remove, nor in the absence of legislative action would it be warranted in removing, the case to the Supreme Court of the United States from the courts of Maine.

To the Governor and Council. 1892 July 23.

I return herewith the petition of the members of the Passamaquoddy tribe of Indians. The substance of the petition seems to be that the State of Maine has interfered with the hunting

and fishing rights of the petitioners, in supposed violation of the obligations assumed by Maine under the act of separation; that the courts of Maine deny or disregard these rights, and two of the tribe are now under conviction of some offence not specified, but committed, I presume, in the alleged exercise of some right which has been denied by the courts of Maine, which conviction is supposed to be reviewable by the Supreme Court of the United States. And the petition is that the Executive Department of Massachusetts intervene and remove the case by writ of error to that court, in behalf of the persons so convicted.

It is, of course, to be presumed that any judgment which the courts of Maine have rendered is in accordance with the laws of that State. If the laws of Maine are unjust to the petitioners, they should go to the Legislature of Maine for redress. If the judgment of the Maine courts is in disregard of rights which belong to the petitioners under the act of separation or otherwise, or operates to deprive the petitioners of such rights, it is possible that it may be reviewable by the Supreme Court of the United States. But I see no reason to suppose that Massachusetts is under any obligation to the petitioners. The petition, at least, does not disclose enough to show any such obligation; and it appears to me also that if Massachusetts is under any obligation to interfere, or would be warranted in interfering, the case ought to be a subject of legislative action before any action of the Executive Department. It may be that a further presentation of facts would modify this view, but this is all that can be said upon the facts set out in the petition.

To the Governor and Council.
1892
December 16.

Upon reviewing the case of the Passamaquoddy Indians, as presented in their petition, I find nothing to modify the view which I expressed to you under date of July 23, 1892. It is clear that the Commonwealth of Massachusetts is under no legal obligation to the Passamaquoddy Indians. If it is under any moral obligation to them, it can hardly extend any farther than to see that they are not subjected to any injustice for which Massachusetts is in any degree responsible. They cannot be said to be unjustly dealt with under the judgment of the Supreme

Court of Maine, if that judgment is right; and I see no occasion to doubt that it is, and no reason to suppose that it can be or would be reversed if carried to the Supreme Court of the United States, as the petitioners desire. Nor, so far as I can see, is Massachusetts in the least degree responsible for the position, however unfortunate, in which the Indians now find themselves. At all events, the question whether Massachusetts should interfere in the case is a question for the legislative rather than the executive branch; which, in my opinion, is not called upon to act unless it chooses to bring the subject to the attention of the Legislature. The expediency of doing even this is, to say the least, open to question.

MUNICIPAL INDEBTEDNESS ACT, — CITIES AND TOWNS, — BORROWING POWER.

In ascertaining the indebtedness of a city or town as affecting its borrowing power under the municipal indebtedness act, its obligations for ordinary current expenses are excluded, and temporary loans in anticipation of taxes are included.

To the Treasurer. 1892 July 23.

I acknowledge the receipt of your inquiry whether, in considering the limit of municipal indebtedness as affecting the borrowing power, current obligations of the municipality for all purposes, such as bills due for various purposes, and loans made in anticipation of taxes, are to be included.

It is practically settled that the municipal indebtedness act does not apply to contracts for ordinary and lawful current expenses (*Smith* v. *Dedham*, 144 Mass. 177); and, if they are not within the act, they are not to be included in ascertaining the amount of indebtedness. The Legislature doubtless considered that, in the ordinary course, these would not amount to a very large sum; and that it might be difficult or impossible to ascertain the amount of them at any given time; and, while they are not expressly excepted, the court seems to consider that they are excluded by implication.

But debts for temporary loans in anticipation of taxes are debts for borrowed money; and the principal, if not the sole purpose of the act was to restrain the borrowing power. These

debts are fully within the language of the prohibitions of §§ 1 and 4, and are not within any of the express exceptions of the act: and many, at least, of the reasons on which the act is based apply to such debts equally with any other. The only distinction in the act between temporary loans in anticipation of taxes and other debts for borrowed money is, that the former may be incurred by ordinary vote, and must be paid out of the taxes of the year (St. 1885, c. 312), while the latter require a two-thirds vote, and may be payable on longer periods. It is evident, I think, from the form in which the original municipal indebtedness act (St. 1875, c. 209) was re-enacted in Pub. Sts., c. 29, that the commissioners on revision, and the Legislature, understood that temporary loans in anticipation of taxes were not an exception to the act, but were included within it. The opposite construction, if it were possible under the language of the act, would open the way to evade it, and would be liable to lead to the very results which it was designed to prevent. I understand that a different view has been adopted in the practice of some cities, but it does not seem to me permissible, under the present form of the act.

I am of opinion, therefore, that in ascertaining the amount of indebtedness of a city or town, as affecting its borrowing power, its obligations for ordinary current expenses are not to be included; but that debts for temporary loans in anticipation of taxes are to be included.

Holiday.

The Governor has authority to make the 400th anniversary of the discovery of America a day of thanksgiving for the purposes of Pub. Sts., c. 77, § 8.

To the Governor. 1892 August 29.

I respectfully reply as below to Your Excellency's request to be advised as to your authority, under Res. 1892, c. 101, to make the 400th anniversary of the discovery of America a day of thanksgiving, for the purposes of Pub. Sts., c. 77, § 8.

The statutes do not define what a legal public holiday is, nor what days shall be legal public holidays, except as to Labor Day (St. 1887, c. 263), the Monday following Christmas, when that

occurs on Sunday (St. 1882, c. 49), and Memorial Day (St. 1881, c. 71); as to which it is provided only that each of these days shall be "a legal public holiday to all intents and purposes in the same manner as Thanksgiving, Fast, and Christmas days, the 22d of February, the 30th day of May and the 4th day of July are now by law made public holidays." As to these days, the statutes provide only that the General Court shall not sit, nor the public offices be open (Pub. Sts., c. 2, § 34); and that commercial paper, etc., falling due shall be payable on the preceding day (c. 77, § 8); and that the courts shall not be opened except for certain necessary business (c. 160, § 4).

In my opinion, while the resolve does not indicate the purpose of the Legislature to make the day in question a legal public holiday, there is a sufficient implication, from Pub. Sts., c. 77, § 8, of authority in the Governor to appoint a day of fasting or thanksgiving at his discretion; and under this implied authority you may, if you see fit, proclaim the anniversary referred to in the resolve a day of thanksgiving, so as to bring it within the provisions of § 8. Your Excellency will naturally consider, whether it is expedient to do this in view of the fact that the Legislature has acted upon the subject, and has confined itself to requesting "a due observance" of the anniversary, without declaring, or directing it to be declared, a legal public holiday.

INSANE PERSON, — GUARDIANSHIP, — TRANSFER.

Pub. Sts., c. 79, § 13, providing for the consent of the guardian of an insane person to his transfer by the Board of Lunacy and Charity from one asylum to another, does not prevent the transfer by such Board of one who has no guardian.

To the Board of Lunacy and Charity.
1892
September 9.

The questions submitted to me as to the construction of the last clause of Pub. Sts., c. 79, § 13, as stated in your letter of 7th inst., are in my opinion to be answered as follows: —

1. There is no natural guardian of a person of full age. The natural guardian of a minor is his father; and if he has no father, his mother.

2. Natural guardianship of an insane minor does not continue after the minor arrives at the age of majority.

3. In my opinion the transfer of an insane person from one asylum to another, provided for by the final clause of § 13, is not limited to those who have a legal or natural guardian. It is possible to suppose either that the Legislature intended to make the consent of the guardian an absolute limitation upon the power of transfer, so that it cannot be exercised in any case in which there is no guardian; or that the purpose was only to provide that the transfer shall not be made without the consent of the guardian, if the insane person has a guardian. If the Legislature had intended the former purpose, it would have been likely, I think, to express it in somewhat different language. The latter construction makes the statute more effective, by allowing it to operate upon all members of the class to which it applies, and is more consistent with its general purpose and object, which is the care and management of the insane by the Board, to which the consent of the guardian in the particular case is only an incident. This construction is somewhat strengthened by the history of the clause in question. St. 1880, c. 250, § 4; St. 1881, c. 183.

TRUSTEES OF HOSPITAL COTTAGES FOR CHILDREN, — TENURE OF OFFICE.

Under St. 1892, c. 407, it is the duty of the Governor to appoint five trustees of the Hospital Cottages for Children, and upon such appointment the tenure of office of the eleven trustees appointed under St. 1890, c. 354, will terminate.

A statute repealing a former statute creating a special tribunal, puts an end to the tribunal unless it is secured by constitutional provision or other legislation.

To the Governor. 1892 September 20.

In reply to your request to be advised as to the effect of St. 1892, c. 407, upon the tenure of office of the eleven trustees of the Hospital Cottages for Children, appointed by the Governor under St. 1890, c. 354, I have the honor to say that, in my opinion, the later act supersedes the former, and that it is now your duty to appoint five trustees as therein

provided; and that upon such appointment the tenure of office of the trustees appointed under the act of 1890 will terminate, if indeed it did not terminate with the passage of the act of 1892.

There is no doubt of the power of the Legislature to put an end to the term of office of the first board of trustees; and the general rule is that a statute which repeals, without any saving words, a former statute creating a special tribunal, puts an end to the tenure and authority of the tribunal, unless that is secured by constitutional provision or by other legislation which is obviously unaffected by the new act. I see nothing in the present statute to take it out of the operation of this rule. The purpose of the Legislature seems to have been to change the scheme of management of the hospital by substituting five trustees for the eleven provided for by the act of 1890; and this construction of the statute is very much strengthened by the express repeal of all that part of the former statute relating to the appointment of trustees.

REGISTRATION OF VOTERS, — RESIDENCE, — REMOVAL WITHIN SIX MONTHS.

Prior to 30th constitutional amendment six months' continuous residence in one place next preceding the election was essential to the right to vote.

In case of removal from one place to another within the Commonwealth during the six months next preceding the election, under 30th constitutional amendment and St. 1892, c. 351, § 4, one may vote in the place where he would have been entitled to vote if he had not removed therefrom, as that is the place where he resided on the first day of the six months period.

To the Secretary. 1892 October 7.

I reply as below to your request for my opinion upon certain questions arising under St. 1892, c. 351, § 4, relating to the right to vote of a person who removes from one place to another within the Commonwealth during the six months next preceding the election, which you state as follows: —

1. A voter resided in A. May 1, and removed to B. May 4, where he remains. In which of these places is he entitled to be registered and to vote?

2. A voter resided in A. May 1, removed to B. May 4, and from B. to C. August 1. In which of these three places is he entitled to be registered and to vote?

In view of the general importance and interest of the subject, I waive the question whether you are required, by the statute of 1891 or otherwise, to give any directions to town officers upon such a point.

As the Constitution and laws stood prior to the adoption of the thirtieth constitutional amendment, in November, 1890, six months' continuous residence in one place next preceding the election was essential to the right to vote. The purpose of the amendment, and of St. 1892, c. 351, § 4 (originally St. 1891, c. 286, § 1), is to relieve a voter who removed during this period from the loss of his vote. They are to be liberally construed to this end, so far as may be.

If a voter resides continuously in the same place for six months next preceding the election, he is not affected by the constitutional amendment or the legislation under it, but derives his right to vote from this period of residence, as he did prior to the adoption of the amendment. Therefore, as the election this year occurs November 8, if he removed after May 1, and on or before May 8, which is the first day of the period of six months next preceding the election, and remains in the place to which he thus removed until the election, he acquires the right to vote there.

But if he removed after May 8, he ceases to be entitled to vote anywhere by virtue of six months' continuous residence next preceding the election, and comes within the operation of the amendment and the act of 1892. In such case, he may vote in the place where he would have been entitled to vote if he had not removed therefrom; that is, in the place where he resided May 8.

It follows that, in each of the cases stated by you, the voter is entitled to be registered and to vote in B.

CIVIL SERVICE, — SUPERINTENDENT OF WATER INSPECTORS OF BOSTON.

The superintendent of water inspectors of the city of Boston is not a person "doing inspection service" within the civil service rules.

To the Civil Service Commissioners. 1892 October 12.

In compliance with the request of the commission for my opinion whether the position of superintendent of water inspectors of the city of Boston is within the civil service rules, I have to say that I do not find in the papers submitted to me sufficient reason to overrule the views of the corporation counsel and water registrar. The statement does not disclose that his ordinary duties are in any part clerical, in the sense of the rules, and indicates the contrary; so that, upon this statement, he cannot be included in class 3 of schedule A. The description of his duties in the statement of the registrar would make it possible to bring him within the language of class 7 of schedule B, as a person "doing inspection service;" but, upon consideration of the entire law and system of rules, I think these words should not be construed to include him. Such inspection service as he has to do seems to be only of a supervisory character, and to be done as a superintendent rather than as an inspector. Without undertaking to lay down any rule of construction applicable to all cases, or any precise rule applicable to this case, it appears to me that the civil service act (St. 1884, c. 320) and the rules should, in general, be so construed as to distinguish between positions of routine, so to speak, which ordinarily do not involve administrative or discretionary powers, on the one hand; and, on the other, positions which involve the exercise of judgment, discretion, authority, and responsibility; and that the general scheme is to include the former and not to include the latter class within the system. The officer in question, so far as his duties are described to me, seems to be within the latter class.

CIVIL SERVICE, — OFFICE, — EMPLOYMENT, — ELECTIVE OFFICER.

An "office" as distinguished from an "employment" involves "a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office."

A clerk whose duties are described by the word "employment" cannot be made an "elective officer" in the sense of § 15 of Civil Service Act by the appointing board going through the form of electing him.

An appointment so made without requisition upon the Civil Service Board or certification of the person elected, is illegal.

To the Civil Service Commissioners 1892 November 21.

In compliance with your request, I submit my opinion upon the legality of the recent election of a female clerk by the board of overseers of the poor of the city of Lawrence without requisition upon the Civil Service Board or certification of the person elected. It appears by your statement of the facts that "the position calls merely for clerical service and assistance to the chief clerk, for which the occupant receives about a dollar and a half a day;" and that the board of overseers justifies its action upon the ground that the occupant was elected to the place, and so is an "elective officer," in the sense of St. 1884, c. 320, § 15; conceding, I presume, that she is within the civil service rules, unless the fact that she was elected instead of being appointed takes her out of their operation.

The case appears to me to turn upon a different point. There is a recognized distinction between an *office* and an *employment* under the government; and the civil service act recognizes and affirms this distinction, by providing in one clause for "the selection of persons to fill *offices* in the government of the Commonwealth, and of the several cities thereof," and in another for "the selection of persons to be *employed* as laborers or otherwise in the service of the Commonwealth, and the several cities thereof." The same distinction has often been recognized by the courts, and it has been judicially declared that an office, as distinguished from an employment, involves "a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office."

The question whether this clerk is an officer or an employee of the city of Lawrence is easily answered, and the answer disposes of the case. She does not appear to have any part

in the government of the city, or any powers or duties of an official character. On the contrary, her duties are plainly such as are properly described by the word "employment," as used in the statute.

Under these circumstances, the method of selection is immaterial, although other cases might turn upon it. The appointing board, by going through the form of an election, cannot make her an officer who obviously is only an employee. Nobody would contend that laborers on the streets or sewers, for example, can be made "elective officers" of the city by calling them so, or by electing them by ballot. The decisive question is whether the real character and functions of the place in question make it an office or an employment, in the sense of the law and in view of the distinction thereby established. It may be difficult in some cases to determine whether it is on the one side of the line or the other, but in the present case I see no room for doubt.

Upon your statement, the clerk is not an "elective officer," in the sense of the law, and for this reason I am of opinion that the appointment, as made, is illegal.

DELINQUENT ASSESSORS, — PENALTY, — DISTRICT ATTORNEY.

The Secretary of the Commonwealth in cases of delinquent returns from assessors should request the District Attorney where they reside to proceed for the enforcement of the penalty prescribed by Pub. Sts., c. 11, § 56.

To the Secretary. 1892 November 30.

In reply to your inquiry as to the proper proceedings to be taken for the enforcement of the returns of assessors, under Pub. Sts., c. 11, § 56, I have to say that the penalty therein provided is to be enforced by action of tort, or indictment in the Superior Court; and it will be proper for you to put the names and residences of the delinquents, with the particulars of the case, before the District Attorney of the district in which they reside, requesting him to proceed for enforcement of the penalty.

CITIES AND TOWNS, — FAILURE TO APPOINT INSPECTORS OF DOMESTIC ANIMALS, — PENALTY.

Cities and towns are not liable for the penalty provided by St. 1887, c. 252, § 14, for failure to appoint inspectors as required by St. 1892, c. 432.

To the Governor. 1892 December 1.

In reply to your inquiry, in behalf of the Board of Cattle Commissioners, whether St. 1887, c. 252, § 14, for the suppression of contagious diseases among domestic animals, laying a penalty upon any person who fails to comply with a regulation made or order given by the commissioners in the discharge of their duty, applies to the failure of a city or town to appoint inspectors as required by St. 1892, c. 432, so that a delinquent city or town thereby becomes liable to the penalty, I have the honor to say that, in my opinion, the penalty in question cannot be applied to such a case.

INSURANCE, — DISTRIBUTING POLICIES AS ADVERTISEMENTS, — LICENSE, — INSURANCE AGENT.

The purchasing of policies of accident insurance by wholesale and distributing them as advertisements is not prohibited by law. The distributor must be duly licensed as an insurance broker, or have a certificate of authority to act as an insurance agent.

To the Insurance Commissioner. 1892 December 3.

I have your letter of inquiry whether accident insurance policies of a foreign company, lawfully transacting business here, can be purchased by wholesale from a licensed agent or broker here, and given away by the purchaser as an advertisement of his own business or as otherwise stimulating his trade; and whether, in such case, the purchaser and distributor of the policies must be licensed as an insurance agent or broker, in order to lawfully transact this portion of the business.

As to the first inquiry, whatever may be said of the policy or expediency of such a practice, and howsoever it might be regarded by the courts in an action against the company on such a policy, I find nothing in the law to forbid it, either expressly or by necessary implication, and no penalty which can be applied to it.

As to the second inquiry, it is plain that the purchaser and distributor of the policies, under the circumstances stated, if not a duly licensed insurance broker, must be deemed an insurance agent, within the description of St. 1887, c. 214, § 87. He transmits for persons other than himself policies of insurance from the company, and offers and assumes to act in the negotiation of such insurance. Under the form of policy submitted with your statement, there is no completed contract until the autograph signature of the insured is affixed to the policy. The purchaser and distributor is the person who brings the insured to the company, or brings him to the making of a contract with the company; and the contract is made, presumably, upon his suggestion or invitation to or solicitation of the person to be insured, and is presumably made and delivered in his place of business, and under his supervision; and he is the only person who comes in contact with the insured in the negotiation or completion of the contract.

I am of opinion, therefore, that such business cannot be lawfully transacted by any person not duly licensed as an insurance broker, or having a proper certificate of authority as an insurance agent.

LEGACY TAX ACT, — EXEMPTION OF CHARITABLE INSTITUTIONS.

Legacies to "literary, benevolent, charitable and scientific institutions" incorporated in Massachusetts, are not subject to the legacy tax. A legacy to such an institution incorporated in another State and exempt from taxation there, is subject to the legacy tax. Real estate in another State or country not converted into personalty by the operation of the will is not "property within the jurisdiction of the Commonwealth."

Personal estate held in trust by a resident of Massachusetts for the benefit of a resident of another State for life, with a power or duty in the trustee to thereafter dispose of it by his own will, which he does, is subject to the legacy tax.

To the Treasurer. 1892 December 17.

I reply as below to your request to be advised as to the application of St. 1891, c. 425, to certain bequests under the will of George A. Stevens, late of Essex County, where the will was proved.

First. — If the National Sailors' Home and the Boston Marine Society come within the description of "literary, benevolent,

charitable, and scientific institutions incorporated within this Commonwealth," they are exempt from taxation, and the legacies to them are not subject to the legacy tax.

Second. — In my opinion the legacy to the Marine General Hospital of Portland, Me., is subject to the tax. The exemption of § 1 of the legacy tax act extends, I think, only to such institutions whose property is exempted from taxation by our own law. And the fact that such an institution of another State may be exempted from taxation by the law of that State does not, in my opinion, bring it within the exemption of § 1.

Third. — Real estate in a foreign State or country, at least unless converted into personalty by the operation of the will, which is not the case here, is not "property within the jurisdiction of the Commonwealth," in the sense of § 1. The real estate in Calais, Me., is, therefore, not subject to the tax.

Fourth. — The fund of $4,293.39 held in trust by the testator under the will of his wife for the benefit of a resident of Maine for her life, and thereafter to be disposed of by the testator in the manner requested by his wife in her will, is property within the jurisdiction of the Commonwealth and passed by the will of the testator, and is, therefore, within the description of § 1, and is subject to the tax.

Legacy Tax Act.

It is not the duty of the Treasurer of the Commonwealth, under St. 1891, c. 425, to determine whether, in the case of a bequest in trust for a sister-in-law of the testator during life, with remainder upon her death to nieces of the testator, it is proper for the executors to have the life estate appraised and the amount of the tax thereon paid by the sister-in-law, and this amount deducted from the whole tax, the balance to be paid on the remainder, but this question must be settled by the court in accordance with the statute.

To the Treasurer. 1893 February 13.

In reply to your inquiry under the legacy tax act (St. 1891, c. 425), whether, in the case of a bequest in trust for a sister-in-law of the testator during life, with remainder upon her death to nieces of the testator, it is proper for the executors to have the life estate appraised and the amount of the tax

thereon paid by the sister-in-law and this amount deducted from the whole tax, the balance to be paid on the remainder, I have to say that in my opinion your duty does not require you to determine nor to concern yourself with this question. The executors and trustees must settle it with the court, in accordance with the statute, and I see no reason why it should be your duty, or how you have any authority, to give them any directions upon it. Even in the case provided for by § 2 of the statute, of a bequest to a direct heir for life or years with remainder to a collateral heir, it is, in the first instance, at least, the duty of the executor or trustee, and not the duty of the treasurer of the Commonwealth, to see that the life estate is properly appraised and the tax paid. Inasmuch as in the present case the whole legacy is taxable, and as you have under § 1 a remedy against the executors or trustees for the whole tax, and as the statute makes it the duty of the executors or trustees in all cases to have the proper appraisal made and to deduct and pay over the tax before settlement of their final account, I see no reason why questions of the time or method of appraisal, division or payment, should be cast upon you to determine. They must ultimately be determined by the court in any case, and the executors or trustees can go to the court at any proper time for determination of such questions, if they are unable to determine them without assistance.

INSURANCE, — NATURE OF CONTRACT, — ADVERTISEMENT.

The offer of a newspaper to pay a certain amount to a certain class of advertisers in case of death or disabling accident is, in effect, a contract of insurance, and unlawful.

To the Insurance Commissioner. 1893 April 26.

Upon your inquiry concerning the legality of an offer of a newspaper to pay a certain amount to a certain class of advertisers in case of death or disabling accident, I see no reason to doubt that the case is covered by my opinion given you under date of December 2, 1891,* in a similar case, that the transaction is in effect a contract of insurance and is unlawful.

---

* See p. 33, *ante*.

SURVEYOR OF LUMBER.

It is not the duty of the surveyor-general of lumber or his deputies to determine the question of the liability of a person, not a sworn officer, who measures and marks lumber, and gives an account of the same for settlement under Pub. Sts., c. 63, § 19.

To the Governor. 1893 May 3.

There appears under the statute to be no duty of the surveyor-general of lumber, or his deputies, which requires them to determine such a question as that submitted to you by him under Pub. Sts., c. 63, § 19, and while it is probable that a person acting as described in his letter would render himself liable to the penalty, the proper way to raise and determine the question is to apply to the district attorney of the district in which any such supposed offence is committed, to prosecute it under the statute.

INSURANCE, — TERMINATION OF ENDOWMENT BUSINESS OF FRATERNAL BENEFICIARY ORGANIZATIONS, — LEGISLATURE, — ATTEMPTED EXERCISE OF JUDICIAL POWER, — CONSTITUTIONAL LAW.

The Legislature may properly terminate the endowment business of fraternal beneficiary corporations by repealing the law under which it is transacted, but it cannot determine in advance the rights of all parties in the property of the corporations and require it to be so distributed among them. That is a judicial duty.

It is doubtful whether the Legislature can provide that any person who may be appointed by an executive officer to examine books and accounts of corporations shall have power to summon and examine under oath any officer or agent of such corporation and any other person.

To the Governor. 1893 May 9.

In compliance with your request for my opinion of the constitutionality of the bill entitled "An Act to terminate the endowment business of fraternal beneficiary corporations," * I have examined the bill, and notwithstanding the presumptions in favor of legislative acts, I am unable to avoid the conclusion that some of its provisions are in conflict with the Constitution.

There is no doubt of the power of the Legislature to put an end to the endowment business of these corporations by with-

* The bill was returned at the request of the Senate, amended, and finally enacted as St. 1893, c. 418.

drawing the legislative authority under which it is done. If the bill, after doing this, had provided for the winding up of the business by the courts in accordance with the rights of the various parties in interest under the law, it would be free of any constitutional objection. The stoppage of the business will leave the corporations with certain funds in their possession, some of them applicable to general, and others, it may be, only to special uses, and with a variety of contracts of different classes upon their hands, which presumably they will be unable to fulfil. The rights of all the parties when the business stops are fixed by law. The inquiry into and determination of these various and perhaps conflicting rights, and the distribution of the assets among the various claimants, is essentially and necessarily a judicial duty, which must be left to the courts, proceeding according to the rules of law. But the bill, in §§ 3 and 4, provides for the appointment of a receiver to take possession of all the moneys and properties of the corporation, of which one common fund is to be made, without regard to particular rights in special funds, or to particular uses to which alone they may be held, and from this common fund to pay, first, the expenses of winding up the business; second, the debts of the corporation contracted in the endowment business, in full, and third, to distribute the balance among the certificate holders or their beneficiaries in proportion to the amount of their claims at the passage of the act, on the basis of the amount paid by each in assessments.

The bill thus undertakes to determine in advance what the rights of each class of claimants shall be, and what disposition shall be made of the assets among them. This, in my opinion, is in effect an exercise of judicial rather than legislative powers, and is not within the province of the Legislature. It is possible, though not likely, that the bill may deal with the rights of the various claimants and dispose of the assets among them exactly as the court would do upon proper judicial proceedings. But this does not avoid the difficulty. The Legislature has no more power to do a judicial act correctly than to do it incorrectly. And unless the bill in fact deals with all the claimants and disposes of all the assets exactly as they would be dealt with and

disposed of in court in accordance with law, or, in other words, if under the operation of the bill any money would go to one claimant which the courts, dealing with the subject in accordance with the established rules, might determine to belong to another, it is plain that such operation, which must to some extent be anticipated, would amount to undue interference with vested rights, if not also to the impairment of the obligation of contracts and deprivation of property without due process of law.

There are other minor difficulties, especially in § 2. If the Legislature can confer the extraordinary powers therein specified, to examine books and papers and summon and examine witnesses under oath, etc., upon a sworn and responsible executive officer, I doubt whether they can be conferred in advance upon any person to be appointed by him for the purpose, as the bill provides, without any official sanction or responsibility.

Obstruction of Street, — Electric Wires, — Surveyors of Highways, — Attorney-General, — Gas and Electric Light Commissioners.

If electric wires are erected in the streets of a town without authority, and materially impair public safety and convenience in travel, they may be removed by the surveyors of highways. It is a general rule that Attorney-General will not interfere if there is a remedy in hands of local authorities, or if the violation of the public right is not serious, or if his interference is sought chiefly for the protection of private interests.

To the Gas and Electric Light Commissioners.
1893
June 8.

I have your communication relating to the complaint of the selectmen of Braintree to your Board, that certain persons have erected electric lighting wires in the streets of Braintree without authority.

If these wires constitute an obstruction of the streets in the sense of the law, or if they materially affect or impair the public safety and convenience in travel, I know of no reason to doubt that it is within the powers of the local surveyors of highways to remove them; and there are expressions in some of the later decisions of the court indicating that electric light-

ing wires may be so regarded. It is a general rule of law, applicable to these cases, that the court will not interfere if there is an adequate remedy in the hands of the local authorities; and as a rule, therefore, it is held inexpedient by the occupants of this office to proceed in such a case. And if this were not so, I doubt if any Attorney-General would regard the unlawful erection of an electric lighting wire in any part of the State as a sufficient violation of the public right to call for his interference by proceedings in court. So far as it is desired to remove these wires for the purpose of preventing or avoiding competition with an existing electric lighting company, it clearly is not the duty of the Attorney-General to interfere *ex officio*. If the case is within St. 1887, c. 382, as amended by St. 1892, c. 274, your Board, as you are aware, is at liberty to proceed in it if it is considered of sufficient importance to make it your duty so to do, but from your present communication I do not infer that you have so determined the matter.

Unauthorized opening of Streets, — Gas Company, — Quo Warranto for Forfeiture of Charter, — Attorney-General.

The unauthorized opening of streets by a gas company is such an improper exercise of its franchises as justifies the Board of Gas Commissioners in reporting it to the Attorney-General under St. 1885, c. 314, for such action as he deems expedient.

Where a gas company has authority under its charter to supply gas in Boston, and opens the streets of Boston under a permit from the superintendent of streets, and the board of aldermen does not interfere, even if such permit is void there is no such improper exercise of its franchise by the gas company as to call for *quo warranto* for forfeiture of its charter; neither is there such a serious invasion of the public right as to call for the intervention of the Attorney-General.

No construction of a statute is to be favored which requires the intervention of the law officer of the Commonwealth solely or principally for the protection of the private interests of a business corporation.

To the Gas and Electric Light Commissioners. 1893 June 16.

At the request of the Brookline Gas Light Company and others having an interest in the subject of your report to me that the Brookline company is violating the provisions of its charter and of the Public Statutes by digging up the streets of

Boston for the purpose of laying gas pipes therein without the consent of the board of aldermen, I have heard them and their counsel upon the questions involved, and it is proper for me to inform you of my conclusion.

It was objected that the case is not within the gas commission act (St. 1885, c. 314), and that your Board has no concern with it, as you are not charged with the care of the streets of Boston. While the statute literally includes all violations of law by a gas company, there are doubtless some offences to which it is not to be applied. If, for example, a gas company should publish a libel, I do not suppose the statute requires your Board or the Attorney-General to interfere. But if the Brookline company has opened the streets of Boston without the consent of the board of aldermen or some equivalent authority, it is an irregular or improper exercise of its franchise, which, in my opinion, you are justified in noticing and reporting to the Attorney-General for such proceedings as, in the language of the statute, he may deem expedient. Such proceedings, however, must be at common law, as there is no express statutory remedy in this case; and the question arises whether any remedy is applicable or is likely to be maintained.

The principal question of law involved is of the validity of the permits issued by the superintendent of streets of Boston, which constitute the only authority the Brookline company has or claims to have for opening the streets. There is much reason for the view which you seem to have adopted, that it does not rest with the superintendent of streets to determine whether one gas company or several shall supply the people of Boston, and while it may be for this executive officer to say when, where or how particular streets shall be opened by a company having authority, it is not for him to say whether they shall be opened at all by any particular company. On the other hand, it is argued with force that as the Brookline company has authority under its charter to supply gas in Boston, it needs nothing more except leave to open the streets here and there, as its operations may require; and that to grant this leave is an executive or administrative act, to be performed, under the charter amendments of 1885, by the

executive officer having charge of the streets. The true view may be that it is, in the first instance, an executive act within the power of the superintendent of streets, unless and until the board of aldermen sees fit to interfere. In this view, the permits are not void, though voidable by the action of the aldermen. But I do not find it necessary to come to a definite conclusion upon the correctness of either of these views, as there are other considerations which, under the circumstances, determine the question whether I ought to proceed.

The supposed violation of law by the Brookline company consists, first, in an irregular or improper exercise of its franchise; and second, in creating a nuisance by obstructing the public streets. As to the first point, the facts do not present a case which calls for the extreme remedy of *quo warranto* for forfeiture of the charter; and apart from the nuisance, there seems to be no sufficiently clear and serious invasion of the public right to call for the intervention of the Attorney-General, in view of other circumstances.

As to the alleged nuisance created by opening the streets, the attitude of the local authorities is important to be considered. The executive branch of the city government is promoting the work, having made the contract under which it is being done. The board of aldermen does not attempt to interfere, and has yet taken no action either way. If the permits are void, the whole matter is in the hands and control of that Board. And whether they are void or not, it appears to me that under the company's charter of 1854 (St. 1854, c. 104, § 4), or Pub. Sts., c. 106, § 77, or in the exercise of the general legislative or judicial powers which they still retain, the aldermen have authority to prevent the opening of the streets by the Brookline company, unless they are now debarred from exercising it by the contract made with the company by the mayor; and if the obligation of the contract puts the matter beyond their reach, it puts it also beyond mine. The aldermen may yet consent to the operations of the Brookline company, or affirm the action of the superintendent of streets; and this would at once put an end to any proceedings in court. The court will not ordinarily interfere to abate or prevent a nuisance upon information of

the Attorney-General while there is an adequate remedy in the hands of the local authorities, nor unless the invasion of the public right is of a substantial character and is clearly established and there is no other adequate and sufficient remedy. In this case there are other remedies besides that in the hands of the local authorities, by indictment, or action for trespass, or perhaps under Pub. Sts., c. 186, § 17, though doubtless none of these are so efficient as a proceeding by the Attorney-General if maintainable. If all these rules should not be strictly applied to this case, they at least make it uncertain whether, in the present position of the matter and in view of the attitude of the board of aldermen, any proceeding in court can be maintained or will even enable the court to reach and determine the question of the validity of the permits or any other important question. If the local authorities appeared to be wilfully disregarding the public interests, or consenting to a serious violation of the public right which clearly ought not to be permitted, the court would doubtless be more willing to interfere, but the circumstances do not appear to present such a case.

It is contended by a competing company that the Brookline company can lawfully enter those parts of the city covered by the contract only under St. 1885, c. 314, § 10, after a public hearing before the board of aldermen, with a right of appeal to your Board on the part of any other company aggrieved by the decision; and that I ought to interfere, as otherwise competing companies will be deprived of this right. It may be possible to so construe this section, but you evidently do not so construe it, as your report is not put upon this ground, and it clearly is not necessary; and a construction is not to be favored which requires the intervention of the law officer of the Commonwealth solely or principally for the protection of the private interests of a business corporation.

LEGACY TAX ACT.

The Treasurer of the Commonwealth has no power to determine nor duty to advise in advance upon the question whether a particular legacy is subject to a legacy tax, or as to the amount of a tax, or when it becomes payable, or any other similar question.

To the Treasurer. 1893 June 19.

It is clear that under the legacy tax act (St. 1891, c. 425), the Treasurer of the Commonwealth has neither the power to determine nor the duty to advise in advance in any case as to whether a particular legacy is taxable, or for how much it is taxable, or when the tax shall be paid, or any other such question. The statute makes it the duty of executors, administrators and trustees to ascertain, or cause to be ascertained, the amount of all taxes due the Commonwealth, and to pay them within a prescribed period, and makes it the duty of the court to find that all such taxes have been paid before allowing settlement of the accounts. The probate court is the only place in which such questions can be determined, and is undoubtedly the only place in which the Legislature intended to have them determined. There is no reason to believe that the Legislature intended to cast this duty or any part of it upon the Treasurer of the Commonwealth, and much less upon the county treasurers, to whom in any case the tax may be paid. I think it is clearly the duty of the several probate courts to take care of the interests of the Commonwealth in respect of this tax, in the settlement of the accounts of executors, administrators and trustees, as it is their duty to take care of the interests of all parties concerned, whether represented before the court by council or not; and I presume there is no doubt or difference of opinion upon this among the judges of probate. The provisions of the statute which require notice to the Treasurer of all taxable cases, by a copy of the inventory or otherwise, and which give him power to proceed for administration, to have a special appraisal made in certain cases, and other like provisions, are intended to give and do give him a sufficient standing in court to work out the rights of the Commonwealth in all cases; but they neither authorize nor require him to deal with these cases out of court.

I think, therefore, that you are warranted in saying, and to

avoid difficulty will be obliged to say, in substance, in reply to all such inquiries, that you cannot undertake to answer or advise upon them, but that you claim in each case the maximum amount which may be due the Commonwealth under any construction of the statute; and that executors, administrators and trustees must proceed upon this assumption, and must deduct and pay such amount unless and until the court determines otherwise.

FIREARMS.

Muskets or rifles are "firearms" in the sense of St. 1893, c. 367, § 124, though defective or disabled for firing.

To the Adjutant-General. 1893 June 26.

I have your request for my opinion whether under St. 1893, c. 367, § 124, a percussion muzzle-loading Springfield or other musket or rifle, the nipple of which is removed or plugged, or a breech-loading rifle of any pattern, of which the firing mechanism is removed, is to be considered a firearm in the sense of that section.

In my opinion there can be but one answer to this question. It is plain that a firearm is none the less a firearm because it may be temporarily disabled for effective use. Nobody would doubt or dispute that in the common understanding such arms as you describe are firearms, notwithstanding their temporary defects. It is clear also that the reasons of the legislation against the organization or parade of unauthorized bodies with firearms are not met or avoided by the circumstances stated in your inquiry. Such firearms as you describe must, therefore, be taken to be within both the language and the intent of the statute.

APPROPRIATION, — LEGISLATIVE INTENT.

A sum of money appropriated to Joseph Tilton may be paid to Josiah H. Tilton if he is in fact the person for whom the appropriation is intended, and is identified as such by the description of him in the resolve.

To the Governor and Council. 1893 June 26.

I have your request for my opinion whether under Res. 1893, c. 36, the payment therein directed to be made to Joseph Tilton can lawfully be made to Josiah H. Tilton, for whom it was

in fact intended. I understand that Josiah H. Tilton is in fact the only survivor of the men who attempted to rescue the crew of the "Aquatic;" that the name Joseph Tilton was inserted in the resolve with the intent to describe the sole survivor, and in the belief that his name was Joseph Tilton; and that there is in fact no such person as Joseph Tilton having any connection with the matter. Under these circumstances I think the recipient of the payment is sufficiently identified by being described in the resolve as the survivor of the men who attempted the rescue; and that, in view of this and the other facts, the mistake in the name may be disregarded, and the payment made to Josiah H. Tilton.

INQUEST, — STENOGRAPHER'S BILL, — RAILROAD.

A private freight railroad track owned and operated by a copartnership is not a railroad within the meaning of St. 1888, c. 365, so as to authorize payment by the Commonwealth of a stenographer's bill for taking evidence at an inquest on a death by accident on such road.

To the Auditor. 1893 June 27.

In reply to your inquiry arising under St. 1888, c. 365, I have to say that in my opinion this statute cannot be construed to require payment by the Commonwealth of a bill for reporting the evidence at an inquest upon the death of an employee killed by accident upon a private freight railroad track owned and operated by a copartnership. Very likely the Legislature would have included such cases if they had been thought of; but the purpose of the statute evidently is to put these bills upon the same footing as the expenses of the Board of Railroad Commissioners, and to require payment of them by the Commonwealth only so far as they can be assessed upon and collected of the railroad corporations. No part of the expenses of the commissioners has ever been assessed upon or collected of the individual owners of private freight railroad tracks, and under the existing statutes I do not think they can be; and the case appears to be the same as to these bills incurred under the act of 1888.

CAUCUSES.

Caucuses for the nomination of town officers and delegates to conventions — how called.

To the Secretary. 1893 September 6.

I reply as below to your inquiries under date of August 29 as to the holding of caucuses: —

First. — In any town in which ballots for town officers are provided at the expense of the town, under St. 1893, c. 417, § 293, a caucus for the nomination of any town officers who are required to be elected by ballot must be called and held under the provisions of §§ 71–74; but a caucus for the nomination of any officer not required to be elected by ballot need not be so called and held. In any town in which ballots for town officers are not provided at the expense of the town, as above, a caucus for the nomination of any town officer need not be so called and held.

Second. — A caucus for nominating delegates to a convention cannot be called and held otherwise than under and according to the provisions of §§ 71–74. The prohibition at the end of § 71 appears to be general, and to apply to the selection of all delegates to all conventions.

OBSTRUCTION OF STREETS, — ELECTRIC WIRES, — SURVEYORS OF HIGHWAYS, — ATTORNEY-GENERAL.

It was not the intention of the Legislature that the Attorney-General should go into court against the unauthorized erection of electric lighting wires in violation of St. 1887, c. 382, § 3, as amended by St. 1892, c. 274, under any and all circumstances, in any part of the Commonwealth, but that, as a rule, he should act in such cases only under circumstances involving a substantial violation of the public right and interest which the local authorities are unable or unwilling to prevent.

To the Gas and Electric Light Commissioners. 1893 September 6.

So far as I can judge from the statement of facts accompanying your report of a violation, by Alonzo W. Perry of Boston, of St. 1887, c. 382, § 3, as amended by St. 1892, c. 274, the case is such as to come within the intimation given you in my communication of June 16, 1893,* that as a rule the Attorney-General ought not to be required to go into court solely or principally for the prevention of business competition; and it may also be a case in which it is within the power of the local

* See p. 84, *ante*.

authorities to control the matter and prevent the violation of law, if any. If the wires constitute an obstruction of the public streets, they are within the reach of the surveyors of highways. Under these circumstances it does not appear to me at present that I am called upon to interfere. I do not think the Legislature ever intended the Attorney-General to go into court against the unauthorized erection of any and every electric lighting wire, under any and all circumstances, in any part of the Commonwealth; and it appears to me that he should, as a rule, act in such cases only under circumstances involving a substantial violation of the public right and interest, which the local authorities are unable or unwilling to prevent.

I know no reason why the Legislature should not give a remedy directly to any person or corporation aggrieved in such a case as this appears to be. This would be much more convenient to the parties, who need not and ought not to be compelled to rely upon the intervention of the Attorney-General. If a change in or addition to the existing law is necessary for this purpose, as it may be, I have little doubt that the Legislature will make it, if attention is called to the subject.

If the case in hand is one in which your Board may lawfully proceed under St. 1885, c. 314, § 13, and if you desire so to do, you will of course be furnished with the necessary legal assistance from this office. Whether you may so proceed is not entirely clear, but from St. 1885, c. 314, and St. 1887, c. 382, taken together, there is at least an implication that the Board may proceed under § 13 of the former act to enforce § 3 of the latter.

GAS AND ELECTRIC LIGHT COMMISSIONERS, — JURISDICTION.

St. 1885, c. 314, §§ 10 and 16, do not confer upon the Board of Gas and Electric Light Commissioners the authority to adjudicate upon the questions presented by the appeals of the Boston Gas Light Company from the granting of permits to the Brookline Gas Light Company by the superintendent of streets of Boston.

To the Gas and Electric Light Commissioners.
1893
September 7.

I reply as below to your inquiry of August 3, whether St. 1885, c. 314, §§ 10 and 16, apply to the appeals of the Boston Gas Light Company and others from the granting of permits to

the Brookline Gas Light Company by the superintendent of streets of Boston, so as to confer upon your Board authority to adjudicate upon the questions presented by the appeals. My reply has been delayed in order to give parties in interest an opportunity to be heard.

The only right of appeal to your Board conferred by §§ 10 and 16 is from the decision of the mayor and aldermen of a city, or selectmen of a town, after a public hearing before them. There has been in this case no action of the mayor and aldermen of Boston, and the action appealed from is that of the superintendent of streets. If the powers of the mayor and aldermen in such cases have been transferred by the charter of Boston to the superintendent of streets, as has been claimed, it may be that his action will support an appeal. But this is, in my opinion, doubtful, and it is clear that, taking the statute as it reads, there has been no such action as to form the foundation of an appeal.

But apart from this, it appears to me upon the facts stated that the Brookline company must be considered as existing in active operation in the city of Boston, in the sense of the statute, at the time of its application for and the granting of the permits appealed from. If this view is correct it disposes of the question, as the requirement of a public hearing with the right of appeal does not apply to such a company.

I am of opinion, therefore, that these sections of the statute do not confer upon your Board the authority to adjudicate upon the questions presented by these appeals.

BOARD OF AGRICULTURE, — AGRICULTURAL SOCIETY, — REPRESENTATION, — BOUNTY.

The right of an agricultural society to representation in the Board of Agriculture in any year depends on its title to receive a bounty that year.

A society's title to bounty and to representation is to be determined by its returns between January 10 and the first Wednesday of February each year.

A society is not entitled to a bounty in any year unless it has awarded and paid premiums to the same amount during the preceding year.

The application of a bounty to the general encouragement or improvement of agriculture or manufactures does not by itself entitle a society to a bounty or to representation in the Board.

The requirement of $1,000 invested capital in order be be entitled to a bounty applies to all societies and means an actually existing invested capital.

The title of a society to representation in the Board accrues year by year, and the membership of a representative of a society terminates when his society ceases to be entitled to representation, though within three years from the time when he took his seat, subject to reinstatement when the society again acquires the right to representation.

To the Governor. 1893 October 3.

I have to reply as below to your request for my opinion upon the questions raised in relation to the rights of representation of certain agricultural societies in the Board of Agriculture. The statutes bearing upon the subject are more or less complicated and confused, and are difficult of construction, but upon careful consideration I am satisfied that the conclusions stated below embody the only practicable and intelligible construction which can be put upon them. I will state the matter somewhat more fully than might otherwise be necessary, in order, if possible, that the whole case may be fully understood, with a view to any changes in the law which may be thought necessary or desirable. I do not understand that Pub. Sts., c. 114, § 11, is material in the case of either of the societies now in question, and I have dealt with the matter only in view of such provisions as seem to be applicable to them upon the statement of facts presented by you, which of course I assume to be correct and sufficiently full for the purpose.

By Pub. Sts., c. 114, §§ 1 and 6, the right of any society to receive any bounty in a particular year depends upon its having awarded and paid the same amount in premiums, and complied with all the requirements of law and the regulations of the Board during the preceding year. The right of any society to representation in the Board in a particular year depends upon its title to receive bounty in that year. Section 2, as now amended, and § 5 require each society to make the proper return on or before the 10th of January in each year, of the facts which show whether it is or is not entitled to a payment of bounty in the following October; and the theory of the law undoubtedly is that between the 10th of January,

when these returns are supposed to be in, and the first Wednesday of February, when new members take their seats in the Board, the title to representation in the Board shall be determined by and upon the returns.

It thus appears that the right of each society to representation in the Board must be determined at the time when the new members take their seats, on the first Wednesday of February, according to what the society has done or omitted to do during the preceding year, as shown by its returns. And as the provision of § 1, that no society shall receive any larger bounty in any year than it has awarded and paid in premiums during the preceding year, and of § 6, that a society which neglects in any year to comply with the requirements of law or regulations of the Board shall not be entitled to bounty, are expressed in prohibitory language, I think they must be construed as peremptory conditions of representation in the Board, failure to comply with any of which forfeits the right of representation.

The question has been raised whether the application of the bounty or its equivalent for the general purpose of the encouragement or improvement of agriculture or manufactures, under the permission of § 7, is not an equivalent for the earning of bounty, so as by itself to entitle a society to representation. I do not think the statute can be so construed. The provision that no society shall receive a larger bounty than it has awarded and paid in premiums during the preceding year was a special enactment, by St. 1870, c. 258, passed while substantially all the other provisions of the law were and had been in force at least for some years; and this clearly indicates the purpose of the Legislature that the right to bounty shall depend absolutely upon the award and payment of premiums during the preceding year, and, as has already appeared, the right of representation in the Board depends upon the right to bounty. The requirement of § 7, to apply the bounty to the general encouragement or improvement of agriculture or manufactures if it is not offered in premiums, is undoubtedly binding upon every society; but while compliance with it fulfils the obligation of that section, it does not necessarily entitle a society to repre-

sentation in the Board, as the bounty is not received and therefore cannot be expended until October, while the right of the society to representation in that year depends upon its having offered and paid in premiums during the preceding year an amount equivalent to the bounty. In other words, under § 7 a society may apply a bounty either in premiums or to the general encouragement or improvement of agriculture or manufactures; but the latter application of it would not entitle the society to representation in the Board during the succeeding year, while the former application of it would, if the other requirements were fulfilled.

The question is raised also whether the requirement of Pub. Sts., c. 114, § 1, of an invested capital of one thousand dollars, is satisfied if a society has ever had and invested a capital equivalent to that amount. Section 1 provides that two classes of societies shall be entitled to bounty upon complying with the other requirements, namely, societies which were entitled to bounty before May, 1866, of which one thousand dollars capital was then as now a condition, and other societies whose grounds are not within twelve miles of any others, which have raised and invested the same capital. As by § 1 the bounty is to a certain extent measured by the capital, and as the reasons for requiring a capital seem to apply alike to all societies, it appears to me that this requirement applies to all. I think the reason of this provision, if not the language, can be satisfied only by an actually existing investment of capital of that amount at the time when the question of the right of the society to representation arises; and that a previous investment of such capital, which has been expended or lost, does not fulfil this requirement; the purpose of which seems clearly to be to require an existing and invested capital of at least one thousand dollars as a sort of guaranty that the society is doing or is prepared to do some actual work in the cause of agriculture.

I understand also that the question is raised whether a member taking his seat in the Board on the first Wednesday of February, by virtue of what his society has done and returned during the preceding year, is entitled to serve during the full

term of three years, or whether his membership may be terminated during that time by the failure of his society to continue entitled to bounty; and that I am desired to express an opinion upon this question. Pub. Sts., c. 20, § 2, provides that persons appointed shall hold their offices for three years, and provides for the filling of vacancies "in the same manner," namely, by the governor and council, or by the societies. As the right to bounty in any year depends on what the society has done during the preceding year, and as the right to membership in any year depends upon the title of the society to bounty in that year, and as the title both to bounty and to membership accrues year by year if it accrues at all, and has to be shown by the returns of the society on or before the 10th of January in each year, I am of the opinion that a society which does not show by its returns on or before January 10 that it is entitled to a payment of bounty in the following October, is not entitled to representation in the Board on or after the first Wednesday of February following; and therefore that the membership of a representative of a society which does not show by its returns on or before the 10th of January that it is entitled to a payment of bounty in the following October ceases on the first Wednesday of February following the making of or the admission to make the return; subject, however, to be reinstated within the period of three years if the society within that time acquires the right to bounty in accordance with the requirements of the law as here stated.

Applying these conclusions to the particular cases now in question, as they appear by the statement of facts furnished me, I am of opinion that the Massachusetts Society for Promoting Agriculture is not at present entitled to representation in the Board, as it did not offer or pay any premiums last year, nor make any returns as required by law; that the Bay State Agricultural Society and the Middlesex Agricultural Society are not at present entitled to representation, as they awarded and paid no premiums last year, and therefore did not become entitled to receive any bounty this year, and as their returns do not show the requisite capital. As to the Hampden Society, its return fails to show the requisite capital. The returns of the

Hampshire, the Hampshire Franklin and Hampden and the Highland societies show the necessary capital.

This disposes of all the questions raised in any case on the statement of facts before me.

PAUPER RETURNS, — CITIES AND TOWNS, — PENALTIES, — BOARD OF LUNACY AND CHARITY.

Where cities and towns have incurred penalties for failure to make pauper returns under Pub. Sts., c. 84, it seems to be the better practice for the Board of Lunacy and Charity to certify to the Treasurer the amount of the reimbursement, if any, due for relief from the Commonwealth to the cities or towns, and the penalty in each case, leaving the adjustment to be made by the Treasurer, by whom the settlement must eventually be made.

To the Treasurer. 1893 October 4.

I acknowledge the receipt of your inquiry, whether it is the duty of your department to enforce penalties imposed on cities and towns for failure to make pauper returns under Pub. Sts., c. 84, by making them part of the account in the regular settlements with the Commonwealth, or whether the officers charged with the making up of the accounts against cities and towns for the support of paupers should include the penalties therein.

The statute does not seem to determine the matter either way, and it must therefore be determined on such general considerations of convenience and expediency as apply to it. There seem to be two classes of these cases: First, cases in which reimbursement for relief is due from the Commonwealth to the city or town, against which the penalty may be set off; and second, cases in which the city or town has incurred the penalty and nothing is due it for reimbursement, or, if anything, a less sum than the amount of the penalty. In the latter case the Board of Lunacy and Charity cannot work out the proper result in their accounts, but must report the penalty to you for collection; and in the former case, while the Board may set off the penalty and deduct it from the amount due for reimbursement, reporting only the latter to you, I am given to

understand that this practice would deprive the Auditor's office of the detailed information as to the whole amount of the receipts and disbursements of the Commonwealth on the pauper account, which it is necessary for the Auditor to have in order to the proper discharge of his duty. As all collections and disbursements in both classes must be made by your department, this seems to be an additional reason for ascertaining the balance therein in all cases, and for dealing with all cases by one uniform rule. I assume of course that you are always properly informed by the Board as to the exact amount due the city or town for reimbursement, as well as the amount of the penalty, so that you can first set off the penalty against the amounts due for reimbursement, if any, and if nothing is due for reimbursement, against any other moneys due the city or town, as required by Pub. Sts., c. 84, § 37.

Upon such information as I have, it seems to me for these reasons the better practice for the Board of Lunacy and Charity to certify to your department the amount of the reimbursement and penalty in each case, leaving the adjustment to be made in your department, where the settlement must eventually be made.

TRUSTEES OF STATE PRIMARY AND REFORM SCHOOLS, — LYMAN SCHOOL FOR BOYS, — STATE INDUSTRIAL SCHOOL FOR GIRLS, — SUPERVISION OF CHILDREN.

It is the duty of the trustees of the State Primary and Reform Schools to exercise a general oversight and supervision of all children committed to the Lyman School for Boys and the State Industrial School for Girls during their minority, or until their discharge in some manner provided by law.

To the Governor. 1893 October 25.

I have your request for my opinion upon the question submitted by the trustees of the State Primary and Reform Schools, whether it is their duty to supervise during minority children committed to the Lyman School for Boys and the State Industrial School for Girls.

I am not sure that I understand precisely what the trustees

desire to learn, nor what their idea is of the meaning of the word "supervise," as used in the statute. It is without doubt their duty to exercise such supervision as the statute prescribes over the inmates of these schools while they remain inmates thereof. And I incline to the opinion that while the system of apprenticeship established by Pub. Sts., c. 89, §§ 38–44, was in use, it was their duty to exercise such supervision over boys or girls so apprenticed or bound out as to keep themselves reasonably informed of the condition of the child, with a view to continuing or terminating the apprenticeship as the interest of the child might require. This is clear as to girls from § 46, and is at least implied as to both sexes by § 40. I understand, however, that this system has gone entirely out of use, and that the inmates of these schools are now placed on probation with families as opportunity offers, without formal indentures. There seems to be no express authority for this practice in the statute, but perhaps sufficient authority is implied by the apparent recognition in §§ 53–56 that inmates of such institutions may be placed "in charge of" a person, as distinguished from the formal binding out by indenture as an apprentice or servant. The provisions of §§ 53 and 54, requiring the State Board to look after children in this situation, do not necessarily conflict with the duty of the trustees to do the same, nor necessarily relieve them from that duty. There is also in § 47 a provision for the transfer of girls to the Reformatory Prison for Women, but it is also provided that upon application of the trustees of the school a girl so transferred may be returned to the school; which seems to imply that it is the duty of the trustees to keep themselves informed of her condition and progress even while in the Reformatory.

On the whole, I am of opinion that it is the duty of the trustees of the State Primary and Reform Schools to exercise a general oversight and supervision of all children committed to these schools during their minority or until their discharge in some manner provided by law.

BAY STATE GAS COMPANY, — CANCELLATION OF NOTE.

Under St. 1893, c. 474, it does not appear to be necessary or material for the Commissioner of Corporations, or for the Attorney-General to determine the regularity or validity of the proceedings of the Bay State Gas Company in effecting or attempting to effect the cancellation or surrender of the note given by it for $4,500,000. The Commissioner of Corporations under the statute appears to have no power or duty but to take what the company offers without admission or acknowledgment of anything.

To the Commissioner of Corporations, 1893 November 27.

In compliance with your request I have examined the papers presented to me by Mr. Chandler in behalf of the Bay State Gas Company, relating to the cancellation and surrender of the $4,500,000 note under St. 1893, c. 474.

I observe in them several things which might affect the validity of the proceedings as a sufficient compliance with the statute, namely, the meeting of the Bay State Gas Company of Delaware at which the surrender was voted appears by the copy of the record to have been held November 21, 1893, while the assignment executed in pursuance of that vote refers to it as a meeting held November 18, 1893; the vote authorizes the *president* of the Delaware company to assign and deliver the note to the Mercantile Trust Company for cancellation and surrender, while the assignment produced is in form the act of the company and not of the president; and it does not clearly appear whether Mr. Dening, the secretary of the Mercantile Trust Company, has sufficient authority to execute the power to cancel and surrender the note, which was voted by the gas company to the trust company and not to its secretary or other officer. There may be other like irregularities, or seeming irregularities, though I at present notice no others; and I express no opinion as to the effect of these. It does not appear to me to be necessary or material for you, nor therefore for me, to determine the effect of these omissions or the regularity or validity of the proceedings of the gas company in effecting or attempting to effect the cancellation and surrender of the note. Under the statute you appear to have no power and no duty in the premises but to take what the company offers, without admission or acknowledgment of anything,

which I think you are not required to make and which probably would not bind the Commonwealth if made. The company, under the statute, must see to it that a legal and effectual cancellation and surrender of the note is made before December 1, 1893, — failing which, its charter stands repealed. It appears to me, therefore, that all questions of the regularity and sufficiency of the proceedings to effect the cancellation and surrender in accordance with the statute are their questions and not yours.

I have called Mr. Chandler's attention to the points above noted, and understand from him that steps will be taken to properly cover them and any others which may be discovered, if any, before filing the papers. But in my opinion your position and duty in the case, now and hereafter, are only as I have above stated.

HISTORIES, — PURCHASE BY COMMONWEALTH.

St. 1893, c. 413, applies to new editions of histories originally published before the passage of the act, if such new edition contains a substantial amount of new and valuable matter, and if it also fulfils the other requirements of the act.

To the Secretary. 1893 December 6.

In compliance with the request of the Executive Council to be advised upon the question whether St. 1893, c. 413, entitled "An Act to authorize the purchase of historical works relative to the services of Massachusetts volunteers during the late civil war," applies to new editions of histories originally published before the passage of the act, I have to say that, in my opinion, the act may be construed to include a new edition of a previously published history, if such new edition contains a substantial account of new and valuable matter, and if it also fulfils the other requirements of the act. The purchase of copies by the Commonwealth is in every case within the control of the Governor and Council and the Secretary, who are to determine whether the history in question fulfils all the requirements of the act, without which the purchase is not to be made.

TRADE-MARK, — LABEL, — FILING AND RECORDING.

A label or trade-mark may be filed and recorded under St. 1893, c. 443, notwithstanding it consists of several words or devises on separate pieces of paper, or is described as a "label *and* trade-mark." The rules, regulations and forms prescribed by the Secretary under § 6 relate only to the filing, and not to the form of the label, etc. It is the duty of the Secretary to see that the label, etc , as presented is not in such form as to be mistaken for one previously recorded. The rights of parties as to the form of labels, etc., are to be determined by the courts.

To the Secretary. 1893 December 20.

I have your request to be advised upon an application for filing certain labels or trade-marks, under St. 1893, c. 443, whether, in the case of a label or trade-mark consisting of two or more distinct parts, on separate pieces of paper, each part must be treated as a separate label or trade-mark, and whether a paper described by the applicant as a "label *and* trade-mark" should under the law be described either as a label or as a trade-mark and not as both.

1. In my opinion the Secretary of the Commonwealth has neither the duty nor the power to prescribe, nor, with a single exception mentioned below, to interfere with the form of the label or trade-mark itself. He is to take it as presented by the applicant, who must take the risk of filing the labels, etc., in such form as may be proper and sufficient in the judgment of the courts, which must eventually determine the matter if any question is raised, to secure the protection of the law. The applicant may have a right to treat a combination of several words or devises on separate pieces of paper, to be affixed to one bottle, box or package, as one label or trade-mark, although the word or device on either piece of paper by itself might be incapable of forming a valid label or trade-mark under the law. It must be left to the courts to determine such rights. The Secretary can neither enlarge nor abridge them by any rule or regulation of his office. The rules, regulations and forms which the Secretary is authorized by § 6 to prescribe are only "for the filing" of the labels, trade-marks, etc., and cannot extend so far as to interfere with or control the form of the labels, etc., themselves as the parties choose to present them. The duty of the Secretary appears to be only to see that such

rules, regulations and forms as he may prescribe "for the filing" are complied with, and that the label, trade-mark or advertisement offered for filing conforms to all the requirements of § 4.

The exception above referred to is this: By the last clause of § 4 it is clearly the duty of the Secretary to pass upon the question whether the label, trade-mark or advertisment offered for record might reasonably be mistaken for one previously recorded. This question he must determine in the first instance, leaving the applicant, if aggrieved by his decision, to such remedy as the courts may afford.

The statute appears to be similar in some respects to the patent laws of the United States, under which an applicant files such description, specifications, etc., as he chooses, and the courts eventually determine, as they must here, whether and how far he has secured the protection of the law.

2. As to the second question, in my opinion the Secretary cannot assume that the same paper may not properly be described as both a label and trade-mark, nor require it to be described either as the one or the other, if the applicant chooses to describe it as both, as he may have a right to do under the law.

Metropolitan Park Commission, — Expenses.

The expenses of the Metropolitan Park Commission, specified in St. 1893, c. 407, §§ 1, 2, may be appropriated under that act, and are to be charged upon the fund of $1,000,000 thereby provided.

To the Auditor. 1893 December 21.

In reply to your request for my opinion whether an appropriation is authorized by St. 1893, c. 407 for the salaries, office expenses and travelling expenses of the Metropolitan Park Commission for the ensuing year, estimated at $10,000, and if so, whether it is to be paid from the loan of $1,000,000 authorized by that act, or from other funds in the treasury, I have to say that if the estimate includes only such expenses as are expressly allowed by §§ 1 and 2, it is authorized by the act, and is to be charged upon the fund of $1,000,000 thereby provided. It is, of course, within the power of the Legislat-

ure to make a special appropriation for the purpose, but the fund of $1,000,000 is expressly provided "to meet the expenses incurred under the provisions of this act," of which the expenses of the commission are a part; and other provisions of the act have some tendency to indicate the intention of the Legislature that they should be charged upon this fund. A like provision in other recent legislation of similar character has received the same construction. The fact that these expenses were met by special appropriation last year has, under the circumstances, no tendency to indicate a purpose of the Legislature that they are not to be charged upon the general fund. The special appropriation of last year covered all purposes for which money was required under the act, and was undoubtedly made only for the reason that the general fund had not then become available.

CIVIL SERVICE ACT, — RULES, — PIECE WORK, — EMPLOYMENT.

Under the civil service act rules may be made to include persons doing ordinary clerical work by the piece or quantity. The present rules may be construed to include such a case if there is an attempt to evade the law.

To the Civil Service Commissioners. 1893 December 22.

I have your request for my opinion whether a clerk in the water income department of Boston, whose duty is to make out and mail bills for water rates for a compensation of one cent each, agreed on with the head of the department, by which he earns about three dollars per day, is within the classified service, or whether the agreement for his services and the manner of compensation take the case out of the civil service act (St. 1884, c. 320) and the rules.

As to your suggestion of the claim that "the personal service rendered by the clerk under an agreement to pay by the piece is not an employment within the meaning of the civil service act and rules, but a contract engagement outside of the rules," I do not think such a distinction between an "employment" and a "contract engagement" can be maintained, at least in the present case. I have already said or intimated to the com-

missioners that in my opinion a case which the law intends to include is not to be taken out of it, nor taken from the class in which it belongs and put into another, merely by the form under which the person may be selected or engaged for the service, especially if such form is adopted for the purpose of evading the law.* The position of this clerk is a position of employment, in the sense of the statute, and the precise form of the contract of employment is immaterial. The case turns on the question whether a person working by the piece, whose compensation depends on the amount of work done, as distinguished from one who receives a fixed salary or compensation measured by time, is within the operation of the system.

I see no reason to doubt that the statute is broad enough to cover such cases, or that under it the rules may be extended, with the exceptions expressed in § 15, to all positions required to be filled by appointment, and all positions of employment, for labor or other service. The express exception of certain cases indicates the purpose of the Legislature to include all which are not so excepted.

But the statute also provides that the rules may be made from time to time, and may be given a general or limited application; and the question here is whether the present rules extend far enough to include this case; and this depends on the question whether the clerk is included within the description of Schedule A, class 1 or class 2, as a "person whose annual compensation is at a rate less than $800" or "a person whose annual compensation is at the rate of $800 and over."

This description might be construed to include a person regularly working by the piece, at least if his annual compensation could be so nearly determined beforehand as to make it certain whether he belongs in class 1 or class 2; and in a case of palpable evasion or attempt to evade the rules, perhaps it ought to be so construed. But I am informed that the rules have not heretofore been generally understood as extending to persons working by the piece or quantity; and as it is within the power of the commissioners to so extend them, if necessary or expedient, by an amendment, making it clear not only that

* See page 72, *ante*.

such cases are included but so defining them that there will be no difficulty in applying the rules to any particular case and no room for evasion, I think it is better to bring them within the system in this way if at all, rather than by a construction of the present rules which might be regarded as doubtful.

I conclude, therefore, that unless the commissioners are satisfied that the form of employment in this case is in fact an attempt to evade the law, it should not be treated as within the present rules.

INSURANCE, — MASSACHUSETTS STANDARD POLICY.

It is lawful to modify the Massachusetts Standard Policy by the addition, in the manner prescribed in the seventh excepting clause of St. 1887, c. 214, § 60 of provisions differing from the standard form; but a policy so modified ceases to be and is not to be called the Massachusetts Standard Policy.

To the Insurance Commissioner. 1893 December 23.

Mr. Atkinson's inquiry whether it is permissible to modify the Massachusetts Standard fire insurance policy by the addition of a signed slip insuring against fire occasioned by riot or civil commotion, upon which you request my opinion, appears to be substantially covered by the opinion which I gave you under date of December 18, 1891;* and much that was there said need not be repeated.

It is clear that under the seventh excepting clause of St. 1887, c. 214, § 60, additions to or modifications of the Standard Policy may be made by a signed slip or rider or otherwise, as therein prescribed; and I see no reason to doubt that this permits the addition of a provision insuring against fire originating in riot or civil commotion. The obvious and only purpose of this clause is to authorize the insertion in fire policies of provisions more or less inconsistent with those of the standard form. But the policy so modified ceases to be the Massachusetts Standard Policy, and is not to be so designated.

The purpose and effect of the legislation concerning the Standard Policy, as now embodied in § 60, is to establish a standard form as therein set out, to be known as the Massa-

---

* See page 34, *ante*.

chusetts Standard Policy, which shall contain nothing more nor less than the statutory form includes, except as permitted by the first five excepting clauses of that section. The addition of anything permitted by these five clauses still leaves it the Massachusetts Standard Policy, and by the express provision of the sixth clause it may be so called. The seventh excepting clause is designed to permit such other modifications of the standard form as may be permissible on general principles of law; but the modifications must be made in the manner therein prescribed, and a policy so modified is not and is not to be described as the Massachusetts Standard Policy.

CORPORATION, — ACCEPTANCE OF STATUTE.

The provision of a statute, passed March 26, 1891, that it shall take effect April 14, 1891, if accepted by the corporation, is an implied limitation of the time for acceptance, and an acceptance voted by the corporation October 14, 1892, is ineffectual.

To the Secretary. 1894 January 4.

I have your request to be advised whether St. 1891, c. 118, approved March 26, 1891, amending the charter of the Worcester Natural History Society, took effect upon its acceptance by the society, at a meeting held October 14, 1892, and has become a law by virtue of such acceptance; § 3 of the act providing that "this act shall take effect on the fourteenth day of April in the year 1891, provided that a majority of the members of said association present and voting thereon at a meeting duly called for the purpose shall vote to accept its provisions." As the question may be of importance to the society I sent them notice of your request, to which they have made no response.

The question is whether this section raises an implied limitation of the time within which the act could be effectually accepted and take effect. In view of the familiar rule that a statutory grant is to be construed strictly as against the grantee, and of the doubts and difficulties which might arise if, under such a provision, it should be considered that the act could be accepted at any time after its passage, at the convenience of the corporation, I think it must be held that § 3 had the effect to

limit the time within which the act could be accepted to April 14, 1891; and that the acceptance voted by the corporation October 14, 1892, was ineffectual, and therefore that the act has never taken effect and is not in force as a law.

The form of this provision is objectionable, as opening the way to uncertainty which can easily be avoided by prescribing definitely in the statute the time within which it shall be accepted, if at all, which is usually done in recent legislation of this character. It ought not to be left in doubt for a long period whether an act of the Legislature has taken effect as a law. St. 1883, c. 100, is intended to prevent this result, and it indicates the policy of the Legislature to prevent it; and I think it tends to confirm my conclusion in the present case.

OPINIONS

OF

HOSEA M. KNOWLTON, ATTORNEY-GENERAL.

MEDFIELD INSANE ASYLUM, — BUILDING COMMITTEE, — PLANS, — ALTERATION, — CONTRACT.

The building committee of the trustees of the Medfield Insane Asylum may at its discretion alter the construction of the buildings, provided that no substantial departure is made from the plans furnished by the commissioners appointed under St. 1890, c. 445. It may use any money available that is not needed for contracts already made; and the method of expenditure is a question for its judgment. It cannot avoid contracts for materials made by the previous building committee.

To the Governor and Council. 1894 January 31.

I have considered the matters contained in the letter of the building committee of the trustees of the Medfield Insane Asylum to the Governor, dated January 17, 1894. Deeming the statements contained in the letter to be insufficient to enable me to answer the questions satisfactorily, I have conferred personally with the committee, and have examined its contracts and plans so far as was necessary to understand the questions submitted.

By St. 1890, c. 445, it was provided that commissioners should be appointed to obtain a tract of land for an asylum, and to procure plans, specifications and estimates for the erection of buildings thereon; and the act further provided that "the cost of said land, buildings and all the appurtenances thereto shall not exceed the sum of $500 per inmate." I am informed that under this act commissioners were appointed who purchased the tract of land in Medfield upon which the buildings are now being erected, and who caused to be prepared certain plans and specifications therefor.

The act authorizing the construction of the asylum is St. 1892, c. 425. By the provisions of this chapter the building

committee "shall have the entire charge of the construction of said hospital buildings." It further provides, in § 2, among other things, that the building committee "shall cause to be erected . . . suitable buildings for an asylum for the chronic insane . . . *substantially* in accordance with the plans, specifications and estimates submitted by the commissioners appointed under" the act above referred to. "Said building committee of the trustees shall have power to make all contracts and to employ all agents necessary for carrying into effect the provisions of this act." The only limitations upon its authority, in addition to the requirement above quoted, that it is to follow the commissioners' plans "substantially," are a proviso that "all contracts for the erection of buildings and the completion thereof and the equipment of the same . . . shall be approved by the Governor and Council;" and a further proviso that "the aggregate expenses and liabilities incurred by virtue thereof shall not exceed the sum of $500,000, exclusive of the compensation provided for the building committee."

The act appropriates a sum not exceeding $500,000, for the expenses incurred by the building committee in the erection of the hospital, with a proviso that the appropriation shall be divided so that no more than $150,000 shall be appropriated during the year 1892, $200,000 during the year 1893, and $100,000 during the year 1894. By St. 1893, c. 395, the committee is authorized to expend for the purposes of said act (St. 1892, c. 425), and under the conditions prescribed by said act, the further sum of $200,000, provided that no portion of this sum shall be "expended" during the years 1893 and 1894.

In view of the provisions above quoted, which include all those relating to the authority of the committee, and the limitations imposed upon it as to the construction of the buildings and the expenditure of the appropriation, it is plain that it has full authority to make any changes in the construction of the buildings from time to time which in its judgment will be for the interests of the Commonwealth and the safety and convenience of the patients for whom the institution is erected; provided such changes are not substantially a departure from the plans

and specifications furnished by the commissioners appointed under St. 1890, c. 445; and provided, further, that it does not incur contracts which call for the expenditure of more money than has been appropriated by the various acts authorizing the construction of the asylum.

But the building committee informs me that the plans and specifications prepared by the commissioners were quite general in their nature, and did not purport to furnish sufficient details for the work. The committee further informs me that the "radical changes in the construction," which it states in its letter of inquiry to the Governor and Council as desirable to be made, are not changes from the plans and specifications furnished by the commissioners, for the reason that the matters as to which it desires to make changes are not detailed at all in those plans, but are changes from the specifications in the existing contracts. That being so, it follows that the committee has the right to make the changes it desires, and to contract therefor, or cause modifications, for that purpose, to be made in existing contracts, with the approval of the Governor and Council, provided it does not contract in excess of its appropriation.

Replying to the second and third inquiries of the committee, I have to say that there is no specified designation of the purpose for which any of the money appropriated is to be expended, but only provisions as to when it shall be expended. The committee, therefore, has power to use any money available that is not needed in payment for contracts already made. There is nothing in the law which prevents it from making changes that it deems essential, even though such changes will make it probable that the six buildings not yet contracted for cannot be erected for the balance of the whole appropriation not covered by contracts already made and by such changes. The question with which it is confronted is not one of law, but one which addresses itself to the judgment of the committee as commissioners. They are bound to see that suitable buildings are erected substantially in accordance with the plans prepared by the commissioners above referred to. But they cannot exceed their appropriation. If that appropriation is not enough

for the purpose, it is for them to decide at what part of the work they will stop. It becomes, therefore, a question for the exercise of their judgment as commissioners whether they shall proceed to contract for the erection of the remaining buildings, if they find that they can do so with the balance of the appropriation remaining uncontracted for, and then go to the Legislature for an additional appropriation to make the changes which they deem necessary; or whether they shall make said changes now, and then go to the Legislature for an additional appropriation for the erection of the remaining buildings. They are limited in their expenditure to the sum named in the acts above referred to, and are bound to use their best judgment to secure, if possible, the erection of the buildings for that sum. If the work cannot be done for that money, they are not responsible. As to when it is their duty to call the attention of the Legislature to the fact that the existing appropriation will be insufficient, is not for me to express an opinion. Perhaps they may, with the approval of the honorable council, deem it best to proceed to make the changes desired as a matter of economy at the present time, and ask later for an additional appropriation to complete the buildings. But, inasmuch as the present committee is not responsible for the existing situation of affairs, but is still charged with the duty of seeing that the appropriations are not exceeded, it would seem to be the more desirable course for it at once, through the Governor and Council, to call the attention of the Legislature to the facts, and discharge itself of the responsibility of determining in which way the balance of the appropriation available shall be expended. This, however, is not a matter as to which it is incumbent upon me to give advice.

As to the fourth inquiry propounded by the committee, I have to say that I have examined the contracts in reference to the material to which it refers in its letter, and I am of the opinion that, as to material to which it refers in said inquiry, the former building committee, having had the right of acceptance or rejection of such material, and having clearly elected, with full knowledge of the facts, to accept the material offered, and the contractors having acted upon such action by the com-

mittee in the purchase of said material, the present committee cannot reverse said action of its predecessors, so far as the same relates to material already purchased or contracted for by the contractors, without giving the contractors the right to recover damages therefor, as for a breach of contract on the part of the Commonwealth.

INSURANCE, — BOSTON MARINE INSURANCE COMPANY, — CORPORATION, — SPECIAL STATUTE.

The Boston Marine Insurance Company may avail itself of the provisions of St. 1886, c. 102, authorizing it to transact fire insurance business. St. 1887, c. 214, § 28, neither limits nor controls the power conferred upon it by this chapter.

To the Insurance Commissioner. 1894 February 1.

Replying to your letter of February 1, 1894, relating to the Boston Marine Insurance Company, I have to say: —

The Boston Marine Insurance Company, having long prior to 1886 been incorporated and carrying on business as an insurance company, may at any time avail itself of the provisions of St. 1886, c. 102, authorizing it to do fire insurance business.

St. 1887, c. 214, § 28, providing that if any domestic company shall not commence to issue policies within one year after the date of its incorporation, or if, after it has commenced to issue policies, it shall cease for a period of one year to make new insurances, its corporate power shall expire, does not limit or control the powers conferred upon this company by the statute of 1886 above referred to. This section is obviously intended to apply, in the first place, to failure of new companies to commence business within one year; and, in the second place, to a complete cessation of insurance business on the part of existing companies.

TRUSTEES OF STATE PRIMARY AND REFORM SCHOOLS, — AGENT, — APPROPRIATION.

There is no existing legislation authorizing an appropriation to pay for the services of an agent appointed by the trustees of the State Primary and Reform Schools to visit the children transferred to families from the Lyman School for Boys.

To the House Committee on Finance. 1894 February 8.

I am in receipt of your letter asking me if "the statutes authorize and require the trustees of the State Primary and Reform Schools to visit the children placed in families from the Lyman School for Boys, and to inquire into the condition of such children, and make such investigation in relation thereto as they may think best."

It would be a sufficient answer to this inquiry to quote the opinion of my learned predecessor, given to the Governor on October 25, 1893,* in which he says, in the concluding paragraph: —

"On the whole, I am of opinion that it is the duty of the trustees of the State Primary and Reform Schools to exercise a general oversight and supervision of all children committed to these schools during their minority, or until their discharge in some manner provided by law."

This opinion I see no occasion at present to re-examine or modify.

I understand, however, that the precise question before the committee is, whether there is any existing legislation which will authorize an appropriation to pay for the services of an agent to be appointed by the trustees to make such visitations. I have been unable to find any such legislation. Whatever duty of supervision is entrusted to the trustees of boys placed on probation is general in its nature, and must be exercised by them as a Board, and not by a paid agent. In this connection it will be observed that the statute establishing the State Board of Health, Lunacy and Charity (St. 1879, c. 291) expressly provides that it "may assign any of its powers and duties to agents appointed for the purpose, and may execute any of its functions by such agents." No such authority for agency, at

* See page 96, *ante*.

least in respect to visitation, is delegated to the trustees of the various primary and reform schools. I am of opinion, therefore, that there is no authority in existing legislation for such an appropriation.

In the consideration of this question, it has been stated to me that the usual way of placing out boys from the Lyman School is not under the provisions of Pub. Sts., c. 89, § 38, but by sending them back to their homes or elsewhere on probation, without any formal contracts of service or apprenticeship. Whether there is any authority for such a course, I do not deem it necessary at this time to consider or determine.

INSANE CRIMINAL, — TRANSFER, — WORCESTER LUNATIC HOSPITAL, — STATE FARM, — STATE PRISON.

The trustees of the State Farm have no authority to recommit to the State Prison a prisoner who, having become insane, has been removed from the State Prison to the Worcester Lunatic Hospital, and thence transferred to the State Farm. The right to adjudge when he shall be recommitted remains with the officers of the Worcester Lunatic Hospital.

To the Governor. 1894 February 10.

I have the honor to acknowledge the receipt of your letter, enclosing the communication of the superintendent of the State Farm, dated February 7, and to reply to the inquiry contained therein as follows: —

William Allison, who had been sentenced to the State Prison in 1890 for a term of seventeen years, was adjudged insane under the provisions of Pub. Sts., c. 222, § 10, and by warrant of the Governor removed to the Worcester Lunatic Hospital. The language of the warrant was as follows: "You are hereby authorized to cause the said convict to be removed to the Worcester Lunatic Hospital, there to be kept until, in the judgment of the superintendent and trustees thereof, he should be returned to prison." This warrant issued February 26, 1892, and he was thereupon removed to the Worcester Lunatic Hospital.

Subsequently, to wit, August 22, 1892, by order of the State Board of Lunacy and Charity, he was transferred from the said

Worcester Lunatic Hospital to the State Farm, and placed in charge of the superintendent thereof. This was done under the provisions of St. 1887, c. 367, which authorizes the State Board to transfer to any other State charitable institution convicts who have previously been committed to a State lunatic hospital.

It now appearing that Allison has become sane, the trustees and superintendent of the State Farm are of opinion that he should be returned to prison, and desire to know if, under the provisions of Pub. Sts., c. 222, § 10, they have authority to order his recommitment. I am of opinion, though not without some doubt in the matter, that they have no such authority. I am led to this conclusion in view of two considerations: —

First. — Said § 10 provides that when duly adjudged insane he is "to be removed to one of the State lunatic hospitals, there to be kept until, in the judgment of the superintendent and trustees of the hospital to which he may be committed, he should be returned to prison." By St. 1887, c. 367, he may be transferred from the Worcester Hospital to the State Farm; but the power of adjudging that he should be returned to prison does not seem so to be transferred, but must still be exercised by the superintendent and trustees of the hospital "to which he was committed." It is so expressed in terms in the warrant of commitment, and such is the clear language of the statute. It would undoubtedly be wise to transfer the power of ordering a return to the prison, when the convict himself is transferred from one institution to another; but the Legislature failed so to provide in terms, and I do not think that the statute in question, § 10, can be construed to read in by implication such a delegation and transfer of authority. It is a statute dealing not with an object of the Commonwealth's charity, but with a convict; and it is therefore to be construed strictly, and not to be enlarged or extended as against the convict.

Second. — Even if the power of returning could be transferred from the officers of one State lunatic hospital to another, so that, for example, the convict, having been transferred to the Taunton Lunatic Hospital could have been by the officers

of that institution returned to prison, yet it is very doubtful whether the State Farm can be called a State lunatic hospital, under the terms of Pub. Sts., c. 222, § 10. The words "State lunatic hospital" seem to be used technically in the section, and as distinguished from a mere asylum or receptacle for the insane. The State Farm has been made by the Legislature a receptacle for pauper insane, St. 1886, c. 219; Res. 1888, c. 89. But, without determining whether this legislation makes it a State lunatic hospital for any purpose, as that term is used in the legislation of the Commonwealth, I certainly do not think the trustees and superintendent of the State Farm can be said to be trustees and superintendent respectively of a State lunatic "hospital," within the meaning of that word as used in Pub. Sts., c. 222, § 10.

It follows, therefore, that the only way in which the convict can be transferred is to retransfer him to the Worcester Lunatic Hospital, and have the judgment of the officers of that institution endorsed upon the order of commitment.

INSURANCE, — ADMISSION OF FOREIGN COMPANY.

A foreign insurance company, in every way qualified to do an insurance business in this Commonwealth, is not to be debarred therefrom because by its charter it has a right to transact and is transacting in a foreign State the additional business of a trust company.

To the Insurance Commissioner. 1894 March 1.

In reply to your communication of February 17, 1894, inquiring whether a corporation organized under the laws of another State, whose principal business is that of a trust company, but which also transacts an insurance business, can be admitted under our statute to transact the business of insurance in this Commonwealth, I reply as follows: —

I understand that in answering your inquiry it is to be assumed that the company in question is in a situation to comply with the requirements of law in reference to a foreign insurance company upon its entrance into business in this Commonwealth, and that no question is made about the form of the agreement, or any reference to any other matter except

the simple question whether or not a foreign insurance company, in every respect qualified to do an insurance business in this Commonwealth, is to be debarred therefrom because by its charter it has a right to transact, and is transacting, also the additional business of a trust company.

In my opinion, there is nothing in the legislation or decisions of this Commonwealth to prevent such a company from lawfully transacting its insurance business. Of course it is entirely within the power of the Insurance Commissioner to see to it that only the insurance business that a corporation may lawfully do in this Commonwealth is carried on separate and apart from any other business. It seems that under the insurance act (St. 1887, c. 214) the power of the commissioner is ample to give to every person insured, and all parties interested in the insurance business of such a corporation, all the protection which could be had if the company was authorized to do, and did, only an insurance business.*

EXTRADITION PAPERS, — STATUTES TO BE COMPLIED WITH.

Extradition papers from a foreign State, which comply with the laws of the United States and also with the statutes of the demanding State, are sufficient to authorize the governor to surrender the fugitive demanded, although said papers do not comply with a Massachusetts statute requiring affidavits by persons having actual knowledge of the offence charged.

To the Governor. 1894 March 15.

In the matter of the demand made by the governor of the State of Nebraska for the extradition of William Clark, and upon the question of the sufficiency of the papers and documents accompanying the same, I have to say: —

By the Revised Statutes of the United States, § 5278, it is provided that "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed

* See also page 1, *ante*.

treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled," it shall be the duty of said executive to cause the person demanded to be arrested, etc.

The demand in question is accompanied by a paper entitled "an information," authorized by the laws of Nebraska, and which is in fact an affidavit made before a magistrate of the State of Nebraska, charging the said William Clark with having committed the crime set forth therein.

The papers, therefore, comply with these provisions of the Revised Statutes of the United States. They are also in compliance with the provisions of the State of Nebraska.

It is suggested, however, that they do not comply with the provisions of Pub. Sts., c. 218, § 1, requiring further that the demand be accompanied by a duly attested copy of an indictment; or of a complaint, accompanied by affidavits of the facts constituting the offence charged, by persons having actual knowledge thereof. Where application is made to the Governor of the Commonwealth of Massachusetts to demand from the executive of another State the extradition of a person in that State, these provisions of our statutes, which are supplementary and in addition to the provisions of the Revised Statutes, may well govern the acts of the Executive of this Commonwealth. But where they are in conflict with the provisions of the Revised Statutes of the United States, they are inoperative, for the reason that the United States has full jurisdiction of the whole matter. The Legislature of Massachusetts has no power to enact a law interfering with the execution of an interstate right given by the authority of the law of the United States. And if it appears that a demand for extradition made upon the governor of a State is in compliance with the laws of the United States and of the State from which the demand issued, the executive upon whom the demand is made cannot lawfully refuse to grant the extradition because the papers do not comply with the provisions of the statutes of the State upon which the demand is made.

I am of opinion, therefore, that the extradition must be granted.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, — OLD COLONY RAILROAD COMPANY, — LEASE, — CORPORATION, — CONSOLIDATION, — CONTRACT.

Under authority of legislation in Connecticut, and likewise in Massachusetts, the Hartford & New Haven Railroad Company, a Connecticut corporation, and the Hartford & Springfield Railroad Company, a Massachusetts corporation, became united under the name of the Hartford & New Haven Railroad Company. Subsequently, under authority from both States, the latter company consolidated with the New York & New Haven Railroad Company, a Connecticut corporation, the consolidated body assuming the name of the New York, New Haven and Hartford Railroad Company. This company, under authority from Connecticut, acquired the New York, Providence & Boston Railroad Company, a corporation whose tracks connected at Providence with the Boston & Providence Railroad Company, the latter being leased to the Old Colony Railroad Company.

The New York, New Haven & Hartford Railroad Company then procured a lease of the Old Colony Railroad Company, the lease being made under the provisions of a Massachusetts statute, authorizing two railroad corporations created by this Commonwealth, whose roads enter upon or connect with each other, to execute a lease of the one to the other, the two roads being deemed to connect if one connected with a road leased to the other.

The connecting roads at Providence are the roads of two railroad corporations created by the Commonwealth within the meaning of the statute. It is immaterial that the connection is made without the limits of the Commonwealth.

To the Senate and House of Representatives.
1894
March 16.

I have the honor to acknowledge the receipt of the order of the Legislature, adopted February 1, requesting my opinion as to the legality of the lease of the Old Colony railroad to the New York, New Haven & Hartford Railroad Company, and to reply thereto as follows: —

I beg leave to suggest to the honorable Senate and House of Representatives that, under the terms of the order, it is doubtful, to say the least, whether I am required to do more than to examine the lease referred to, and to determine whether its provisions appear to be conformable to law. No statement of facts accompanies the order, nor is my attention called to any special question touching its legality, excepting, perhaps, such as may arise upon inspection of the instrument itself.

But I assume that the order was intended to have a much broader scope, and that I am desired to inquire into all the facts

material to the transaction, whether appearing of record or not, and to consider not only whether in its provisions the lease appears to conform to the law, but also its legality in view of all the attendant and antecedent circumstances, and of the history and status of the contracting corporations. In deference, therefore, to what I assume to be the wishes of the honorable Senate and House of Representatives, and in view of the importance of the question and the wide-spread interest felt in it by the public, I have endeavored to ascertain, so far as possible, all the facts touching the transaction, including the legislative history of the contracting parties, not only in this Commonwealth, but in Rhode Island and Connecticut as well. In so doing, however, I do not yield my contention that the investigation of facts is a matter peculiarly within the province of the Legislature through its committees, and that it cannot be devolved as of right upon the Attorney-General.

No special authority for the lease was granted by the Legislature of this Commonwealth. Its legality, therefore, depends upon whether it is authorized by Pub. Sts., c. 112, §§ 220, 221. These sections, so far as they affect this transaction, provide substantially that two railroad corporations created by this Commonwealth, whose roads enter upon or connect with each other, may execute a lease from one to the other; and that they shall be deemed to connect if one of the roads enters upon or connects with a road leased to the other.

The lease purports to be between the Old Colony Railroad Company as lessor and the New York, New Haven & Hartford Railroad Company as lessee. It describes both corporations as "existing under the laws of the Commonwealth," and recites that their "roads connect with each other." If the recitals in the lease are true, it is within the provisions of the statute. It is necessary, however, to go further, and to ascertain whether in fact the parties to the lease are both corporations created by the Commonwealth of Massachusetts; and whether their roads connect, and where; and whether such connection is a connection contemplated by the statute.

There is no claim, as I am informed, that there is any connection between the roads of the contracting parties excepting

at two points. One connection is in Providence, in the State of Rhode Island, between the tracks of the Boston & Providence Railroad Company, a railroad company leased to the Old Colony Railroad Company, and the tracks which were constructed by the corporation known as the New York, Providence & Boston Railroad Company, which it is claimed have been acquired and made a part of the road of the New York, New Haven & Hartford Railroad Company. The other connection is at a point in Massachusetts near the Blackstone River, between the tracks of the said Boston & Providence Railroad Company and the tracks of the Providence & Worcester Railroad Corporation, a railroad operated by the New York, New Haven & Hartford Railroad Company under a lease.

I do not deem it important to consider at length the latter connection. It is sufficient to say that it is not within the terms of the statute, which authorizes a lease only when the connection is between the roads of the two parties to the lease, or between the road of one party and a road leased to the other. A connection formed by two leased lines is not, in my opinion, a sufficient connection to authorize a lease under the statute of Massachusetts.

The legality of the lease, therefore, must stand upon the connection at Providence. This raises two questions: —

First. — Is a connection between the roads of the contracting parties without the limits of the Commonwealth a sufficient connection within the words of the statute authorizing the leasing of railroads?

Second. — Are the connecting roads at Providence the roads of two railroad corporations "created by this Commonwealth," within the meaning of said statute?

Upon the first question it is to be observed that there is nothing in the words of the statute which can be construed to limit the connection required of roads proposing a lease to a connection in this State. It must be presumed to have been within the knowledge of the Legislature, when the law was enacted, that the roads of many of the railroad corporations "created by this Commonwealth" extended into other States. If in view of this fact it had been intended to limit the connec-

tion to tracks within the State, the act would doubtless have read "whose roads enter upon or connect with each *within this Commonwealth*." The omission of the words italicized, or any words of similar import, cannot be regarded as unimportant.

Nor do I find anything in the purpose of the statute which requires such a limitation of the provisions regarding connecting roads. Two restrictions upon the leasing of railroads appear to have been intended by the Legislature in enacting this law. One was, that both railroads should be Massachusetts corporations. This preserved the control by the State of the leased road notwithstanding the lease. Another was, that there should be a physical connection between the roads which were to be jointly operated under a lease. It is to be remembered that all statutes granting privileges to railroad companies are presumed to be enacted with a view to the advantage of the community for whose use and benefit railroads are chartered. The obvious intent of the statute under consideration is to declare it to be for the advantage of the public to permit two railroads to be united under one management whenever they are so connected that they can be operated as one line. It is the fact of physical connection that is of importance, not the place where it happens to exist. A lease between two railroads whose tracks do not connect does not benefit the public. But if they connect, even though the connection be outside the limits of the State, the lease enables them to be operated together as one line, and inasmuch as both derive their existence and franchise from the Legislature of the Commonwealth, they are still under its control, notwithstanding the lease.

Supposing, for example, there were no general laws authorizing a lease between railroad companies, and it was proposed that the Legislature should authorize a lease to be made between the Providence & Worcester Railroad Company and the New York & New England Railroad Company, whose tracks connect at Blackstone. The point of junction is said to be almost exactly upon the line between Massachusetts and Rhode Island. The question to be considered being whether such a lease would be beneficial to the community served by the two companies, could it be said that, inasmuch as both roads derived their cor-

porate existence from, and were subject to the jurisdiction of Massachusetts, it would make the slightest difference, in determining the question as a matter of public policy, whether the physical connection between them happened to be on one side of the line or on the other?

I am not aware that this question has been considered by the courts of this Commonwealth. Such decisions as I have examined in other States turn upon the language of the statutes of those States, none of which are similar in form or substance to the statute now under consideration. But I am clearly of opinion that a sound and consistent interpretation of the statute does not require or justify the interpolation of the words "within this Commonwealth" after the words relating to the physical connection of the roads between which a lease is authorized; that the Legislature, not having in terms so limited the connection prescribed, did not intend so to limit it; and that it is not necessary to the legality of a lease under that statute that the connection between the roads shall be in this Commonwealth.

The second question, to wit, whether the connecting roads at Providence are the "roads" of "two corporations created by this Commonwealth," within the meaning of the statute, requires an examination of the legislative history of the two corporations by whose roads it is claimed the connection is made. These are the Boston & Providence Railroad Company (the lessee of the Old Colony Railroad Company), coming from the north, and the New York, New Haven & Hartford Railroad Company, coming from the south.

The Boston & Providence Railroad Company was incorporated in Massachusetts by St. 1831, c. 56. By the terms of its charter it was authorized to construct a line from Boston to the line of the Commonwealth in Pawtucket or Seekonk. Statutes Massachusetts, 1846, c. 158, authorized the corporation to construct a branch from Dodgeville westward to the line of the State of Rhode Island. Section 3 of the same chapter further provided that said corporation was "authorized to expend of their capital stock, such sum as the directors may deem expedient for constructing a railroad, which shall be a continuation of the

branch railroad hereinbefore authorized to be constructed, with the railroad of the Providence & Worcester Corporation, for the laying of a track or tracks from the point of junction of said road to the city of Providence, for the purchase of depots and accommodations in Providence, and for the making of other arrangements, etc." What is now known as the main line of the Boston & Providence Railroad Company southerly from the State line was constructed under this statute, and under a contract between the Boston & Providence Railroad Company and the Providence & Worcester Railroad Company, providing for its joint use by both companies.

It is well settled that a railroad corporation chartered under the laws of a State may, under authority from that State, extend its line into another State, if permitted to do so by the other State. It still remains throughout its entire length the corporation of the State from which it derives its charter. It is clear, therefore, that the road of the Boston and Providence Railroad Company in Providence is the road of a railroad corporation "created by this Commonwealth," within the meaning of Pub. Sts., c. 112, § 220.

The history of the New York, New Haven & Hartford Railroad Company is as follows: In 1833 the Hartford & New Haven Railroad Company was incorporated by the Legislature of Connecticut, with authority to construct a railroad from Hartford to New Haven. In 1842 the said company was authorized by the Legislature of Connecticut to extend its railroad to the north line of the State, and, with the consent of Massachusetts, thence to Springfield; and it was further authorized to form a union with the Hartford & Springfield Railroad Company, a Massachusetts corporation.

In 1839, by c. 101, the Hartford & Springfield Railroad Corporation was incorporated by the Legislature of Massachusetts, with authority to construct a railroad from a point in Springfield to the north line of the State of Connecticut "with a view to unite said railroad with a railroad authorized by the Legislature of Connecticut, from Hartford to the line of the State of Massachusetts." In 1844, by c. 28, § 2, the Legislature of Massachusetts provided as follows: "The persons who now are, or

may hereafter be stockholders of the Hartford & New Haven Railroad Company, a Connecticut corporation, shall be stockholders of this corporation (the Hartford & Springfield Railroad Company), together with such persons as are now or may hereafter become stockholders of this corporation; and when the stockholders shall by vote have assented thereto, the said corporations shall become united in one corporation by the name of the New Haven & Springfield Railroad Company." The statute of Connecticut of the year 1844, above referred to, enacted substantially similar provisions in respect to the Hartford & New Haven Railroad Company. In each State the charter was conditioned upon the granting of a similar charter by the other State. By Statutes Massachusetts, 1847, c. 244, it is provided that when the union thus authorized shall be accomplished "the united corporation shall be called the Hartford & New Haven Railroad Company." Section 2 of the same chapter further provided "that the said corporation, so far as their railroad is situated in Massachusetts, shall be subject to the general laws of this Commonwealth to the same extent as though their road were wholly therein."

The effect of these statutes was to unite, so far as could be done by concurrent acts of the Legislatures of the two States, the entire railroad from New Haven to Springfield under one corporation, called the Hartford & New Haven Railroad Company.

In 1844 the Legislature of Connecticut incorporated the New York & New Haven Railroad Company, with authority to construct a railroad from the city of New Haven westerly to the west line of the State towards the city of New York. I am informed that in 1870, by indentures duly authorized under the statutes of the State of Connecticut, the New York & New Haven Railroad Company was made lessee by a perpetual lease of the railroad company called the Shore Line Railway, whose line extended from New Haven eastward to the city of New London. The New York & New Haven Railroad Company thereby acquired prior to 1871 a line of railroad from the west line of Connecticut through the city of New Haven eastward to the city of New London.

In the year 1871 an act was passed by the Legislature of Connecticut, approved July 26, which, after reciting that the New York & New Haven Railroad Company and the Hartford & New Haven Railroad Company had on the third day of August, 1870, entered certain covenants and agreements under authority of and in accordance with the laws of the State, by which covenants and agreements the entire railways and properties of said corporations had been merged into a joint estate, and after further reciting that it would be for the convenience and best interests of said companies and of the travelling and shipping public having dealings with them that said companies should have a single corporate existence, enacted that the Hartford & New Haven Railroad Company might sell, transfer, merge and consolidate its corporate rights, powers and estates to, into and with the New York & New Haven Railroad Company, upon such considerations, terms and conditions as might be agreed upon between said corporations; that the directors might enter into joint articles of agreement for the sale, transfer, purchase, merger and consolidation thus authorized, prescribing the terms thereof, and providing that the number of shares should not exceed "the present authorized capital of said companies;" which agreement should be submitted to the stockholders of each of said corporations separately; and if approved in the manner directed in said act, and a certified copy of the agreement of the certificate of adoption of the same by the stockholders of the two corporations filed in the office of the secretary of the State of Connecticut, that thereupon the said Hartford & New Haven Railroad Company should be and become merged and consolidated into and with the said New York & New Haven Railroad Company; and that the consolidated corporation should continue a body politic and corporate under the corporate name of the New York, New Haven & Hartford Railroad Company, and should possess, hold and enjoy all the rights, powers, franchises and privileges theretofore vested in either of said corporations; and that thereupon all the property, real and personal, belonging to either of said corporations should be deemed and taken to be transferred to and vested in the corporation into which such merger was

made. It was further provided that the consolidated corporation should be subject to the charter of the corporation into which said merger was made (to wit, the New York & New Haven Railroad Company), with the proviso that when any special duty or liability was imposed, or any special privilege, franchise or immunity was conferred upon the corporation so merged (to wit, the Hartford & New Haven Railroad Company), such duty and liability and such franchise and privilege should attach to the consolidated corporation, " so far as the same were applicable to the right and franchise of said merged corporation. It was further enacted in § 6 that said consolidation should at " all times be subject to the power, control and legislation of the General Assembly of the State."

In the following year (Statutes Massachusetts, 1872, c. 171), the Legislature of Massachusetts passed an act almost identical in its terms with the Statute of Connecticut above recited, authorizing the merger of the Hartford & New Haven Railroad Company into the New York & New Haven Railroad Company; and providing that when such agreement was made, approved and filed in the office of the Secretary of the Commonwealth, the two companies should be merged into one corporation under the name of the New York, New Haven & Hartford Railroad Company. The only material difference in the provisions of the two charters is that, instead of § 6 of the Connecticut charter above recited, the Massachusetts charter provided as follows: " Said consolidated corporation shall at all times be subject to the Legislature of this State as to that portion of its road in this State, as heretofore; and shall be subject to the general laws of this State as to its whole road so far as such laws may be applicable thereto."

In pursuance of these charters, an agreement was entered into by the directors of the two railroad companies, which was duly ratified by the stockholders of both companies and filed in the office of the Secretary of this Commonwealth on the sixth day of August, 1872, and in the office of the secretary of the State of Connecticut on the second day of March of the same year. This agreement conformed to the provisions of said charters, and recited that " the Hartford & New Haven Rail-

road Company doth hereby sell, transfer, merge and consolidate its corporate rights, powers and estate to, into and with the New York & New Haven Railroad Company," under the name of the New York, New Haven & Hartford Railroad Company. It further provided that the capital stock of the consolidated corporation should be $15,500,000, "which is the amount of the present authorized capital of the two companies."

By a statute of Connecticut, approved June 14, 1889, the New York, New Haven & Hartford Railroad Company was authorized to increase its capital stock for the purpose of paying its funded and floating debt, "and to make permanent additions and improvements." It was further authorized to "increase its capital stock up to and during the year 1899 for the shares of the capital stock and for the obligations of any railroad company whose property it may hold by virtue of a lease for a term as long as fifty years; and, in case of roads to be leased hereafter, whose railroad is located in whole or in part within this State." By § 3 it was further provided that "in case the said New York, New Haven & Hartford Railroad shall retire all of the capital stock of any such leased line by purchase or exchange, the officers of said respective companies shall certify the same, by certificate to be filed in the office of the State Secretary; and the said stock of said leased line and all its franchises shall thereupon be and be deemed to be forever transferred to and merged in the stock and franchise of said New York, New Haven & Hartford Railroad Company."

I am informed that on the first day of April, 1892, an indenture, purporting to be a lease for the term of sixty years, was executed between the New York, Providence & Boston Railroad Company, "a corporation existing under the laws of the States of Rhode Island and Connecticut," owning and operating a railroad from New London to the city of Providence, and there connecting with the tracks of the Boston & Providence Railroad Company, as lessor, and the New York, New Haven & Hartford Railroad Company, "a corporation existing under the laws of the States of Connecticut and Massachusetts," as lessee, by which the lessor demised to the lessee its railroad, franchises and property. The lease contained a

further covenant as follows: "And the lessee further covenants that, under the provisions of a certain resolution of the General Assembly of Connecticut amending the charter of the New York, New Haven & Hartford Railroad Company, approved June 14, 1889, and the amendment thereto approved June 22, 1889, it will make prompt application to the committee constituted by § 2 of said resolution for the approval of terms of exchange whereby shares of the capital stock of the lessee may be exchanged for shares of the capital stock of the lessor, share for share; and so soon as said terms of exchange shall have been approved by said committee, the lessee will increase its capital stock by the amount of the capital stock of the lessor, and will give notice thereof to each stockholder of the lessor by mail; and thereafter, upon the assignment to the lessee of any share or shares of the capital stock of the lessor, and the surrender of the certificate or certificates therefor, the lessee will, whenever its stock transfer-books are open, issue to the owner of said share or shares, in exchange therefor, a certificate for a like number of shares of the capital stock of the lessee, as provided in said resolution, and will make an equitable adjustment in cash for the difference in the dates upon which the quarterly dividends of the respective companies have been paid." This lease was authorized under the General Statutes of Connecticut, § 3472, which provided that "any railroad company may make lawful contracts with any other railroad company with whose railway its tracks may unite or intersect with relation to its business or property; and may take a lease of the property or franchise of, or lease its property or franchise to, any such railway company."

The Legislature of Rhode Island, on the sixth day of April, 1892, passed an act providing that the New York, Providence & Boston Railroad Company should be authorized and empowered to lease its railroad, property and franchise to the New York, New Haven & Hartford Railroad Company, for a term not exceeding ninety-nine years; and upon such terms and conditions as had been or should be agreed upon by said companies; and "the New York, New Haven & Hartford Railroad Company is hereby authorized and empowered to

accept such lease, and to hold and use said demised railroad, property and franchise, and to acquire the same, in accordance with the terms and conditions of said lease: and thereupon shall succeed to and have, use, exercise and enjoy all the rights, privileges and powers heretofore granted and belonging to the said New York, Providence & Boston Railroad Company."

I am further informed that under the provisions of said lease the stock of the New York, Providence & Boston Railroad Company was all delivered to and retired by the New York, New Haven & Hartford Railroad Company in exchange for stock of that company, prior to the third day of February, 1893. On the last-named date, the New York, Providence & Boston Railroad Company executed and delivered to the New York, New Haven & Hartford Railroad Company what purported to be a quit-claim deed of its entire property, franchises and privileges. On the twenty-fourth day of February, 1893, the Legislature of Rhode Island passed an act reciting that the New York, New Haven & Hartford Railroad Company had succeeded to the rights, privileges and powers, and become subject to the duties, obligations and liabilities of the New York, Providence & Boston Railroad Company. As a result of these transactions, and by virtue of the legislative acts of the States of Connecticut and Rhode Island, it appears that the New York, New Haven & Hartford Railroad Company acquired and succeeded to all the property, franchises and privileges of the New York, Providence & Boston Railroad Company; and that the tracks in Providence connecting with the tracks of the Boston & Providence Railroad Company became, before the date of the lease now in question, were and are the tracks of the New York, New Haven & Hartford Railroad Company.

None of these proceedings, however, subsequent to the charter of 1872, were authorized or ratified, at least in express terms, by the Legislature of Massachusetts. On the other hand, there were statutes of this State in force when the charter of 1872 was granted which, it may be claimed, the proceedings above recited are in conflict with, if not in violation of. Massachusetts Statute, 1871, c. 392 (now Pub. Sts., c. 112, § 59), provided, in substance, that when a railroad corporation was

authorized to increase its capital stock, it should, if the market value of its shares was above par, sell the new stock at auction in the city of Boston. The act contained a further provision as to the methods of advertising and conducting said sale. Massachusetts Statute, 1868, c. 310, provided that no railroad corporation should create any additional new stock, or issue certificates thereof, unless the par value of the shares so issued be first paid in cash to the treasurer of said corporation; and that all certificates of stock issued in violation of the foregoing provision should be void, and the directors issuing the same should be liable to a penalty of one thousand dollars each, to be recovered by indictment in any county where any of said directors resided. This act was incorporated into the general railroad law of 1874, and was re-enacted by Pub. Sts., c. 112, § 61; with the additional provision that if a railroad corporation, without authority of the General Court, should increase its capital stock beyond the maximum fixed in its act of incorporation, or in conformity with the provisions of the general railroad law of Massachusetts, the certificate so issued should be void. It may be assumed that these provisions of the laws of the Commonwealth were not observed in the proceedings of the New York, New Haven & Hartford Railroad Company, above recited. There is another statute, first enacted in Massachusetts Statutes, 1871, c. 389, and now forming the last sentence of Pub. Sts., c. 112, § 61, which provides that: "If a railroad corporation owning a railroad in this Commonwealth and consolidated with a corporation in another State owning a railroad therein increases its capital stock, or the capital stock of such consolidated corporation, except as authorized by this chapter, without authority of the General Court, or without such authority extends its line of road, or consolidates with any other corporation, or makes a stock dividend, the charter and franchise of such corporation shall be subject to be forfeited and to become null and void."

This apparent conflict between the legislation of Massachusetts and of Connecticut, so far as the same has reference to a railroad company holding a charter from each, raises important questions, the determination of which involves the exact issue

now under consideration, to wit, whether the road constructed by the New York, Providence & Boston Railroad Company and connecting with the road of the Boston & Providence Railroad Company at Providence had become and was on the fifteenth day of February, 1893 (the date of the lease in question), the "road" of the New York, New Haven & Hartford Railroad Company, a corporation "created by the Commonwealth of Massachusetts." These questions may be stated to be: —

First. — What is the effect of reciprocal statutes enacted by two or more States, purporting to form one consolidated corporation into which are merged two or more corporations previously existing in each State respectively?

Second. — To what extent does each State retain control over a consolidated corporation so formed?

To state the first question more explicitly in its relation to the present issue, do the two charters create one corporation, which is endowed with the rights granted by each charter, including the power of enlargement, growth and extension in each State under the authority of the Legislature of that State? Or do they create two separate and distinct corporations, in the sense that each holds its property under a separate title, so that a contract made under the authority of one State does not enure to the benefit of both corporations, but only to the corporation of the State authorizing the contract?

These questions are of grave importance. Among other Massachusetts corporations, the Boston & Albany, the Boston & Maine, the Eastern, the New York & New England and the Nashua & Lowell were incorporated by similar concurrent legislation of this and other States; and the same questions are liable to arise at any time affecting the rights and duties of those corporations. I am not aware that the questions suggested here have been passed upon by our courts. In *Attorney-General* v. *The Boston & Maine Railroad Company*, 109 Mass. 99, the whole matter was ably discussed by counsel, from whose briefs I have derived much valuable assistance. But in view of certain special legislative provisions applicable to the defendant corporation, the questions raised were not adjudicated. In his opinion in that case Mr. Justice Morton says:

"If the government of Massachusetts had taken no action upon the subject, the case would present the important questions, ably argued by counsel as to the relative powers of the several States by whose concurrent action a consolidated corporation like this has been created, acting independently of each other, over the corporation, and particularly over that part of its road situated within their limits. But we have not found it necessary to consider these questions, because," etc.

Consolidating statutes similar in form have been enacted in many of the United States. Early in the history of railroads, the advantages of through trunk lines made such legislation obviously necessary to facilitate intercommunication between different parts of the country. The status of such corporations has been elaborately considered in many cases both in the Federal and the State courts; but, as far as I can discover, the precise question involved in the present inquiry, to wit, the power of a corporation to increase its capital stock and extend its road in one State by the authority of that State, but without the sanction or against the prohibition of another State, has not been adjudicated.

There has been, moreover, some apparent conflict among the cases, even before the same tribunal, in discussing the character and scope of such consolidations. For example, in *Railroad Company* v. *Harris*, 12 Wall. 65, a case in the Supreme Court of the United States, Mr. Justice Swain, in delivering the opinion of the court, said: "We see no reason why several States cannot, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one." On the other hand, in *Nashua & Lowell Railroad Corporation* v. *Boston & Lowell Railroad Corporation*, 136 U. S. 356, a case before the same tribunal, Mr. Justice Field delivering the opinion of the majority of the court, in speaking of the statutes of Massachusetts and New Hampshire, which purport to consolidate the corporation in each State known as the Nashua and Lowell into one corporation, said: "The new corporation created by Massachusetts, though having the same name, composed of the same stockholders and designed to accomplish the same purpose, is not

the same corporation with the one in New Hampshire. Identity of names, powers and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity." The chief justice and Justices Gray and Lamar, however, dissented from this opinion. In *Railway Co.* v. *Auditor-General*, 53 Michigan, 79, Cooley, J., said: "It is impossible to conceive of one joint act, performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty." On the other hand, in *Horne* v. *Boston & Maine Railroad Company*, 62 N. H. 454, the court, speaking of the Boston & Maine Railroad Company, said, "the defendants are a single corporation, having its powers from, and existing by the laws of Maine, New Hampshire and Massachusetts." And in *Covington Bridge Company* v. *Mayer*, 31 Ohio, 317, speaking of the effect of similar consolidating statutes upon the corporation so formed, the court said: "It is in truth a single corporation with the power of two. It acts under two charters, which are in all respects identical, except as to the source from which they emanate. What is authorized by one of these charters is authorized by both. What may be lawfully done under one may be lawfully done under both."

But, notwithstanding the apparent inconsistency of these views, in my opinion they may be largely reconciled by consideration of the true essence of corporations, and of the different but not inconsistent definitions of those bodies which may be given, according to the point of view from which they are regarded. These different aspects of corporations grow out of the nature of the issues before the court in the several cases to which I have alluded; and they go far toward explaining the seeming conflict in the views expressed.

A recurrence to definitions may therefore be of assistance in determining the question now under discussion. Regarded as a creature of the sovereign, a corporation has been defined to be "an artificial being, invisible, intangible and existing only

in contemplation of law." As such, it is obvious that there can be no such thing as a corporation which owes its existence to two or more independent sovereigns. Two States cannot unite in one legislative act. As an artificial person, created by an act of legislation, it is the child only of the Legislature by which it was created. It cannot have two parents.

But such a definition, although entirely accurate, and in some respects sufficient, falls far short of describing a corporation in fact. For all purposes, excepting such as relate to its origin, domicile and similar matters, a corporation may be defined as a collection of persons united in one body under a special denomination, having perpetual succession under an artificial form, and capable of taking and granting property, of suing and being sued, of making contracts, of enjoying privileges and immunities in common, and of exercising the right conferred upon it by its charter. In other words, as has been well said by an able writer (Morawetz on Corporations, § 1), a corporation is not "in reality a thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association."

Bearing in mind these different, but by no means inconsistent, definitions, it is not difficult to understand the status of a consolidated corporation, like the New York, New Haven & Hartford Railroad Company. With respect to its origin, creation and domicile, and regarding it as an artificial person or entity created by legislation, it is a distinct corporation in each State. But, as to all the purposes for which it was created, it is, and must have been contemplated by each Legislature to be, one corporation in both States. It is but one body of men, formed into one company. All the property of its constituents (the two domestic corporations and their stockholders) has been merged into one joint and indivisible stock, represented by one set of shares, managed by one set of officers, and in all respects dealt with as one property and business. It may commit torts, and torts may be committed upon it as one corporation. It makes its contracts as one corporation. It grants and acquires property as one corporation. It has no machinery by which it

can act in a dual capacity. So far as respects its charter, it is two corporations. As to its property, contracts and business, it is one and indivisible. In short, to quote the words of the Ohio court above cited, it is, in fact, "one corporation with the power of two corporations."

An examination of the case of *Attorney-General* v. *Boston & Maine Railroad Company*, above cited, goes far to confirm this position. Though it is not so declared in express terms, yet throughout the opinion the Boston & Maine Railroad Company, holding charters from the legislatures of three States, is regarded and spoken of as one corporation, and not as three corporations acting together.

It follows that whatever property it has acquired by contract, whether upon its joint credit or in exchange for its joint stock or its joint surplus, is added to and becomes a part of its property as one corporation. To hold otherwise would be to destroy at once the unity of action and interest which both legislatures must have contemplated, and would divide it into two corporations, in fact, where only one was intended and created. Whether it be a locomotive, a station, a bridge, an addition to its track or its location, a new branch, or even the property and franchise of a connecting road, whatever is purchased by the joint assets of the corporation becomes a part of the joint property of the corporation.

The acquiring and retiring of the stock and the purchase of the property, road and franchises of the New York, Providence & Boston Railroad Company was a transaction differing not in kind, but only in degree, from the acquisition of any other property. Being acquired, it became and was the property of the corporation; and the road at Providence became and was the road of the corporation. It was no less its property because it was a corporation created by the Commonwealth of Massachusetts and by the State of Connecticut as well.

It remains to consider whether and how far the transactions by which the New York, New Haven & Hartford Railroad Company acquired the road of the New York, Providence & Boston Railroad Company are affected by the provisions of the statutes of this Commonwealth, above recited, relating to

the increase of capital stock of railroad companies, it being conceded that they were not observed in those transactions.

Certain general principles, in the light of which these statutes, as well as the statutes of consolidation, must be regarded, underlie the discussion of this question. The States of the Union in respect to the control of persons and property within their borders are as to each other sovereign. No State can be hampered or hindered by another State in the full and effectual control of its subjects and their property within its limits. In the matter of concurrent legislation by two States, creating a consolidated corporation out of two domestic corporations, neither State has precedence over the other. Each retains all the rights it had before within its jurisdiction, and no legislation of the other State can affect or impair them.

The charter by Massachusetts of the New York, New Haven & Hartford Railroad Company (St. 1872, c. 171), must be regarded as concurrent legislation with the charter of Connecticut. The Massachusetts act does not, indeed, refer in terms to the Connecticut act. But it purports to create a new corporation which should succeed to the rights of two existing corporations, one chartered solely by Connecticut and the other by the two States expressly concurring, and which new corporation should operate and maintain a railroad line in both States. This, obviously, could not be done except by concurrence of Connecticut; and such concurrence must have been in contemplation by the Legislature of Massachusetts when it gave a charter professing to deal with a Connecticut corporation. Moreover, the Massachusetts charter was granted the next year after the Connecticut charter, and was so identical in its terms and provisions that it is inconceivable that the similarity could have been accidental. The agreement for merger filed in the office of the Secretary of the Commonwealth, which was a necessary antecedent to the taking effect of the charter, recited that it was executed in pursuance of authority granted by the legislatures of both States.

Acting, therefore, with full knowledge of and acquiescence in the fact that the railroad company it incorporated had already received a similar charter from Connecticut, the Leg-

islature of Massachusetts must be presumed to have conceded, by implication, the right to the consolidated corporation to have and exercise such powers as the State of Connecticut, acting upon matters within its exclusive jurisdiction, should grant to it by virtue of its sovereignty; and to reserve to itself the right to exercise exclusive control over the corporation only as to such matters as should be within its exclusive jurisdiction. Any other construction of the rights conceded and reserved by the reciprocal charters would tend to cripple, if not to destroy, the power of the corporation to carry on the business for which it was created.

To illustrate these propositions, suppose, when the charters were granted, the road in Connecticut was constructed with a single track; and that subsequently the Legislature of that State had enacted a law requiring all railroads in the State to be equipped with double tracks, and had further authorized an increase of the capital stock of this road to meet the expense of such equipment, prohibiting the payment for it out of surplus earnings, or by incurring a debt therefor. All these matters would be exclusively within the jurisdiction of that State. Such an increase of the capital of the company would be necessary to the continuance of its franchise in Connecticut, and would be obviously valid. Even though Massachusetts were to pass a law prohibiting such an increase under penalty of indictment, and declaring such certificates of new shares void, it would be ineffectual, because it would be an attempt to impair the control by Connecticut over the consolidated road as to matters under the exclusive jurisdiction of that State.

The same principle holds equally true of extensions of the railroad within the limits of either State. Such extensions are authorized by the Legislature because they are presumed to be for the advantage of the State and its citizens. It is for the State within which the railroad is situated to determine when the leasing or acquiring of a connecting road, the building of a branch or the extension of its existing road is required in the interest and for the convenience of its citizens. For either State to pass laws purporting to interfere with or limit the exercise of this prerogative by the other State is to deny to

that State the right to legislate for the benefit of its people as to matters within its own jurisdiction.

To regard the statutes of Massachusetts now under consideration as intended to impair the validity of acts done under the authority of Connecticut, legislating upon matters within its jurisdiction, is inconceivable. It follows, therefore, that those statutes must be regarded as relating only to railroad corporations chartered solely by the Commonwealth and under its exclusive control; or, if applicable to consolidated corporations, that they contain the implied exception that they are not intended to prohibit or invalidate acts lawfully done under the authority of another State legislating upon matters over which it has full jurisdiction.

But what remedy, it may be asked, has the Commonwealth, if its consolidated corporations do things under the authority of another State, lawfully exercised, which are contrary to the spirit and policy of its own legislation? Whether there be other remedies, which may be doubtful, there is certainly one which is effectual. It may revoke its charter. It may even go further, and declare that such acts shall be a revocation of its charter. The Legislature of Massachusetts has not proceeded to this extent. It has contented itself with the declaration in St. 1871, c. 389 (now Pub. Sts., c. 112, § 61), that such acts shall render the charter subject to forfeiture. The history of the law sheds much light upon the view taken by the Legislature as to its powers of remedial legislation for evils that might result from the exercise of franchises by a consolidated corporation, granted to it by another State in contravention of the policy of Massachusetts. It originated in an order instructing the railroad committee to consider the effect of the consolidation of the Boston & Albany Railroad Company with other corporations in the State of New York. In the report of that committee made to the Legislature the questions now under consideration were fully discussed, and the possibilities growing out of the exercise of a double franchise were clearly set forth. The report closes with these words: "To assert any direct control over the corporations of other States would, of course, be futile; but there seems no

objection in law or justice to coupling with a grant of a franchise any reasonable conditions and limitations. No complaint can justly be made by a corporation created by and receiving its privileges from this State, if the State requires that its action and the exercise of its powers under the charter granted by another State shall be subject to all the limitations upon its rights in this State, and that the attempt to exercise greater powers without the assent of this State shall be ground for a forfeiture of its franchise in this State."

With this report was submitted a bill similar to the law as it now stands, excepting that it provided that if such a railroad corporation should increase its capital stock, etc., without the authority of the Legislature of this Commonwealth, "the charter and franchise of such corporation shall be forfeited and become null and void." This bill was amended by the Legislature so that it read "shall be *subject to be* forfeited and become null and void;" and as thus amended it became a law. It is scarcely necessary to say that as amended the law amounts to nothing more than a declaration of the policy of the State, and that it does not pretend to prohibit, much less to make unlawful, the acts of a consolidated corporation done in another State, and under the lawful authority of the Legislature of that State.

I am, therefore, of the opinion that the railroad which connects with the road of the Boston & Providence Railroad Company at Providence is the "road" of the New York, New Haven & Hartford Railroad Company, a corporation "created by the Commonwealth of Massachusetts." I am not disturbed in this conclusion by the suggestion which has been made that it could not have been intended by the Legislature that a construction should be put upon its statutes, which would permit a lease to be executed, under which extensive railroad systems, like the Old Colony and Boston & Providence, should pass into the control of a corporation largely owned and controlled in another State, and owning but a few miles of track in this Commonwealth. The intent of legislative acts is to be judged by their scope. It will not be seriously questioned, I presume, that, by virtue of its connections at Springfield, the New York,

New Haven & Hartford Railroad Company might have acquired a lease of the Boston & Albany railroad system, or even of the Boston & Maine system. And yet the evils, if any, of such a transaction, would be no less than the lease of the Old Colony Railroad.

My attention has been called to some provisions in the lease providing for an exchange of the stock of the lessor for the stock of the lessee. The clause begins with these words: "And the lessee further covenants that *as soon as it lawfully may*, it will prior to January 1, 1900, issue in proportion of nine shares of its own stock for ten shares of the capital stock of the lessor," etc. It is plain that this covenant does not invalidate the lease, because it only provides for a "lawful" issue and exchange. Whether, since the execution of the lease, unlawful acts have been done under this covenant, does not affect the legality of the lease, and is not within the scope of the inquiry submitted to me.

Upon all the facts, therefore, I am of the opinion that the lease is legal.

JUSTICE OF THE PEACE, — APPOINTMENT, — COMMISSION, — CONSTITUTIONAL LAW.

The appointment of a justice of the peace is complete when the seal of the Commonwealth is affixed to the commission.

To the Governor. 1894 March 29.

I have the honor to acknowledge the communication of Your Excellency, dated March 28, requesting my opinion upon the following question, to wit: a citizen of this Commonwealth has been appointed justice of the peace, and his commission as such has been duly signed by the Governor, and the seal of the Commonwealth affixed by the Secretary. The commission has not been delivered to him, but he has paid the fee therefor. Can the commission now be revoked?

The Constitution of the Commonwealth appears to provide that the successive steps in the constitution of judicial offices shall be as follows: first, the appointment by the Governor; second, confirmation by the Council; third, the signature of

the Governor to the commission; fourth, the affixing of the seal of the Commonwealth by the Secretary of State. To these may be added the delivery of the commission.

In my opinion, the appointment is complete when the seal of the Commonwealth is affixed to the commission, if not before. The person named in the commission then holds the office to which he has been appointed, and, the tenure of the office being fixed by the Constitution, his commission cannot be revoked. Pub. Sts., c. 21, § 1.

I am not aware that the question has been decided in this Commonwealth, but under substantially similar provisions of the Federal laws it has been held by the Supreme Court of the United States that the office is constituted by the signing and sealing of the commission, and that the delivery of the commission is not a necessary precedent.

In *United States* v. *Le Baron*, 19 How. 73, Mr. Justice Curtis at p. 78 says: "When a person has been nominated to an office by the president, confirmed by the senate, and his commission has been signed by the president, and the seal of the United States affixed thereto, his appointment to that office is complete. . . . The transmission of the commission to the officer is not essential to his investiture of the office. If by any inadvertence or accident, it should fail to reach him, his possession of the office is as lawful as if it were in his custody. It is but the evidence of those acts of appointment and qualification which constitute his title, and which may be proved by other evidence."

To the same effect is *Marbury* v. *Madison*, 1 Cranch, 137. In this case Chief Justice Marshall in delivering the opinion says (p. 157): "Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission." And again, on p. 160: "The transmission of the commission is a practice directed by convenience, but not by law. It cannot, therefore, be neces-

sary to constitute the appointment, which must precede it." It may be observed that the case of *Marbury* v. *Madison* was touching the commission of a justice of the peace for the District of Columbia, as to whose appointment the provisions of the Constitution of the United States and of the statutes were substantially similar to those of the Commonwealth of Massachusetts for the like officer.

STATE OFFICIALS, — EXPENSES INCURRED IN TRAVELLING OUTSIDE LIMITS OF COMMONWEALTH.

Bills for expenses in attending conventions and travelling without the limits of the Commonwealth cannot be paid out of an appropriation for incidental and contingent expenses of a commission, when such attendance or travel is not included among the official duties of the commission.

To the Auditor. 1894 March 31.

In reply to your letter of March 3, inquiring whether expenses incurred by boards, commissioners and other officials for travelling outside the limits of the Commonwealth, more particularly to attend conventions, etc., can be properly allowed from existing appropriations, I have to say as follows: —

The expenses to be allowed out of an appropriation depend entirely upon the purpose for which the appropriation is made; and this can be ascertained only by examining each act making such appropriation. In answering your questions, therefore, I confine my opinion to the expenses of the officials whom you mention specifically and to their expenses under the laws of 1893, such being the appropriations concerning which these questions have arisen.

As to the Insurance Commissioner, an appropriation was made "for incidental and contingent expenses in the department of the Insurance Commissioner." A bill for the expenses of the commissioner and deputy in attending an insurance convention outside the Commonwealth cannot be paid from such an appropriation.

The insurance commission is established by statute with certain well-defined duties. Attendance at insurance conventions is not among them. The fact that such attendance might have

a tendency ultimately to increase the utility of the commission does not authorize the expenses so incurred to be paid out of an appropriation limited by its terms to the expenses of its statute duties.

For the same reason, bills incurred by members of the Board of State Lunacy and Charity in attending the conference of charities cannot be paid out of an appropriation made "for expenses of the Board of Lunacy and Charity, including travelling and other expenses of members." Neither can a bill incurred by a member of the Bureau of Statistics of Labor in attending a statistical convention outside the limits of this Commonwealth be paid out of an appropriation "for such expenses of the Bureau of Statistics of Labor as may be necessary."

For the same reason, a bill for expenses by the Warden of the State Prison, the Superintendent of the Massachusetts Reformatory and the Superintendent of the Reformatory Prison for Women, incurred in attending prison congresses and other gatherings outside the limits of the Commonwealth, cannot be paid out of an appropriation "for the payment of salaries, etc., and for the current expenses of said institution;" nor can a bill of expenses for travelling outside the limits of the Commonwealth in attending conferences, incurred by officials of the State Almshouse, State Farm, the Lyman School for Boys, State Industrial School for Girls and the State Primary School at Monson, be paid out of an appropriation made "for other current expenses at said institution."

The State Board of Health has an appropriation "for the general work of the State Board of Health, including all necessary travelling expenses." The duties of the Board are defined in Pub. Sts., c. 80, and the various amendments thereto. Section 1 of this chapter provides that "It shall make sanitary investigations and inquiries in respect to the cause of disease and especially of epidemics, and the source of mortality and the effects of localities, employments, conditions and circumstances on the public health; and shall gather such information in respect to those matters as it may deem proper for diffusion among the people."

By this section the Board is especially granted the power to gather such information in respect to those matters as it may deem proper. Therefore a bill of expenses in attending outside the limits of the Commonwealth a meeting of those interested in the subject of health, drainage, etc., is incurred in the exercise of official duties authorized by statute, and can properly be paid from the appropriation.

You likewise inquire whether "a bill incurred for travelling outside the Commonwealth by the Gas and Electric Light Commissioners can be paid from an appropriation" for travelling and incidental expenses. I cannot answer this question without knowing for what purpose the travelling was done. The mere fact that travelling is without the limits of the Commonwealth is immaterial, if done in the exercise of the official duties of the commissioners.

COUNTY COMMISSIONERS, — EXPENSES, — HOTEL BILL.

St. 1893, c. 273, does not authorize a county commissioner to charge for the expenses of a hotel bill.

To the Governor. 1894 April 4.

I have the honor to acknowledge the communication from Your Excellency, dated March 30, requesting an opinion upon the construction of St. 1893, c. 273, relating to the travelling expenses of county commissioners.

The chapter in question provides that "there shall be allowed and paid to each of the county commissioners of the several counties the actual, necessary and proper expenses for transportation paid by him in the discharge of his duties." You inquire whether under the act a county commissioner can charge for a hotel bill.

Whatever distinction may be made between the word "travel," as used in some similar statutes, and the word "transportation," here employed, and whether there is any difference in the meaning, it does not seem necessary now to decide. I am quite clear, however, that the word "transportation" in this statute must be taken to have its ordinary and usual signification, and that the proper expenses of transportation are the

expenses of conveyance in going and returning. It cannot include expenses incurred after transportation has ceased.

I am of opinion, therefore, that under the provisions of this act a commissioner is not entitled to charge for the expense of a hotel bill.

ANCIENT AND HONORABLE ARTILLERY COMPANY, — OFFICERS, — COMMISSION, — GOVERNOR.

The Governor has no authority to commission the officers of the Ancient and Honorable Artillery Company. He may at his discretion issue a certificate to the effect that he has inducted the officers of the company into office in accordance with ancient custom.

To the Governor, 1894 April 4.

I have the honor to acknowledge the communication of Your Excellency, dated March 29, asking my opinion upon two questions submitted by the Adjutant-General, and to reply thereto as follows: —

The questions are: —

First. — Can the Governor commission, by written commission, the officers of the Ancient and Honorable Artillery Company?

Second. — If not, can he issue a certificate saying that he has inducted into office, in accordance with ancient custom, the officers of said company?

The position of the Ancient and Honorable Artillery Company, and its relations to the Commonwealth, are in many respects unique. It is not a part of "the military forces of the State," as that expression is used in the Constitution c. 2, § 1, art. 7, and has no standing as such. The Governor, therefore, is not its commander-in-chief. As a military body, however, it has been frequently recognized by the Legislature, and granted many privileges. St. 1893, c. 367, concerning the volunteer militia, expressly provides in § 161, that nothing done in said act "shall be construed as affecting the right of the Ancient and Honorable Artillery Company to maintain its organization as a military company, according to ancient usage, and agreeably to the provisions of its Constitution and by-laws, provided the same are not repugnant to the laws of this Com-

monwealth, or do not restrain the lawful parade or exercise of the active militia." By § 124 of the same chapter this organization is exempt from the general provisions that no body of men, other than the regularly organized militia, shall associate themselves together as a company for drill or parade with firearms, etc. By § 153 of the same chapter it is provided that the company shall annually furnish rolls of its membership to the mayor and aldermen of the city of Boston. The members of the company are exempt from jury duty Pub. Sts., c. 170, § 2. By Res. 1859, c. 106, the thanks of the Legislature were extended to the company for escort duty tendered to the Legislature. By Res. 1888, c. 77, an appropriation was made to enable the company to celebrate its two hundred and fiftieth anniversary.

There are also some usages connected with the company for which no legislative authority exists. Such is that part of the ceremony of the annual installation of officers, in which the Governor receives the insignia of office from the retiring officers and bestows them upon their successors. This custom has existed from time immemorial, but rests for its authority upon usage only.

But, notwithstanding the recognition which has been accorded the company by legislation and by usage, the fact remains that it has no existence as a part of the State militia. Its officers do not derive their authority from the Commonwealth. It is clear, therefore, that there is no authority in the Governor to issue a commission to such officers.

As to the second question, whether he may issue a certificate saying that he has inducted the officers of said company into office in accordance with ancient custom, I can only say that it is a proceeding for which there is no legislative sanction, and which is not in accordance with ancient usage. As the representative of the Commonwealth, the Governor has nothing to do with the installation of officers, and his conferring of the insignia of office is an act of courtesy merely. It gives the officers no additional authority, and is not necessary to the validity of their title thereto. Such a certificate, therefore, is not an act which is included in the duties of the office of Governor.

Whether as a further act of courtesy Your Excellency shall deem it proper or expedient to sign and issue such a certificate, is not a question coming within the province of the Attorney-General to give advice upon, further than to say that I see nothing unlawful in so doing.

UNION OF TOWNS FOR EMPLOYMENT OF SUPERINTENDENT OF SCHOOLS, — DISSOLUTION.

The increase above the limit of two and one-half millions in the valuation of one of the towns of a union formed under the provisions of St. 1888, c. 431, for the purpose of the employment of a superintendent of schools, whether before or after the period of three years, does not of itself dissolve the union.

To the Auditor. 1894 April 4.

Your favor of the 2d inst., asking for my opinion as to the construction of St. 1893, c. 200, § 2, was duly received, and I have to reply as follows: —

I understand the facts upon which the inquiry is based to be that three towns formed a union under St. 1888, c. 431, for the purpose of the employment of a superintendent of schools, all being at that time towns whose valuation did not exceed two and one-half millions. The union has continued three years, and the valuation of one of the towns is now increased to an amount in excess of said limit of two and one-half millions, no other change having taken place. The question submitted to me is, whether, under the provisions of the last sentence of said § 2, such increase dissolves the union. The clause in question is as follows: "When such a union has been effected it shall not be dissolved because any one of the towns shall have increased its valuation so that it exceeds $2,500,000, nor because the number of schools shall have increased beyond the number of fifty or decreased below the number of twenty-five, nor, for any reason, for the period of three years from the date of the formation of such union, except by vote of a majority of the towns constituting the union."

The exact question is, whether the words "for the period of three years from the date of the formation of such union" relate to the whole sentence, or to that part of the sentence beginning

"nor for any reason," etc. If the former construction is adopted, the union referred to has been dissolved by the increase of one of the towns beyond the limit.

I am of opinion, however, that the phrase "for the period of three years," etc., relates only to the last division of the sentence, beginning "nor for any reason," etc.; and that the meaning of the sentence is that the union shall not be dissolved because any one of the towns has increased its valuation, etc.; and that it shall not be dissolved because the number of schools has increased or decreased, etc.; and that it shall not be dissolved for a period of three years for any reason, excepting by vote of a majority of the towns. If the meaning of the Legislature had been that a union should not be dissolved for a period of three years because one of the towns had increased its valuation or had increased its number of schools, the phrase "for the period of three years," etc., would properly and naturally have been inserted after the words "shall not be dissolved," etc. The phrase then would have limited the whole sentence. In the place where it is inserted, however, it refers only to part of the sentence in which it is interpolated.

The statute purports to provide that a union once formed shall not be dissolved: first, because one of the towns has increased its valuation; nor, second, because the number of schools has increased or diminished; nor, third, for any reason, for a period of three years, excepting by a vote of a majority of the towns.

The history of the act in question confirms this view. As originally reported (Senate Doc. No. 126), the bill provided that: "When such a union has been effected, it shall not be dissolved because either of the towns shall have increased its valuation so that it exceeds $2,500,000, nor because the number of schools shall have increased beyond the number of fifty or decreased below the number of twenty-five, nor for any reason except by vote of a majority of the towns constituting the union."

It being deemed inadvisable, apparently, to impose an unwilling membership in a union upon a single town for an indefinite period, the bill was amended by inserting the phrase

"for a period of three years," etc. This phrase was inserted not at the beginning of the sentence, where it naturally would have been placed if it had been intended to limit the whole sentence, but in the third division, relating to the dissolution of the union by vote of a majority of the towns.

It is not a safe or recognized rule of construction to interpret a statute by considering the views and desires of those by whom it was promoted. It is satisfactory, however, to be assured that the initiation of the act in question was a petition from the inhabitants of one of the towns of the union now in question, which asked, in terms, for the enactment of a law by which the increase of valuation of a town above the statute limitation of two and one-half millions at any time should not operate as a dissolution of the union.

I am of opinion, therefore, that the increase of the valuation of one of the towns above the limit of two and one-half millions, whether before or after the period of three years, does not of itself dissolve the union.

SAVINGS BANKS, — LEGAL INVESTMENTS, — RAILROAD BONDS.

Bonds executed jointly and severally by two railroad companies and secured by a first mortgage on one of the roads, when the mortgaged road, although leased to the other, has paid dividends on its entire issue of capital stock out of the rentals received from the lease, are legal investments for savings banks under the provisions of Pub. Sts., c. 116, § 20, cl. 3, as amended by St. 1889, c. 305.

To the Commissioners of Savings Banks.
1894
April 14.

I have the honor to acknowledge your communication of April 11th, asking my opinion as to whether certain bonds therein described are a legal investment for savings banks of this Commonwealth, under the provisions of Pub. Sts., c. 116, § 20, cl. 3, and amendments thereof.

What purports to be a copy of the form of the bond in question shows that it is an instrument executed jointly and severally by the European & North American Railway and the Maine Central Railroad Company. It is said to be secured by a mortgage of that part of the railroad of the European & North American Railway lying between Bangor and Winn in said

State of Maine. It is also stated that the European & North American Railway has leased its railroad, including the part described in said mortgage, to the Maine Central Railroad Company for a term of nine hundred and ninety-nine years.

These bonds are the several obligations of each railroad corporation executing them. They are the several bonds of the European & North American Railway, and are secured by a mortgage of its road. They are also the several obligations of the Maine Central Railroad Company. The fact that both companies join in executing the bonds does not operate to destroy their character as the several obligations of each company.

Pub. Sts., c. 116, § 20, cl. 3, provides that savings banks may invest in the "first mortgage bonds of any railroad company incorporated under the authority of any of the New England States, and whose road is located wholly or in part in the same, and which is in possession of and operating its own road, and has earned and paid regular dividends for the two years next preceding such investment." These bonds do not come within this description. While they are the bonds of the Maine Central Railroad Company, they are not its first mortgage bonds, for they are not secured by mortgage of any part of its railroad. The Maine Central Railroad Company, it is true, is the lessee for a term of nine hundred and ninety-nine years of the railroad described in the mortgage, but it is not the owner of that railroad. It is only lessee, and the lease may be avoided, and the possession of the railroad return to the owner by the happening of several contingencies, some of which are specifically set forth in the lease. A lessee, even for a period of nine hundred and ninety-nine years, may not execute an indefeasible mortgage of the leased road. On the other hand, although they are the first mortgage bonds of the European & North American Railway, that corporation is not in possession of and operating its own road.

The clause further provides as follows: "or in the first mortgage bonds guaranteed by any such railroad company (to wit, a railroad company which has earned and paid regular dividends, etc.) of any railroad company so incorporated, whose

road is thus located." These bonds are not guaranteed by the Maine Central Railroad Company; technically, therefore, they are not within the class of railroads to which this operation of the statute has reference. It is to be remarked, however, that, although the Maine Central Railroad Company is not a guarantor, technically speaking, it is in fact a guarantor, and more, for it is an original obligor upon the bonds. A guarantor may have certain defences such as laches, want of notice, etc. None of these defences could be set up by an original promisor. The obligation of the Maine Central Railroad Company is that of a guarantor, but is stronger, for it is open to none of the defences which might be set up by a guarantor. Looking, therefore, at the spirit of the statute, rather than its language, it appears to me quite plain that these bonds are a permissible investment by our savings banks. The greater includes the less; and it can scarcely be supposed that the Legislature intended to exclude a character of investments which contained all the elements of security set forth in the statute, with other elements of strength added.

But whether this be so it may not be necessary to decide. Upon the facts submitted to me, the bonds in question appear to fall within the description of St. 1889, c. 305, which provides that savings banks may invest "in the first mortgage bonds of any railroad company incorporated under the authority of any of the New England States, and whose road is located wholly or in part in the same, and has earned and paid regular dividends for the two years next preceding such investment on all its issues of capital stock, notwithstanding the road of such company may be leased to some other railroad company." If the European & North American Railway has paid dividends on all its issues of capital stock out of the rentals received by the lease, such dividends have been earned within the meaning of that statute; and the bonds in question fulfil the description of this statute. The fact that by the same instrument the Maine Central Railroad Company has become bound to pay them, does not as above stated, diminish or detract from their validity as the first mortgage bonds of the European & North American Railway.

COURT SITTINGS.

If the courts of Middlesex County devote more time to their sittings in Cambridge than in Lowell, the remedy is by application to the court itself or to the Legislature.

To the Governor. 1894 April 14.

I have the honor to acknowledge the communication of Your Excellency, dated April 13, asking for my opinion upon the questions stated in a communication from Charles R. Blaisdell enclosed therein.

So far as I am able to understand the letter of Mr. Blaisdell, he asks what relief can be had, first, by reason of the alleged fact that much more of the time of the sitting of the courts in Middlesex County is given to Cambridge than to Lowell, including the probate court; and, second, for disagreement of juries.

As to the first matter of inquiry, I find, upon examination of the statutes, that the same number of sittings for civil business are appointed for Lowell as for Cambridge. Pub. Sts., c. 152, § 17. It is further provided that sittings of the court may be adjourned from one shire town in the county to another. Pub. Sts., c. 153, § 25. It would appear, therefore, that so far as the statutes are concerned the sittings of the court are fairly proportioned between the two portions of the county. If, as is alleged, a disproportionate amount of the business of the court is transacted at Cambridge, the remedy of the parties interested would seem to be, first, by an application to the court itself, which is presumed to see that justice is done in the matter of assignments; and, second, if such course proves ineffectual, by application to the Legislature.

The statutes also provide that sittings of the probate court shall be held on the first, second and fourth Tuesdays of every month at Cambridge; and on the third Tuesdays of January, March, May, July, September and November at Lowell. This being a matter within the jurisdiction of the Legislature, if injustice is done under the present law, the remedy of the parties aggrieved would seem to be by application to the Legislature.

As to this matter, therefore, it does not seem to be within the province of the Executive to furnish the desired relief.

As to the second complaint, that juries do not agree, I know of no remedy excepting the improvement of the character of jurymen, a subject which I understand is already under consideration by the Legislature.

CORPORATION, — PURPOSE TO REGISTER EMPLOYEES AND PROVIDE EMPLOYMENT, — INSURANCE.

A corporation whose purpose is to register employees and provide such as register with employment in case they are discharged or suspended, is not entitled to be organized under Pub. Sts., c. 106, § 14. Its purpose is to do insurance business.

To the Commissioner of Corporations. 1894 April 20.

I am in receipt of your communication of April 16, requesting my opinion as to whether a corporation whose purpose is stated to be "to register employees and provide such as register with employment in case they are discharged or suspended from employment" is entitled to be organized under Pub. Sts., c. 106, § 14.

The section referred to reads as follows: —

"For the purpose of carrying on any lawful business not mentioned in the seven preceding sections, except buying and selling real estate, banking, insurance, and any other business the formation of corporations for which is otherwise regulated by these statutes, three or more persons may associate themselves, with a capital of not less than one thousand nor more than one million dollars."

The question which arises is, whether the purpose stated comes within the definition of the word "insurance," as used in that section.

If the only purpose of the proposed corporation was to conduct an employment bureau, it would be a lawful business, and not one included within any of the exceptions set forth in said section. If this were the only purpose, it could be stated in unmistakable language.

But I am of opinion that the statement of the purpose quoted

above plainly indicates a purpose to guarantee employment, or its equivalent. It does not provide for a register of persons seeking employment, but deals only with those already employed. It undertakes to provide such employees as register with employment. Inasmuch as such a contract might not be capable of execution if a situation were not open, the purpose therefore must be to provide indemnity for such as fail of securing employment under such a contract. That this construction is correct is confirmed by the fact that, as I am informed, such is stated to be the purpose of the proposed corporation.

This is plainly insurance; and it was with a view of excluding from corporate rights in Massachusetts such corporations that the exception was made in the statute quoted. The statutes relating to the business of insurance carefully limit the forms of insurance which are permitted in this Commonwealth, and many subjects of insurance are declared by implication to be contrary to the policy of our laws.

Taking the statutes as a whole, they plainly point to a purpose on the part of the Legislature to restrain the formation of corporations for the purpose of doing insurance business to such as are specified in the statutes relating to that subject. The purpose declared by this corporation is not so included; and if this corporation were chartered, it would acquire rights which the insurance statutes intended to forbid.

CHIEF OF DISTRICT POLICE, — ATTORNEY-GENERAL.

The Chief of the State District Police has the exclusive right to the advice of the Attorney-General in relation to the rights and duties of the State District Police.

To the Governor. 1894 April 20.

I have the honor to acknowledge the communication of Your Excellency, dated April 16, referring to me certain questions relating to the rights and duties of the Chief of the State District Police force in the matter of fire-escapes for buildings, under St. 1888, c. 426.

The Chief of the State District Police force is not an officer who has the right to take the opinion of the Attorney-General. But under § 12 of said c. 426 it is made the duty of his department to bring proceedings in the Supreme Judicial and Superior Courts for the enjoining of persons who use or occupy buildings contrary to the provisions of said act. In such cases, if the suit is brought in the Supreme Judicial Court, it is, under other statutes, the duty of the Attorney-General to appear in behalf of the Commonwealth. The State police department, therefore, has the right to my services in the enforcement of the provisions of the statutes, to which the questions submitted to Your Excellency and referred to me relate.

This being so, it would be obviously improper for me to give advice as to the rights and duties of the Chief of the District Police force under said chapter to any one excepting him and at his request. It would be especially improper to advise persons upon such matters who may at any time become or be interested in behalf of defendants in suits brought by the State police force, and in which I may be called upon to appear.

I do not doubt that Your Excellency will upon consideration fully agree with me that in the matters referred to the Chief of the District Police force has the exclusive right to my services and advice; and that other parties seeking information as to rights in such matters must go elsewhere.

INSURANCE, — FRATERNAL BENEFICIARY CORPORATIONS, — REAL ESTATE.

A fraternal beneficiary corporation organized and transacting business under St. 1888, c. 429, as amended by St. 1890, c. 341, cannot hold real estate, except a limited amount in a building for its use and occupancy as a home office in this Commonwealth.

To the Insurance Commissioner. 1894 May 15.

I am in receipt of your letter of May 4, inquiring whether a fraternal beneficiary corporation organized and transacting business under St. 1888, c. 429, as amended by St. 1890, c. 341, can hold real estate, other than as permitted in § 9, to

a limited amount, in a building for use and occupancy by the corporation. Your letter also states that the moneys proposed to be invested in said building did not belong to any of the beneficiary funds, but are received from donations, entertainments and the like sources.

The statutes referred to in your letter provide in §§ 8 and 9 for the payment of benefits to sick members, for the payment of benefits at the end of a fixed period, and for payments to beneficiaries of deceased members. A provision is also made for a death and reserve fund; and there are provisions authorizing assessments for these purposes.

The rapid increase of the endowment insurance business undoubtedly led to the more elaborate provisions contained in St. 1890, c. 341, specifying the amount of funds which such corporations might hold, and the manner of their investment. Under this act by amended § 9 the corporation is allowed to invest not exceeding twenty per cent. of the emergency fund in a building for use and occupancy by the corporation as its home office within this Commonwealth. The only business contemplated by § 8 is the payment of one of the several specified benefits, or of an endowment insurance, so called; and the amount of property which the corporation may acquire and hold, and the manner of the investment of the same, is carefully specified in said acts.

The limitations imposed by these acts upon the right of the corporation to acquire and hold funds is exclusive of any right to said corporation to receive from any other source, or to hold any property for any purpose, except as therein expressly provided. It follows, therefore, that such corporation may not receive money from donations, entertainments and the like. This being so, it necessarily follows that property which it is not authorized to receive or hold cannot be invested by it in real estate.

This conclusion is made certain by the provision of St. 1893, c. 47, that "Any corporation organized as aforesaid which limits its membership to the permanent employees of towns and cities and which pays only annuities or gratuities contingent upon disability or long service, shall not be subject to the

foregoing limitation as to the amount of funds to be held for purposes of its organization, and may accept and hold gifts, legacies or other contributions therefor."

I assume that your inquiry does not relate to the particular class of corporations described in this exception; and I am, therefore, of opinion that, with the exception included in the provision quoted, corporations organized and transacting business under St. 1888, c. 429, as amended by St. 1890, c. 341, cannot hold real estate except in accordance with the provisions of § 9 as amended by the last-named act.

MEDFIELD INSANE ASYLUM, — APPROPRIATION.

St. 1894, c. 391, does not authorize the expenditure during the year 1894 of any part of the $200,000 appropriated for the construction of the Medfield Insane Asylum by St. 1893, c. 395.

To the Auditor. 1894 June 7.

I have, at your request, examined St. 1894, c. 391, in reference to the question submitted by me to you, whether that act authorizes the immediate expenditure of the $200,000 appropriated by St. 1893, c. 395, for the construction of the Medfield Insane Asylum. St. 1893, c. 395, provides that no portion of said sum of $200,000 shall be expended during the years 1893 and 1894. The question submitted I understand to be whether St. 1894, c. 391, can be construed as repealing the prohibition as to the time of the expenditure of the $200,000.

In my opinion, the provisions of St. 1893, c. 395, providing that no portion of said sum of $200,000 shall be expended during the years 1893 and 1894, are not affected by St. 1894, c. 391. The last-named act provides only for the method of raising the money to be expended for the plan of the asylum. It authorizes the issuing of bonds to the amount of $700,000, that being the amount authorized to be expended by previous legislation. It does not make a new appropriation of $700,000, nor change the terms and conditions upon which the money already appropriated is to be expended.

INSURANCE, — MUTUAL FIRE COMPANIES, — PREMIUM NOTES.

Mutual fire insurance companies doing business upon the premium note plan under authority of St. 1887, c. 214, § 46, may cease such business and proceed upon the cash premium plan stated in § 45 of said act; but in so doing they lose their right to continue under the provision of § 46.

To the Insurance Commissioner.
1894
June 7.

I am in receipt of your favor of May 21, asking for my opinion whether a mutual fire insurance company, authorized to transact business under St. 1887, c. 214, § 46, can avail itself of the provisions of § 45 of the same chapter.

I understand the exact question to be this: under § 46 certain insurance companies are authorized to issue policies of insurance upon the plan of taking deposit notes for a percentage of the amount insured by its policy, and making a call or assessment thereon for the payment of losses and expenses as the same are incurred. One of the companies authorized to do business under said § 46 desires to abandon that method of doing business, and to conduct its business for the future upon the plan set forth in § 45 of the same chapter; under which a full mutual premium is provided to be paid in cash upon fire policies, with liability to the insured to assessment to an amount fixed by the by-laws of the company for the payment of such losses and expenses as are not provided for by its cash fund.

The provisions of § 46 are permissive, merely. The section provides that such fire insurance companies as at the time of the enactment of that section were lawfully doing business upon the premium note plan "may" continue such system of business. Whether under that section companies having the right to conduct business upon that plan would have the right to issue both kinds of policies may well be doubted. It would be impracticable to carry on business under both sections. If, therefore, the question were whether companies authorized to do business under the provisions of § 46 could also do business under the provisions of § 45, I should feel inclined to say it could not be done.

The policy of the Legislature in enacting §§ 45 and 46 was obviously to provide that fire insurance should be done upon

the cash premium basis as laid down by § 45, but permitting companies already doing business upon the premium note plan to continue that form of business, if they desired. If, however, companies having the permissive right to do business under § 46 desire to abandon that plan of doing business and to bring themselves within the provisions of § 45, and in line with the general policy of legislation with regard to fire insurance companies, I see no reason why they may not do so. I regard the provisions of § 46 as creating a permissive exception only to the general policy as enacted in § 45.

My answer to your question, therefore, is that the companies who come within the description of § 46, and who are exercising the privilege granted by said section of doing business upon the premium note plan, may surrender the privilege granted them by § 46 and proceed upon the cash premium plan set forth in § 45; but that in so doing they lose their rights to continue under the provisions of § 46.

PAUPERS, — DISCHARGE, — CLOTHING.

The trustees of the Danvers Lunatic Hospital cannot charge a town, under Pub. Sts., c. 87, § 45, for clothing furnished patients transferred by the Board of Lunacy and Charity to another State institution, under the provisions of Pub. Sts., c. 79, § 9.

To the Trustees of the Danvers Lunatic Hospital.
1894
June 10.

I acknowledge the receipt of your communication of June 8, in which you request my opinion upon the following question: —

Can the trustees of the Danvers Lunatic Hospital, under the provisions of Pub. Sts., c. 87, § 45, legally charge a town or city for clothing furnished patients transferred by the Board of Lunacy and Charity to another State charitable institution or lunatic hospital, under the provisions of Pub. Sts., c. 79, § 9?

Pub. Sts., c. 87, § 45, provides that no pauper shall be discharged from a State hospital without suitable clothing; that the trustees may furnish the same at their discretion; and that the cost of said clothing shall be reimbursed to the trustees

by the places of local settlement of city and town paupers, and by the Commonwealth in the case of State paupers. No direct decision has been given upon this question by our court, but in the late case of *Gould* v. *Lawrence*, 160 Mass. 232, in referring to this provision, the court intimates that such a charge as this would ordinarily be made but once in the case of each pauper; and it is apparent that in the statute the meaning of the word "discharged" imports the going out of an inmate to resume his status and position in the world at large, and the purpose of it is that he may be furnished with suitable clothing. By Pub. Sts., c. 79, § 9, the State Board of Lunacy and Charity is given the power to transfer pauper inmates from one State charitable institution or lunatic hospital to another, or send them to any city or place where they belong; and this power of transfer is limited only by the public interest or the necessities of the inmates, and lies wholly within the discretion of the Board. It is apparent, therefore, that under its provisions a case might arise in which a pauper inmate might be transferred many times from one lunatic hospital to another, and returned in the course of the transfer several times to the hospital to which he was originally committed. In this case, if the construction was given to the word "discharged" that it might apply to the case of a transfer, it is evident that it would be within the powers of the trustees of a lunatic hospital to charge a city or town, or the Commonwealth, with the costs of suitable clothing whenever the transfer was made. It does not seem that such a construction can reasonably be supposed to have been intended by the Legislature; and we must assume that the State Board would not order the transfer of a pauper inmate from one State institution to another when his condition as to clothing was such as to endanger his life or health.

In my opinion, your question must be answered in the negative.

CONTRACT, — STATE PRINTERS.

In a contract covering printing for all the "several departments of the government of the Commonwealth," county courts, or officers of any department which have to do only with a portion of the Commonwealth, are not included. For the same reasons, insolvency blanks, although furnished at the expense of the Commonwealth, are not within the terms of the contract.

To the Auditor. 1894 June 21.

I am in receipt of your letter of June 14, asking my opinion as to the construction of the contract between the Commonwealth and the State printer, a copy of which is submitted with your letter.

The material portions of the contract, so far as they relate to the question submitted, are as follows: "The said Commonwealth agrees to give to said parties of the second part (the State printers) all the printing and other work to be performed by the terms of this contract for the several departments of the government of the Commonwealth" . . . "it is understood and agreed that this contract shall not apply to or include envelopes with printing upon them, letter paper with printed headings, blank books, or any form or blanks used in the various departments of the Commonwealth in which printed matter occurs, unless the printing covers one-half or more of the entire surface of the sheet."

The questions stated are as follows: —

First. — Are judges, registers and assistant registers of probate and insolvency "departments of the government of the Commonwealth" within the meaning of the expression as used in said contract, and, therefore, subject to the provisions of the clause of said contract first above quoted?

The contract submitted with your letter was made under the authority of Res. 1892, c. 90. Previous resolves referring to the matter of State printing are Res. 1887, c. 16, and Res. 1882, c. 57. The resolve of 1882 sets forth a form of contract which appears to be substantially similar to the form of contract executed under the resolve of 1892. I am further informed that the contract executed under the resolve of 1887 was substantially in the same form. I am further informed that all three of these contracts were with the same printers.

I find upon examination of the statutes that the salaries of the judges and registers of probate are paid out of the treasury of the Commonwealth. Pub. Sts., c. 158, § 23. The blanks used in probate proceedings are provided by the county commissioners, and are, therefore, payable out of the county treasuries. Pub. Sts., c. 156, § 42. The blanks used in insolvency proceedings are furnished at the expense of the Commonwealth. Pub. Sts., c. 157, § 13. Probate blanks have always been paid for by the county. Gen. Sts., c. 117, § 31; Rev. Sts., c. 83, § 54. Separate courts of insolvency were established by St. 1856, c. 284; and in that act (§ 23) it was provided that blanks used in the business of the court should be paid for out of the treasury of the Commonwealth. Probate courts and insolvency courts were consolidated by St. 1858, c. 93; but the provisions in regard to the payment for blanks have remained unchanged, and have so continued until the present time. The reason for charging the expense of insolvency to the Commonwealth is probably the fact that the fees received in the course of insolvency proceedings are rendered by the registers to the treasurer of the Commonwealth. Pub. Sts., c. 157, § 138.

What is the meaning of the expression "departments of the government of the Commonwealth," as used in the contract for the State printing? This contract is executed under a resolve which authorizes the making of a contract for the printing "for the several departments of the government of the Commonwealth." Substantially similar words have been used in all previous resolves authorizing contracts for State printing, excepting Res. 1857, c. 86, in which the language was "the State printing." See Res. 1849, c. 57; Res. 1852, c. 9; Res. 1855, c. 49; Res. 1856, c. 100; Res. 1857, c. 86; Res. 1866, c. 74; Res. 1867, c. 4; and Res. 1877, c. 69.

I am of opinion that the words "the several departments of the government of the Commonwealth," as used in the contract referred to, do not include county courts, even though the salaries of officers of those courts are paid from the treasury of the Commonwealth. It is true that the Constitution of Massachusetts recognizes the judiciary as one of the "departments"

of the government of the Commonwealth. Part the second of the Constitution is entitled "The Frame of Government." There are three topics under this title. Chapter I. is the legislative power, chapter II. the executive power and chapter III. the judiciary power; and under the head of the judiciary power, in Art. 4, the judges of probate are specifically referred to. And the Bill of Rights provides in Art. 30 that "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers," and "that the judicial shall never exercise the legislative and executive powers." If, therefore, we are to look to the frame of government set forth in the Constitution for the definition of the words "the departments of the government of the Commonwealth," the judiciary must be regarded as a part of the government, including probate courts.

But I do not think the words are used in this contract as they are used in the Constitution. They are words not of law, but of contract, and are to be understood in a commercial sense; that is, in the sense in which they are commonly used. As so used, the expression "the departments of the government of the Commonwealth" refers exclusively to those branches of the government which have to do with the entire Commonwealth, and not with a portion only. Such a definition would include the Governor, the Secretary, the Treasurer, the Auditor and the Attorney-General. It would also include commissions having jurisdiction throughout the Commonwealth, appointed by the Governor or created by an act of the Legislature, — such as the Insurance Commissioner, the Gas and Electric Light Commissioners and the Harbor and Land Commissioners. These different branches of the government of the Commonwealth are usually entitled "departments," such as the executive "department," the "department" of the Attorney-General, the insurance "department," etc. I think the word "department," as used in the contract, has the same significance; and, therefore, that it does not and is not intended to include officers, whether of the judiciary or any other department, which have to do with only a portion of the Commonwealth.

Just how far practice and usage are admissible to throw light

upon the construction of the contract is not entirely clear; but so far as they have any weight they strengthen this view; for I understand that, not only in the previous contracts with the present State printers, but in all the contracts under the various resolves hereinbefore cited, this construction has been put upon similar expressions; and that it has never been supposed that any of the blanks for county courts were included in the contract with the State printer.

Second. — Are blanks of the kind annexed to your letter included within the terms of the contract in question?

Said annexed blank is a form of petition by a widow for the assignment of dower. It is a form used in the probate courts. Inasmuch as probate blanks are furnished by the county, as hereinbefore stated, it is obvious that they are not within the terms of the contract with the State printer; because the Commonwealth does not furnish them, and has no authority to contract for their printing under existing laws.

I presume, however, that the enclosing of a probate blank was an inadvertence, and that your inquiry was intended to refer to blanks used in insolvency proceedings. Assuming this to be so, I reply that, for the reasons above set forth in answer to your first inquiry, I am of opinion that insolvency blanks, although furnished at the expense of the Commonwealth, are not within the terms of the contract with the State printers.

INSURANCE, — NATURE OF CONTRACT, — GUARANTEEING EMPLOYMENT.

A certificate issued by a company for a money consideration, whereby it agrees to employ the holder at a fixed salary for a limited period in case he is discharged from employment, is a contract of insurance within the meaning of St. 1887, c. 214, § 3.

To the Insurance Commissioner.
1894
June 21.

I am in receipt of your favor of June 13, asking my opinion whether the certificate issued by the United States Registration Company is insurance within the meaning of that term as defined by St. 1887, c. 214, § 3.

The certificate of the United States Registration Company is in effect a contract between the company and the holder thereof,

whereby for a money consideration the Registration Company agrees to employ the holder of a certificate, at a fixed salary per week, for a period not to exceed ten weeks in any one year excepting at the option of the company, in case the said holder is discharged or suspended from employment.

In my opinion, this is a contract of insurance under the provisions of the section above referred to. That section defines a contract of insurance to be "an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest." The contract in question is for a consideration. It promises to do some act of value to the assured, to wit, to furnish him employment for ten weeks at a fixed compensation. It further promises to furnish this employment upon the destruction or injury of something in which the other party has an interest, to wit, his prior contract of employment. This contract of employment, upon the destruction of or injury to which the obligation of the Registration Company arises, may be a contract for a fixed time and for fixed wages; or it may be a more ordinary form of contract for an indefinite time, either at fixed wages or for a *quantum meruit*. In either case it is a contract in which the certificate holder has an interest; and for the destruction, or, in other words, the cancellation or suspension of which he receives his indemnity in the shape of employment by the Registration Company.

I do not agree to the suggestion of the representatives of the company, that the words "upon the destruction or injury of something," are intended to include only material commodities, like houses, ships and the like. Among the authorized subjects of insurance set forth in § 29 of the same chapter are enumerated "the fidelity of persons in positions of trust," and "the liability of employers for injuries to persons in their employment." These are schemes of insurance not against loss of material things, but against liabilities which may arise by reason of the acts of others. If these are included within the meaning of the expression already quoted, to wit, "the destruction or injury of something" in which the insured has

an interest, I see no reason why the cancellation of a contract by which the assured is enabled to earn his subsistence may not also be included.

It has been further suggested that the business of this company, as set forth in its contract, amounts to nothing more than the carrying on of the business of an employment bureau. The clear distinction, however, is that an employment agency merely undertakes to use its best efforts to provide employment, while the contract of this company guarantees employment.

MILITIA, — QUARTERMASTER-GENERAL, — HORSES.

The quartermaster-general has no legal right to furnish horses for batteries for any ordered tour of duty.

To the Adjutant-General. 1894 June 25.

I have your request for my opinion whether, under the provisions of St. 1893, c. 367, the quartermaster-general can furnish directly horses for batteries for any ordered tour of duty.

In § 14 the duties and powers of the quartermaster-general in the provision, purchase and custody of military stores and property are carefully defined, and what he is to furnish is enumerated with great precision. No mention is made of horses for the purpose named by you. The power given him to "provide means of transportation" I understand is for a purpose quite different from that for which the present requisition referred to in your letter has been made.

I am of the opinion that the quartermaster-general under this section has no legal right to furnish horses for the purpose named. The provisions of other sections of the act indicate that the intention of the Legislature was that horses for the purpose named should not be furnished directly by the quartermaster-general, but by the officers and soldiers authorized by law to be mounted; and that a fixed sum should be allowed in full for keeping and forage. See §§ 127, 129, 130.

BOARD OF LUNACY AND CHARITY, — JURISDICTION, — SUSPENSION OF STATE IMMIGRATION LAWS BY ACT OF CONGRESS REGULATING IMMIGRATION.

The powers and duties of the Board of Lunacy and Charity to regulate immigration, under Pub. Sts , c. 86, are superseded by the act of Congress, approved March 3, 1891, vesting the regulation of immigration in United States officials.

To the Board of Lunacy and Charity. 1894 June 25.

I am in receipt of your letter of June 16, asking my opinion concerning the "powers and duties of the Board under Pub. Sts., c. 86, since the passage of the act of Congress approved August 5, 1882, and the acts supplementary thereto;" and "what, if any, power and duty does the Board have in relation to the matter of immigration from foreign countries to the ports of this Commonwealth."

It is well settled that the immigration of aliens is within that clause of the Constitution of the United States which gives Congress power "to regulate commerce with foreign nations;" and that whenever this power is exercised by Congress it is exclusive of the jurisdiction of the several States.

While the States have no power to pass laws limiting or imposing any burdens whatever upon immigration, it is undoubtedly true that, so long as Congress does not exercise the powers conferred upon it by the Constitution, the Legislatures of the States may, in the exercise of the power of police supervision, enact laws for their own benefit regulating foreign immigration, so as to exclude from their borders persons liable to become a public charge, infected with disease, or criminals.

Pub. Sts., c. 86, was presumably enacted in the exercise of such a power by the Commonwealth; and at the time of the enactment of the law Congress had not undertaken to interfere with the subject. Indeed, an act of Congress, approved August 3, 1882, authorized the Secretary of the Treasury to act in co-operation with the appropriate boards of the several States in the regulation of immigration into those States.

Since that time, however, by act of Congress, approved March 3, 1891, the whole matter of the regulation of immigration has been vested in officers of the United States, with the

power or right on the part of such officers to act in co-operation with the officers of the several States. This act is similar in its provisions to those of Pub. Sts., c. 86, in respect to the prohibition of the immigration of persons liable to become a public charge, or criminals, and of those suffering from contagious diseases.

It is well settled that when Congress exercises the powers conferred upon it by the Constitution, such exercise of power is in its nature exclusive of concurrent legislation by the several States. It follows that Pub. Sts., c. 86, are now inoperative, and cannot be sustained even in the exercise of the police power of a State. That being so, your Board can exercise no power or duty in the matter of foreign immigration.

The foregoing principles, although briefly stated, are elaborately discussed and settled in many cases in the supreme court of the United States, some of which, for convenience, I herewith cite: —

New York v. *Miln*, 11 Peters, 102.
Passenger Cases, 7 How. 283.
Henderson v. *Mayor of New York*, 92 U. S. 259.
Chy Lung v. *Freeman*, 92 U. S. 275.
Railroad Company v. *Husen*, 95 U. S. 465.
Bowman v. *Chicago Railway Company*, 125 U. S. 465, 492.
Leisy v. *Hardin*, 135 U. S. 100, 108.
Head Money Cases, 112 U. S. 580.
Ekiu v. *U. S.*, 142 U. S. 651.
Brennan v. *Titusville*, 153 U. S. 289, 299–306.

GOVERNOR, — APPROVAL OF BILL AFTER PROROGATION OF LEGISLATURE.

The Governor, after the Legislature is prorogued, may sign bills that have been presented to him within five days before prorogation.

To the Governor. 1894 June 30.

In response to the inquiry of Your Excellency whether the Governor has the power under the Constitution to sign a bill after the Legislature is prorogued, presented to him within five days before the prorogation, I have the honor to reply: —

The question has not been passed upon in this State, although I cannot learn upon inquiry that any Governor has ever signed a bill after the Legislature adjourned.

The question has been brought before the courts, however, in other States.

In *Fowler* v. *Peirce*, 2 Cal. 165, where the Constitution provided that "If a bill shall not be returned by the Governor within ten days after it shall have been presented to him, Sundays excepted, the same shall be a law in like manner as if he had signed it, unless the Legislature by adjournment prevents such return," the court held that the Governor had no power to sign a bill after the adjournment of the Legislature. The reason for the opinion is stated to be (p. 172) that "The Executive is, by the Constitution, a component part of the law-making power. In approving a law, he is not supposed to act in the capacity of the executive magistrate of the State, whose duty it is to see that the laws are properly executed, but as a part of the legislative branch of the government. This power is *a unit*, though distributed; and the parts can only act in unison. Whenever a part ceases to act, the whole becomes inoperative. The executive act owes its validity to the existence of the legislative body. Upon the adjournment of that body, the power ceases, and all acts of a legislative nature are void."

I have found no other case which sustains this view.

On the contrary, in the case of the *People* v. *Bowen*, 21 N. Y. 517, upon a provision of the Constitution substantially similar to that of California above cited, the court held, with one judge dissenting, that the Governor had the right to sign bills after the Legislature had adjourned. The court says: "If he approves, the concurrence of the whole law-making power is secured; precisely as though the Legislature was in session. The bill has received the concurrence of all the functionaries which the Constitution requires should unite in enacting a perfect law."

In Louisiana, in the case of *Attorney-General* v. *Fagan*, 22 La. 545, in which State the Constitution made provision that when the Legislature by adjournment prevented the return of

the bill, the governor should return the bill on the first day of the next meeting of the General Assembly, or it should be a law, the court held that the Governor could sign the bill after the adjournment of the Legislature. The same conclusion was reached in *Solomon* v. *Commissioners*, 41 Ga. 157. And in *Seven Hickory* v. *Ellory*, 103 U. S. 423, a case decided in 1880, — in which the opinion was delivered by Chief Justice Waite, — the court held that, under the Constitution of Illinois, the provisions of which were in many respects similar to those of Louisiana, the Governor might sign a bill after the Legislature had adjourned. The court says: "*After a bill has been signed, the Legislature has nothing more to do with it.*"

I think it may be fairly said that the weight of authority is in favor of the proposition.

It appears to me, also, that the reasons stated by the courts in favor of the proposition, as above briefly summarized, are the more cogent. The Governor is undoubtedly a part of the legislative department of the government, in that his signature is necessary to the enactment of a law. But the affixing of his signature is an act which is independent of the action of the Legislature, — an act over which that body has no control, and which he does under his constitutional power as Governor. It does not follow that he can only perform that constitutional act before he has prorogued the Legislature. If he disapproves, the provisions as to co-ordinate action are minute and particular; but his approval is an independent act.

An inspection of the language of the Constitution, Part II., c. I., § I., Art. II., in connection with the articles of amendment, Art. I., confirms this view. No bill shall become a law "until it shall have been laid before the Governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing." Then follow provisions for the return of the bill by him in case of disapproval, with the additional provision in the original instrument that if he does not return the bill within five days the same shall have the force of a law.

Transposing the words of the amendment, it provides substantially that a bill or resolve shall not become a law if it shall

be objected to and not approved by the Governor, and if the General Court shall adjourn within five days after the same has been laid before him for his approbation. In other words, the amendment provides substantially that a bill or resolve shall not become a law if the Legislature adjourns within five days after its presentation to the Governor, in case he objects to it and does not approve it. The amendment does not cover, and has no reference to a case where the Governor does *not* object to the bill, but on the contrary, approves it. The provisions relate wholly to the failure of the bill to become a law in case of his disapproval. It follows that it was not intended to limit his right of approval by the prorogation of the Legislature.

I am aware that this view raises the very important question within what time the Governor may approve a bill passed within the five days before prorogation. In some of the cases above cited, it is urged that to give him the right to sign bills after adjournment would put it within his power to hold them indefinitely during his term of office. In the New York case, however, it is held that by implication his signature must be affixed within the time provided for his disapproval; and this seems to be reasonable. Upon the whole, therefore, I am of the opinion that the Governor may sign bills after the Legislature has adjourned that have been presented to him within five days before that time.

It is proper, however, to say to Your Excellency that the authorities are not unanimous in support of this doctrine; that the usage in this Commonwealth, so far as there is a usage, is otherwise; and that to delay action until after prorogation upon a bill which Your Excellency proposes to sign may involve serious, and to some extent, doubtful, questions of law.

GOVERNOR, — ATTEMPT OF LEGISLATURE TO IMPOSE DUTIES NOT PRESCRIBED BY CONSTITUTION, — CORPORATION, — CONSTITUTIONAL LAW.

A statute provided that the directors of a newly incorporated railway, before constructing the road, should apply to the Governor and Council for a certificate that public convenience required the construction; and that, in case such certificate was refused, the act of incorporation was to become void. Such a statute is unconstitutional.

To the Governor. 1894 July 18.

In response to the verbal request of Your Excellency as to the rights and duties of the Governor under St. 1894, c. 550, § 18, I have the honor to reply as follows: —

The act in question is an act to incorporate the Boston & Lowell Bicycle Railway. By the first section of the act the persons therein named are made a corporation under the above name, "to construct and operate an elevated bicycle railway for the carriage of passengers," etc., between and through the cities therein named. Section 18 of the same act provides that "within sixty days after the passage of this act, the directors shall apply . . . to the Governor and Council for a certificate that public convenience and necessity require the construction of said railway. If a certificate is granted by . . . the Governor and Council, proceedings may be continued as herein provided. If a certificate is refused, no further proceedings shall be had, and this act shall be null and void."

This section makes it the duty of the executive department to pass upon the question of the "public convenience and necessity" of the proposed railway. It further provides that in case of an adverse decision upon this question the act shall become null and void. The question submitted to me is whether this duty can be imposed upon the Executive by the Legislature.

I am clearly of the opinion that it is not within the constitutional power of the Legislature to impose such a duty upon the executive department of the government. I am led to this conclusion upon various considerations.

1. The Governor is "the supreme executive magistrate of the Commonwealth." He is independent of the Legislature.

His rights and duties are prescribed solely by the Constitution. No duties can be imposed upon him by the Legislature or by any other authority, other than those set forth by the terms of that instrument. It is needless to say that the duties required by § 18 are not such as are required by any of the provisions of the Constitution prescribing his duties.

2. Under the section in question the Governor is called upon to pass upon the question of the expediency of the charter, and in effect to nullify the act by his adverse decision upon that subject. In other words, a veto power is given to him in addition to the carefully guarded provisions relating to his right of veto in the Constitution. He is a constituent part of the Legislature, in so far as he has the right under certain conditions and within certain limitations, of revising the bills passed by the Legislature, and of signifying his approval by his signature, or his disapproval by returning the same without his signature to the Legislature. The terms of the limitations of this power of revision are necessarily exclusive of all other interferences with, or revision of, legislative acts. The Legislature cannot give him the right to revise the law in the manner provided in this section, and to declare it null and void as therein provided, for the reason that it provides for a method of doing so not known to the Constitution, and not included within the veto powers of the Governor as therein expressed.

3. The question submitted to the Governor and Council under said section is a legislative question. Without attempting to determine the question how far the Legislature may delegate its legislative power by provisions that the acts passed by it shall become a law upon their approval by other tribunals, like towns, private corporations and the like, it is sufficient for the purpose of the exact inquiry submitted to me to refer to explicit provisions of the Constitution of Massachusetts, which absolutely separate the legislative from the executive department; excepting, of course, so far as the Executive has legislative powers under the constitutional provisions requiring his signature to bills passed by the Legislature. To attempt to confer upon the Governor the power or duty of passing upon the questions which are properly for the consideration of the

Legislature, as is attempted by this section, is a clear invasion of the provision of the Bill of Rights, which provides that "the Executive shall never exercise the legislative and judicial powers, or either of them." Bill of Rights, Art. 30; *Case of Supervisors*, 114 Mass. 247.

The foregoing considerations sufficiently dispose of the proposition that the Legislature could lawfully impose upon Your Excellency any duty of determining, in the manner provided in the section referred to, whether the act should be in force or not. I have not attempted to consider whether this section, so far as it attempts to impose a duty upon the executive department, renders the act, as a whole, unconstitutional or not. It is sufficient at present to say that there can be no doubt that, in so far as it attempts to impose duties of revision upon the executive department, it is in violation of the Constitution, and in so far is void.

Deputy Fire Marshal, — Appointment.

Under St. 1894. c. 444, § 1, the power of designating the Deputy Fire Marshal is incidental to the power of appointment vested in the Governor; and the phrase, "upon the recommendation of the Fire Marshal," must be interpreted in reference to the general expediency of an appointment.

To the Governor. 1894 July 18.

Replying to your verbal request for my opinion as to the construction of St. 1894, c. 444, § 1, I have the honor to reply as follows: —

The words of the statute as to which the inquiry is directed are as follows: "The Governor and Council may, upon the recommendation of the Fire Marshal, appoint a Deputy Marshal to assist him in his duties, and such deputy may in like manner be removed." As I understand the question of Your Excellency, it is this: does the "recommendation of the Fire Marshal" mean a recommendation that an appointment be made, or a recommendation of a person for appointment?

The words of the statute are not technically accurate. Strictly speaking, there is no such thing known to our laws as an ap-

pointment by the "Governor and Council." Inasmuch, however, as in the first part of the section it is provided that the Fire Marshal is to be appointed by "the Governor, with the advice and consent of the Council," it is to be presumed, I apprehend, that the briefer words "the Governor and Council" in the latter part of the section are intended to have the same significance, and to authorize an appointment by the Governor by and with the consent of the Council.

I have been unable to find any other statute containing the same form of language. The interpretation of this statute, therefore, must be determined on general principles, and by comparison, so far as the same is useful, with other statutes relating to the appointment of heads of departments and subordinates in the same department.

On general principles, it may be said that the power of appointment necessarily imports the power of designation. It is of the essence of the exercise of the privilege of appointment that the appointing power shall have the right of selection of the person to be appointed. It is not to be presumed, therefore, that the Legislature intended to abridge the scope of the authority of the Executive in making appointments, unless such limitation is expressed in unambiguous language. A power of appointment without the right to select and designate the person to be appointed is an anomaly. It is in no proper sense of the term a power of appointment. It is a limitation of the functions of the Executive which is to be found in no other law.

There are statutes, however, in which the power of appointment is expressly given to the head of the department, and the duties of the Executive are merely those of approval of the appointment so made. St. 1887, c. 214, § 5, provides that the Insurance Commissioner "may, with the approval of the Governor and Council, appoint . . . a Deputy Commissioner." In this statute the power of appointment is clearly conferred upon the Commissioner, and the Governor and Council have the power of approval only. But in the statute under consideration the Executive is vested with the power of appointment, and he can effectually exercise this power only when he has

the right of selection. If it had been intended by the Legislature to confer upon the Executive the power of approval only of a person designated by the Fire Marshal, it is to be presumed that apt language for that purpose would have been used, as in the provision above quoted for the appointment of a Deputy Insurance Commissioner.

On the other hand, it well may be that the question of the expediency of the appointment of a Deputy Fire Marshal is one that can be best determined by the Fire Marshal, in consequence of his more intimate acquaintance with the extent of the work of his department.

It may be suggested, however, that the efficiency of the department would be promoted if the Marshal were to have the selection of his subordinates, for the performance of whose duties he is responsible, and that the Legislature may be presumed to have had that consideration in mind in enacting the section. But an examination of the provisions of the statute do not bear out this suggestion. The duties of the Deputy Fire Marshal, as specified in the act, are not subordinate duties in the same sense as are those of clerks and employees. The Deputy Fire Marshal is, for all practical purposes, an additional Fire Marshal. He has the same powers of summoning witnesses and of inquiry and investigation as the Fire Marshal himself. It is true that the Deputy Fire Marshal as to the assignment of his work is necessarily under the direction of the head of the department, and in that respect is a subordinate officer; but in the performance of the work assigned to him he acts upon his own responsibility and with the same judicial powers as the Marshal himself.

The act seems to contemplate the possibility that the duties of the Fire Marshal may be so onerous as to render it necessary to divide his work. When he finds it so, the act provides that he may recommend to the Executive that a Deputy Marshal should be appointed; and thereupon the Governor, in his discretion, may make an appointment. The same considerations which render the Executive interested in the efficiency of the Marshal apply to the work of the Deputy Marshal. The latter officer is required to act in the matters assigned to him upon

the same lines and with the same powers as the Marshal himself.

On the contrary, as to officers whose duties are strictly subordinate, like clerks and other employees, for whom the Fire Marshal is and should be responsible, the act provides in § 7 that such officers shall be appointed by the Fire Marshal himself.

Upon the whole, therefore, I am clearly of the opinion that the expression "upon the recommendation of the Fire Marshal" is intended to have reference to the question of the expediency or necessity of an appointment of an assistant, and that the Legislature did not intend, while employing language which purports to give the Governor the power of appointment, to reduce that power in effect to a mere right of approval or disapproval of the person appointed by the Marshal, but did intend to give to the Governor the right of selection as incidental to the right of appointment.

It is proper to say, however, that the whole matter of appointment of a deputy is discretionary with Your Excellency; and to the end of securing greater harmony and efficiency in the work of the office, the Governor may in his discretion require the Fire Marshal to make suggestions as to the person to be appointed.

SURVEYOR-GENERAL OF LUMBER, — DUTIES.

St. 1890, c. 159, § 3, does not require a measurement of lumber to be made by the surveyor-general unless such a measurement is requested by one of the parties to the sale. The surveyor-general can establish other grades of lumber not included in the statute and not in conflict with its terms.

To the Governor. 1894 July 25.

Replying to the questions contained in a letter to Your Excellency from John W. Wiggin, surveyor-general of lumber, submitted to me June 21, I have the honor to say: —

The first question contained in the letter is as follows: "Does it not require in § 3 of the law that all lumber that is to be surveyed for any purpose of getting grade or measurement for settlement of a sale between purchaser and seller shall be surveyed under the authority of this office?"

As originally enacted (St. 1859, c. 224, § 2), it was provided that all lumber brought into the district of Boston for sale should be surveyed by the surveyor-general. By St. 1878, c. 65, § 2, this law was amended so that the survey of lumber by the surveyor-general became optional.

The law was again amended by St. 1890, c. 159, and the effect of this amendment is the substance of inquiry now under consideration. The exact change made was in striking out the words "he shall, by himself or his deputies, survey and measure all lumber brought into said district for sale, when a request therefor is made by either the purchaser or the seller," and in substituting in the place thereof the following: "All lumber brought into said district for sale, a survey or measurement of which is required by either seller or purchaser, shall be surveyed or measured by him or his deputies."

It is probable that the intention of the Legislature in so amending the law was to provide that all lumber, measurement of which is needed in order to effect a sale, must be surveyed by the surveyor-general or his deputies. I can conceive of no other purpose of the amendment. I understand, however, that, acting under advice, dealers in lumber do not so construe the statute, and continue as before in many instances to do their own measuring without calling upon the surveyor-general, thereby largely reducing the emoluments of his office. This practice, if the law will permit him, he desires to stop.

It must be borne in mind, however that the statute is penal in its nature, and must be construed strictly. It is a cardinal principle in the construction of penal statutes that a criminal offence cannot thereby be created except by the use of plain and unambiguous language.

Notwithstanding the apparent intent of the Legislature, it seems to me the language is not only not ambiguous, but that its plain intent is to leave the question of whether the services of the surveyor-general or his deputies shall be invoked still optional with the parties. I presume the Legislature intended the language "measurement of which is required by either seller or purchaser" to be equivalent to the words "measurement of which is necessary" in order to effect a sale. That

is, if in order to make a sale it is necessary to measure the lumber, then the measuring must be done by the surveyor-general. Such might be the meaning of the words if the clause "by either seller or purchaser" were omitted, making the statute read "measurement of which is required." Though even then the language would be somewhat ambiguous, as the word "required" may import either a request or a necessity.

But the expression cannot be construed without giving some force to the words "by either seller or purchaser." I cannot conceive of a case where measurement is necessary to effect a sale as to one of the parties to the transaction and not necessary to the other. If it is necessary to the buyer, it is also necessary to the seller. These words, therefore, "by either seller or purchaser," cannot be construed sensibly without giving to the parties therein described the option of having it measured or not by the official surveyor, as either of them may choose.

The plain meaning of the statute as it now stands, therefore, is that in case of a sale of lumber by measurement either party may call upon the surveyor-general or his deputies for measurement. If either party so requires his services, he shall survey it and receive his fees. If neither party invokes his services, then he has no jurisdiction.

I am not unmindful of the suggestion which may be made, that this construction leaves the law as it was before the statute of 1890; and that no essential change was made by c. 159 of that year so far as this part of the law is concerned. If it were a remedial statute, it might be imported into its significance by the intent of the Legislature; but a penal statute cannot be construed otherwise than by its own terms.

My attention has been called to the last section of the law, which provides that "Whoever performs without authority any of the duties of surveyor of lumber shall forfeit not less than fifty nor more than two hundred dollars." This section has not been changed by the amendment discussed, and was a part of the law when measurement of lumber was clearly optional on the part of dealers and purchasers. It cannot, therefore, add to or modify the meaning of the section under discussion.

On the whole, therefore, my answer to the question submitted by the surveyor-general is that the section he refers to does not require a measurement by the surveyor-general or his deputies, unless such measurement is requested by one of the parties to the sale of the lumber.

The foregoing consideration disposes of the second and third questions in his letter; to wit, whether a man in the employ of a dealer or consumer can measure or mark its contents, and render account thereof, for purposes of sale or purchase, without making himself amenable to the law and liable to the penalty imposed. He would if he assumed to act as an official measurer; otherwise, not.

The fourth question submitted by the surveyor-general is not clearly stated; but I understand from oral conversation with the surveyor-general that it is intended to inquire whether the surveyor-general has the right to establish grades of lumber other than which are provided for in Pub. Sts., c. 63, § 16, referring to the duties of the surveyor-general, in case the grades established in that statute have become obsolete.

In answer to this question, I should say that, while the surveyor-general cannot change the existing law as to grades of lumber, he can introduce and establish other grades not included in the statute and not in conflict with its terms.

Pilotage Fees.

A pilot who offers his services to a vessel bound into a port where pilotage is not compulsory has no claim for services when they are declined in favor of a person forbidden under a penalty to act as pilot, or when another authorized pilot subsequently offering himself is secured.

To the Pilot Commissioners. 1894 August 3.

I am in receipt of your letter requesting my opinion as to whether or not it is the duty of the Pilot Commissioners, under Pub. Sts., c. 70, § 21, to approve pilotage fees in two cases referred to in your communication. The facts as stated by you in the two cases, while different in other respects, are the same in this, — that in neither case was the pilotage compulsory under the provisions of law.

In my opinion, in neither case has the pilot a legal claim for compensation for the services which in each case he offered to render. The fact that in the first case mentioned by you some person may be liable to a penalty under St. 1884, c. 252, § 6, in no way affects the question of the legality of the claim of the pilot for compensation for the services offered to be rendered by him. In the second case, the pilotage not being compulsory, the provisions of Pub. Sts., c. 70, § 26, have no application to the claim of the pilot who has offered his services.

In answering your inquiries I have assumed that the provisions of § 21 above referred to make it the duty of the Pilot Commissioners to consider not alone the question of the correctness in amount of the pilotage fees, but also the question of the legality of any claim a pilot may make for fees.

FOREIGN CORPORATION, — ATTORNEY FOR ACCEPTING SERVICE.

A foreign corporation, organized for purposes many of which are lawful under the laws of this Commonwealth, may, under St. 1884, c. 330, appoint the Commissioner of Corporations its attorney for accepting service of process.

To the Commissioner of Corporations. 1894 August 25.

Your letter of August 4 raises some interesting questions. Understanding from oral conversation with you that you are only desirous of such interpretation of the law as may assist you to the performance of your duties, it seems to be unnecessary at present to pass finally upon the questions raised. I am informed that the law was drawn primarily with reference to a class of corporations that do not come within your jurisdiction. The only particular in respect to which it affects the performance of your duties, at least so far as concerns the questions submitted by you, is the accepting of the appointment of attorney for foreign corporations under the provisions of St. 1884, c. 330. Under St. 1894, c. 381, it is your duty to refuse to accept appointment as attorney for a corporation doing "business in this Commonwealth the transaction of which by domestic corporations is not then permitted by the laws of the Commonwealth."

So far as it concerns your duty, the law seems to look only to the carrying on of unlawful business, and not principally to the purposes for which the business is formed.

Inasmuch as no brewing company has asked you to accept appointment as attorney, there seems to be no occasion to answer the first question.

Unless you have information that the corporation with reference to which the second inquiry is put is engaged in carrying on business "the transaction of which by domestic corporations" is forbidden, there is no reason why you should refuse to accept appointment as its attorney. Many of the purposes of its organization are lawful, if not all; and it certainly has a right to carry on such portions of its business as are permitted by the laws of this Commonwealth.

STATE INDUSTRIAL SCHOOL, — STATE REFORM SCHOOL, — CHILDREN, — TRANSFER, — STATE PRIMARY SCHOOL, — BOARD OF LUNACY AND CHARITY.

An inmate of the State Industrial or Reform School transferred under Pub. Sts., c. 89, § 7, to the State Primary School becomes a member of the latter school, and subject to all the laws relating to its scholars. The power of discharge of children so transferred lies in the State Board of Lunacy and Charity.

To the Governor. 1894 August 25.

I have the honor to acknowledge the receipt of your communication enclosing a letter from the trustees of the State Primary and Reformatory Schools, in which my opinion is asked upon the question, "Whether the transfer of inmates from the Industrial School and Reformatory School to the Primary School, as provided in Pub. Sts., c. 89, § 7, discharges said inmates from the custody of said schools and transfers said custody to the State Board of Lunacy and Charity."

The statute referred to in the inquiry is as follows: —

"The trustees may also transfer inmates from the Industrial School and Reform School to the Primary School. When such transfers are made, the mittimus upon which the person was committed shall accompany the person transferred; and such

person shall be held upon the mittimus until the term of sentence has expired, unless sooner discharged or remanded. On application of any three of the trustees, the State Board of Health, Lunacy and Charity may return any boy so transferred, with the mittimus, to the Reform School, there to be held as if no such transfer had been made."

Upon examination of the numerous and in some respects not wholly consistent provisions of the statutes relating to the duties of the trustees and of the State Board with relation to the State Primary School, I am led to the conclusion that when an inmate of the Industrial or Reform School has been transferred to the State Primary School, as provided in the law referred to, the child so transferred becomes a member of the State Primary School to all intents and purposes, and as such is subject to all the provisions of law with relation to scholars in the State Primary School. In other words, the status of a child so transferred is the same as the status of all the other scholars in the State Primary School.

It seems to be unnecessary at this time to attempt to define or to distinguish the respective duties of the trustees and of the State Board with reference to the State Primary School. In general, however, it may be said that the State Board is to have general supervision over the State Primary School (Pub. Sts., c. 79, § 2); also the duty of visitation of the school (Pub. Sts., c. 79, § 5). It also "shall have the power of admission and discharge." Pub. Sts., c. 79, § 11.

On the other hand, the trustees are charged with the government of the school. Pub. Sts., c. 89, §§ 1 and 3. The trustees may also place inmates of the Primary School in charge of suitable persons; but, even in such case, "the power of visitation and final discharge" remains with the Board. Pub. Sts., c. 89, § 6.

It has been suggested that the inquiry submitted is intended to relate principally to the question of who has the right of discharge of children so transferred to the Primary School. I see no reason to doubt that the right of discharge is with the State Board, as above stated. The power of admission and discharge is expressly vested in the State Board. Pub. Sts.,

c. 79, § 11. This provision is in the chapter of the Public Statutes which defines the duties and powers of the State Board. It must be taken to be broad enough to include all the inmates of the school, however admitted. The fact that the mittimus accompanies the child transferred does not change its status, so far as the power of discharge by the State Board is concerned. So long as the child is in the State Reform or State Industrial School, he may be discharged by the trustees under the authority given them in relation to inmates of those schools. When he is transferred to the State Primary School he is subject to be discharged from that institution like any other pupil in the school, upon the order of the State Board, which has the exclusive right of discharge from that school.

The section under consideration is almost identical with the provisions of Pub. Sts., c. 89, § 47, relating to the transfer of girls from the Industrial School to the State Reformatory. In case of such transfer it is provided in that section that the girl is to be held upon the mittimus in the Reformatory Prison "until the term of sentence has expired, unless sooner discharged." It will scarcely be disputed that a girl so transferred and held in the Reformatory Prison may be discharged only as other inmates of the reformatory are discharged, — to wit, by the authority of the Commissioners of Prisons.

Upon the whole, therefore, I am clearly of the opinion that the power of discharge of children transferred to the State Primary School from the State Industrial School or Reformatory School is in the State Board.

BALLOT LAWS, — REGISTRARS OF VOTERS, — SESSIONS.

No session of registrars for the purpose of registering voters can lawfully be held after the Saturday but one before election day.

To the Secretary. 1894 October 8.

I have the honor to acknowledge your favor of October 6, relating to the duties of registrars of voters under St. 1894, c. 271, § 2.

Inasmuch as the question stated in your letter is one which may come before the Ballot Law Commission, of which both

you and I are members, it would not be proper to pass finally upon the question submitted at this time.

However, as I am told that there is a general inquiry on the subject, and as it is desirable to secure uniformity and regularity of action, I may, perhaps, properly say that it is a well-recognized principle of law that a later statute, inconsistent in its terms with a former statute, must be taken to repeal the former statute, although such repeal is not expressed in terms.

Applying this principle to the case submitted, it would seem to be plain that, although St. 1893, c. 417, § 38, provided for a meeting of the registrars on the Wednesday next preceding the annual State election, yet, inasmuch as St. 1894, c. 271, § 2, has explicitly provided that registration shall cease the Saturday but one before election day, no session of registrars for the purpose of registering voters can now be lawfully held after the last-named date, to wit, the Saturday but one before election day; and that, so far as St. 1893, c. 417, § 38, provides for sessions for the purpose of registering after that date, its provisions have become inoperative.

CORPORATION, — ORGANIZATION WITHOUT LIMITS OF COMMONWEALTH.

A business corporation, under Pub. Sts., c. 106, cannot be legally organized without the limits of the Commonwealth.

To the Commissioner of Corporations. 1894 November 13.

I have the honor to acknowledge your letter of the 24th ultimo, making the following inquiry: "Can a business corporation, under Pub. Sts., c. 106, be legally organized outside the limits of the Commonwealth?"

Corporate powers are the creation of the sovereign. Its charter invests those to whom it is granted with the right to act, not as natural persons, but in a corporate capacity. But, inasmuch as the charter is inoperative beyond the jurisdiction of the State, the powers granted by it do not accompany the persons holding it beyond its jurisdiction. It is well settled that a corporation whose charter has been granted by one State cannot hold meetings, pass votes or in any way exercise its corporate functions in another State. It has no legal exist-

ence outside the jurisdiction of its sovereign. *Miller* v. *Ewer*, 27 Maine, 509; *Freeman* v. *Machias Water Power Company*, 38 Maine, 343; *Franco-Texan Land Company* v. *Laigle*, 59 Tex. 339; *Ormsby* v. *Vermont Copper Mining Company*, 56 N. Y. 623.

It is to be observed that this principle applies only to corporate acts. It does not include and does not prohibit the carrying on of business and the making of contracts through the agents of the corporation, whether within or without the State. The limitation is only upon the exercise of the corporate functions of its charter. *Bellows* v. *Todd*, 39 Iowa, 209; *Arms* v. *Conant*, 36 Vt. 744.

The cases cited deal mostly with the doings of the corporation after its organization. But the principle is equally applicable to the act of organization itself. The meeting at which the life granted by the charter is set in being is not only a corporate act, but it is the first and most important act. If a corporation cannot live and have being as a corporation, under Pub. Sts., c. 106, without the State, *a fortiori*, it cannot begin to live abroad.

In my opinion, therefore, a business corporation cannot be legally organized outside the limits of the Commonwealth.

PUBLIC DOCUMENTS, — RETURNS OF GAS COMPANIES.

It is not compulsory upon the Board of Gas and Electric Light Commissioners to exhibit the returns made by gas companies to any person who may ask to see the same.

To the Gas and Electric Light Commissioners.
1894
November 14.

I have the honor to acknowledge the receipt of your letter of 8th inst., containing several specific inquiries as to the duty of your Board in reference to the exhibition, to any person who may ask to see the same, of the returns of gas companies made to your Board, pursuant to the provisions of St. 1885, c. 314, § 7, and St. 1886, c. 346, § 2.

The statutes of the Commonwealth contain many and various provisions for returns by corporations, both those chartered within the Commonwealth and foreign corporations doing busi-

ness here. Some of the returns so provided for are plainly for the information of the public. Examples of such are the returns required to be made by domestic corporations to the Secretary of State, under the provisions of Pub. Sts., c. 106, § 54; and returns required of foreign corporations to be made to the Secretary of State, under the provisions of St. 1891, c. 341. The returns provided by these statutes relate to the financial condition of the corporations affected by its provisions, and are obviously of interest and importance to all persons having business with them.

But the returns required to be made by gas companies to your Board are of a different character, and for a different purpose. An examination of the purpose and scope of the acts containing such provisions makes it clear that returns from gas companies are required for the information and guidance of the Board in discharging its duties of supervision and regulation over such companies. By St. 1885, c. 314, § 8, it is provided that the Board shall have "the general supervision of all corporations engaged in the manufacture and sale of gas for lighting and for fuel." By § 9 of the same chapter the Board is authorized, upon the complaint in writing of the officers of the city or town in which a gas company is located, or of twenty customers of the company, to order such reduction in the price of gas, or improvement in the quality thereof, as it shall deem just and proper. The Board is also by § 11 charged with the duty of ascertaining with what degree of purity gas companies can reasonably be required to make and supply gas. By St. 1886, c. 346, § 5, the Board has jurisdiction over complaints for the refusal or neglect of gas companies to supply gas to persons residing in the place where the company carries on its business.

To the end that the Board may perform the duties so required of it intelligently and wisely, the same act (St. 1885, c. 314, § 7), provides that every gas company shall annually make a return to the Board in such form as may be prescribed by the Board, "setting forth the amount of its authorized capital, its indebtedness and financial condition on the first day of January preceding, and a statement of its income and expenses during

the preceding year, together with its dividends paid or declared, and a list containing the names of all its salaried officers and the amount of the annual salary paid to each." This return must be signed and sworn to by the officers of the company. The same section further provides that the company shall also at all times on request "furnish any statement of information required by the Board concerning the condition, management and operations of the company." Acting under the authority of this section, I am informed that your Board has prescribed a form of return by the gas companies within your jurisdiction, calling for a large number of items of information as to the business management and operations of the company not included in the statute requirements for sworn returns. These inquiries are so minute and far-reaching in their nature that they are intended to exhibit to the Board every detail of the business of the company making the return.

These inquiries are within the authority contained in § 7 above cited, and put the Board in possession of such information as enables it to exercise the jurisdiction conferred upon it as to the price and quality of the gas furnished, and the other matters of supervision set forth by the provisions of the statutes.

They are not, however, of interest or importance to the public generally. The customers of the company, it is true, are interested in the price and quality of the gas furnished. Express provision, however, is made for the hearing of complaints made by them to the Board; and, if they deem the price unreasonably high or the quality unreasonably poor, they have their remedy by appeal to the Board, which, with the knowledge furnished it by the returns called for, is enabled to do justice between them and the companies who serve them.

This view is confirmed by the fact that there is no provision of law for giving publicity to the returns made to your Board, excepting St. 1886, c. 346, § 2, providing that the Board shall transmit such abstracts of the returns as it shall deem expedient annually to the Legislature. The abstracts referred to by this section are obviously abstracts of the sworn returns, and do not relate to the other inquiries, whether made from

time to time by the Board or included by them in the requirements from the annual returns to be made by the companies. It would seem, therefore, that the only duty of the Board is to exhibit to the Legislature such portions of the sworn returns as may be called for by that body.

This view is confirmed by the consideration of the fact that gas companies, in addition to the returns required to be made by your Board, are also required to return a statement of their financial condition to the Secretary of State, under the provisions of Pub. Sts., c. 106, § 54. The latter returns, as already stated, are intended for the information of the public and persons having business dealings with the companies making the returns. If the returns required to be made to your Board were for the information of the public, it would not be necessary to make returns to the Secretary of State, as all the information returned to the Secretary of State is contained in the returns made to your Board. It is plain, therefore, that the returns to the Secretary of State are for the use and information of the public generally, while the returns made to your Board are for the use and information of your Board in the performance of its duties of supervision and regulation.

I am of opinion, therefore, that it is not the duty of your Board to exhibit the returns of gas companies to any person who may ask to see the same. I am of opinion, on the contrary, that it is your duty to refuse to exhibit any part of said returns to casual inquirers. What, if any, duties as to the exhibition of the returns devolve upon the Board in the case of proceedings before courts or other tribunals, or in hearings before your Board where the information contained in the returns may be of importance, is a question which may well be left to be dealt with when it arises.

SAVINGS BANKS, — AUTHORIZED INVESTMENTS, — MUNICIPAL NOTES.

An instrument with a seal attached, but in other respects bearing all the attributes of a note, and issued by a city under a resolution authorizing the issue of promissory notes in anticipation of certain assessments, is not a bond within the meaning of a statute authorizing savings banks to purchase legally authorized bonds.

To the Commissioners of Savings Banks.
1894
November 22.

I have the honor to acknowledge the receipt of your communication of November 7, enclosing a form of instrument entitled "Cleveland City Promissory Note," together with sundry other papers in connection with the same matter. In your letter you ask my opinion as to whether (other requirements being satisfactory) the instrument in question is a bond within the meaning of St. 1894, c. 317, § 21, cl. 2, par. f. The portion of the statute in question authorizes savings banks, under certain conditions, which are not important to the present inquiry, to invest their deposits in legally authorized bonds for municipal purposes of certain cities in the State of Ohio, the city of Cleveland being one of those so described. If the instrument in question is a note, savings banks may not invest their funds therein. If it is a bond, I understand by your letter that it is a legal investment for savings banks.

It may be a question whether the word "bond" is used in the statute above quoted in its commercial or legal sense. As used in business transactions, the term "bond" often includes classes of securities which would hardly fulfil the common law definition of the word. Some confusion also has arisen through the legislation of different States upon the subject. It may therefore be difficult, if not impossible, to define the difference between notes and bonds in a way that shall be conclusive and sufficiently accurate to cover all possible cases that may arise.

But, whatever the general rule may be, it is plain that the instrument submitted by your letter is a note, and not a bond. It was issued under the authority of Rev. Sts., Ohio, § 2705, which is in the following words: "If the council makes any special assessment payable in annual installments . . . it shall have authority to borrow upon the credit of the corporation a sum of money sufficient to pay the estimated cost and expense

of the improvement, and shall have authority to issue bonds, notes or certificates of indebtedness . . . for the payment of the principal and interest of such bonds, notes or certificates of indebtedness." Acting under this statute, the council of the city of Cleveland passed a vote providing "that the city auditor may be authorized to make a loan of $53,200 in anticipation of the collection" of certain described assessments; and further providing "that the mayor and city auditor are hereby authorized to execute promissory notes of the city of Cleveland for said amount." The instrument itself is entitled "Cleveland City Promissory Note." It is of the tenor of a note in all respects, and is signed by the mayor and auditor.

It therefore appears that the Legislature gave and intended to give to the city of Cleveland the election to issue bonds, notes or certificates of indebtedness, as it should determine. The city council elected to issue notes, and so authorized the treasurer. The instruments issued have the attributes of a note, and are so entitled. Neither the intention of the corporation nor the form of the instrument can properly be disregarded. Upon all the circumstances, therefore, it is plain that the instrument in question is intended to be and is a note, and is an instrument that the Legislature of the Commonwealth did not intend to authorize its savings banks to purchase.

It is suggested, however, that, inasmuch as the seal of the city is affixed to the instrument, it has thereby become a bond. But upon examination of the statutes of Ohio it is clear that the affixing of the seal has not changed the character of instrument. The seal was affixed in accordance with the requirements of Rev. Sts., Ohio, § 2706, which provided that "All bonds, notes or certificates of indebtedness issued by municipal corporations shall be signed by the mayor and by the auditor . . . and be sealed with the seal of the corporation." The affixing of the seal is not recited in the body of the instrument, and it does not purport to be a sealed instrument by its tenor. The intention of the law was obviously to require the affixing of seals to municipal notes and certificates of indebtedness, not for the purpose of changing their character, but to establish their authenticity as municipal obligations. I am confirmed in

this view upon consideration of the fact that by § 4 of the Revised Statutes of Ohio private seals are abolished, and the affixing of a private seal does not give an instrument any additional force or effect.

But, even if the affixing of the seal has changed the character of the instrument, the answer to your inquiry must still be the same. The statute in question authorizes savings banks to invest in the legally authorized bonds of certain western cities. The city council of Cleveland authorized the treasurer to issue promissory notes; it did not authorize him to issue bonds. If the instruments are, or, by the affixing of the seal, have become, bonds, they are not legally authorized, and are not, therefore, obligations in which savings banks may invest.

Upon the whole, therefore, I have to say that the form of obligation submitted to me is a note and not a bond, and is not an authorized investment for our savings banks.

MASSACHUSETTS AGRICULTURAL EXPERIMENT STATION, — PROPERTY, — TRANSFER.

St. 1894, c 143, is insufficient to authorize the transfer of the property that is vested in the Massachusetts Agricultural Experiment Station under the provisions of St. 1887, c. 31.

To the Governor.
1894
December 3.

I have received your communication with various papers relating to the transfer of the property of the Massachusetts Agricultural Experiment Station under the provisions of St. 1894, c. 143.

St. 1863, c. 220, is entitled "An act to incorporate the trustees of the Massachusetts Agricultural College." By the provisions of § 1 the name of the body corporate thereby established is "Trustees of the Massachusetts Agricultural College." The corporation received certain moneys by the sale of land scrip, by virtue of the provisions of the 130th chapter of the Acts of the 37th Congress of the second session thereof, approved July 2, 1862. The land was bought and the college was located at Amherst, the town of Amherst giving thereto the sum of $75,000.

St. 1882, c. 212, established an agricultural experiment station to be maintained at the Massachusetts Agricultural College in the town of Amherst, and the management of said station was vested in a board of control.

The following acts and resolves relate to said Agricultural Experiment Station: St. 1883, c. 105; Res. 1884, c. 48; Res. 1885, c. 66; Res. 1885, c. 68; St. 1885, c. 327; Res. 1886, c. 17; Res. 1887, c. 44; Res. 1888, c. 15; St. 1888, c. 296; St. 1888, c. 333.

By St. 1887, c. 31, the members of the board of control of the Agricultural Experiment Station, established by the Massachusetts Agricultural College in the town of Amherst, their associates and successors, were made a body corporate under the name of the "Massachusetts Agricultural Experiment Station;" and by § 5 of said act the said corporation, by virtue of the act, was authorized to take and hold as and for its property all the property in the charge of said board of control; and was thereby further authorized to hold such real estate and personal property as may be necessary for its purpose. The act was approved February 21, 1887, and took effect upon its passage.

By St. 1887, c. 212, the Commonwealth of Massachusetts assented to and accepted "a grant of moneys to be annually made by the United States, as set forth and defined in an act of Congress, entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several States, under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto,' said act, designated Public No. 112, being passed at the second session of the 49th Congress, and approved March 2, 1887, and upon the terms and conditions contained and set forth in said act of Congress."

The result is that there are in operation two experiment stations, one known as the Massachusetts Agricultural Experiment Station, carried on as the Massachusetts Agricultural Experiment Station, under the management of the body corporate known as the Massachusetts Agricultural Experiment Station, and a station known as the Hatch Experiment Station,

carried on by the corporation known as the trustees of the Massachusetts Agricultural College. In order to consolidate these stations, St. 1894, c. 143, was enacted.

As will be seen, St. 1887, c. 31, § 5, vested in the Massachusetts Agricultural Experiment Station, the body corporate constituted by said act, all the property in charge of said board of control. On the sixth day of July, A.D. 1887, the Massachusetts Agricultural College leased to the Massachusetts Agricultural Experiment Station, a corporation duly organized by law, certain real estate in Amherst for the term of ninety-nine years, which is part of the property enumerated in St. 1894, c. 143. In the legislation in reference to the Massachusetts Agricultural Experiment Station, subsequent to St. 1887, c. 31, to wit, St. 1888, c. 333, and St. 1894, c. 143, and c. 144, the fact that by St. 1887, c. 31, the board of control was made a corporation appears to have been overlooked.

In my opinion, St. 1894, c. 143 is insufficient to authorize the transfer of the property that is vested in the corporation by the provisions of St. 1887, c. 31. It seems to me that the matter can be remedied only by legislation.*

CIVIL SERVICE, — DEPUTY SUPERINTENDENT OF PUBLIC BUILDINGS OF BOSTON.

The duties of the deputy superintendents of the public buildings department of the city of Boston, as defined in the evidence submitted by the Board of Civil Service Commissioners, are such as to bring the office of deputy superintendent within the classification of the public service provided by Class 7 of Schedule B, Rule 6 of the civil service rules.

To the Civil Service Commissioners
1894
December 4.

I beg to acknowledge your request for my opinion as to whether the duties of the deputy superintendents of the public buildings department of the city of Boston are such as to bring the office of deputy superintendent within the classification of the public service provided by Class 7 of Schedule B, Rule 6 of the civil service rules.

---

* Remedied by St. 1895, c. 57.

The offices and places which are filled under the civil service rules are classified in two divisions. The first division is subdivided into Schedule A and Schedule B, and each schedule is in turn subdivided into several classes. Class 7 of Schedule B includes inspectors of work and all persons under whatever designation doing inspection service not included in Schedule A. Rule 21, § 4, of the civil service rules, provides for the examination of applicants for the position of inspector, by giving the commissioners authority to order examinations upon subjects of a technical or special character, to test the capacity which may be needed in any part of the classified service which requires peculiar information or skill.

On the other hand, St. 1893, c. 95, provides that heads of any principal departments of a city shall not be affected by the civil service rules, either as to their selection or their appointment.

The deputy superintendents of the public buildings department are at the present time appointed by the superintendent of the department. Under authority of the city ordinances, c. 33, § 1, the superintendent has divided the city of Boston into six territorial districts, and for each district he has appointed under him a deputy superintendent, giving to each deputy a designated district. The question then is, first, whether these deputy superintendents are heads of any principal department of the city of Boston, and therefore specially exempt under authority of the above act from the operation of the civil service rules; second, if not so exempt, whether they are inspectors of work or persons under any designation doing inspection service, and therefore coming within the classification of the civil service rules.

An examination of the exhibits presented with your request shows: —

1. The work of inspection of buildings must be performed personally by each deputy.

2. A deputy has not the right to repair a building upon his own personal responsibility; but whenever, in his opinion, any building stands in need of repair, he is obliged to make a written report and recommendation of that fact to the superintendent, setting forth fully the nature of the repairs needed.

3. The execution of these repairs, and the employment of mechanics and other assistants in furtherance thereof, can only be had upon the approval of the superintendent.

4. There are no city employees under the control of any deputy.

5. The deputies have no offices of their own, each one merely having a desk in the office of the superintendent of the public buildings department.

6. The superintendent can change the number of deputies at will, and there is nothing to prevent him from sending one deputy into the district of another.

7. Each deputy is obliged to make an annual report to the superintendent.

8. The entire work is done under the general supervision of the superintendent.

The duties of the superintendent of this department are shown in the revised ordinances of the city of Boston c. 33, § 1. He has the supervision of all buildings belonging to the city and of all buildings or parts of buildings hired by the city, and he must provide therein all necessary furniture and keep the same in good condition; and he has the supervision of all repairs upon all buildings and parts of buildings used by the city.

It seems perfectly clear from the character of the deputy superintendents' duties, as shown by this analysis of the evidence submitted, that the said deputies cannot in any way be considered as the heads of any principal department of the city of Boston; and they do not, therefore, come within the exemption of St. 1893, c. 95. The evidence shows with the same clearness that in reality these so-called deputies are merely inspectors performing their work under the supervision of the superintendent, responsible to the superintendent, at the head of no department, and having no men in their employment; and, therefore, that they fall within the definition of Class 7 of Schedule B, Rule 6 of the civil service rules.

COUNTY ACCOUNTS, — SPECIAL COUNTY COMMISSIONER, — ALLOWANCE FOR TRAVEL.

It is not necessary for a special county commissioner to present a certified itemized statement to the Controller of County Accounts in order to obtain the allowance of ten cents a mile for travel, granted by St. 1894, c. 250.

To the Governor. 1895 January 21.

I have the honor to acknowledge your request for my opinion upon the question raised by the Controller of County Accounts in his communication of January 10, addressed to Your Excellency.

The question is this: By St. 1894, c. 250, § 1, a special county commissioner is allowed ten cents a mile travel each way for time spent in the discharge of his official duties. Is it necessary, before such expenses are allowed and paid to him out of the county treasury, for him to present a certified itemized statement thereof to the Controller of County Accounts, to be by him audited and certified to the treasurer of the proper county.

By St. 1887, c. 438, § 3, it is provided that the Controller shall inspect and audit the accounts of the county treasurers of each county. Comparing this statute with those concerning the duties of county treasurers, it appears that, in cases of county expenses of this nature, the usual course is for the expenses to be allowed and paid directly by the county treasurers, the accounts of the latter being afterwards audited by the Controller.

A new method of auditing accounts, for the particular case specified in the statute in question, was introduced by St. 1893, c. 273. This act provided that there should be allowed and paid to each county commissioner the "actual necessary and proper expenses of transportation paid by him in the discharge of his duties, upon a certified itemized statement of such expenses, made . . . to the Controller of County Accounts, who shall audit and certify the same to the treasurer of the proper county."

Pub. Sts., c. 22, § 31, provided that all the provisions of law concerning the duties of county commissioners should,

except where it was otherwise specially provided, be construed to include and apply to special county commissioners. If the question were, then, whether a bill of a special county commissioner for actual necessary and proper expenses for transportation, before being allowed by the county treasurer, should be presented to and certified by the Controller of County Accounts, there would be good ground for holding under authority of this chapter that the duty placed upon the county commissioners in similar cases to present such an itemized statement necessarily implied a like duty in the case of special county commissioners.

But the question raised by the Controller presents a different aspect of the case. His question is whether, for allowance and payment of the "ten cents a mile travel each way," granted by St. 1894, c. 250, to special county commissioners, it is necessary for a certified statement to be presented to the Controller.

There is no provision in this act either stating or implying that a special county commissioner, in order to have this allowance paid to him, shall present such a statement to the Controller. Likewise there is no statute requiring a county commissioner to present such a statement; for the statement required by St. 1893, c. 273, from the county commissioners, and therefore by implication from special county commissioners, is a statement of the actual necessary and proper expenses for transportation; whereas, in the case under consideration a special county commissioner is not paid the actual expense of transportation, but is allowed instead the arbitrary sum of ten cents a mile travel each way.

For these reasons I am of the opinion that, in the absence of any obligatory statutory provision, either expressed or implied, it is not necessary for a special county commissioner to present a certified itemized statement to the Controller of County Accounts in order to obtain the allowance of ten cents a mile for travel each way granted to him by St. 1894, c. 250.

CONVICT, — PARDON, — CONSTITUTIONAL LAW.

The Governor may refuse to pardon a convict, although pardon is recommended by the Council.

To the Governor. 1895 January 21.

I have examined the question submitted to me orally by Your Excellency, to wit, "Can the Governor refuse to pardon a convict, although advised by the Council to pardon him?" and have to reply as follows: —

By the Constitution of Massachusetts, Part 2, c. 2, art. 8, "The power of pardoning offences . . . shall be in the Governor, by and with the advice of Council." The Council has no pardoning power. The Governor, it is true, cannot exercise the power of pardon vested in him excepting by the advice of the Council. But he cannot be directed by that body to exercise the power; for, if he could be, the power would be in the Council and not in him, and he would be a ministerial officer only to execute the power so vested in that body. The power to pardon necessarily imports the right to refuse pardon.

CONTROLLER OF COUNTY ACCOUNTS, — TRAVELLING EXPENSES.

The expenses of the Controller of County Accounts and his deputies, incurred in travelling from their homes to their Boston office and in returning therefrom, cannot be allowed them under a statute providing for their actual travelling expenses incurred in the discharge of their official duties.

To the Governor. 1895 January 22.

I have the honor to acknowledge the receipt of your letter, dated December 29, 1894, referring to me a letter of inquiry from the Controller of County Accounts. The question stated in the letter of the Controller is "whether, under the provisions of St. 1887, c. 438, § 2, the Controller and his deputies should be allowed their actual expenses incurred in travelling in the discharge of their official duties between their respective places of residence and the office of said Controller in Boston." It is further stated in the letter that the travelling in relation to which the inquiry is made is "for the purpose of reaching the

office, to there perform the duties of the day, and for returning from said office to their homes."

The act referred to provides in § 2 for the salary of the Controller; and that he "shall be allowed also the actual expenses of himself and . . . clerks incurred in travelling in the discharge of official duties." By an amendment (St. 1890, c. 306) of this act the same provision for travelling expenses is made as to deputies. St. 1887, c. 438, § 3, prescribes the duties of the Controller and his deputies, which are, in substance, to inspect the books and accounts of the county treasurers, and to visit, at least once a year, all other county officers receiving money of the county, and also all clerks of courts and trial justices, and examine their accounts. I do not find any provision of law which requires him to maintain an office for his own use, or to attend at such office for any purpose, although this fact is not, in my opinion, material to the inquiry proposed.

The official duties in the discharge of which he is allowed the actual expenses of himself and deputies obviously refer to the duties prescribed in § 3, which necessarily require the Controller and his deputies to travel about the Commonwealth; and it must be taken to have been the intention of the Legislature to confine the allowance for travelling expenses to expenses so incurred. It has not been the policy of the Commonwealth, nor the practice under its laws, to allow officers for travelling expenses from their homes to their offices, except when provision is especially made therefor. I have no hesitation in saying that the expenses of the Controller incurred in travelling from his home to his office in Boston and of returning therefrom to his home are not within the scope of the statute referred to.

UNITED STATES SENATOR, — ELECTION.

A person who, on the first day when the two branches of the Legislature meet separately, receives in each branch a majority of the votes for the office of United States senator, is elected on the day such votes are taken, and all subsequent proceedings are merely in the nature of verification.

To the Secretary. 1895 January 22.

I am in receipt of your letter of January 18, asking my opinion whether, in case the same person receives a majority of the votes for the office of United States senator in each house of the Legislature on the first day when the two branches vote separately, he is elected that day, or not until the following day, when the two houses convene in joint assembly and the journals of the two houses are read and the result declared.

I presume the inquiry is made in the interest of technical accuracy. I can conceive of no circumstances under which the question would become of practical importance; for, whenever elected, the person chosen is not entitled to take his seat in the Senate until he receives his certificate of election.

The Constitution of the United States, Art. I., § 3, provides that "The Senate of the United States shall be composed of two senators from each State, chosen by the Legislature thereof." Section 4 provides that "The times, places and manner of holding elections for senators . . . shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations."

Under the authority of § 4, above quoted, Congress has regulated the election of senators by the Legislatures of the several States. U. S. Rev. Sts., §§ 14 and 15. Section 14 provides that the Legislature of each State "shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress." Section 15 provides that "Such election shall be conducted in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for senator in Congress from such State, and the name of the person so voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk or

secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal." The same section further provides that "At twelve o'clock meridian of the day following . . . the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected senator." The section provides further that in case the same person has not received a majority of the votes in each house, the joint assembly shall thereupon proceed to choose by a *viva voce* vote in a similar manner a person for senator, and the person who receives the majority of all the votes of the joint assembly shall be declared to be elected.

It is plain that the election takes place on the day when the two houses separately make their choice, provided they both choose the same person. The proceedings of Wednesday are for the purpose of ascertaining whether the same person has been chosen or elected by each branch. If such, by the records of the two houses, appears to be the fact, nothing remains but a declaration of the result. If, on the other hand, it appears that no person has been so chosen, the electors, being then assembled together, shall proceed to the election of a senator. The election is on Tuesday; the ascertaining and declaration of the fact takes place on Wednesday. The formalities incident to the election are not complete until the two houses meet in joint convention; but the day of election is the day when the electors record their votes.

The proceedings are analogous in some respects to those incident to the election of officers by two or more voting precincts. The electors cast their ballots on the Tuesday after the first Monday in November. The record of the votes so cast is submitted on a subsequent day to a returning or canvassing board, who examine the returns and declare the result. It is not formally ascertained who is elected until these formalities are complied with; but there can be no question that the election was held on the day when the electors cast their votes. The only essential difference between these two cases, to wit,

an election by voting precincts and the election of a senator by the two branches of the Legislature on Tuesday, is that, under the statutes of the United States, above quoted, there is no election unless both constituents of the Legislature elect the same person. If they do not, there is no election. If, however, they do so concur, the act of election is complete, and the subsequent proceedings are in the nature of verification only.

This conclusion is in accordance with what I understand to have been the uniformly established practice in senatorial elections in this Commonwealth. That it is also the view of Congress appears from the fact that by Rev. Sts., § 14, above quoted, it is provided that the Legislature shall elect a senator "on the second *Tuesday*," etc.

CORPORATION, — INCREASE OF CAPITAL, — CERTIFICATE, — PREFERRED STOCK.

A corporation, upon increasing its capital stock under the provisions of Pub. Sts., c. 106, § 59, presented to the Commissioner of Corporations for his approval a certificate correct in form, with the exception of the following words, which were unnecessarily inserted: "One hundred and fifty thousand preferred stock and one hundred thousand common stock." The Commissioner is not required to approve such a certificate.

To the Commissioner of Corporations. 1895 January 22.

I have the honor to acknowledge the receipt of your letter of inquiry, dated November 9, 1894, asking my opinion upon the questions: first, whether a manufacturing corporation, by vote of its stockholders, can increase its capital stock partly in preferred stock and partly in common stock; and, second, if so increased, is the Commissioner of Corporations bound to approve a certificate which sets forth the fact that a portion of the increase is in preferred stock?

Pub. Sts., c. 106, § 56, provides that every corporation subject to said chapter "shall, upon an increase of its capital stock, within thirty days after the payment or collection of the last instalment thereof, file a certificate of the amount of such increase and the fact of such payment, signed and sworn to

. . . in the office of the Secretary of the Commonwealth." Section 59 provides that every such certificate "shall, before filing, be submitted to the Commissioner of Corporations, who shall examine the same; and if it appears to him to be a sufficient compliance in form with the requirements of this chapter, he shall certify his approval thereof by indorsement upon the same."

The Commissioner of Corporations under the section last quoted is only required to see that the certificate is in due form. The certificate is obviously for the purpose of informing the Commonwealth and those having business with the corporation as to the amount of its capital stock, and whether it has been paid in.

The certificate as to which your inquiry is made has been submitted to me for examination. I find it to be correct in form and in accordance with the provisions of said § 56, excepting that, after stating that the capital stock of the corporation has been increased by the amount of two hundred and fifty thousand dollars, and that the same has all been paid in, the following words are inserted in brackets: "One hundred and fifty thousand preferred stock and one hundred thousand common stock."

I am of opinion that you are not called upon to approve a certificate containing these recitals, for the reason that they are no part of the return required by § 56. You are not required to determine whether the corporation has the right to characterize a part of the increase of its stock as preferred, but only to certify that the certificate is in form as required by § 56. The incorporation of statements not required by the section is a departure from the form of certificate required, and authorizes you to disapprove of it.

These considerations also dispose of your first inquiry, so far as it relates to the performance of your duties. Whether a corporation may issue preferred stock under any circumstances, and, if so, under what circumstances, is a question which may well be left to be dealt with when it arises. It does not arise in the performance of your duties under § 59, and there is no occasion at present to consider it.

CORPORATION, — FEE FOR RECORDING CERTIFICATE OF CHANGE OF BUSINESS, — CAPITAL.

Pub. Sts., c. 106, § 84, cl. 3, provides that the fee for recording the certificate required by §§ 51 and 52 of the same chapter shall be a certain per cent. of the capital stock of the corporation. The words "capital stock," as here used, mean not the amount actually paid in, but the amount fixed by the corporation.

To the Secretary. 1895 January 23.

I am in receipt of your letter of 21st inst., asking for a construction as to the meaning of Pub. Sts., c. 106, § 84, cl. 3. That clause provides that the fee to be paid for filing and recording the certificates required by §§ 51 and 52 of the same chapter shall be "one-twentieth of one per cent. of the amount of the capital stock of the corporation." The question submitted is whether this fee is to be computed on the amount of the capital stock fixed by the corporation, or the amount actually paid in.

Section 51 referred to in the clause under consideration provides that a corporation may, "upon the vote of all its stockholders at a meeting duly called for the purpose, alter, add to or change the business for the transaction of which it was incorporated." It is further provided that a certificate setting forth such alteration, addition or change shall be filed in the office of the Secretary. Section 52 provides that a gas company may engage in the business of generating or furnishing steam or hot water for mechanical purposes under certain provisions, upon filing a certificate thereof, as provided in § 51.

I apprehend that the only occasion for doubt in reference to the inquiry suggested is the fact that § 84 provides, in cl. 2, that the fee to be paid upon original incorporation is declared to be one-twentieth of one per cent. of the capital stock "as fixed by the agreement of association;" and it may be claimed that the omission of the words last quoted in the clause under consideration is significant, as indicating the intent of the Legislature to confine the tax in the latter clause to a percentage on the capital stock actually paid in. There is no force, however, in this suggestion. In the former clause the fee specified is to be paid immediately upon the organiza-

tion of a corporation and at the time of the filing of the certificate of organization, presumably, therefore, before the capital stock is taken, or perhaps even subscribed for.

In the entire chapter the words "capital" or "capital stock" are used to mean the amount of capital stock fixed by the charter of the company or subsequently voted as an increase. See §§ 7, 8, 16, 21, 32, 33 and 46. The chapter does not appear to recognize the *status* of a corporation whose stock is partially paid in. Indeed, it is expressly provided in § 46 that it shall not commence the transaction of its business until the whole amount of the capital stock is paid in. There is no room for doubt, in my opinion, that whenever the words "capital stock" are used in the chapter they are intended to denote the capital stock as fixed by the charter or by vote, regardless of the question whether it is paid in or not.

Reference to the statutes of which §§ 51 and 52 are substantially re-enactments confirms this view. St. 1875, c. 177, § 4, which is the original enactment of § 51, now under consideration, after a provision that a corporation may alter, add to or change the business for the transaction of which it was incorporated, contains these words: "and *provided, also*, that a certificate setting forth such alteration, addition or change, signed and sworn to by the president, treasurer and a majority of the directors, shall be filed in the office of the Secretary of the Commonwealth, to whom shall be paid a like fee to that prescribed by the schedule contained in section 59 of chapter 224 of the Acts of 1870."

St. 1879, c. 202, § 2, where § 52 first appears, after providing for a change of business by a gas company, adds, "on complying with the provisions of section 4 of chapter 177 of the Acts of the year 1875, as the certificate and fee therein provided for."

By the reference contained in these statutes the fee fixed is "one-twentieth of one per cent. of the amount of the capital stock as fixed by the agreement of the association." It is not to be presumed that the meaning of these statutes was changed, or intended to be changed, by their consolidation into the Public Statutes.

I am, therefore, of the opinion that the fee for filing the certificate is based upon the amount of the capital stock as fixed, and not upon the amount of capital paid in.

PUBLIC RECORDS, — CHURCH RECORDS.

The Commissioner of Public Records has no authority to require the records of existing churches, parishes or religious societies to be kept with the same safety required in the case of city, county or town records.

To the Commissioner of Public Records. 1895 February 7.

I take pleasure in acknowledging your letter of February 6, asking my opinion as to whether, under St. 1892, c. 333, § 3, you have any authority to require that the records of existing churches, parishes or religious societies shall be kept with the same safety required for county, city or town records.

It is your duty under the said act of 1892 "to take such action as may be necessary to put the public records of the counties, cities, towns, churches, parishes or religious societies of the Commonwealth, in the custody and condition contemplated by the various laws relating to said records, and to secure their preservation."

The laws relating to the preservation, condition and custody of the public records of the Commonwealth are embraced in Pub. Sts., c. 37, and the various amendments thereto. These acts, with the exception of Pub. Sts., c. 37, § 15, are all limited, as regards this question, to the custody and preservation of the records of counties, towns and cities. The only instance where legal provision is made for the preservation of the records of a church or religious society occurs in said § 15, which provides, in the case of a church or religious society ceasing to have a legal existence, and when the care of its records and registries is not otherwise provided for by law, that the person having possession of such records or registries shall deliver them to the clerk of the city or town in which said church or society was situated.

In the case, therefore, of an existing church, parish or religious society, there is no legal provision regulating the preservation of its records. And, although it may be true

that in many cases the earliest records concerning the town in question are embraced within the records of some church, parish or religious society, it cannot be said that this would make a record belonging to such a body the record of a town, county or city within the meaning of the words of the statutes. The words "records of the counties, cities or towns," as used in the statutes, mean the records owned by such bodies, and cannot include the records concerning the towns in question, however valuable they may be from any historical point of view, which belong to another corporate body not included in the words "counties, cities or towns."

It is your duty, therefore, in the case of the records of churches, parishes or religious societies of the Commonwealth, to see that such records shall be kept in the custody and condition contemplated by the various laws relating to churches, parishes or religious societies; and you cannot require the records of these bodies to be kept in the manner prescribed for counties, cities or towns. If such a course is desirable, your only remedy is to secure adequate legislation.

It might be claimed, under the authority of the words "and to secure their preservation," in § 3 quoted above, that you were given the power in question. The clause is ambiguous, and it is a question whether it should not be read as meaning that you were to secure their preservation in the manner contemplated by the various laws relating to records. But, however this question may be answered, I do not think that this clause is sufficient to give you authority to require that the records of churches, parishes or religious societies should be kept with the same safety required by the statutes in case of county, city or town records.

MANUFACTURING, — TYPESETTING IN NEWSPAPER OFFICE, — EMPLOYMENT OF WOMEN.

St. 1894, c. 508, § 12, prohibiting the employment of women in any capacity for the purpose of manufacturing between ten o'clock at night and six o'clock in the morning, does not prohibit the employment of women during the night for the purpose of setting type in a newspaper office.

To the Governor. 1895 February 21.

I understand that my opinion is desired for the guidance of the Chief of the State District Police upon the following facts, to wit: —

In certain establishments within this Commonwealth, engaged in the business of printing and publishing a morning newspaper, women are employed at setting type during the night. Is such employment forbidden by St. 1894, c. 508, § 12?

The language of the section in question is: "No person or corporation . . . shall employ any woman or minor in any capacity for the purpose of manufacturing, between the hours of ten o'clock at night and six o'clock in the morning."

The exact question presented is whether a woman employed in setting type to be used in printing a newspaper is employed "in any capacity for the purpose of manufacturing." The word "manufacture" is defined in the Century dictionary as "the production of articles for use from raw or prepared materials by giving these materials new forms . . . whether by hand labor or by machinery." In *Stone* v. *Howard Insurance Company*, 153 Mass. 475, 478, Mr. Justice Charles Allen says: "A manufacturing establishment is an establishment for manufacturing raw material."

The word "manufacturing" may sometimes be used in a more limited or more enlarged sense, but I have no doubt that the above definitions are fairly applicable to the word as used in legislation upon the subject of labor, for they indicate the sense in which the word is ordinarily used. A manufacturing establishment, in the common use of that term, is a mill or other plant in which the principal duty of those employed therein is to work by hand or by machinery upon raw material, and convert it by such labor into some article of commerce.

Regarding the word "manufacturing" as having the meaning I have indicated, it cannot be fairly said that the business of producing a newspaper is manufacturing. It is true labor is expended upon paper, so that it becomes an article of commerce, to wit, a newspaper; but the labor so bestowed is not the principal element which enters into the construction of a newspaper. Typesetting is rather a mechanical than a manufacturing work; like horseshoeing, carriage painting or any other form of employment in which no essential change is produced in the thing upon which the labor is expended.

In *Evening Journal Association* v. *Assessors*, 47 N. J. L. 36, the court says (page 41): "A newspaper has intrinsically no value above that of the unprinted sheet. Indeed, it has less value, considered intrinsically, as a mere article of merchandise. Its value to its subscribers arises from the information it contains, and its profit to the publisher is derived, in a great measure, from the advertising patronage it obtains by reason of the circulation of the paper induced by the enterprise and ability with which it is conducted. Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer." See also as to the meaning of the word "manufacture," as used in the statutes of Massachusetts: *Dudley* v. *Jamaica Pond Aqueduct Corp.*, 100 Mass. 183; *Byers* v. *Franklin Coal Co.*, 106 Mass. 131; *Hittinger* v. *Westford*, 135 Mass. 258.

The view I take derives much support from an examination of the statutes relating to the forming of corporations under the general laws. Pub. Sts., c. 106, § 7, authorizes the forming of corporations for the purpose "of carrying on any mechanical, mining or manufacturing business." Section 8 authorizes such corporations to be formed for the purpose "of printing and publishing newspapers, periodicals, books or engravings." It is plain that the framers of this statute did not regard a printing office as a manufacturing establishment. Some argument may also be drawn from the fact that the section now under consideration limits the restriction as to employment of females to employment in manufacturing;

whereas the preceding section (§ 11) forbids the employment of women more than fifty-eight hours in a week "in any manufacturing or mechanical establishment." If the word "mechanical" had been used in the section under consideration, a very different question would have been presented.

I am of opinion, therefore, that the employment of women in typesetting in a newspaper office is not prohibited by St. 1894, c. 508, § 12, and I cannot advise the Chief of the District Police to prosecute for such employment under that section.

FIRE MARSHAL, — JURISDICTION, — ESTABLISHMENT FOR REFINING PETROLEUM, — DANGEROUS BUILDING, — POLICE REGULATIONS.

St. 1894, c. 444, § 5, does not confer upon the Fire Marshal the power to adjudge as dangerous an establishment for the refining of petroleum, which has conformed to all the statutory requirements relating thereto.

To the Fire Marshal. 1895. February 26.

I have given some time to the consideration of the questions stated in your letter of the 6th inst., in view of their importance and difficulty.

St. 1894, c. 444, § 5, provides substantially (omitting such portions as define the duties of other officers than yourself) that the Fire Marshal has the right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings; and that whenever he finds in any building "combustible material or inflammable conditions dangerous to the safety of such building or premises" he may order the same to be removed or remedied. The section further provides that "upon complaint of any person having an interest in such buildings or premises, or property adjacent thereto," he shall make such investigation.

The general question stated in your letter relates to the interpretation to be given to the words "inflammable conditions or combustible materials dangerous to the safety of such buildings;" or, to quote from your letter: "Is the word dangerous used in a broad and liberal sense, with the intention of placing within the discretion of the Fire Marshal the power to annihilate if necessary any building which necessarily involves the pres-

ence of combustible materials or inflammable conditions dangerous, etc.; or was it intended that the word dangerous should be taken comparatively, and that the question as to whether certain conditions and certain materials are dangerous within the meaning of the statute should be gauged by the standard of such danger as may be reasonably expected from a particular class of business similar to the one which may be under consideration?"

It is impracticable if not impossible to lay down in advance any general rules of procedure which shall be sufficient for all cases that may arise. I am not certain that either of the alternatives stated in your general inquiry are fully descriptive or conclusive as to your duties under all circumstances.

I prefer to consider specifically the questions arising upon the facts stated by way of illustration in your letter. The case presented I understand to be this. There is in the city of Somerville an establishment in which the business of storing, making and refining petroleum oil is carried on. Complaint in due form under the provisions of § 5, above quoted, has been made by persons or corporations "having an interest in . . . property adjacent thereto." I understand that you have investigated the plant, and have ascertained that all the provisions of the statutes with relation to the making, storing and refining of petroleum oil have been complied with by the owners of the plant. You are also satisfied that, speaking relatively, the premises contain combustible material or inflammable conditions dangerous to the safety of the building. That is to say, as compared with a school-house, a hotel or a cotton mill, the oil works are dangerous. I further assume that you may have determined that the existence of the oil works is, relatively speaking, a menace to the safety of the adjoining property. Is it your duty upon this state of facts to order the combustible material or inflammable conditions to be "removed or remedied;" and are the owners thereof liable to the penalties imposed by the section in case they refuse to comply with your orders in respect thereto?

It has long been settled that the Legislature has the right, within certain lines of distinction not definitely settled, to

determine what is and what is not a nuisance; that is to say, dangerous to the health and comfort of the community or to property in the vicinity. It is also well settled that the right of so determining what is or is not a nuisance may be delegated to inferior tribunals, boards or officers. For example, certain trades or employments are forbidden to be exercised excepting under a license by municipal authorities. Boards of health, also, are charged with responsibility of regulating, even of forbidding, within certain limits, trades, employments or establishments that are dangerous to the public health. Upon the same principle it may well be that the Legislature has the right to delegate to an officer like the State Fire Marshal the right of determining what conditions are, by reason of their combustible or inflammable nature, a menace to the property in the vicinity.

In all cases, therefore, where the Legislature has not by positive enactments determined the question of what conditions are to be regarded as inflammable and dangerous, the section under consideration must be considered as vesting in the Fire Marshal the authority of determining each question in his discretion as it arises; and he is not limited in so determining it to the question whether the conditions under consideration are more or less dangerous than may be reasonably expected from those which ordinarily exist in similar situations.

Nor does the fact that the business under investigation is carried on by virtue of a license necessarily restrain the Marshal in the exercise of the powers conferred upon him by this section. It is well settled that a license is subject to such police regulations as the Legislature may see fit to enact with reference to the subject matter. *Commonwealth* v. *Ellis*, 158 Mass. 555, and cases cited; *Commonwealth* v. *Kidder*, 107 Mass. 188.

For example, the manufacture of gunpowder can only be carried on under a license from the municipal authorities. Pub. Sts., c. 102, § 61. It is scarcely open to doubt, however, that, under the law establishing the office of State Fire Marshal, that officer would have the right to adjudge a powder factory dangerous, and to order its removal, notwithstanding it had been licensed by municipal authorities. To cite another

instance, it is expressly provided in Pub. Sts., c. 80, §§ 92 and 93, that the business of slaughtering, etc., may not be carried on without a license from the municipal authorities; but the State Board of Health may, notwithstanding the license, adjudge the building occupied for such a purpose to be a nuisance, and restrain the carrying on of the business so licensed. *Sawyer* v. *State Board of Health*, 125 Mass. 182, 193. But, on the other hand, when the Legislature has by positive enactments declared that certain trades and occupations and acts are or are not a nuisance, such a declaration is conclusive upon the authority of its officers and upon the courts when dealing with the question of a nuisance. *Sawyer* v. *Davis*, 136 Mass. 239.

An examination of the numerous statutes with relation to the manufacturing and storing of petroleum oil makes it evident that the Legislature has declared affirmatively that, within the conditions and under the limitations prescribed in the various statutes relating to the subject, the refining and storing of petroleum is not so dangerous to adjacent property as to be a nuisance, and liable to abatement either under any provision of the common law or by any officer acting under the authority of the State.

Without reviewing all the legislation upon the subject, it is sufficient to say that by St. 1869, c. 152, re-enacted in Pub. Sts., c. 102, § 72, it is expressly and affirmatively provided that "crude petroleum, or any of its products, *may* be stored, kept, manufactured or refined" in buildings constructed as provided in said section. This statute is still in force, and must be taken as declaratory of the policy of the Legislature upon the subject. It is further provided in Pub. Sts., c. 102, § 73, that petroleum shall not be manufactured or stored, even in the buildings described in said § 72, without a license from the municipal authorities, which license shall express the conditions and limitations under which the business may be carried on. By St. 1894, c. 399, additional restrictions are established and the issuing of licenses is more strictly guarded; and it is therein provided that no building for the manufacture of petroleum oil or any of its products shall be erected unless the municipal authorities "have granted a license therefor, prescribing the place

where such building shall be erected," etc. But it is to be observed in connection with this statute that Pub. Sts., c. 102, § 72, providing explicitly how and in what manner and place petroleum may be stored, kept, manufactured and refined, is not repealed and is still in force.

The statutes to which I have referred, together with others of the same general nature, must be taken as a regulation of the whole business of the refining of petroleum oil, and as a declaration that the Legislature regards these regulations as sufficient to protect the public against the danger arising from the explosive and inflammable nature of the business; and that any establishment so conducted is not to be disturbed on account of the combustible material or inflammable conditions thus allowed, regulated and guarded; and that in respect to such dangers the business shall not fall within the rules of common law. They declare in substance that, although the business of refining petroleum oil is attended with some dangers, it is on the whole of more advantage than disadvantage to the community at large; and, while recognizing the fact that under all circumstances the business is relatively dangerous, it is better for the Commonwealth to allow it to be carried on, provided the regulations made with respect to it are conformed to, than to permit a valuable and profitable industry to be excluded from the Commonwealth.

This position is supported by the dictum in *Commonwealth* v. *Kidder*, 107 Mass. 188. In that case the defendant was indicted for maintaining an establishment for the refining of petroleum oil, and it was alleged in the indictment that the business was a nuisance by reason of the noisome and unwholesome smoke, smell and stench which arose therefrom. The defendant relied upon the statutes relating to the manufacture of petroleum oil, to which I have referred. Mr. Justice Gray, in delivering the opinion of the court, referring to these statutes, says: "These enactments are manifestly intended to protect the public against the dangers arising from the explosive and inflammable nature of petroleum; and, having regulated the whole subject in that aspect, they might well be deemed to protect any establishment, guarded as they direct,

from indictment as a nuisance on account of such dangers only."

I am of the opinion that the Legislature did not intend, by St. 1894, c. 444, § 5, to confer upon the Fire Marshal, or any other authority, the power to adjudge that an establishment for the refining of petroleum, which conformed to all the regulations provided therefor by the various statutes upon the subject, should be adjudged dangerous; although independently of such legislation it might well be regarded to be a menace to adjacent property.

I believe the foregoing sufficiently answers the inquiries contained in your letter, so far as questions have yet arisen in the performance of your duties.

CIVIL SERVICE, — SECRETARY OF OVERSEERS OF POOR OF LOWELL.

The secretary of the overseers of the poor of the city of Lowell is not an officer whose selection comes within the civil service rules.

To the Civil Service Commissioners. 1895 March 6.

I do not think that the secretary of the overseers of the poor of Lowell is an officer who should be appointed under the civil service rules. His duties are described in art. 4 of the regulations of said board. These regulations were adopted under the authority of St. 1894, c. 190, which provides that said officers "may appoint a secretary and superintendent and such other subordinate officers as the ordinances of the city may require, and may define the duties of said officers."

The regulations of the overseers of the poor, adopted in pursuance of said statute, provide in art. 4 thereof that the secretary's duties shall be "to make all such investigations as to the settlement of paupers as may be necessary to determine the rights of the city in relation thereto; to attend to their removal to or from the city or to the several city institutions provided for the same, and in case of death to care for the burial. He shall inquire into the condition and means of subsistence of all who apply to the city for charity, and shall determine by such investigations who is and who is not entitled to the same. He shall visit the institutions at the city farm at

least once a week, and oftener if the interests of the same require it. He shall visit all pauper children, and others, if such there be, placed out by the board in private families or in other public institutions, at least as often as once in three months, and report quarterly to the board the condition of all such. He shall see to it that all regulations for the management of the pauper department and the several pauper institutions therein are duly observed, and shall furnish to the board all such information as shall enable the clerk thereof to make out accurate accounts against the Commonwealth, or other cities and towns therein, for assistance rendered to paupers having settlements outside of Lowell. He shall attend all regular meetings of the board, and such special meetings as he shall be notified of and requested to be present at; and he shall not be required, nor is it considered a part of his duty, to keep the records of the votes and doings of the board in meetings assembled, nor to perform any work in the way of keeping the accounts of the department or of a merely clerical nature, save such as is purely incidental to the performance of his duties as herein defined. He shall exercise supervision over the detail management of the affairs of the department, outside of the control and management of the city institutions at the city farm, but shall have no power to make purchases for the department in excess of fifty dollars without a vote of the board or of the particular committee for which such purchases are made."

It is obvious that these duties are not those of persons "rendering services as copyists, recorders, book-keepers, agents, or any clerical, recording or similar service." Schedule A, civil service rules. Nor are they the duties of persons who are included in the class just quoted, who, "by reason of their rendering a limited amount of clerical service, are employed in positions requiring special knowledge of duties not clerical, and for which such special knowledge constitutes the chief qualification." Schedule A, class 3.

Under the regulations of the overseers the person they designate as secretary has in fact practically no clerical duties, but is the agent of the board in the administration of its affairs. It

would have been more correct to designate him as superintendent. But the designation is not primarily the test by which public servants are to be considered in reference to civil service rules. These rules look to the character of the service rather than to the designation of the office. I cannot believe that it was intended by the statutes relating to civil service that an officer holding so important, confidential and responsible a position must be selected by competitive examination. The character of his employment is such that no form of competitive examination would be so likely to secure an efficient officer as would be the case if the employing board had the right of personal selection.

Whether the overseers had the right to assign such duties to an officer whom they designated as "secretary" may be a question attended with more difficulty, although I see no reason why, under the statutes, they may not assign such services as they see fit. Practically they seem to have devolved upon him the duties of superintendent, while retaining the title of secretary, whether for economical or other reasons I am not informed. This view is confirmed by the fact that, as I am informed, no such office as that of superintendent has been created. It cannot be said that they have imposed upon him any duties that they have not the right to. That being so, it may well be that the regulation was within their jurisdiction.

But whether they acted beyond their powers in defining his duties does not appear to be a matter with which your honorable board need be concerned. The officer in question, under whatever title, or whether rightly entitled, is not one required to be selected under the rules of the commission.

BOARD OF LUNACY AND CHARITY, — JURISDICTION TO RELEASE PERSONS COMMITTED TO STATE FARM.

The State Board of Lunacy and Charity has the power to release persons committed by the Superior Court to the State Farm for the offence of drunkenness.

To the Board of Lunacy and Charity. 1895 March 7.

I have the honor to acknowledge your letter of the 6th inst., inquiring whether the Board "is authorized, under the provisions of Pub. Sts., c. 220, §§ 66 and 68, to discharge prisoners committed to the State Farm for the offence of drunkenness by order of the Superior Court."

Pub. Sts., c. 220, § 66, relates only to persons convicted under c. 207, § 29, but that section does not purport to punish the offence of drunkenness. The offence of being a "common drunkard," as described in § 29, is distinct from the offence of drunkenness, as described in §§ 26 and 27.

Pub. Sts., c. 88, § 4, gives the Board the same power of discharging persons confined in the State Workhouse (which I understand to be the State Farm, referred to in your letter) "for any cause that the county commissioners have in houses of correction." Under the provisions of c. 220, § 66, county commissioners have the power only to release persons committed on conviction by an inferior court, and may not discharge a person committed by the Superior Court. Your Board, acting upon the case of a person to whom the provisions of § 66 are applicable, is similarly limited, and may not release persons committed by the Superior Court.

But c. 220, § 68, authorizes the county commissioners to release a person committed to a house of correction for drunkenness, whether committed by the Superior or an inferior court. Inasmuch as c. 88, § 4, gives your Board all the powers that county commissioners have in relation to houses of correction, it follows that the State Board may release persons committed by the Superior Court to the State Farm for the offence of drunkenness.

EXTRADITION, — CERTIFICATION OF EXECUTIVE OF DEMANDING STATE, — MISTAKE IN RECORDING INDICTMENT.

A petition was presented to the Governor, stating that, in the case of W., who had been duly surrendered to the State of Connecticut as a fugitive from justice, the indictment upon which the rendition was made had been procurred either by fraud or mistake, and that the petitioner could present the sworn statement of every member of the grand jury to the effect that no indictment had been authorized by them against W., and praying that the Governor demand the return of W.

It seems that such a statement made by members of the grand jury might be received in a local proceeding to show fraud or mistake in the recording of the indictment. But in a rendition case, when the certificate of the Governor of the demanding State accompanies the copy of the indictment, certifying the latter to be an authentic copy of an indictment found, the Governor of this Commonwealth has no legal right to go behind this certificate and question the fact so certified.

To the Governor. 1895 March 7.

Replying to the verbal request of Your Excellency for my opinion upon the questions arising upon the petition of George E. Whitten, I have the honor to say, to wit: —

The facts which the petitioner proposes to establish I understand to be as follows: on January 14, 1895, a requisition was received from the Governor of the State of Connecticut requesting Your Excellency to surrender George W. Whitten as a fugitive from justice. Annexed to said requisition was a paper purporting to be an indictment found against the said Whitten by the grand jury for the county of New Haven, charging said Whitten with the crime of murder in the second degree, to wit, abortion resulting in the death of the victim. The requisition contained the necessary formalities required by law. Upon this requisition a warrant was issued by Your Excellency, authorizing the arrest of said Whitten and his surrender to the agent of the State of Connecticut. He was thereupon arrested, and, after consulting counsel, he waived hearing and was taken by the agent of the State of Connecticut to New Haven, where he was arraigned upon said indictment, pleaded not guilty, was ordered to recognize, did recognize, and has returned to his home in Newton, Mass., where he now is. The time for trial of the indictment has not yet been fixed.

The petitioner further claims that he can prove that said in-

dictment was never in fact authorized by the grand jury, and that, on the contrary, the said jury refused to indict him. He claims to be able further to show that the case was heard by the grand jury upon a charge against said Whitten and one Lee; and that when the foreman reported to the prosecuting attorney (who in Connecticut does not go into the jury room during the proceedings) he was shown by the attorney an indictment containing the names both of Whitten and Lee. That the foreman thereupon stated to the attorney that the jury had indicted Lee but had refused to indict Whitten, and suggested that the form of indictment presented incorrectly stated the results of the deliberations of the jury. That thereupon it was suggested by the prosecuting attorney that the instrument should be amended to conform to the facts, and with that understanding it was signed by the foreman. The name of Whitten was not in fact erased from the indictment, and it stands upon the file as an indictment against both Lee and Whitten, duly certified as required by law.

Some of the members of the grand jury learned through the newspapers that Whitten had been arrested and arraigned upon an indictment against him, and in consequence of what they learned communicated with Whitten, and informed him that they had not indicted him. Subsequently a paper purporting to be signed by all the members of the grand jury was filed in the case and is now on file, in which the jurors say that they did not find a true bill against Whitten, and so understood their presentment; and if a true bill was returned against him it was so returned by mistake.

I am further informed that the prosecuting attorney does not assent to the foregoing facts, and insists upon trying Whitten upon the indictment.

The petition of Whitten is that Your Excellency "demand of the Governor of the State of Connecticut to show cause why they should further proceed under and by virtue of said extradition proceedings, and under and by virtue of such indictment against your petitioner."

The first question proposed is whether, supposing the foregoing statements to be capable of proof, the defendant can be

allowed to prove them, or whether he is bound by the record as it stands. In view of the conclusions to which I have come upon the second question proposed, as hereinafter stated, I do not deem it necessary to pass definitely upon this question. I have little doubt, however, that the petitioner may at the proper time and place be allowed to show that the indictment was rendered by mistake. I am aware that the proceedings not only of a traverse jury but of the grand jury are secret, and that it has often been held that no evidence can be offered which is in the nature of a disclosure either of the proceedings or the votes of jurors in secret session. But the mistake here charged is not with reference to the proceedings of the grand jury. It relates to what took place after they had concluded their deliberations and announced their result to the officer of the State. I do not believe that a mistake of fact as to what was communicated to the prosecuting officer may not be the subject of review by the court. It is not an inquiry, primarily, into the deliberations of the jury room, but only as to what took place after their deliberations were concluded. The case of *Capen* v. *Stoughton*, 16 Gray, 364, supports this distinction. In that case a sheriff's jury by mistake signed the wrong blank and the verdict was accepted by the court. At a subsequent term the action was brought forward and the entry vacated. Affidavits of the jurors were admitted to show the mistake, and a new trial ordered. Bigelow, C. J., in delivering the opinion of the court, draws the distinction above indicated between an inquiry into what took place in the jury room and the investigation of an alleged mistake, in the nature of a clerical error, happening after the deliberations of the jury had ceased, and they had actually agreed upon their verdict.

If this be so as to a traverse jury, it is much more so with reference to a grand jury, particularly in view of the fact that the findings of a grand jury are not usually announced in open court, but are filed with the clerk without being read.

It seems to me plain, therefore, that this petitioner need have no fear that he will be debarred from substantiating his allegations in the court having jurisdiction of the case. It is not to be presumed that the court would try an indictment which was

never in fact found by the grand jury, and which only became signed and filed through a misunderstanding with the prosecuting attorney.

But upon the second question proposed, as to whether the petitioner may be allowed to prove his allegations before Your Excellency, I am clearly of the opinion that under the statutes of the United States relating to extradition the certificate of the Governor of Connecticut is conclusive upon Your Excellency. The act of Congress provides (U. S. Rev. Sts., § 5278) that whenever the executive authority of any State demands a fugitive from justice "and produces a copy of an indictment found . . . charging the person demanded with having committed . . . crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the prisoner so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such prisoner has fled" to take proceedings looking to the delivery of the fugitive to the agent of the State making the requisition. This statute prescribes the manner of proof of the judicial proceedings of the requiring State, to wit, that they shall be *certified as authentic by the governor of that State.*

It is a provision of the Constitution of the United States, Art. IV., § 1, that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Congress has so provided in respect to requisitions, and the governor of the State upon which the demand is made is bound to accept the proof offered as conclusive, if it comes within the requirements of the statutes. *Kentucky* v. *Denison*, 24 How. 66, 105, 106; *Ex parte Swearinger*, 13 So. Car. 74, 76, 80; *Roberts* v. *Riley*, 116 U. S. 80.

I cannot accept the contention of the petitioner, which is that the certificate of the Governor relates only to the accuracy of the copy, leaving the parties open to show that the indictment purporting to be found was not in fact found. The petitioner may be able to prove that it was never voted by the grand jury

nor intended to be found; but it was in fact returned into court with the attestation of the foreman, and entered upon the files in the presence of the grand jury. This constitutes a finding, within the meaning of that word as used in the statute; and, while the manner of the finding may be the subject of investigation by the court having jurisdiction of the case, it cannot be said that there is no indictment "found" by the grand jury.

I am therefore of the opinion that Your Excellency has no power to grant this petition.

The facts claimed, however, if established, present a case where injustice has been done and is likely to be done to a citizen of this Commonwealth. I cannot doubt that, if the allegations contained in the petition in question had been proved to the Governor of Connecticut, he would not have issued the requisition upon which Whitten was arrested. In view of this, it seems to be entirely proper for the Governor of the Commonwealth of Massachusetts to call the attention of the Governor of Connecticut to the statements made by the petitioner, and request that he investigate the same, to the end that, if injustice has been done to a citizen of this Commonwealth, the Governor of Connecticut, in so far as it lies within his power, may redress the wrong.

EMINENT DOMAIN, — LAND FOR PUBLIC LIBRARY, — CONSTITUTIONAL LAW.

The proposed act authorizing the trustees of the Berkshire Athenæum to take land for a free public library, is constitutional.

To the Governor. 1895 April 23.

I have the honor to acknowledge the receipt of your letter, dated the 18th inst., asking me to "examine into the constitutionality of an act authorizing the trustees of the Berkshire Athenæum to take land for a free public library." *

The act in question authorizes the trustees of the Berkshire Athenæum to take any land, not appropriated to public uses, adjoining the land now owned by that corporation, as a place for the erection of a building to be used for its free public

* Enacted as St. 1895, c. 301.

library. It contains further and sufficient provisions for compensation to the owners of the land so taken.

This act is a constitutional exercise of the right of eminent domain.

The constitutional provision (Declaration of Rights, art. X.) is that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." The question whether the uses for which the property proposed to be taken are "public" is a question for the determination of the courts; but the question of "exigency" is for the Legislature. *Talbot* v. *Hudson*, 16 Gray, 417. The question of what constitutes a public use, within the meaning of the Constitution, has been many times considered by the court. In general, it may be stated that property may be lawfully taken under the right of eminent domain where the government is supplying its own needs or is furnishing facilities for its citizens in regard to matters of public necessity, convenience or welfare. Cooley's Constitutional Limitations, 6th ed., p. 655.

Thus it has been held that land may be taken for a highway, a town way, a public park, a railway, a town house or city hall, a school-house and a cemetery. I can find no express decision in relation to public libraries, but it is difficult to see why such an institution, which is educational in its nature, and of whose benefits all citizens may avail themselves, does not come within the rule.

It is well settled that the power of exercising the right of eminent domain may be delegated to private citizens, or to bodies corporate, public or private. *Hingham and Quincy Bridge and Turnpike Corp.* v. *Norfolk*, 6 Allen, 353; *Dorgan* v. *Boston*, 12 Allen, 223.

BOARD OF LUNACY AND CHARITY, — JURISDICTION TO RELEASE ON PROBATION, — LYMAN SCHOOL FOR BOYS, — STATE PRIMARY SCHOOL.

The State Board of Lunacy and Charity has no authority to release upon probation a boy committed to the State Primary School.

To the Governor. 1895 April 23.

I have the honor to acknowledge the receipt of a letter addressed to Your Excellency by the trustees of the State Primary and Reform School, dated April 14, and referred to me for reply.

The letter states that a boy who had been committed to the Lyman School, and was afterwards transferred to the Primary School, by order of the trustees, has been ordered by the State Board of Health, Lunacy and Charity to be placed on probation with his family; that the trustees, though they have complied with the order of the Board, question its right to act in the matter, and request the opinion of the Attorney-General as to whether the custody of such boys is with the trustees or with the State Board.

The respective rights of the State Board on the one hand, and of the board of trustees on the other hand, as to boys in the State Primary School, have been considered by me in previous opinions published in my last annual report,* and by my distinguished predecessor in an opinion published in his report for the year 1893;† and I beg to refer the trustees to those opinions for a general consideration of the rights and powers of the two boards, although the precise question now presented was not considered in any of them.

So far as the right to place boys who are in the Primary School in families outside is concerned, the statutes appear to be explicit. Pub. Sts., c. 89, § 6, provides in terms that the trustees may place in charge of suitable persons any of the children of the Primary School. I have been unable to find that any power is vested in the State Board to place boys in the Primary School out in families. In so far, therefore, as the State Board has assumed to place boys in the Primary School

* See pp. 112 and 182, *ante*. † See p. 96, *ante*.

on probation without the approbation or consent of the trustees, I am of opinion that their action is unauthorized.

The State Board has the general supervision over the school (Pub. Sts., c. 79, § 2); also of visitation (§ 5); also of admission and discharge (§ 11). Upon petition of the trustees the State Board may return to the Lyman School a boy who has been previously transferred from the Lyman School to the State Primary School. Pub. Sts., c. 89, § 7. In general, therefore, it may be said that the duties of the State Board with reference to the Primary School are those of visitation, with the power of admission and final discharge. This is confirmed by the language of c. 89, § 6, above quoted, in which, after providing that the trustees may place boys in the Primary School in charge of suitable persons outside, it is further provided that "the power of visitation and *final* discharge" shall remain with the State Board.

The general power given to the State Board is one of "general supervision over the State Lunatic Hospitals, the State Almshouse, the State Workhouse, the State Primary School, the State Reform School, and the State Industrial School for Girls." Pub. Sts., c. 79, § 2. This "general supervision," from an examination of the succeeding sections, appears to be one of visitation and inspection; and when any specific powers as to the management of the institution is intended to be vested in the State Board, it is so stated in specific terms. See c. 79, § 11; c. 89, §§ 5, 6, 7, 50 and 53.

On the other hand, the direct government of the Primary School is vested in the trustees. Pub. Sts., c. 89, § 1. "The superintendent *under the direction of the trustees* shall have charge of the Primary School," etc. c. 89, § 3. The only limitation to this control, so far as the point in question is concerned, is that "the power of visitation and final discharge is in the State Board." c. 89, § 6. I do not think the power to discharge includes the power or the right to place the boys in families on probation or otherwise, especially as that power is specifically entrusted to the trustees by c. 89, § 6, above quoted.

I have considered the question proposed only with relation to the right of the respective boards to place the boys in the Primary School outside in families. As intimated in my opinion of last year, I know of no authority in either board to release the boys generally upon probation.

BOARD OF EDUCATION, — AUTHORITY TO INCUR EXPENSES TO INVESTIGATE SCHOOL ATTENDANCE AND TRUANCY.

Under the authority of Res. 1895, c. 47, the Board of Education may employ and pay an expert for special services in gathering data regarding school attendance, provided that the approval of the Governor and Council is obtained.

To the Governor. 1895 May 3.

I have the honor to acknowledge your communication of April 29, requesting my opinion whether, under the truancy resolve (Res. 1895, c. 47), it is legitimate to pay an expert for special services for a few months to gather truancy data under the direction of the Board of Education.

The resolve in question directs the State Board of Education to investigate the subject of school attendance and truancy in the Commonwealth. "Said Board shall be allowed for all expenses actually incurred in the performance of this duty such sum as the Governor with the advice and consent of the Council shall approve."

Payment of the incidental expenses of the Board incurred in the discharge of its duties is provided for by Pub. Sts., c. 41, § 10. When, therefore, by this resolve the duties of the Board of Education were increased, the payment of the expenses incurred thereby by the members of the Board in the discharge of their official duties was already provided for by statute. The resolve in question, however, in addition to the statutory provision already existing providing for payment, enacts the further provision above quoted, allowing the Board such a sum in the performance of this additional duty as the Governor and Council shall approve. The duty imposed upon them by the resolve is to investigate the subject of school attendance and truancy in the Commonwealth. If it had been intended that

only the personal expenses of the Board should be paid, the additional provision in the resolve providing for certain payments under the approval of the Governor would be entire surplusage. If in the investigation of this subject it is considered necessary by the Board to secure an expert for special services for a few months, and the Governor and Council approve of such employment, there is no reason why under the terms of the resolve the expert should not be paid for his time as well as his expenses. By placing in the Governor and Council the power of approval or non-approval of expenses incurred in the performance of this duty, the Legislature has practically made the Governor and Council the official discretionary arbiter of the question whether any expenses incurred were properly incurred. The Board may properly incur any expenses in investigating the subject of school attendance which shall be approved by the Governor and Council.

CORPORATION, — BONDS OF OFFICERS, — SAVINGS BANKS, — INSURANCE COMPANIES.

A statute providing that an officer of a corporation shall give bond "for the faithful discharge of his duty" is not complied with by the use of the ordinary form of bond given by fidelity insurance companies, and more particularly set forth in the context.

No duty of supervision over the forms of bonds of such officers, except in the case of savings banks and insurance companies, devolves upon any department of the Commonwealth.

To the Governor. 1895 May 4.

I have been requested by Your Excellency to examine the form of the bonds given by fidelity insurance companies carrying on business under the provisions of St. 1887, c. 214, § 61, or St. 1894, c. 522, § 61, with a view of ascertaining whether the form adopted by them complies with the statutes relating to bonds to be given by treasurers of corporations and by public officers; and to see if any duty of supervision over the form of bonds of such officers devolves upon any department of the Commonwealth.

The form most commonly adopted creates a contract between the fidelity insurance company and the employers of such

officers, by which the company agrees that at the expiration of three months after proof of a loss it will reimburse to the employer such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of its employee in connection with the performance of his duties, amounting to embezzlement or larceny, and which has been committed and discovered during the continuance of his term of office, and within three months from the death, dismissal or retirement of the employee. There is in some cases a further provision that the insurance company shall not be liable unless the employer shall prosecute to conviction the embezzling official.

I am told that this form of bond has been adopted with the object of stating more specifically the contract of the guarantor, and obviating any contest in the courts as to the nature thereof. I am further informed that many corporations, public and private, have adopted this form of bond, and availed themselves of the contracts of these companies whenever they are required or desire to take bonds from their treasurers or other officers.

The provisions of the statutes of Massachusetts in relation to bonds of treasurers of corporations almost without exception require that the treasurer shall give bond "for the faithful discharge of his duty;" and the statutes in relation to bonds to be given by officers of the Commonwealth and of counties and towns require that the bonds shall be expressed to be for the "faithful discharge of the duties" of "the officer giving the bond."

I scarcely need say that the form of bond above referred to furnished by fidelity insurance companies is not a compliance with the statutes, which require bonds for the faithful discharge of duties, and is not equivalent to or a substitute for such bonds. It is also plain that St. 1887, c. 214, § 61, was not intended to repeal or supersede the statutes prescribing the form of bonds to be given.

In relation to the supervision by departments of the Commonwealth over the form of bonds of Massachusetts corporations, St. 1894, c. 317, § 14, provides that the bonds of treasurers of savings banks shall be under the supervision of the Board of Savings Banks Commissioners. St. 1894, c. 522,

§§ 7, 25, while not specifically calling for the supervision of the Insurance Commissioner over the bonds of treasurers of domestic insurance companies, yet gives power to the Commissioner to proceed against such corporations if they have failed to comply with the statutory provisions made in their behalf. I do not find that any supervision over bonds of corporate officers devolves upon any department of the Commonwealth as to any other classes of corporations. It may well be that the Legislature has regarded the matter of the bonds of corporations, in which the public generally are not interested, as being the subject of concern rather by the stockholders of such corporations than the Commonwealth; while, on the other hand, as to savings banks and insurance companies, in the official integrity of which many others than stockholders may be directly interested, it has thought proper that the bonds of the treasurers of such corporations should be supervised under the direction of the Commonwealth.

It is not within my province to discuss the wisdom of the policy of the Legislature, or even to recommend any change in existing legislation. If, however, it be a fact, as I am told, that bonds of these insurance companies are being largely availed of by Massachusetts corporations, it may be well to call the attention of the Legislature to the matter, to the end that such forms of bonds may be authorized; or, if not, that some authority be given to the Commissioner of Corporations to require compliance with the existing statutes relating to the form of bonds.

Supplies for State House.

Concerning various provisions in St. 1895, c. 284, an act in relation to the care and custody of the State House.

To the Auditor. 1895 May 6.

1. The word "supplies," in St. 1895, c. 284, is to be construed as though the statute read "all repairs, improvements, furniture, fixtures or [other like] supplies." It is familiar law that a general word connected by the conjunction "or" with specific words preceding is limited in its signification to the

particular classes included in the words of special signification which precede it.

Under this construction all the "supplies" of the character enumerated in your letter, such as "brushes, brooms and dusters, ice, spring water, toilet materials and the like" are included in the statute under consideration. On the other hand, stationery, postage, printing and the like, which are otherwise provided for, usually in special appropriations for the several departments, are not so included.

2. No part of an appropriation "for the care of the State House and grounds" can be used, under the provisions of St. 1895, c. 284, for supplies furnished to departments outside of the State House and its annex.

3. If, under the existing provisions of law, departments not domiciled in the State House building or its annex have authority to spend money for furniture, fixtures and other like supplies out of any appropriation which they have control of and for which they must approve the bills, I am of opinion that they still may do so, notwithstanding St. 1895, c. 284. Although that statute purports to require that a requisition shall be made upon the sergeant-at-arms and approved by him, it would be useless circumlocution to make such a requisition and require such an approval, if ultimately the bills are to be approved by the departments. The statute in question must be taken to apply to expenditures made out of appropriations over which the sergeant-at-arms has control.

SUBSTITUTE JUDGE, — SALARY.

Under the provisions of St. 1894, c. 377, a substitute judge is to be paid only for the days in which by holding court he actually performs the duties of judge.

To the Auditor.
1895
May 11.

In reply to your letter of May 9, I have to say as follows: —

1. I am of the opinion that St. 1894, c. 377, is not to be construed as intending to provide that a judge of probate from another county, who is designated by the register of probate of a county where there is a vacancy in the office of judge of probate

to perform the duties of judge in the latter county, shall receive a salary of fifteen dollars per day during the continuance of said vacancy after designation by the register, but that he shall be paid only for the days in which he actually performs the duties of judge, to wit, by holding court.

2. The certificate of the register as to the number of days and the dates of the same, provided for by § 2 of said chapter, is not conclusive upon the Auditor. He may accept it as sufficient evidence of the services performed by the judge, or he may satisfy himself in any other proper way as to the truth of the matter.

MEMBER OF LEGISLATURE, — BOARD OF EDUCATION.

The same person may lawfully hold the positions of senator of Massachusetts and member of the Board of Education.

To the Governor. 1895 May 14.

The same person may lawfully hold the office of senator of Massachusetts and member of the Board of Education.

Article 30 of the Declaration of Rights, which provides, among other things, that "the legislative department shall never exercise the executive and judicial powers, or either of them," is intended to prohibit the Legislature as a body from exercising executive or judicial duties. It has no application to the members of the Legislature. The limitations of the individual members of the several departments are carefully guarded by other provisions in the Constitution, to wit, c. 6, art. 2, and Amendments, art. 8. The specific prohibitions contained in the articles quoted would be plainly unnecessary if art. 30 of the Declaration of Rights was intended to apply to individuals rather than to departments.

There is nothing in the statutes which prevents the appointment of a member of the Legislature upon the Board of Education.

TUBERCULOUS CATTLE, — VALUE, — POLICE POWER, — CONSTITUTIONAL LAW.

A bill providing for the seizure and destruction of diseased cattle, which among its other provisions provides that the owners of cattle afflicted with tuberculosis shall be paid the full value thereof for food and milk purposes, without taking into consideration the fact that the animal is so afflicted, is in this respect unconstitutional.

To the Governor. 1895 May 22.

I have the honor to acknowledge your letter asking my opinion upon the constitutionality of certain sections of Senate Bill No. 261, entitled "An act relative to inspection of domestic animals," * and to reply thereto as follows: —

My attention is particularly called to §§ 3 and 10 of the bill. These sections respectively amend St. 1894, c. 491, §§ 10 and 45, relating to contagious diseases among domestic animals. Section 3 provides, among other things, that the inspectors provided by St. 1894, c. 491, may inspect the carcass of all slaughtered animals, and all meats, fish, vegetables, produce, fruits or provisions of all kinds; and whenever the carcass of any such animal is, in the opinion of such inspector, diseased or unfit for food, or when such meat, fish, vegetables, produce, fruit or provisions are found on inspection to be tainted, diseased, corrupted, decayed or unwholesome, for any cause, the inspector shall seize and destroy the same forthwith. The section further provides for an appeal to the Board of Health, who have, upon such appeal, the jurisdiction of the inspector; with the further provision that if said Board finds that the substance seized is not unsound or unfit for food, it may order the same to be returned to the owner.

The section further provides that all moneys received by said inspectors or Board of Health for property disposed of as aforesaid shall, after deducting all expenses incurred by reason of said seizure, be paid to the owner of said property; "*provided, however*, that whenever the carcass or meat of any neat cattle is destroyed under the provisions of this section by reason of the same being infected by tuberculosis, upon the owner

* Amended and enacted as St. 1895, c. 496.

thereof furnishing to the Board of Cattle Commissioners satisfactory evidence of the existence of such disease *he shall receive the full value of the same for food purposes, without taking into consideration the fact that the same is then infected with such disease.*"

Section 11, amending St. 1894, c. 491, § 45, provides that whenever the Board of Cattle Commissioners, after examination of a case of contagious disease among domestic animals, become satisfied that the public good requires it, they may cause such animals to be killed without appraisal or payment and without expense to the owner. The section further provides that "if it shall subsequently appear upon post-mortem examination or otherwise that said animal was free from the disease for which it was condemned, a reasonable sum therefor shall be paid to the owner thereof by the Commonwealth; *provided, however*, that whenever any cattle afflicted with the disease of tuberculosis are killed under the provisions of this section, *the full value thereof at the time of slaughter for food or milk purposes, without taking into consideration the fact that the animal at the time of slaughter is then afflicted with such disease*, shall be paid to the owner thereof out of the treasury of the Commonwealth if such animal has been owned within the State six months continuously prior to its being killed."

These provisions, so far as they authorize proceedings against diseased cattle, tainted food, etc., are clearly within the police powers conferred upon the Legislature by the Constitution. The constitutional question, however, arises upon the provision in each section, that, when meat unfit for food by reason of tuberculosis is seized, or cattle afflicted with the same disease are killed, the owner shall receive full value of the carcass for food or milk purposes, "without taking into consideration the fact that the same is then infected with such disease."

It may well be assumed that a carcass which is infected or an animal which is afflicted with tuberculosis has practically no value for food or milk purposes. That such was the intention of the Legislature is clearly deducible from the provisions of St. 1894, c. 491. Section 10 of that statute, as amended by

the bill in question, authorizes the destruction of a carcass whenever, in the opinion of the inspector, it is diseased or unfit for food. Section 15 of the same chapter makes it a penal offence for any one to sell, or to have in his possession with the intent to sell, for food, any diseased animal or any diseased carcass. St. 1886, c. 318, § 2, also makes it a penal offence to sell the milk of a diseased cow. The meat or milk of a cow which has been pronounced unfit for sale by the Legislature, and the sale of which is made a criminal offence, cannot be regarded as having any market value.

The sections under consideration, therefore, must be taken to authorize and require the payment to the owner of a diseased cow or an infected carcass, which, by the determination of the Legislature, is worthless, a value equivalent to the value of sound cattle or sound meat. This is not compensation. It is a gift.

If it were provided that the Board having jurisdiction of the subject-matter might condemn all suspected meat or kill all suspected cattle, leaving it uncertain whether the disease existed, the Legislature might reasonably provide, in the exercise of the police power given to it by the Constitution, that compensation for cattle so destroyed should be paid without determining the question of the existence of disease. But the statute in question is not of that character. It provides for a definite adjudication as to the existence of disease or otherwise. If this adjudication is made in the first instance by the inspector or commissioners, an appeal may then be had to a board of arbitration, or even to a jury, so that the question of the existence of disease is capable of judicial determination.

This fact having been determined, the bill provides that the owner shall receive "reasonable" compensation for cattle that prove to be sound, and which were killed under mistake by the officers. This is as it should be. But, on the other hand, in respect to cattle as to which there is a final determination that they are diseased, and therefore worthless for food and milk purposes, the bill provides that this fact shall be disregarded in estimating the damage to the owner, although it is a fact which destroys their value.

The Constitution, c. 1, § 1, art. 4, authorizes the Legislature to impose taxes "to be used and disposed of . . . for the public service." This provision, which if not in words is in substance in the constitutions of most of the States, has been uniformly construed by the courts to restrain the Legislature in the exercise of its rights of taxation to such purposes as are public in their nature, in distinction from expenditures which are for the benefit of individuals only. Thus it has been held that under this clause a State has the power to spend money for the expenses of judicial, legislative and executive officers; for the improvement of coasts and harbors; for the construction of highways, sewers, aqueducts, public educational institutions and the support of paupers. On the other hand, it does not authorize the raising of money by taxation to be divided among the inhabitants of a town; to make a gift to an individual for his own private use; to issue bonds and loan the proceeds on mortgage to the owners of land the buildings on which had been burned by fire; to loan money to a corporation to aid it in establishing a manufacturing establishment within the limits of the town making the loan; to assist individuals to carry on particular industries within a town; to aid a private school; to supply needy farmers with seed; or to refund to individuals the amount paid by them to procure substitutes in the civil war. Among the many cases in which these distinctions have been considered may be cited: *Lowell* v. *Boston*, 111 Mass. 454; *Lowell* v. *Oliver*, 8 Allen, 247, 255; *Loan Association* v. *Topeka*, 20 Wall. 655; *Allen* v. *Jay*, 60 Maine, 124; *State* v. *Osakee*, 14 Kan. 418; *Opinion of the Justices*, 150 Mass. 592; *Morse* v. *Stocker*, 1 Allen, 150; *Freeland* v. *Hastings*, 10 Allen, 570; *Concord R.R.* v. *Greeley*, 17 N. H. 47; *Sharpless* v. *Mayor of Phila.* 21 Penn. St. 147; *Whiting* v. *Sheboygan, etc., R.R. Co.*, 25 Wis. 167; *People* v. *Salem*, 20 Mich. 452; *Mead* v. *Acton*, 139 Mass. 341; *Hanson* v. *Vernon*, 27 Iowa, 28.

The general principle upon which these cases are decided is that to constitute a public use there must be a direct relation between the primary object of the appropriation and the public good. The object of expenditure must be specifically of a public

nature, and distinct even from such public benefits or interests as arise incidentally from benefits conferred upon individuals.

It is not enough that it may be wise, or incidentally for the interests of the public, that the individuals should be benefited. As was said by Wells, J., in *Lowell* v. *Boston*: "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary."

Simply stated, the Legislature under our Constitution has no right to take money by taxation from all to enrich one; and it is of no consequence how meritorious upon general considerations the position of the recipient may be. Money raised by taxation can be used for public purposes only.

Nor is the Legislature the final judge of whether the purpose be public. The extent and value of the public use and the wisdom and propriety of the appropriation are matters exclusively within the province of the Legislature; but whether the expenditure proposed is for private or for public objects, in the legal sense, is for the determination of the judicial power. *Lowell* v. *Boston*, 111 Mass. 454, 463, 473.

Applying these principles to the bill in question, I am of the opinion that, in so far as it requires the payment of a fictitious value in all cases to the owners of cattle killed as diseased, and consequently worthless, it is an appropriation of public money for the benefit of individuals. It takes money from the common fund contributed by all citizens, and confers it as a gift upon such owners of diseased cattle. This being so, it is an unauthorized exercise of the power of taxation.

It is to be observed that the constitutionality of a measure does not depend upon its being a bill directly providing for

the imposition of a tax. The right of the Legislature to place such an obligation upon the State implies the right to raise money by taxation for the payment of obligations thereby incurred. *Lowell* v. *Boston*, 111 Mass. 454, 460. It is well settled that the disposition of money raised by the Legislature by means of a tax is limited to the purposes for which such a tax may constitutionally be levied. *Lowell* v. *Oliver*, 8 Allen, 247, 255. If the Legislature has the constitutional power, therefore, to place an obligation upon the Commonwealth, it must first have the legal right to raise money by taxation to meet this obligation. Expenditures which must be provided for by taxation are to be judged of upon the same principles which govern the right of taxation.

It may be said that the bill in question is an exercise by the Legislature of the police power of the Commonwealth, and as such may be sustained. There is no doubt of this proposition as to the main provisions of the bill; and I am not called upon to consider whether the bill as a whole is unconstitutional, even if the provisions under consideration are adjudged bad. But the exercise of the police power of the Commonwealth and the promotion of public health may be lawfully exercised in the fullest manner without gifts to private individuals. The Legislature may in its wisdom determine that it shall be so exercised without compensation. *Miller* v. *Horton*, 152 Mass. 540. Or it may provide that where property is taken or destroyed for objects which are in promotion of the public good, such as prevention of disease, the prevention of fire and the like, compensation therefor shall be awarded to the person suffering thereby.

But this is entirely independent of the principal objects of the bill in question. It was not necessary to the jurisdiction of the Legislature that the sections under consideration be incorporated in the bill. All its main provisions were within the constitutional power of the Legislature. These sections cannot therefore be defended as an essential part of the scheme proposed by the bill for the promotion of public health.

It may be further suggested that the Legislature has the right to order such compensation as it deems reasonable to

individuals for the inconvenience and annoyance of having their cattle seized and destroyed, especially upon suspicion, and when it is not certain that they are tainted. It is not necessary to determine whether the Legislature might not so provide, or even whether it might not establish some reasonable gross amount to be paid every owner whose property was taken under the provisions of the bill. The difficulty with the provision in question is that it professes in explicit terms to require its officers to give to the cattle owner a sum of money which by other provisions of the same act he clearly has no right to, and for which the Commonwealth, either in law or in equity, is under no obligation to him.

Upon the foregoing principles, and upon such consideration as I have been able to give the matter in the brief time allotted to me, I am constrained to advise Your Excellency that the provisions of the bill in question which provide that owners of cattle shall be paid the full value thereof for food and milk purposes, without taking into consideration the fact that the animal or carcass is at the time of taking infected or afflicted with tuberculosis, is unconstitutional.

Fight, — Sparring Exhibition.

Any contest which tends to result in substantial injury to one or both of the contestants, by reason of the character of the weapons used and the methods of their use, is a fight within the meaning of Pub. Sts., c. 202, § 15.

To the Chief of District Police.
1895
June 20.

I have been requested to consider the scope of Pub. Sts., c. 202, § 15, relating to fights by appointment; and especially how far the statute applies to what are known as public athletic contests, or sparring exhibitions.

The statute provides substantially that "Whoever, by previous appointment or arrangement, engages in a fight with another person," shall be guilty of felony. It has been suggested that this statute, which was originally enacted in St. 1849, c. 49, § 1, was passed with special reference to what are commonly called prize fights. Public sparring contests, as now usually conducted, are said to be of recent origin, and it may be, there-

fore, that prize fighting was more especially in the minds of those who enacted the law. But a statute is to be construed according to the obvious import of its terms. Whatever is plainly prohibited thereby must be regarded as unlawful, whether specifically in contemplation of the Legislature at the time of the enactment of the statute or not.

The construction of the statute depends upon the signification of the word "fight." This word is defined as "an attempt by adversaries to injure or disable each other;" or, by another authority, as "a contest with natural or other weapons." It may be claimed that the *animus* of the contestants is an essential feature in determining whether a contest is a fight; but if the definitions above quoted are accurate, and I see no reason to doubt that they are, the test of what constitutes a fight is not so much the spirit in which it is engaged as the purpose. If the object of the contestant is to injure or disable, by means of natural or other weapons, and the contest is engaged in for that purpose, it must be regarded as a fight.

While the disposition of the contestants towards each other may be evidence in determining for what purpose the contest is engaged in, it is not conclusive. It is conceivable that there might be even a prize fight in which the contestants were on friendly terms each toward the other. On the other hand, there might be a contest with protected gloves in which no damage could reasonably be expected, where, from rivalry or other causes, the enmity of the parties would contribute the chief interest to the exhibition.

The question, therefore, whether a given contest is a "fight" is one of fact, depending upon all the circumstances. If the weapons used, whether fists or foils, are so protected that no amount of violence could reasonably be expected to inflict substantial injury, such a contest would not be a fight. But if the weapons used are unprotected, or so little protected that the obvious tendency of their use is to disable, wound or injure the opponent, such a contest would come within the scope of the statute.

I am of opinion that any contest which, in the opinion of the jury, tends to result in substantial injury to one or both of the

contestants, by reason of the character of the weapons used and the method of their use, is a fight within the meaning of the statute, and, if engaged in by appointment, is within the prohibition of the statute.

MEMBER OF CONGRESS, — DEATH, — ELECTION TO FILL VACANCY.

Upon the death of a member of Congress representing the Commonwealth it is the Governor's duty and right forthwith to issue a warrant for the election of a member to fill the vacancy.

To the Governor. 1895 June 21.

I understand that my opinion is desired as to the proper course to be taken by the Governor in reference to the vacancy in the sixth Congressional district. The question upon which my opinion is desired is as to when a precept for an election should issue.

It has been suggested that the Governor has no power to act until informed by Congress that a vacancy exists. I do not concur in this view. The fact of death is one that usually requires no particular or formal mode of proof. This, of course, does not refer to cases where death is in dispute. Ordinarily, the fact of death is recognized by judicial tribunals on their own motion, or upon the suggestion of some person, *amicus curiæ*. Even probate courts, whose jurisdiction depends upon the fact of death, have never required proof of the fact. The same principle holds in the Executive department, which is frequently called upon to make appointments to fill vacancies caused by death. The death of a person is matter of common knowledge, of which all persons have the right to take cognizance. This rule applies to the existing vacancy. The Governor has the right to know, what every one else knows, that the person who was elected to the office has deceased, and that there is a vacancy. In fact, the Governor has already taken official cognizance of the death of General Cogswell in a communication to the Legislature announcing the fact. It cannot be necessary for the Executive department to be informed by Congress of a fact already known and officially acted upon by that department.

I am of opinion, therefore, that it is the Governor's right and duty forthwith to issue a warrant for the election of a member of Congress to fill the vacancy occasioned by the death of General Cogswell.

St. 1893, c. 417, § 216, provides that, in case of failure at an election to choose a representative in Congress, the Governor shall cause precepts to be issued calling for a special election therefor on such day as he may appoint. It further provides that "If a vacancy occurs in the office of representative in Congress, the Governor shall in like manner cause precepts to be issued for an election of representative in Congress in the district in which the vacancy occurs." It is within the power of the Governor to appoint the day of election. He may either direct a special election to be held, or direct that it shall be held upon the day of the annual State election. Inasmuch as it is not likely that Congress will convene until the first Monday of December, the latter course is probably the better.

The precedents are in support of this view. The Hon. James Buffington was elected a member of the House of Representatives of the 44th Congress at the annual election in November, 1874. He died March 6, 1875, before the organization of the Congress to which he was elected. The Governor issued a precept for an election to be held to fill the vacancy, and an election was held in November, 1875. This election was had under the provisions of Gen. Sts. c. 9, § 6, but its provisions are substantially the same as the statute now in force.

CIVIL SERVICE, — VETERANS' PREFERENCE ACT.

The provisions of rule X. of the civil service rules, enforcing requirements of age, height and weight in certain classes of the public service, apply to veterans seeking examination and preference under St. 1895, c. 501, § 1.

The age limit established by the civil service rules is to be applied to all applicants for appointment under § 2, except applicants for appointment to the police force of any city other than Boston and applicants for appointment to the district police force.

St. 1884, c. 320, § 3, and § 4 as amended by St. 1888, c. 334, are applicable to the cases of all veterans who file an application in conformity with the requirements of St. 1895, c. 501, § 6.

Veterans seeking appointment under St. 1895, c. 501, are subject to the provisions of rule VII. of the civil service rules.

A reappointment to office may be made in accordance with rule XL. of the civil service rules, although a veteran has applied for the place, and has complied with the requirements of St. 1895, c. 501.

Rule XLIII., providing for promotion by examination, is to be enforced against a veteran now on the force seeking a higher grade by virtue of St. 1895, c. 501.

Rule XXXVI., providing that where there is no eligible list a provisional appointment may be made by examination, cannot be enforced in any case where a veteran applies, under the provisions of St. 1895, c 501, for appointment without examination.

A veteran applying for the position of laborer in Boston or other city, in the absence of any rule of the Civil Service Commission prescribing an age or other qualification, must be certified and employed in preference to all other persons.

To the Civil Service Commissioners. 1895 July 5.

I have the honor to acknowledge the receipt of your letter of June 21, asking my opinion on the construction of St. 1895, c. 501, entitled "An act relative to the preference of veterans for employment in the public service," and to reply thereto as follows: —

The statute in question is obviously amendatory of existing legislation. It follows that it operates to change or modify previous laws upon the same subject only so far as it does so expressly or by implication. The statute further recognizes the rules of the commission which have been approved by the Governor and Council. The statute, therefore, is to be construed in view of the existing legislation and of the rules established under it.

Keeping in view the statutes already enacted, and the rules established by the authority of the same, I proceed to answer the questions contained in your letter specifically.

"*First.* Under civil service rule X. there are certain requirements of age, height and weight in certain classes of the public service. For instance, in the police force of Boston every applicant must be less than thirty-three years of age. See rule X., pages 55 and 56 of the report of the Civil Service Commission, October, 1894. The first section of the recent act requires the commissioners 'to cause the names of veterans, who having been examined and found qualified for appointment to the position for which they have applied,' to be placed

upon the eligible list, and to be certified in preference to others; and provides that veterans so certified 'shall be appointed in preference to those who are not veterans,' excepting women. Under this statute provision, are the present requirements of civil service rule X., fixing an age limit in the designated classes, applicable to veterans applying for examination under the section, or has any veteran, without regard to any absolute requirements as to age, weight or height, a right to apply for and demand examination, and certification if he passes the examination? In other words, do the requirements of civil service rule X. apply to veterans seeking examination and the preference under § 1 of the act?"

The section referred to in this question is an amendment of St. 1884, c. 320, § 14, cl. 6. The clause as it originally stood gave a preference in the appointment to office and promotion in office (other qualifications being equal) to veterans; but it had reference only to appointments that were made after examination. The statute of this year strikes out the words "other qualifications being equal," and makes it the duty of the Civil Service Commission to cause the names of veterans who have been examined and found qualified for the position to which they have applied to be put upon the eligible list in the order of their respective standing, above the names of all other persons.

This section is not to be construed as inconsistent with the provisions of civil service rule X., which was in force at the time of its enactment and is still in force, which rule prescribes certain requirements as to age, height and weight. These requirements are to be taken to be still in force, and applicable to the case of persons coming within the provisions of § 1. The purpose and effect of the amendment was merely to repeal the provision in cl. 6, that other qualifications should be equal, and to prefer all persons included within the provisions of said section to all other persons otherwise qualified for the office.

"*Second.* Under § 2 of the recent act, veterans who apply for employment under civil service rule XII. (that is, without examination) shall be preferred for certification and appointment in preference to all other applicants not veterans except women. The section then contains a proviso 'that the age

limit now established by the civil service rules, with regard to appointments in the police and prison service and fire departments, may be applied to such appointments.' This 'age limit now established' is contained in rule X., above referred to. You will notice that in that rule (cl. *c*) it is provided that 'applicants for appointment to the police force of any city other than Boston must be not less than twenty-two nor over forty years of age; and applicants for appointment to the district police force must be not less than twenty-two nor over fifty-five years of age at the time of filing the application; *provided*, *however*, that this limitation as to age shall not apply to persons who served in the army or navy of the United States in time of war, and have been honorably discharged therefrom.' With the recognition in this section of the act of the 'age limit now established by the civil service rules,' and with this exemption in the rule of an age requirement of veterans applying for positions on the police force of cities outside of Boston, and on the district police force, can the age limit provided in this rule be applied to veterans applying under § 2 for appointment, without examination, to such positions?"

Section 2 referred to in the foregoing question relates to veterans who desire appointment to office or employment in the service classified under the civil service rules without having passed examination. The age limit referred to is to be found in the various divisions and clauses of rule X. of the civil service rules. Clause *c* in said rule provides that "in class 3 applicants for appointment to the police force of any city other than Boston must be not less than twenty-two nor over forty years of age, and applicants for appointment to the district police force must be not less than twenty-two nor over fifty-five years of age at the time of filing the application; *provided*, *however*, that this limitation as to age shall not apply to persons who served in the army or navy of the United States in time of war, and have been honorably discharged therefrom. In all cases in this class, except the inspection force of the district police, applicants must be not less than five feet seven inches in height and weigh not less than one hundred and thirty-five pounds."

Construing § 2 of the act in connection with the proviso in the clause above quoted, I am of opinion that, in order to give proper effect to the language of said § 2, it must be held that the age limit established by the civil service rules is to be applied to all applicants for appointment under § 2, except in the case of applicants for the appointment to the police force of any city other than Boston, and applicants for appointment to the district police force, these being exempt by the terms of cl. *c*, above quoted.

"*Third.* The civil service act (St. 1884, c. 320) provides, in §§ 3 and 4, that no person habitually using intoxicating beverages to excess, and no vendor of intoxicating liquor, and no person within one year after conviction of an offence against the laws of this Commonwealth, shall be appointed to, or retained in, any office. In view of the new act, and especially of the provisions of § 6, defining what shall be a sufficient 'application' by a veteran, can the above-cited provisions of the civil service act be applied to, or enforced against, a veteran filing an application which conforms to the requirements of this 6th section of the act?"

I am of the opinion that St. 1884, c. 320, § 3, and § 4 as amended by St. 1888, c. 334, are applicable to the case of all veterans who file an application in conformity with the requirements of St. 1895, c. 501, § 6. Upon the principle already stated, inasmuch as the act under consideration is amendatory, all existing legislation, including the civil service rules, are in force, excepting so far as they are modified or repealed by the statute of this year. There is nothing in § 6 of the latter act, or in any part of the act, which repeals or modifies in any way St. 1884, c. 320, §§ 3 and 4.

"*Fourth.* Civil service rule VII. requires, as an absolute qualification, residence of a year in the Commonwealth, and where city service is sought, of six months in such city, before filing the application. Can this rule be applied to veterans seeking examination, or appointment without examination, under this new act, or does the act abrogate the rule as to them?"

This question differs from question 3 in that there were certain prohibitions contained in statute of 1884, to which said

question referred; while, on the other hand, the present question relates to rule VII. of the civil service rules, which prescribes certain qualifications for appointment which are not found in any existing statute. But I cannot doubt that the Board clearly had the right to adopt rule VII. under the provisions of St. 1884, c. 320, § 2, and that the Governor and Council could properly approve it. The question is, whether persons seeking appointment under the act of 1895, either with examination under the provisions of § 1 or without examination under the provisions of § 2, are subject to the provisions of this rule. There is no reference to any rule of the civil service rules in § 1. In § 2 there is a direct reference to the civil service rules, with the proviso which has already been recited. The exact language of § 2 is as follows: "Veterans who have made application for appointment in the public service in accordance with the second section of rule twelve of the civil service rules shall be preferred for certification and appointment in preference to all other applicants not veterans, except women; provided that the age limit now established by the civil service rules with regard to appointment in the police and prison service and fire departments may be applied to such appointments."

The second section of rule XII. of the civil service rules provides as follows: "Any veteran desiring, under St. 1887, c. 437, appointment to office or employment in the service classified under the civil service rules without having passed any examination provided therein, shall file an application for said appointment, stating on oath, first, his full name, residence and post-office address; second, the office he seeks; third, that he desires appointment without having passed any examination provided for by the civil service act or the rules thereunder; fourth, his services in the army or navy of the United States in time of the war of the rebellion, and discharge therefrom; fifth, that he has not suffered loss of limb, or other physical impairment, which incapacitates; sixth, his citizenship; seventh, that he does not habitually use intoxicating beverages to excess, and is not a vendor of intoxicating liquor; eighth, that he has not within one year been convicted of any

offence against the laws of this Commonwealth. Such application must be supported by certificates that the applicant has all the qualifications required by law of veterans. Such application, if for an office or employment in the service of the Commonwealth or of the city of Boston, shall be filed in the office of the Commissioners in Boston; if for an office or employment of any city other than Boston, it shall be filed with the local board of examiners in such city."

This rule makes it incumbent upon the veterans desiring employment without passing examination to conform to the second section of rule XII. of the civil service rules, and when they have done so they shall be preferred for certification and appointment above all other applicants not veterans, except women, with the limitations contained in the proviso. This being so, it follows, upon the principles already stated, that applicants are subject to rule VII. The same is true of applicants under § 1.

"*Fifth.* In several of the classified offices there is a fixed term of office. District police officers hold for three years. In six of our cities, Lynn, Salem, Newburyport, Fitchburg, Taunton and Northampton, the police officers hold for the term of one year. By recent statute the term of office of the police officers of Haverhill is fixed for four years. In recognition of this fact, civil service rule XL. provides: 'No examination shall be required upon a reappointment of any person to the same office.' This rule has had its intended effect in allowing the Governor to reappoint district police officers, and the mayors of these cities to reappoint police officers without examination, or civil service application on the part of the incumbent. The question now arises, and is addressed by us to you: Can such reappointment, if of a person not a veteran, be made, if there is under this act any veteran who has applied for the position and complied with the requirements of the act?"

Rule XL. provides that "no examination shall be required upon the reappointment of any person to the same office." This rule, it is said, was intended to allow the Governor to reappoint district police officers, and the mayors of the various cities to reappoint police officers without examination at the

expiration of their various terms of office. There is no express provision in the act of 1884, or the amendment thereof, establishing any such rule. It has been made by the commissioners under the authority given them by § 2 of said act; and I am of the opinion that it stands upon the same ground as the case considered under the fourth question, and that, upon a reappointment to the office named, if a veteran has applied for the place and has complied with the requirements of the act of 1895, the appointing power may, nevertheless, reappoint the person whose term has expired.

"*Sixth.* Civil service rule XLIII. provides for promotion by competitive or non-competitive examination; and provides that, so far as practicable, such promotion shall be made by successive grades. This rule in practicable operation affects mainly the police and fire forces, especially of Boston, where the forces are large, and chances of promotion correspondingly great. Can this rule be enforced against a veteran now in the force seeking the higher grade by promotion under the preference secured by this act, with or without examination?"

Civil service rule XLIII. provides for promotion by competitive and non-competitive examination, and provides that, so far as practicable, such promotion shall be made by successive grades. The question is, whether this rule is to be enforced against a veteran now on the force seeking a higher grade, by this act, with or without examination. I am of opinion that it must be so considered.

"*Seventh.* Under civil service rule XXXVI. it is provided that where there is no suitable eligible list a provisional appointment may be made by competitive or non-competitive examination. This is frequently the case when special qualifications are required, or when, as in smaller cities, no eligible list exists. Can this rule be enforced in any case where a veteran, filing the certificates provided under § 6 of the act, applies for appointment to the position, without examination? Must such veteran be certified and appointed?"

Under civil service rule XXXVI. it is provided that where there is no suitable eligible list a provisional appointment may be made by competitive or non-competitive examination. The

question is, whether this rule can be enforced in any case where a veteran, filing the certificate provided under § 6 of the act, applies for appointment without examination. I am of the opinion that it cannot, for the reason that, upon the application of a veteran in accordance with the provisions of the act of 1895, it can no longer be said that there is no suitable eligible list, and so the rule to that extent fails.

"*Eighth.* Under civil service rule XLV. provision is made for the registration of laborers in Boston and other cities. Neither an age limit nor an examination is required by the rules. In many cases, however, where the labor requires strong and active men, the employing department has been accustomed to call for an age limit, as a special qualification in the requisition for laborers; and the commissioners, believing the requirement to be *bona fide*, have recognized it. Have the commissioners, under this new statute, any right to recognize an age limit in a requisition for laborers in Boston, if veterans are on the labor rolls seeking certification and employment? Must veterans, applying for city labor, be certified and employed in preference to all other persons, if they have filed the statement and certificates required by § 6 of the act?"

I am of the opinion, for the reasons already stated in reply to the previous questions, that veterans applying for such labor, in the absence of any rule of the Civil Service Commission prescribing an age limit, must be certified and employed in preference to all other persons, if they file the statements and certificates required by § 6 of the act.

Ballot Boxes.

It is the duty of the examining board provided for by St. 1895, c. 508, to approve any and all patterns of ballot boxes which comply with the requirements of St. 1893, c. 417, § 123.

To the Secretary. 1895 July 19.

I have the honor to acknowledge the receipt of your letter of the 11th inst., requesting my opinion as to the construction to be given to St. 1895, c. 508, § 2; and whether under the statute it is the duty of the examining Board to approve any and all patterns of ballot boxes submitted to it which in its

judgment shall comply with the requirements of St. 1893, c. 417, § 123, or whether the Board shall approve only boxes of a single pattern which in its opinion comply most fully with said requirements.

In my opinion, it was not the intention of the Legislature to limit the Board in its approval to a single pattern of ballot box. Such is not the plain intent of the language used. If the Board finds that several patterns fully comply with the requirements specified, it may in its discretion approve all such patterns.

It was the intention of the Legislature to commit the whole matter to the discretion and sound sense of the officers who constitute the commission, having regard not only to the requirements specified in the statute of 1893, but also to the obvious fact that the ballot boxes are liable to be used by people unaccustomed to the working of machines, and to the further fact that the practice of fraud in many places is to be expected, and must be guarded against. Keeping these considerations in view, the duty of the Board, in my opinion, is to approve any and all patterns of ballot boxes which, when put in practical use, in its opinion will fulfil the requirements of the statute.

CIVIL SERVICE, — METROPOLITAN WATER BOARD, — AUDITOR AND ACCOUNTANT.

The position of auditor and accountant of the Metropolitan Water Board, established by St. 1895, c. 488, does not fall within the classified service of the Civil Service Commission.

To the Civil Service Commission. 1895 August 2.

I have the honor to acknowledge your communication of July 29, requesting my opinion upon the question whether the position of auditor and accountant of the Metropolitan Water Board, established by St. 1895, c. 488, is within the classified service, and whether the person occupying that position should be appointed in accordance with the rules of your Board.

It appears, by the communication of the Water Board, submitted with your letter, that that commission proposes to appoint a person as auditor and accountant. The duties of

such officer will be to organize and be at the head of the department of accounts. These accounts will involve the expenditure of several millions of dollars per annum. The person to be appointed will have the immediate oversight of the proper accounting for the expenditures, the scrutiny of contracts and agreements and the classification and comparison of classes of work and supplies. The person to be appointed will be required to give a bond with sureties for the sum of ten thousand dollars, and it is expected that his duties will include the disbursing of sums of money from time to time for that amount. It is also stated by the Water Board that the person occupying the position should be "a man of such experience, breadth of view and skill in organization and classification that his system of accounts may be convenient for the use of the engineering department in estimating cost of future work from work already done, and for the analysis of elements of economy on work in progress."

It is not pretended that the officer to be appointed comes within the classified service unless he is included in schedule A of rule 6 of the civil service rules. Said schedule A includes "clerks and other persons, of whatever designation, rendering service as copyists, recorders, book-keepers, agents or any clerical, recording or similar service."

I am of opinion that the officer proposed to be appointed by the Water Board does not come within the scope of the language of said schedule. He is certainly not within the letter of the rule, for he is neither a copyist, recorder, book-keeper or like agent, nor are his services clerical.

But as well upon a broader view of the question, and taking into consideration the obvious intent of the rules, it cannot be fairly said that one whose duties are of organization and supervision, and who is called upon to have charge of the contracts of the Board and to disburse money as well, is an officer who could properly be selected under the rules of examination of the Civil Service Commission. No form of examination would tend to establish the qualifications of an applicant for such a position. He belongs rather to the class of officers who are to be selected in view of their general experience, reputation and

skill, as all principal officers and heads of departments are and must always be selected.

While the question is not in all respects identical, yet the opinion of my learned predecessor, Mr. Pillsbury, given Oct. 12, 1892,* holding that the position of superintendent of water inspectors of Boston is not within the classified service, has been of much assistance to me in coming to the conclusion above stated.

MILITIA, — COMMISSIONED OFFICERS.

St. 1895, c. 465, § 3, applies only to officers commissioned after the passage of the act and to officers so commissioned whose grade and date of commission are the same.

In the case of three commissions of the same grade and date, the holder of one having served two years in the army, the holder of one of the others having served three years in the navy, and the holder of the third having served four years in the volunteer militia, the first has seniority in rank over the second, and the second seniority over the third.

Where in the case of two officers previous service in the army or navy has been the same, their seniority is to be determined by the regulations of the army and navy respectively applicable to such cases.

An officer who resigns and is afterwards recommissioned with the same rank is the junior of another officer who in the interim has been commissioned with such rank.

To the Adjutant General
1895
August 8.

I have the honor to acknowledge the receipt of your letter of June 25, asking my opinion as to the proper construction of St. 1895, c. 465, § 3.

Your first question is, whether said section applies only to officers whose present grade and commission date the same. The section in question applies only to officers commissioned after the passage of the act and to officers so commissioned whose grade and date of commission are the same; that is to say, in commissions issued after the passage of the act on the same day and for the same grade the rank is not to be determined by lot unless there has been no previous military service. If there has been such service, the rank is not to be determined by lot.

---

* See page 71, *ante*.

Your second question is, if A had served two years in the army, B three years in the navy and C four years in the volunteer militia, which would take precedence in case of three commissions of the same grade and date? The language of the last sentence of § 3 is somewhat obscure; but, upon consideration of the whole statute, I am of the opinion that it must be taken as meaning that seniority shall depend upon the character rather than the length of the service. There is no reference to the length of service, and it seems to declare quite explicitly that the three classes of service are to be considered in the order named as establishing seniority. This being so, it follows that in the given case A is the senior and C the junior.

Your third question is, "Does the sentence 'as in the army or navy of the United States' mean that credit be given for such service, and also that the service is to be counted by the same methods and customs as are employed in the army, as stated in the army regulations?" I am of opinion that the intention of the act is that, where the previous service in the army or navy has been the same in the case of two given officers, seniority shall be determined by the regulations of the army and navy respectively applicable to such case; that is to say, in case A and B have each served two years in the army, their relative rank would be determined by the army regulations of the United States; so in case of two persons who have had equal previous service in the navy.

Your fourth question, briefly stated, is, whether one who held a commission which he resigned and who was afterwards again commissioned with the same rank, would be the senior of another officer who had been commissioned to the same rank prior to the date of the last commission of the first named. This question is not within the statute you quote. St. 1895, c. 465, has no application to the state of facts suggested in this question; but I am of opinion that the seniority is to be determined by the age of the existing commission, where there was a break in commission between the existing commission and a prior one.

GOVERNOR, — PROCLAMATION FOR ESTABLISHING STATE INSTITUTION.

The Governor has no authority to issue a proclamation for the establishing of a State institution or an addition to a State institution except when so authorized by statute.

To the Governor. 1895 August 15.

I have examined the questions stated in the letter from the secretary of the trustees of the Lyman School to Your Excellency, and beg to reply as follows. I know of no authority which the Governor has to issue a proclamation for the establishing of a State institution or an addition to a State institution except when so specially authorized by statute. In the case referred to by the secretary the proceedings were under the authority of St. 1884, c. 322. Similar authority was conferred upon the Governor by the statute establishing the State Reform School. See St. 1847, c. 165, § 3. Statutes authorizing such proclamations have usually been passed by the Legislature, when, owing to delay in erection or completion of buildings, it would be impossible to fix a time in advance for the occupancy of new or additional buildings. See St. 1884, c. 323, § 5. The plan, therefore, proposed by the secretary, seems to be impracticable.

So far as I have examined the matter, I do not see how boys under sentence to the Reform School can be placed elsewhere, even in quarters hired for the purpose by the trustees. If, however, without expense to the Commonwealth, the trustees, to meet the exigencies of the case, see fit to hire or purchase additional buildings, it would seem to be a practicable solution of the difficulties which now press upon them; and I doubt if any serious trouble would arise. The boys under sentence to the Lyman School who were transferred to such unauthorized quarters might perhaps escape therefrom without being liable civilly or criminally, but I apprehend that even this contingency will not give serious trouble.

This, however, is not within the scope of the inquiry in the letter referred to me, and I only offer the suggestion for the practical consideration of the trustees in their present difficulties. The plan they propose, while it is unauthorized by law and cannot be officially recognized by the Governor, is yet one

which the trustees may, perhaps, well take the responsibility of, if they think the exigency so serious that great harm is liable to result from the present condition of things.

BONDS OF COMMONWEALTH, — DENOMINATIONS.

Under authority of a statute authorizing the issue of bonds with the principal and interest payable in gold coin of the United States or its equivalent, no legal right exists to issue bonds payable interchangeably in denominations of dollars or pounds sterling.

To the Treasurer. 1895 August 22.

I am in receipt of a memorandum from your office, stating the following question: "By a provision of St. 1895, c. 488, § 17, the bonds to be issued thereunder 'shall have the principal and interest made payable thereon in gold coin of the United States of America or its equivalent.' I have the honor to ask if, in your opinion, the bonds contemplated to be issued under said § 17 may properly be made payable in denominations of dollars or sterling interchangeably, that is to say, in pieces made payable either as $1,000 or £205–9–9, the latter being the exact equivalent of $1,000 in gold coin of the United States of America, at the legal par rate of exchange of the United States at $4.8665 for each pound sterling, as adopted by Massachusetts in St. 1882, c. 110."

I am of the opinion that your authority is limited to the use of the language of the statute, and that the bonds to be issued thereunder must be expressed to be paid "in gold coin of the United States or its equivalent." The word equivalent must be taken to mean such other money as *at the time of payment* is of equal market value with gold. The Commonwealth has no power to establish a currency or to fix the value of foreign currency. Both of these, under the Constitution of the United States, are the prerogative of Congress. Foreign money of any kind is merchandise only, and is not currency in the United States. It differs from other merchandise only by reason of the fact that under the Constitution Congress may fix its value. The Commonwealth of Massachusetts has no authority to establish the value of English money.

Your memorandum refers to St. 1882, c. 110; but that statute does not assume to fix the value of foreign currency. It only adopts the value established by Congress for the "accounts, entries and records" of the Treasurer and Auditor. It is doubtful whether so much was necessary, and whether the act of Congress was not binding upon those officers with reference to their accounts and records. But, whether that be so or not, the statute cannot be taken to have fixed the value of foreign currency for the Commonwealth of Massachusetts; that was done by Congress, acting under its constitutional power. While it is not probable that a different value will be established by Congress, yet it is within the power of that body to do so at any time.

If you put into bonds issued by you a computation of the value of the same in English money (which is what your proposition amounts to), such a proceeding would bind the Commonwealth to pay its indebtedness in merchandise, to wit, foreign money, at a value which might not be its established value at the time of the maturity of the bonds. Without doubt the Legislature might authorize you to make such a contract; but it has not done so. A bond containing such a contract, therefore, would be beyond your authority as Treasurer.

But, independently of the foregoing considerations, I do not think you have the right to make contracts in behalf of the Commonwealth in anything but the lawful and established currency of the United States, unless so specifically authorized by the Legislature. Congress, acting under the authority of the Constitution, early declared that the money of the United States should be expressed in dollars, dimes and cents. These coins are the currency of the nation. While this law applies in terms only to the accounts of the United States, and does not prohibit citizens of States from making contracts expressed in foreign money, it would, notwithstanding, in my judgment, be not only unpatriotic, but unauthorized, for the State, without express authority of the Legislature, to incorporate in the contracts of the Commonwealth any expression of the money of other nations. I am told that, if the course you suggest could lawfully be adopted, the proposed loan might be placed

at better figures and with more profit to the Commonwealth; but it would be a profit acquired at the expense of the dignity of the Commonwealth, and by means of a transaction which in my judgment should only be entered into with the sanction of the Legislature.

It is suggested that the bonds of the Commonwealth have heretofore from time to time been expressed in foreign money. So far as my attention has been called to the matter, this has never been done without express authority of the Legislature, either specifically authorizing the contracts to be expressed in pounds sterling or in "such currency as the Governor and Council should approve." See St. 1865, c. 32; St. 1868, c.c. 51, 333; St. 1869, c. 450; St. 1874, c. 391.

In all of the above statutes, which were passed at a period in the history of the nation when its credit and financial position were less firmly established, there was incorporated express authority to make contracts in foreign money. The absence of any such provision in the statute now under consideration must, I think, be interpreted as a declaration by the Legislature that it is not now necessary or becoming that the contracts of the Commonwealth shall be expressed other than in the currency of the nation.

VETERAN, — DISCHARGE, — METROPOLITAN PARK COMMISSION, — POLICE FORCE.

An employee on the police force of the Metropolitan Park Commission, although a veteran of the civil war, can be discharged by the commission for reasons which to it are satisfactory.

To the Metropolitan Park Commission.
1895
August 23.

I am in receipt of your letter of August 20, informing me that, for the purpose of reducing the force in the employ of the Metropolitan Park Commission, the Board has selected certain men to be discharged, including among others a veteran of the late war, who was employed on the police force. My opinion is asked as to whether you have the right to discharge him.

I have no doubt that the Board has authority to discharge members of its police force for any cause satisfactory to it. The Board has power to employ and make rules and regula-

tions to govern its police force. This implies the power of discharge. St. 1893, c. 407, § 4. The only duty of the commission with reference to the discharge of employees is to report the fact to the Civil Service Commissioners. St. 1884, c. 320, § 22.

TUBERCULOUS CATTLE, — SIX MONTHS' OWNERSHIP IN STATE.

St. 1895, c. 496, § 10, provides for compensation to owners of cattle taken by the Cattle Commissioners, provided the animal in question "has been owned within the State six months continuously prior to its being killed." It is not necessary, under the statute, that the animal should be kept within the State, provided it is owned here.

To the Cattle Commissioners. 1895 September 4.

Your letter of the 26th ultimo, asking my opinion as to the construction of St. 1895, c. 496, § 10, is received.

The question stated in your letter is, whether the words, "if such animal has been owned within the State six months continuously prior to its being killed," are to be taken to mean both owned and kept in the State; the fact being, as stated in your letter, that many owners of cattle in Massachusetts own pastures in other States, into which they turn their cattle, returning them to Massachusetts in the fall.

The statute in question is amendatory of St. 1894, c. 491, § 45, in which provision was made for compensation to owners of cattle under similar cases, whenever such animal had "been within the State six months continuously prior to its being killed." The statute of this year amended the statute of 1894 by inserting the word "owned," so that the expression under the present statute is, "has been owned within the State," instead of the expression in the statute of last year, "has been within the State."

"Owned within the State" signifies "owned [by a person] within the State." As the law stood last year, the clause "within the State" modified the predicate "has been." In the present law it modifies the predicate "has been owned," and relates to the place of ownership and not to the place of keeping.

This, it is true, is a radical change from the letter and spirit of the statute of last year, and it may be urged that the con-

siderations which led the Legislature to limit compensation to such cattle as had been kept within the State for six months before being killed by the commissioners should apply to the law as it now stands; for, if place of ownership only be considered, a resident of Massachusetts may purchase cattle in another State, keep them there for six months, and then, having brought them into the State afflicted with tuberculosis, recover compensation for their killing.

But this consideration is rather an argument as to what the law should be than as to what it is. The wisdom of the law does not enter into the discussion as to its meaning. The Legislature saw fit, in its wisdom, to decree that cattle owned within the State for six months should not be killed without compensation, wherever kept prior to their killing. No other consistent construction of the expression, in my judgment, is possible.

Militia, — Commissioned Officer.

Concerning the validity of the commission issued Feb. 20, 1862, to Lieut.-Col. Charles W. Whelden, of the Thirty-first Mass. Volunteers, by His Excellency Gov. John A. Andrew.

To the Governor. 1895 September 4.

I have the honor to acknowledge your communication, referring to me "the case of Lieutenant-Colonel Whelden's commission" for my opinion.

It appears, from the voluminous correspondence and records submitted, that a commission was issued to Charles W. Whelden by His Excellency Governor Andrew, as lieutenant-colonel of the Thirty-first Mass. Volunteers, to date Feb. 20, 1862. This commission was duly signed by Governor Andrew and Oliver Warner, Secretary of State, and, I assume, was duly sealed. This commission was enclosed in an envelope directed to Lieutenant-Colonel Whelden, and with others was sent to Colonel Gooding, the colonel of the regiment, in New Orleans, La., and was received by him (Colonel Gooding) in July, 1862. At the time of the receipt of the package containing the commission in question Colonel Whelden was absent, and Colonel Gooding returned it to Governor Andrew with a letter dated

Aug. 21, 1862, declining to transmit it to Lieutenant-Colonel Whelden. The commission thus returned was received at the Executive office and opened by Col. A. G. Browne, the military secretary of Governor Andrew, Nov. 6, 1862, who endorsed the fact that he had opened it upon the envelope. No action was taken upon the commission, but it remained in the Executive department and was finally deposited in the so-called "Shoe-string Library" in the State House, together with the correspondence relating to the same, where it now is. It is in the same envelope in which it was sent to Louisiana.

Many other factors appear in the correspondence, but none of them are, in my judgment, relative to the issue now presented.

From the facts above stated, it clearly appears that all the acts and formalities necessary to the commission of Lieutenant-Colonel Whelden were done by Governor Andrew. The appointment was made by him, the commission prepared, signed, sealed and transmitted to be delivered to him. In my opinion, these acts establish the validity of the commission. I beg leave to refer to a discussion of the question in an opinion relating to the appointment of justices of the peace, sent to Your Excellency from this office under date of March 29, 1894,* in which the authorities pertinent to the question were cited and considered.

The only possible ground for holding that the commission did not take effect was the fact that Colonel Gooding did not deliver it to Lieutenant-Colonel Whelden, but returned it to the Governor. It is doubtful whether, even if the Governor had so desired, after having taken the steps which have been recited, he could have recalled the commission. Indeed, it might well be urged that the investure of office was complete when the commission was duly signed and sealed.

But that question does not arise in this case. The commission was not recalled by Governor Andrew. Colonel Gooding was only authorized to deliver it, and had no authority to return it. Even had the Governor been disposed to recall the commission, he did not do so. It does not appear that any

* See page 140, *ante*.

action was taken by him in relation to it. It was merely opened by his private secretary, and remained without retransmission in the archives of the office. Granting that the Governor might have revoked the commission, it appears that no effectual steps were taken to do so, and that no action was taken by the Executive in relation to the commission after it was transmitted in the manner above stated.

It follows, therefore, that the commission belongs to Lieutenant-Colonel Whelden, and that, so far as may be done, the military records should be amended to conform to the truth.

MUNICIPAL INDEBTEDNESS ACT, — WATER BONDS, — SINKING FUND, — GENERAL STATUTE CONFLICTING WITH PARTICULAR STATUTE.

A town voting to purchase an existing water supply and to issue bonds for the payment thereof, under the provisions of Pub. Sts., c. 27, §§ 27 and 28, is bound by such provisions of said chapter as are general in nature, including those in relation to the creation of sinking funds; although the bonds are valid, even if the town does not establish a sinking fund.

To the Treasurer. 1895 September 13.

I have the honor to acknowledge your favor of the 4th inst., containing the following questions: —

"1. If a town votes to purchase an existing water supply plant, and to issue bonds for the payment thereof, under the provisions of Pub. Sts., c. 27, §§ 27 and 28, is it necessary that the town shall establish a sinking fund for the payment of said bonds under the provisions of Pub. Sts., c. 29, § 9?

"2. If in such a case the town does not establish a sinking fund, are the bonds valid?"

In replying thereto I have to say: —

1. Pub. Sts., c. 27, §§ 27 and 28, are substantially a reenactment of St. 1870, c. 93. Pub. Sts., c. 29, § 9, was first enacted in St. 1875, c. 209. St. 1870, c. 93, was an act to authorize cities and towns to purchase water plants. It provided, among other things, how cities and towns might vote to exercise the right granted them of purchasing water plants, and in what manner bonds might be issued in payment thereof. It provided that in the case of towns the right of purchase

should not be exercised without the consent of a majority of the selectmen, sanctioned and ratified by a majority of the voters present and voting thereon at a legal meeting; and that bonds might be issued redeemable at any time not exceeding twenty years from date.

St. 1875, c. 209, was a general act "to regulate and limit municipal indebtedness." This act purported to deal with debts of all kinds. It provided that debts should be incurred only by a vote of two-thirds of the voters of a town. It also made provision for the period of time for which bonds might be issued, especially providing that debts incurred in supplying the inhabitants with pure water might be made payable at a period not exceeding thirty years.

It will be observed that in the particulars specified, at least, the provisions of the statute of 1875 were inconsistent with those of the statute of 1870. There was nothing in its terms to indicate that it did not include debts incurred for the purchase of water rights. On the other hand, debts for supplying the inhabitants of a town with pure water were expressly exempt from certain general provisions of the act. For example, the limit of indebtedness was by § 10 declared not to be applicable to water debts.

If, therefore, there had been no subsequent action by the Legislature, it might well have been presumed that the statute of 1875, being general in its nature, and applicable to debts of all kinds, superseded the provisions of St. 1870, c. 93, in so far as they were inconsistent therewith.

But, when the statutes of the Commonwealth were revised by the commissioners and consolidated into Public Statutes, both these acts were brought forward and made a part of the Public Statutes, as above stated. Both, therefore, must be taken as independent and co-existing statutes; one (c. 27) relating to a particular form of municipal indebtedness, the other (c. 29) relating to municipal indebtedness in general. This being so, the true rule of construction, I apprehend, is this: When the provisions of the particular statute conflict with those of the general statute, they are in force as to the particular form of municipal indebtedness with reference to which they are enacted, and

are not superseded by the general provisions. On the other hand, all provisions in the general act which are not inconsistent with the particular act must be held to be in force as to all forms of indebtedness, including debts created under the authority of the particular statute.

For example, c. 29 provides that indebtedness shall be incurred only by a two-thirds vote of the inhabitants of a town; c. 27 provides that debts for the purchase of a water supply may be incurred by a majority vote. These provisions, being inconsistent, must both stand; and c. 27 must in this respect be taken to be an exception to the general provision of c. 29. Again, c. 29 provides that debts incurred for supplying the inhabitants of a town with pure water may be made payable at a period not exceeding thirty years; by c. 27 debts incurred for the purchase of a water plant must be redeemable in not exceeding twenty years. Here, again, the general provisions of c. 29 must be taken as not applicable to debts incurred under the authority of c. 27.

On the other hand, c. 29, § 9, providing for the creation of a sinking fund, is general in its terms, and may properly be held to be applicable to all forms of municipal indebtedness. I see no reason why it does not apply to debts created under the provisions of c. 27.

This view is strengthened by the fact that another important provision of c. 29, to wit, that fixing the limit of municipal indebtedness, is expressly declared not to be applicable to debts created for supplying inhabitants with pure water. There can be no doubt that debts created for the purpose of a water supply, under the provisions of c. 27, are debts incurred for the supply of pure water, and as such are exempt from the provisions of law relating to the limit of municipal indebtedness.

But such provisions of c. 29 as are general in their nature, including those in relation to the creation of sinking funds, are, in my judgment, applicable to all forms of municipal indebtedness, including debts created under the authority of Pub. Sts., c. 27.

2. It is expressly provided in Pub. Sts., c. 29, by § 16, that the restrictions contained in the chapter "shall not exempt

a city or town from its liability to pay debts contracted for purposes for which it may lawfully expend money." This section was undoubtedly intended to relieve the creditor from any responsibility or interest in the observance by the town of the statutory provisions limiting and regulating municipal indebtedness. It follows that, inasmuch as debts created for the purchase of a water supply are "contracted for purposes for which it may lawfully expend money," the town is liable for the payment thereof, notwithstanding the fact that it has not created a sinking fund.

The provisions with relation to sinking funds are for the benefit of the tax payer rather than the creditor; and it is expressly provided by c. 29, § 17, that tax payers may enforce the provisions of the law. Excepting so far as the sinking fund adds to the practical security of the debt, I do not see how a purchaser of the bonds is interested in its establishment.

MEDFIELD INSANE ASYLUM, — BUILDING COMMITTEE, — DISPUTED CLAIMS, — COMPROMISE.

The building committee of the Medfield Insane Asylum has legal authority to compromise disputed claims for expenses incurred in the erection of the buildings.

To the Building Committee of Medfield Insane Asylum.
1895
October 5.

I understand the facts upon which you ask my opinion to be that a contractor, who has done work upon the asylum buildings or grounds, claims a large additional amount above his contract for work done by reason of alleged misrepresentations made to him by your agents to induce him to enter into the contract. Whether the alleged misrepresentations consisted in stating things that were not true, or in keeping back material facts, is not to the point. A proposition has been submitted to compromise this claim, which the building committee may desire to consider if it is authorized to do so. The question is, whether it has such authority.

Under the provisions of St. 1892, c. 425, § 2, which authorizes the building committee to build the asylum and to make contracts therefor, the only restraint upon their power being

that contracts shall be approved by the Governor and Council, and that the aggregate cost shall not exceed the sum named in said section, I see no reason to doubt that, in the exercise of the discretion committed to them, the building committee may compromise disputed claims upon such terms as they shall deem to be for the interest of the Commonwealth.

BUILDING LAWS, — INSPECTOR OF BUILDINGS.

Concerning the interpretation of St. 1894, c. 481, §§ 25 and 26, regarding the filing of plans with the inspector of buildings; also concerning the order to be issued by the inspector under St. 1894, c. 508, § 42.

To the Chief of the District Police.
1895
October 5.

I have your letter of the 27th ult., containing questions calling for a construction of St. 1894, c. 481, §§ 25 and 26.

The intent of § 25 is not so clearly expressed as it might easily have been; but, in my opinion, the purpose of the section may be thus stated: before entering upon the erection of a building, such as comes within the provisions of this act, a plan with such specifications as may be called for is to be filed with the inspector of public buildings for his examination. It is his duty thereupon to examine the plans, and to see whether they include a system of ventilation, and whether, when constructed, the building will comply with the provisions of the statutes relating to means of escape from fire. If he finds that the plans provide a system of ventilation, and that when erected the building will conform to such provision of law, it is his duty to approve the plans; if he finds otherwise, it is his duty to disapprove the plans. He has nothing to do with the general construction of the building. If the plans are conformable to law in matters within his jurisdiction, it is his duty to approve them.

The approval of the inspector does not appear to be a condition precedent to the lawful construction of the building. The builder may proceed with the construction of the building when he has filed the plans. If, however, the plans are disapproved, he does so at his peril; and, if the building does not conform to the statutory requirements, he may be enjoined

under the provisions of § 26, or, when completed, he may be prosecuted therefor. The approval of the inspector is, as the act states, conclusive evidence that the building, when erected, is in conformity with the requirements of the statutes, and operates as a protection to him to that extent. Even if the inspector disapproves the plans, it may be that the building erected in accordance with them will conform to the requirements of the law; but of that the builder takes the responsibility. If, on the other hand, the plans are approved, the builder is relieved from further responsibility in the matter, so long as he conforms to the plans.

The last question in your letter is in reference to St. 1894, c. 508, §§ 40, 41, and 42. Section 42 provides that when it appears to the inspector that "further or different sanitary provisions or means of ventilation are required . . . and that the same can be provided without incurring unreasonable expense, such inspector may issue a written order . . . directing such sanitary provisions or means of ventilation to be provided." In my opinion, the order to be issued by the inspector should conform to the words of the statute, and that he is not responsible, and should not undertake to be responsible, for the particular means adopted by the owner of the building to comply with the order. If any changes which have been made by the owner prove faulty, the inspector may issue further general orders in reference to the same, and so continue until the building conforms to the law.

Legacy Tax Act, — Time of Payment of Tax.

The Treasurer of the Commonwealth has no discretionary power to allow time for the payment of taxes under the laws relating to collateral legacy taxes. The time for payment is fixed by the statute.

To the Treasurer. 1895 October 5.

The time for the payment of taxes on collateral legacies and successions, and all interest thereon, is fixed by the original act, St. 1891, c. 425, as amended by St. 1895, c. 430, and by said acts no discretion is given to the Treasurer of the Commonwealth in the matter. This being so, of course there is no

occasion to consider what would be a reasonable time to allow the payment of taxes free from interest.

The only discretion as to the extension of time for the payment of a tax is that given to the court in the last paragraph of St. 1891, c. 425, § 18. There is nothing in the act which contemplates the exercise of any discretionary powers by the Treasurer, either in this or in any other respect, as far as I have been able to discover. When the original act was first passed a similar question was then examined quite carefully by the Attorney-General, and his views were communicated to the Treasurer. See Opinions of May 11, 1892, Feb. 13, 1893, and June 19, 1893.*

I agree with the conclusions stated in the opinions above cited.

INSURANCE, — ADMISSION OF FOREIGN COMPANY, — BUSINESS OF INSURING IMPAIRED LIVES, — VALUATION OF POLICIES.

A foreign insurance company, organized for the purpose of insuring impaired lives and applying for admission into this Commonwealth, is not to be excluded therefrom merely on account of this characteristic of its business.

The Insurance Commissioner, under the provisions of St. 1894, c. 522, § 11, is required to use the tables therein provided in order to estimate as required by that section the financial standing of such a company; but if he is not then satisfied that the company is in sound financial condition, according to § 67 of that act, he may refuse it admission to the Commonwealth.

To the Insurance Commissioner. 1895 October 11.

I have considered the question stated in your letter of September 4, and more explicitly stated orally at the time of the hearing given to counsel for the insurance company interested, and beg to reply as follows: —

The facts, as stated both in your letter and at the hearing, and which are practically undisputed, are as follows: The St. Paul Life Insurance Clearing Company, a foreign corporation, has applied to the insurance department for admission to do business in the Commonwealth of Massachusetts. This company is organized for the purpose of making insurance upon what are called impaired lives; intending by that expression persons who, by reason of hereditary disease or other cause,

* See pp. 52, 76 and 85, *ante*.

are unable to pass the medical examinations of ordinary life insurance companies. It is claimed by the company, and I understand it to be conceded by yourself, that the plan of the insurance company is a good one; and that, so far as the experience of other companies doing the same business, particularly in Great Britain, affords a guide, its method of business is safe.

The statute relating to the admission of foreign corporations (St. 1894, c. 522, § 67) provides that "A company organized under the laws of any other of the United States for the transaction of life insurance may be admitted to do business in this Commonwealth, provided it has the requisite funds of a life insurance company and in the opinion of the commissioner is in sound financial condition." The meaning of the expression "requisite funds of a life insurance company" is to be ascertained from other provisions of the statute. The same chapter provides (§ 11) that the Insurance Commissioner shall annually compute the net value of all policies of life insurance in companies authorized to insure lives in this Commonwealth "upon the basis of the 'Combined Experience,' or 'Actuaries' Table' rate of mortality, with interest at four per cent. per annum, and the aggregate net value so ascertained, of the policies in any such company shall be deemed its liability on account of its policy obligations." The section further provides that "it shall hold funds in secure investments of an amount equal to such net value above all other liabilities." The funds so provided for in this section are without doubt the "requisite funds of a life insurance company," which, by § 67, above quoted, it is required that a foreign company shall hold in order to be admitted to do business in this Commonwealth. This appears by various sections of the same chapter, and it is practically undisputed by the company that such is the intention of § 67 in relation to the admission of foreign life insurance companies.

It further appears that the "Combined Experience" or "Actuaries' Table" rate of mortality is ascertained by taking the average of what are called selected lives between the ages of ten and eighty years. By selected lives is meant the lives of persons who are free from disease, and who have no hereditary or other tendencies or susceptibility to disease. This classification clearly

excludes the lives which it is the business of the St. Paul Company to insure. It follows, therefore, that these tables afford no accurate guide to the value of the policies is sued by the St. Paul Company. This is not disputed by the company, but it is claimed that, if the Insurance Commissioner is satisfied that the reserve established by that company is sufficient to protect the policy holders, it is his duty to admit the company.

I cannot agree with the contention of the Insurance Commissioner that the provisions of § 11, requiring him to ascertain the net value of life insurance policies by the tables therein specified, of themselves prohibit life insurance companies doing business in this Commonwealth from effecting insurance other than upon selected lives between the ages of ten and eighty years. There is nothing in the charter of any of the five domestic insurance companies doing business in this Commonwealth to limit them to that extent, nor in any provision of law regulating the admission of foreign companies which can be regarded as a limitation of their power to effect such life insurance. It would be, in my judgment, an unwarrantable inference to say that, because the Insurance Commissioner is required to make use of certain tables to ascertain the net value of policies, companies can only insure the class of lives upon which those tables are based. If the Legislature had intended to prohibit the insuring of impaired lives, or lives of persons over eighty years of age, it would undoubtedly have expressed the prohibition in plain terms, and not left it to be drawn by inference upon the consideration of extraneous facts, as applied to the provisions of § 11. I am of opinion, therefore, that the insuring of impaired lives of itself is not prohibited or unlawful in this Commonwealth; and that the company seeking to do business of that character is not for that cause to be excluded.

Neither can I accept the contention of the company that the expression "upon the basis of the 'Combined Experience' or 'Actuaries' Table' rate of mortality" authorizes the commissioner to use the figures of those tables as a starting point of computation, and to make estimates therefrom applicable to the facts of each policy. Such, in my judgment, is not the intention of the statute. But one rule for the valuation of policies

is permitted to him. He has no authority to put any other valuation than such as the tables prescribe. If such valuation, by reason of the facts of the specified life, is inaccurate, it is not his fault, but is the result of the limitations prescribed upon his work by the Legislature.

It follows, therefore, that, in the performance of his duty when a foreign company applies for admission to do business in this Commonwealth, he must ascertain its financial standing in accordance with the rule stated in § 11. He is to compute the value of outstanding policies by means of the tables provided; and if by the use of those tables he ascertains that the company has, as is provided in § 67, "the requisite funds of a life insurance company," it would be his duty to admit the company to do business in this Commonwealth, but for a further and very salutary provision of the same section, to wit, he is to be satisfied not only that "it has the requisite funds of a life insurance company," but further that, in his opinion, it is "in sound financial condition." In other words, the Legislature contemplated the very contingency which seems to have arisen in this case. That is, ascertaining the net value of policies of a company by the rule established, it might yet happen that by reason of the method of doing business such value would be misleading, and give no guide to the actual financial condition of the company. If, for example, a company issued policies upon all lives indiscriminately without medical examination, the commissioner would still be required to ascertain the nominal net value of the policies by the tables prescribed; but, in view of the method of doing business, he would have no difficulty in arriving at the conclusion that the financial condition of the company was not good.

The same rule would apply in the case of a domestic company. Supposing one of the domestic companies were to engage in the business of issuing insurance upon impaired lives. The rule of computation prescribed for the commissioner for ascertaining whether the funds carried by the company were sufficient for the protection of the insured would not thereby be altered; but, under the general authority conferred upon him by all the sections which prescribe his duties to pass

upon the financial condition of the company, he would be justified, if in his judgment the business of the company was hazardous, in taking measures to restrain its further continuance.

In the case in question the Insurance Commissioner, upon application for admission, is bound to examine the policies by the rule laid down in § 11, and thus to ascertain whether the amount of funds carried by the company is requisite for the protection of the insured within the rule laid down by that section. But it is thereupon his further duty to examine the method of doing business adopted by the company, and to determine whether, in his opinion, it is in a sound financial condition; that is to say, whether it has in fact funds sufficient for the protection of the policy holders. He may be of the opinion that, although nominally its reserve fulfils the requirements of § 11, yet in fact, owing to its method of doing business, the reserve is insufficient. He may, in the exercise of the discretion conferred upon him, go further, and say that, in view of the fact that the rule laid down for him by § 11 is misleading when applied to the policies carried by the company seeking for admission, he can form no opinion that is satisfactory to him as to whether the company is solvent or not, and, on that ground alone, decline to admit the company. But the exercise of that discretion rests upon him, and I do not understand it to be the duty of the Attorney-General to advise him with reference thereto.

LYMAN SCHOOL FOR BOYS, — STATE PRIMARY SCHOOL, — FINAL DISCHARGE OF INMATE.

The power to finally discharge a boy transferred from the Lyman School to the State Primary School, and thence by the trustees placed in charge of a person outside the institution, is vested, since the passage of St. 1895, c. 428, in the same body that held the power to discharge before such transfer was made.

To the Trustees of the Lyman and Industrial Schools.

1895 October 16.

Your letter of the 2d states the following case: A boy committed by the court to the Lyman School during his minority was transferred in November, 1893, to the State Primary School, under the provisions of Pub. Sts., c. 89, § 7. In

June, 1894, he was placed by the trustees in charge of a person outside the institution, who, upon investigation, was deemed suitable by the State Board of Lunacy and Charity. This was done under the provisions of Pub. Sts., c. 89, § 6.

Your inquiry is, "In whom was the power of final discharge of such boy vested after he had been placed out and prior to the passage of St. 1895, c. 428; and in whom is the power vested since the passage of said act?"

1. Prior to St. 1895, c. 428, the power of final discharge was vested in the State Board of Lunacy and Charity. This question was considered in a letter written by me to His Excellency the Governor, dated August 25, 1894,* to which I beg leave to refer.

2. On the first Monday of July, 1895, under the provisions of St. 1895, c. 428, the State Primary School ceased to exist. Section 3 of said act provided substantially that the trustees of the Lyman School should thereupon resume the personal care and possession of children released on probation or previously transferred to the State Primary School, and might recall them to the school to which they were originally committed. Under the provisions of this statute, therefore, children who had been previously transferred from the Lyman School to the State Primary School were to be restored to their former status as inmates of the Lyman School, and therefore in the custody of the trustees under the provisions of the Pub. Sts., c. 89, § 5. The right of the State Board to discharge such boys under the provisions of Pub. Sts., c. 89, § 6, thereupon ceased, and the power of discharge of such boys as inmates of the State Reform School is to be determined as though they had never been transferred.

The foregoing opinion is upon the facts submitted to me, and recited in the first paragraph. In an informal discussion of the question after receiving your letter it was suggested that the facts were not as stated, and that the boy was "placed out" by the State Board of Lunacy and Charity; and I understand it to be claimed by the members of the Board that if they had no power to place out boys from the State Primary School, their

* See page 182, *ante*.

action is to be regarded as a discharge, and that therefore the State has no further right of custody of boys so placed out by the Board. It is not the province of this office to determine questions of fact, and I see no occasion to discuss the hypothetical questions which might arise upon a state of facts not given me by the trustees.

I may say, however, that it appears from Pub. Sts., c. 89, § 6, that the respective duties of the Board and trustees are clearly defined. The Board has the power of visitation and final discharge; and the trustees have the right and duty of "placing out." If the State Board has assumed the jurisdiction of placing boys from the State Primary School in families, their action would apparently be illegal, unless there is some further provision of law authorizing some action, to which my attention has not been called.

I cannot agree with the position suggested by the secretary of the State Board, that an illegal "placing out" of an inmate of the Primary School by the State Board would operate as a discharge of the boy. The only power vested in the Board is that of discharge; if it assumed to exercise that power the boy would be free; if it did not assume to exercise that power, its removal of the boy would operate only as an escape, and not a discharge, and he could be retaken by the persons entitled to his custody.

CORPORATION, — SPECULATIVE BUSINESS.

The fact that a proposed corporation is to deal in bonds, stock, grain, petroleum and other articles of a speculative nature, is not a bar to its becoming incorporated under Pub. Sts., c. 106, § 14.

To the Commissioner of Corporations. 1895 October 26.

I have examined, at your request, the articles of association of the proposed corporation, to be known as the Boston Stock and Grain Exchange, and am unable to see why the purpose set forth therein is not within the provisions of Pub. Sts., c. 106, § 14. This section provides, among other things, that corporations may be formed for the purpose of carrying on any lawful business not mentioned in the seven preceding sections, excepting buying and selling real estate, banking,

insurance, and any other business the formation of corporations for which is otherwise regulated by these statutes.

Whatever may be said of the manner in which the business of buying and selling bonds, stock, grain, petroleum and other articles of a speculative nature is carried on, it is obvious that the business in itself is lawful, and not within the above-specified exceptions.

CIVIL SERVICE, — VETERANS' PREFERENCE ACT.

St. 1895, c. 501, does not exempt veterans from the rule that an applicant for appointment to the police force shall be of good moral character and shall be physically able to perform the duties of the position. These requirements are still in force, and the commissioners have the right to determine them.

To the Civil Service Commissioners. 1895 October 28.

I have the honor to acknowledge your letter, in which, after stating that a veteran soldier in a city outside of Boston, admitted to be entitled to any preference provided by St. 1895, c. 501, who is reported to the commissioners as receiving a pension from the United States for total disability, has applied under § 2 of said act for appointment without examination on the police force of such city, and has filed certificates from three citizens of good repute in the community, stating that they know said applicant to be fully competent to perform the duties, as provided by § 6 of the act, defining the word "application" used in § 2 of the act, you ask my opinion upon two questions: —

First. — Whether this application, made under St. 1895, c. 501, § 2, in view of the definition of the term "application" in § 6 of this act, must be received as conclusive of the qualifications; or whether, in view of the reference in § 2 of the act to civil service rule 12, the commissioners still have power to investigate the physical qualifications of the applicant.

Second. — Can the commissioners under the same circumstances investigate the moral qualifications of the applicant under the act, provided his application conforms to St. 1895, c. 501, § 6?

The considerations suggested in my letter to your Board,

dated July 5, 1895,* furnish the answer to the above questions. I then stated that I construed the act of 1895 to be amendatory of the legislation already enacted upon the civil service; and that the rules established by the Civil Service Commissioners, in pursuance of the authority vested in them, are valid and in full force, excepting so far as the act of 1895 expressly repeals or modifies them.

Under the civil service rules it is necessary that the applicant for appointment be physically able to perform the duties of his position; also that he be a person of good moral character. These requirements are still in force, and, in my opinion, the commissioners have the right to determine them.

By St. 1895, c. 501, § 2, it is provided that veterans who have made application for employment in accordance with the second section of rule 12 of the civil service rules shall be preferred in preference to all other applicants not veterans, except women; "*provided*, that the age limit now established by the civil service rules, with regard to appointments in the police and prison service and fire departments, may be applied to such appointments." It may be urged that the proviso above quoted, authorizing the application of a single one of the conditions (to wit, age) prescribed by the civil service rules, must be taken to exclude the application of other terms and conditions in said rules. If the section were taken alone, there would be much force in the suggestion. But by St. 1887, c. 437, providing that veterans need not be examined, it was further provided that "age, loss of limb, or physical impairment, which shall not in effect incapacitate, shall not be deemed cause to disqualify under this act." I think the more reasonable construction of the proviso in St. 1895, c. 501, § 2, is that it was intended to repeal the provision in St. 1887, c. 437, by which age was not deemed cause for disqualifying a veteran.

---

* See page 243, *ante*.

PUBLIC RECORDS, — TAX RETURNS.

The general public has no right to demand inspection of the tax returns of corporations made to the Tax Commissioner under the provisions of Pub. Sts., c. 13, § 38.

To the Tax Commissioner.
1895
October 29.

I have received your letter of October 25, inquiring whether the office of the Tax Commissioner "is so far a public record office as that the tax returns of corporations under Pub. Sts., c. 13, for taxation purposes are public records, so that the general public has a right to demand their production, or require the office to make and certify copies thereof, or allow others to do so."

The provisions of Pub. Sts., c. 13, § 38, require every corporation chartered under the laws of the Commonwealth to make a return to the Tax Commissioner, between the first and the tenth days of May annually, of its shareholders, with their places of residence and the number of shares belonging to each on the first day of May. Under the system of taxation in force in this Commonwealth all taxes against corporations other than those upon their real estate are assessed by the Tax Commissioner of the Commonwealth and paid to the Treasurer of the Commonwealth, and thereafterwards distributed to the cities and towns where the stockholders reside, in proportion to the number of shares owned in each city or town. The return in question is required for the purpose of enabling the Tax Commissioner to make this distribution, and, so far as I am informed, for no other purpose.

There is no provision of law by virtue of which the general public has the right to demand the production of such tax returns, or to require the Tax Commissioner to make and certify copies thereof, or allow others to do so. On the other hand, by way of contrast, under St. 1888, c. 307, the valuation and assessment books of town and city assessors are expressly declared to be open to the public. The absence of any such provision in regard to the returns made to the Tax Commissioner by corporations under Pub. Sts., c. 13, is a strong indication that the Legislature did not intend them as public records.

They are not for the use of the public, and are only required for the Tax Commissioner in the discharge of his duty of assessing and distributing the tax.

On the other hand, by Pub. Sts., c. 106, § 54, as amended by St. 1887, c. 225, every corporation excepting banks, steam and street railway companies and insurance companies is required to make and file in the office of the Secretary of the Commonwealth annually a certificate stating, among other things, the name of each shareholder and the number of shares standing in his name. It is further provided by § 59 that this certificate shall be examined by the Commissioner of Corporations for the purpose of ascertaining if it complies with the law, and upon his approval it is to be filed in the office of the Secretary of the Commonwealth, who shall receive and record the same in books to be kept for that purpose. The object of this requirement is obviously to furnish to the citizens of the Commonwealth all necessary information both in regard to the condition of the corporations specified therein and of the names of the stockholders thereof.

So far as I have been able to discover, the only provisions relating to the names and number of shares of stockholders of steam and street railway companies are Pub. Sts., c. 112, § 23, and St. 1889, c. 222. Under the former statute the Board of Railroad Commissioners shall at all times have access to the list of stockholders of said corporations, and may cause the same to be kept for its information, or for the information of persons owning stock therein. And under St. 1889, c. 222, upon request of a stockholder such corporations shall make and file in the office of the Secretary of the Commonwealth a list of stockholders and the number of shares held by each. This certificate also when so filed is open to the public. There appears to be no provision by which the public generally can ascertain the names of the shareholders in railroad companies, excepting through the intervention of a stockholder acting in pursuance of the statutes above quoted.

But this apparent failure to provide means by which the public may obtain the names of the stockholders of railroad corporations does not modify my opinion that the returns to

the Tax Commissioner are not intended to be public records, "so that the general public has the right to demand their production, or require the office [of Tax Commissioner] to make and certify copies thereof, or allow others to do so."

FOREIGNER, — PENAL LAWS.

The Trustees of the Lyman School have the right to hold a foreigner committed to that school for larceny.

To the Trustees of the Lyman and Industrial Schools.
1895
November 6.

I beg to acknowledge your letter of October 29, requesting my opinion as to the right of the trustees to hold within the Lyman School one John G. Alexanian, an Armenian, recently committed to the Lyman School for the offence of larceny.

The fact that Alexanian is an Armenian does not invalidate his commitment to the Lyman School. An Armenian has no more right to commit larceny in Massachusetts than an American. Living here, he subjects himself to the penal statutes of the Commonwealth, as though he were a citizen.

PUBLIC RECORDS, — RECORDS OF CATTLE COMMISSIONERS.

The Board of Cattle Commissioners are under no legal obligation to submit their records to public examination.

To the Cattle Commissioners.
1895
November 19.

I have the honor to acknowledge the receipt of your letter of October 31, requesting my opinion upon the question "whether it is the duty of the commission to furnish or expose to any or all applicants" the records required to be kept by the commission, under the provisions of St. 1894, c. 491, § 51.

The section in question is as follows: "The Board of Cattle Commissioners shall keep a full record of their doings and report the same to the Legislature on or before the tenth day of January in each year, unless sooner required by the Governor; and an abstract of the same shall be printed in the annual report of the State Board of Agriculture."

Under this statute the Board is required to report its records to the Legislature on or before the tenth day of January, and

may be sooner required to do so by the Governor. I am of opinion that this provision is intended to define the whole duty of the Board with reference to the inspection of its records, and, therefore, to exclude any right of the public generally to examine them.

It should be said that under § 5 of the same chapter the records of inspectors appointed by the commissioners are open to the examination of the board of health of the city or town for which the inspector is appointed; and that all your records are open to the examination of the Auditor, under the provisions of Pub. Sts., c. 16, § 5.

PRISONER, — DISCHARGE, — CLOTHING.

The amount to be expended in providing suitable clothing for a prisoner upon his discharge is limited, by Pub. Sts., c. 220, § 64, to the sum of ten dollars.

To the Commissioners of Prisons.
1895
November 20.

I beg leave to acknowledge your letter of October 22, in which, after calling my attention to a rule made by you, you ask my opinion whether said rule is repugnant to the statutes. The rule referred to is in the following language: "The clothing of each prisoner received shall be taken from him, and, if worth preserving, shall be cleansed, securely kept and restored to him upon his discharge; each prisoner having a sentence of six months or more shall, upon his release, be decently clothed with clean garments, with good under-clothing, shoes and stockings, and if the release takes place between the first of November and the first of April, he shall have a decent and warm overcoat."

Pub. Sts., c. 219, § 14, which substantially re-enacts St. 1879, c. 294, § 10, provides that "The commissioners shall from time to time prepare rules, not repugnant to law, for the direction of the officers of each jail or house of correction in the discharge of their duties, the government, employment, and discipline of convicts, and the custody and preservation of the property connected therewith; and shall cause copies thereof to be laid before the Governor and Council, who may approve,

annul, or modify the same. Jailers, keepers of houses of correction, county commissioners, and the directors for public institutions in the city of Boston, shall make no rules inconsistent with the rules of the commissioners."

Pub. Sts., c. 220, § 64, which substantially re-enacts St. 1881, c. 126, provides that "The keeper or master of a jail or house of correction may, with the approval of the county commissioners, expend in aiding any prisoner discharged from his custody such sum, not exceeding ten dollars, as in his opinion will assist said prisoner in his endeavor to reform. The money so expended may in the discretion of the keeper or master be paid to the prisoner, or to such person to be expended in behalf of the prisoner as the keeper or master may select, or for furnishing the prisoner with board, clothing, transportation or tools. The sums expended by the keeper or master under this section shall be allowed and paid to him from the county treasury like other prison expenses."

I am of the opinion that the section last quoted must be taken as fixing a limit to the amount to be expended for clothing, etc., furnished to a prisoner at the time of his discharge. The authority conferred upon the commissioners by Pub. Sts., c. 219, § 14, to provide rules, even if it authorizes the rule in question, cannot be taken to authorize a rule in respect to a matter as to which the statutes have made explicit provision. In so far, therefore, as the rule to which you call my attention contemplates an expenditure above the sum of ten dollars, as provided by statute, it is without authority.

The same consideration disposes of the suggestion that "the master or keeper shall furnish, at the expense of the county, necessary fuel, bedding and clothing for all prisoners in his custody." This provision obviously relates to prisoners, and not to discharged prisoners.

PRIVATE INSANE ASYLUM, — VOLUNTARY PATIENT.

A voluntary patient may be received into a private insane asylum, but there is no power vested in the officials of such an asylum to detain such a patient against his will.

To the Inspector of Institutions. 1895 November 20.

I have the honor to acknowledge your letter of November 14, inquiring whether private insane asylums may receive and detain what are called "voluntary" patients.

"Voluntary" patients I understand to be those referred to by Pub. Sts., c. 87, § 28, which is as follows: "The superintendent or keeper of any hospital as aforesaid may receive and detain therein, as a boarder and patient, any person who is desirous of submitting himself to treatment, and makes written application therefor, but whose mental condition is not such as to render it legal to grant a certificate of insanity in his case. No such boarder shall be detained for more than three days after having given notice in writing of his intention or desire to leave such hospital."

The hospitals which, under the section quoted, are authorized to receive such patients, are named in § 26 of the same chapter. They are the State lunatic hospitals and the McLean Asylum at Somerville.

The patients described in § 28 are not insane. They have, therefore, the right to make contracts; and they may not be confined or detained excepting as specially authorized by the provisions of § 28.

Private insane asylums are authorized by § 53 of the same chapter, providing that "The Governor and Council may license any suitable person to establish and keep an asylum or private house for the reception and treatment of insane persons." Although such institutions are licensed especially for the reception of insane persons, I see no reason why the keepers of them may not receive boarders who are not insane, including those of the character referred to in § 28. But such boarders do not become subject to the jurisdiction of the Commonwealth, and may not be detained against their will for any length of time whatever.

STATE HIGHWAY, — LIABILITY OF COMMONWEALTH FOR INJURIES TO TRAVELLERS.

A road taken under authority of St. 1894, c. 497, § 2, becomes a State highway upon the filing of the plans and certificate. If it is a new way, the State is not liable for injuries to travellers thereon until it is constructed and open to public use; if an existing highway, the State becomes liable immediately, provided, however, that the road is still left open for public travel.

To the Highway Commission.
1895
November 22.

I have considered the question orally stated by your commission, to wit, as to when, under St. 1894, c. 497, § 2, a highway taken thereunder becomes a State Highway, so as to make the State liable for defects and injuries resulting therefrom to travellers.

The section in question provides that when a petition is filed with the Highway Commission, asking them to take charge of a new or existing road as a highway, the commission shall consider and determine what the public necessity and convenience require in the premises; and, "if they deem that the highway shall be laid out or be taken charge of by the Commonwealth, shall file a plan thereof in the office of the county commissioners of the county in which the petitioners reside, with the petition therefor and a certificate that they have laid out and taken charge of said highway in accordance with said plan, and shall file a copy of the plan and location of the portion lying in each city or town in the office of the clerk of said city or town." I am of the opinion that these proceedings constitute a taking of the highway by the Commonwealth analagous to the taking of land for the purposes of a highway by county commissioners and by municipal boards; and that, when the plan and certificate are filed in the office, the way, if an existing town or county way, ceases to be such and becomes a State highway. If it is a new way, then it is by such proceedings established as a State highway, in the same sense that a new way is established by the proceedings of local boards. It follows that the liability of the town to keep the road is determined by these acts; when the commission "takes charge" of the highway, the town is discharged.

I am aware that § 2 further provides that after the filing of said plans said highway shall "be *laid out* as a highway, and shall be constructed and kept in good repair and condition as a highway by said commission." The words "lay out" are sometimes used in the statutes of the Commonwealth to designate the act of taking, and at other times as descriptive of the work of construction. It is obvious from the connection that the laying out referred to by the language quoted, inasmuch as it is to be done after the filing of the plan and the certificate, refers to the work of construction, and not to the act by which the title of the road is established. The certificate recites in terms that the commission "have *laid out* and taken charge of" the way. The expression "laid out," so used in the certificate, obviously signifies the establishment of the way as a State highway. The further provision that after the filing of the certificate the highway shall be "laid out" must therefore refer to the construction of the way; for it would be absurd to provide for its being established twice.

As to the liability of the State for injuries resulting from defects after the way has been taken by the filing of the certificate and plan referred to in § 2, the situation is the same as when a road is established by a county or municipal board. If it is a new way, there is no liability until the road is constructed and open to public use. *Bowman* v. *Boston*, 5 Cush. 1, 7. If the taking by the commission is of an existing highway, the Commonwealth becomes liable for its condition immediately, if it is permitted to be open to travel. It is to be presumed that the commission will not invite the public to use the road until it has ascertained whether it is safe for use or not. If it is judged expedient by the commission to reconstruct the highway, the road may of course be closed up while it is rendered dangerous by the work, as in the case of ordinary highways.

METROPOLITAN PARK COMMISSION, — EXPENDITURE OF APPROPRIATION.

Two million dollars appropriated by St. 1893, c. 407, St. 1894, c. 483, and St. 1895, c. 305, may be expended by the Metropolitan Park Commission for any purpose for which it is authorized to expend money; provided, that not over ninety per cent. can be expended in acquiring land.

The appropriation of three hundred thousand dollars, made by St. 1894, c. 509, can be expended only for parks on the banks of the Charles River; although the sum appropriated under the general appropriation may still be expended upon this district, notwithstanding the special appropriation.

To the Auditor.
1895
November 23.

I have the honor to acknowledge your letter of the 22d inst., asking my opinion as to the proper construction of the various acts appropriating money for the purposes of the Metropolitan Park Commission, to wit: St. 1893, c. 407; St. 1894, c. 483; St. 1894, c. 509; and St. 1895, c. 305.

The original act (St. 1893, c. 407) which created the Board authorized it to acquire, maintain and make available "open spaces for exercise and recreation," and to take, or acquire by purchase, gift or otherwise, lands therefor. The sum of $1,000,000 was appropriated to meet the expenses incurred under the provisions of the act. The only limitations imposed upon the expenditures of the Board under this appropriation seem to have been that its jurisdiction was confined to certain cities and towns named in said act, which were called the metropolitan park district; and that it should not take or purchase land to an amount exceeding in value ninety per cent. of the money available for its use.

St. 1894, c. 483, gave to the commission the right to acquire all rights of the public, or of any corporation or individual, in the property known as Revere beach, including the location and railroad of the Boston, Revere Beach & Lynn Railroad Company. Revere was named in the original act as one of the towns comprised in the metropolitan park district; and no legislation was necessary to authorize the Board to establish a park in that town. The object of the statute was undoubtedly to enable the Board to acquire for park purposes the rights of the public in the flats, and also the location of the railroad company, which, under the original act, it would have had no right

to take. In the fourth section of this act the original appropriation was increased $500,000; but there is nothing in the terms of the statute to limit the increase to Revere beach. It was plainly intended as an increase of the original appropriation from $1,000,000 to $1,500,000. St. 1895, c. 305, further increased the original appropriation by making the total amount $2,000,000 instead of $1,500,000. Both this act and the preceding act are amendatory of the original act, and the whole sum of $2,000,000 thus appropriated may be expended by the Park Commission for any of the purposes for which they are authorized to expend money, with no other limitation upon their authority than that not more than ninety per cent. of the whole sum can be expended in acquiring land.

St. 1894, c. 509, is a special act concerning the Charles River. It authorizes the Board to "expend the sum of $300,000 in addition to any and all sums hitherto authorized to be expended by them" by the original act and by all acts in addition thereto or in amendment thereof, for the purpose of acquiring and making available open spaces for exercise and recreation along or near the Charles River. I am of opinion that this appropriation is not to be regarded as an increase of the general appropriation, but as a special appropriation for parks on the banks of the Charles River. It does not, however, otherwise limit the authority of the Board. In so far as under the previous acts any part of the general appropriation might have been expended for "open spaces for exercise, etc.," along or near the Charles River, it may still be so expended, notwithstanding the special appropriation in this act.

Great Pond, — Lease, — Rent.

The Commissioners on Inland Fisheries and Game have no authority, upon leasing one of the great ponds belonging to the Commonwealth, to authorize the rental thereof to be paid to the towns of West Tisbury and Edgartown.

To the Commissioners of Inland Fisheries and Game.
1895
November 27.

I have your letter of November 20, stating that you are about to lease Oyster Pond in the county of Dukes County, acting under the authority of St. 1895, c. 180, and asking if you have

the right to have the rental paid to the towns of West Tisbury and Edgartown.

The only possible ground for doubt that can arise in the matter is the fact that, as I am informed, you have heretofore leased another pond, to wit, Tisbury Great Pond, by a lease which purported that the rental should be paid to the town of Tisbury.

Notwithstanding this fact, I think the commission has no right to make a contract by which the rental shall be diverted from the State treasury. Oyster Pond is a great pond, and is the property of the Commonwealth. There is no authority to divert the rental of it excepting the Legislature.

Legacy Tax Act, — Retrospective Statute.

St. 1895, c. 307, exempting bequests not exceeding $500 from taxation under the legacy tax act, is not retrospective.

To the Treasurer. 1895 November 29.

I have your letter of November 5, requesting my opinion as to whether St. 1895, c. 307, is retrospective in any respect.

The statute in question provides that "No bequest of a testator whose estate is subject to taxation under the provisions of chapter 425 of the Acts of the year 1891 shall be subject to the provisions of said chapter unless the value of such bequest exceeds the sum of five hundred dollars, nor shall bequests to towns for any public purpose be subject to a tax under the provisions of said chapter."

In response to an inquiry by the Treasurer of the Commonwealth, asking the opinion of the Attorney-General upon certain questions arising under the collateral inheritance tax statute (St. 1891, c. 425), my predecessor, Mr. Pillsbury, in his opinion dated June 19, 1893,* advised him that the "Treasurer of the Commonwealth has neither the power to determine nor the duty to advise in advance in any case as to whether a particular legacy is taxable, or for how much it is taxable, or when the tax shall be paid, or any other such question. The statute makes it the duty of executors, administrators and trustees to

* See page 85, *ante*.

ascertain, or cause to be ascertained, the amount of all taxes due the Commonwealth, and to pay them within a prescribed period, and makes it the duty of the court to find that all such taxes have been paid before allowing settlement of the accounts. The Probate Court is the only place in which such questions can be determined, and is undoubtedly the only place in which the Legislature intended to have them determined. There is no reason to believe that the Legislature intended to cast this duty or any part of it upon the Treasurer of the Commonwealth." He further advised the Treasurer that it was his duty to claim in each case that might arise "the maximum amount which may be due to the Commonwealth under any construction of the statute." I see no reason to dissent from these views. The collateral inheritance tax act statute confers the jurisdiction of the whole subject matter upon the Probate Court. In my opinion, you have no right to waive any claims the State may have under any reasonable construction of the law.

The question contained in your letter, however, cannot be of great importance. The taxes due from the estates of people who died in 1891 and 1892 were due and payable prior to the passage of the act in question. The only legacies which the act can possibly affect if retrospective are those of five hundred dollars or less of persons who died since April, 1893, being a period within two years prior to the passage of the act. The number of such legacies must be comparatively insignificant, and the tax of five per cent. would be a very small amount. The same may be said as to legacies to towns for public purposes; although it would seem that such legacies are not taxable if for charitable or educational purposes. *Essex* v. *Brooks*, 164 Mass. 79.

But I think that the statute is not retrospective.* It has been held that the tax is not upon the property, but upon the privilege of transmission and succession. *Minot* v. *Winthrop*, 162 Mass. 113, 115. The exercise of the right of transmission and succession is complete when the will is probated. The fran-

* Attorney-General Pillsbury was of opinion that the legacy tax act (St. 1891, c. 425) was not retrospective. See pp. 28 and 32, *ante*.

chise for which the tax is levied has then been enjoyed, and the right to the tax thereupon accrues to the Commonwealth. The fact that it is not payable until some later period does not modify this proposition.

If the statute under consideration is retrospective, it must operate by way of discharge of a tax to which the Commonwealth is already entitled. This is not in accordance with the general rule of construction of statutes. One who claims exemption from a tax must bring himself strictly within the terms of the statute under which he claims exemption; much more one who seeks to be relieved from the payment of a tax to which he has become subject.

It is also well settled that a statute is not to be given a retrospective effect unless such a construction is necessary from its language. *United States* v. *Heth*, 3 Cranch, 399, 413.

MASSACHUSETTS REFORMATORY, — BOARD OF HEALTH OF CONCORD, — POLICE POWER.

The board of health of the town of Concord has no authority to inspect or order changes in the plumbing and drainage of that part of the Massachusetts Reformatory within the walls, or in the houses occupied by the superintendent or deputy superintendent upon the front of the prison building, or in the unattached tenements belonging to the reformatory and upon the land of the Commonwealth; nor has it authority to make regulations concerning the keeping of swine by the reformatory.

The board has the power, however, to order the discontinuance of the transportation of swill through the streets of the town.

The town of Concord has authority to demand that the dogs belonging to the reformatory shall be licensed.

To the Superintendent of the Massachusetts Reformatory.
1895
December 4.

The questions submitted in your letter of October 30 are important, and are by no means free from difficulty. They involve an inquiry into the extent of the jurisdiction of a local board of health over the property of the Commonwealth and over its officers in their charge of such property. They are: —

"1. Has the board of health of the town of Concord authority to inspect the plumbing and drainage of that part of the Massachusetts Reformatory within the walls, or order changes therein?

"2. Has the said board authority to inspect the houses occupied by the superintendent and deputy superintendent upon the front of the said prison building, or to order changes therein?

"3. Has the said board authority to inspect the unattached tenements belonging to the said reformatory and upon the land of the Commonwealth, and occupied by its officers, or to order changes therein?

"4. Has the board of health authority to make regulations concerning the keeping of swine by the Massachusetts Reformatory, and, if so, do we come under the regulation prohibiting piggeries to be within six hundred feet of the highway?

"5. Has the said board of health authority to order the discontinuance of the transportation of swill from the State Prison at Charlestown to the reformatory piggeries?

"6. Has the town of Concord authority to demand that the dogs belonging to the Massachusetts Reformatory shall be licensed?"

The reformatory at Concord was first established as a State Prison. By Res. 1872, c. 39, the inspectors of the State Prison, which was then at Charlestown, were directed to report to the next Legislature, among other things, upon the expediency of building a new prison upon another site. The inspectors having reported that a new prison was expedient, an act was passed (St. 1873, c. 155) authorizing the Governor to appoint a board of commissioners, with full power to select a plan of a State Prison, to purchase an eligible site therefor within the limits of the Commonwealth, and to cause to be erected thereon a suitable prison, "together with such household accommodations for the warden and his family and for subordinate officers and attendants as the said board may deem necessary." The commission entered upon its work, and, after much discussion and consideration of plans, selected the present site of the reformatory at Concord, being a tract of more than one hundred acres, and proceeded to erect thereon a prison with workshops, dwelling-houses for the officers, cook houses, a chapel and other buildings deemed necessary for the maintenance of a prison. Its plans and doings were reported to the

Legislature (see Legislative Documents, 1875, House No. 120; 1876, Senate No. 3, House No. 70), and appropriations were made by the Legislature from time to time for the prosecution and completion of the work in accordance with those plans.

By St. 1884, c. 255, the State Prison, which had been established in the buildings built therefor at Concord, was ordered to be removed back to Charlestown; and the Governor was authorized to issue a proclamation "establishing the Massachusetts Reformatory in the buildings now owned by the Commonwealth in the town of Concord and occupied as the State Prison, and said buildings and all lands and buildings owned by the Commonwealth in said town of Concord are hereby devoted to the use of said reformatory." The reformatory so established comprised, and still comprises, buildings used as dormitories for the prisoners, other buildings for workshops, cook houses, farm buildings, dwelling-houses for the warden and for the other officers of the institution, and an extensive farm, carried on as a part of the institution. Some of these buildings are enclosed by the prison wall, while others, particularly the officers' houses, are not so enclosed, but yet are on the land taken and held by the Commonwealth for prison purposes. In the construction of these buildings elaborate provisions were made for plumbing and other sanitary arrangements, all of which were duly reported to and approved by the Governor and the Legislature. Whatever buildings or structures, therefore, exist upon the land owned by the Commonwealth in Concord, are a part of the reformatory, and may be considered to exist and to be established as such by authority of the Legislature.

St. 1884, c. 255, § 28, provides that "The Commissioners of Prisons shall have the general supervision of said reformatory, and shall make all necessary rules and regulations for the government and direction of the officers in the discharge of their duties, for the discipline of the prisoners and the custody and preservation of the property of said reformatory." Section 24 provides that "The superintendent . . . shall have the management and direction of the reformatory under the rules and regulations of the same, . . . and shall have the custody

and control of the buildings and property of the Commonwealth connected therewith." Section 32 provides that "Prisoners confined in said reformatory may be employed, in the custody of an officer, upon any land or buildings owned by the Commonwealth in the town of Concord."

The first four questions contained in your letter raise the inquiry whether in any respect this institution, the general control and management of which is so vested in officers of the Commonwealth designated for that purpose, is in any way subject to the supervision and regulation of the board of health of the town of Concord.

The town board of health derives its authority from the provisions of Pub. Sts., c. 80. Under this statute it is authorized to "make such regulations as it judges necessary for the public health and safety, respecting nuisances, sources of filth and causes of sickness, within its town" (§ 18); to "examine into all nuisances, sources of filth and causes of sickness, within its town . . . " and to "destroy, remove, or prevent the same as the case may require" (§ 20); to "order the owner or occupant at his own expense to remove any nuisance, source of filth, or cause of sickness, found on private property" (§ 21); and if the owner or occupant fails to comply with the order relating thereto, to "cause the nuisance, source of filth, or cause of sickness, to be removed," and to collect the expense thereof from the "owner, occupant, or other person who caused or permitted the same" (§ 23). It is further authorized "when satisfied upon due examination that a . . . building, in its town, occupied as a dwelling-place, has become, by reason of the number of occupants, want of cleanliness, or other cause, unfit for such purpose," to "issue a notice in writing to such occupants, or any of them, requiring the premises to be put into a proper condition as to cleanliness, or, if they see fit, requiring the occupants to quit the premises within such a time as the board may deem reasonable" (§ 24). Section 27 provides also that "When the board thinks it necessary for the preservation of the lives or health of the inhabitants to enter any land, building, premises, or vessel within its town, for the purpose of examining into and destroying, removing, or preventing a

nuisance, source of filth, or cause of sickness, and the board or any agent thereof sent for that purpose is refused such entry, any member of the board or such agent may make complaint under oath to any justice of any court of record or to two justices of the peace of the county" . . . who may "issue a warrant, directed . . . to any constable of such town, commanding him to take sufficient aid and . . . repair to the place where such nuisance . . . may be, and to destroy, remove, or prevent the same, under the directions of the board."

St. 1894, c. 455, § 7, provides that "every town having a system of water supply or sewerage, shall by ordinance or by-law, within six months from the passage of this act, prescribe rules and regulations for the materials, construction, alteration and inspection of all pipes, tanks, faucets, valves and other fixtures by and through which waste water or sewage is used and carried. . . . But nothing in this section shall prevent boards of health from making such rules and regulations in regard to plumbing and house drainage hitherto authorized by law, which are not inconsistent with any ordinance or by-law made under the authority of this section."

The board of health of the town of Concord, in pursuance of the authority of the statutes above quoted, and perhaps of other statutes not quoted, has established certain regulations relating to disinfection, swine, swill, etc., and to the prevention and restriction of disease; and also certain rules in relation to plumbing. These regulations and rules are minute and explicit in their character, providing for the manner of constructing privies, water-closets, privy vaults, sewers and cesspools; and for the manner of keeping and removing swill and house offal, for the cleansing of cellars, for the keeping of swine, for the disinfection of houses in which contagious diseases break out and for the construction of plumbing in dwelling houses. No question is made that these regulations are lawful and within the authority conferred upon the board.

It is obvious that the enforcement of these rules would be in many respects inconsistent with the exclusive control and direction of the buildings and property of the reformatory, which by the statutes are vested in the officers established for that

purpose. Some of them could not be enforced except at the expense of prison discipline; while others would require the admission of persons not connected with the reformatory within the walls of the institution, without the authority, and even against the objection, of the persons in charge. It is not difficult to come to the conclusion that, so far as concerns, for example, the inspection of the plumbing within the walls of the reformatory where persons are confined under sentence of court, and in the exclusive control and care of the officers of the State, the regulations of the board of health cannot well be enforced, and must be held to be inapplicable.

The same objection does not arise in the case of officers' dwellings, which are at some distance from the main prison, and are not enclosed by its walls; nor, perhaps, even in the case of the warden's house, although, as I am informed, it is connected with the prison itself. I am told also that the swine are kept outside the prison. It would be practicable, and perhaps not necessarily inconsistent with the government of the convicts, for the board to inspect and regulate the plumbing in those buildings. Nor would it be subversive of prison discipline if the rules of the board with relation to the keeping of swine were enforced upon the grounds of the institution. But I am of opinion that it was not the intent of the Legislature to subject the conduct of the reformatory, or the control and management of the property connected therewith, to the regulations or interference of any other tribunal or board than the officers constituted and designated therefor, to wit, the Commissioners of Prisons, and, under them the superintendent of the reformatory. As was well stated by Birdseye, J., in *People* v. *Roff*, 3 Parker (N. Y.) Criminal Reports, 216, 225 (a case involving the validity of the regulation of a town board of health over the property of the State): "The institution of the state, . . . the object of its bounty and its constant legislative attention, presided over by officers carefully selected by the highest executive authorities of the State, and who are vested with large powers and set apart for the performance of highly important and delicate duties, permanent, comparatively speaking, in the tenure of their offices . . . is to be preserved, to

be kept in full vigor and efficiency; it is not to be sacrificed to the local, limited board of health of a town or village, whose members may change from year to year."

This view derives some support from Pub. Sts., c. 80, § 49, describing the duties of town boards of health. This section provides that "When a person confined in a common jail, house of correction, or workhouse, has a disease which, in the opinion of the physician of the board . . . is dangerous to the safety and health of other prisoners or of the inhabitants of the town, the board shall by its order in writing direct the removal of such person to some hospital or other place of safety, there to be provided for and securely kept so as to prevent his escape until its further order." This provision would obviously be unnecessary if it were the intention of the Legislature that the jurisdiction of boards of health of towns should extend over State or county penal institutions situated within the limits of the town.

The establishment of a town board of health, and the authority given to it to make regulations with regard to sanitary matters, are a delegation of the police power of the Commonwealth. Such a delegation is to be strictly construed. It is a well-recognized principle, governing the interpretation of statutes delegating such authority, that boards of health are to be strictly confined to and by the statutory provisions of the acts by which they are created. *Spring* v. *Hyde Park*, 137 Mass. 554; *Rogers* v. *Barker*, 31 Barb. N. Y. 447; *Wutuppa Reservoir Co.* v. *Mackenzie*, 132 Mass. 71. Nor can a local board under a general grant of authority adopt a by-law which is repugnant to the public policy of the State. Dillon, Municipal Corporations, 4th Ed., Vol. 1, § 329, and cases cited. It has been uniformly held, too, that a legislative grant of authority is made subject to certain implied reservations. For example, in the case of *Beer Co.* v. *Massachusetts*, 97 U. S. 25, a corporation was chartered by the State to manufacture and sell liquors. At a later date the Legislature passed a prohibitory liquor law. The court held that the charter was subject to the implied reservation of control under the police power of the State. So, too, when a general grant is given to a railway

company to take land for the construction of its road, there is an implied exception that its right shall not extend to the land of the State. It is a presumption of law that the Legislature in creating its laws has primarily in view the establishment of rules regulating the conduct and affairs of the citizen and not those of the sovereign. Endlich on the Interpretation of Statutes, § 167.

The fountain of the police power of the Commonwealth is the Legislature, acting under the authority of the Constitution. The Legislature has seen fit to delegate a portion of this police power to local boards of health. Although this delegation is absolute in terms, it is not to be construed as exclusive of the authority of the Commonwealth, or as against its public policy. It would certainly be against public policy to hold that a local and transient board should have greater authority over the property of the Commonwealth, cared for and controlled by the officers of the Commonwealth, acting under direct authority of the Legislature, than those officers themselves. It is much more consistent to assume that in the delegation of police power to boards of health there is an implied reservation as to the property of the Commonwealth which is specifically and fully provided for by legislation, and the care and control of which are committed to boards and officers established for that purpose and acting under the direction and authority of the Legislature. Any other position is inconsistent with the sovereignty of the Commonwealth. It follows, therefore, that, although the delegation of authority to local boards of health is general in its terms, and purports to embrace all persons and property within the limits of the town, there is an implied exception of such property as is cared for and controlled by the Commonwealth itself, and under its special and peculiar jurisdiction.

I am of opinion, therefore, that your first three questions relating to the authority of the Board of Health of the town of Concord to inspect and order changes in the plumbing and drainage (1) of that part of the reformatory within the walls, (2) of the superintendent's house, (3) of the unattached tenements belonging to the reformatory and on the land of the

Commonwealth and occupied by its officers, must be answered in the negative.

The same considerations, in my opinion, apply to the keeping of swine within the limits of the property of the Commonwealth occupied by it for the purposes of the reformatory. It is unnecessary to decide whether the penal statutes of the Commonwealth, or even such provisions of the common law as have the force of penal statutes, are in all cases applicable to the officers of the Commonwealth. Many of them, obviously, are so applicable. An officer of the Commonwealth, even under the direction of the superintendent or the Commissioners of Prisons, may not commit felony or any other grave crime or misdemeanor. On the other hand, statutes relating to hours of labor and to fire-escapes, and even the ordinary rules of law relating to assault, are inapplicable to the conduct of the reformatory. It may be a question whether, if the officers of the reformatory permitted a preventable nuisance to exist upon the land of the Commonwealth, such, for example, as a decaying heap of vegetable matter, a filthy and offensive piggery or other source of pollution of the health of the neighborhood, they could not be indicted and punished for maintaining a nuisance. It is not to be presumed that the officers of the Commonwealth will direct or authorize acts which are in violation of the rights of the community; and if such acts occur, it may well be that the court would hold them to be unauthorized; or, if authorized, that the persons in charge exceeded their own authority. So, if the keeping of swine should become, in fact, a nuisance to the extent that people residing in the neighborhood were endangered in their health, it may be that the persons in charge or responsible for such keeping would be liable to be indicted therefor as for a nuisance.

But this is a very different question from that which involves the right of the local board of health to prescribe an arbitrary distance from the highway within the limits of which swine shall not be kept. That is a local police regulation in which a limit is fixed for convenience, and under which the question of the actual nuisance does not arise. An offensive and unhealthy pigsty more than six hundred feet from the highway could not

be complained of under such a rule; while, on the other hand, one that was clean and in fact inoffensive would still be unlawful within that limit. Even if the officers are liable for maintaining what is in fact a nuisance, it by no means follows that they are subject to the regulations of the board of health with respect to the place where swine shall be kept, or that, in order to keep them, they shall be required to obtain a license from the board. I assume that the keeping of swine is an incident of the business of carrying on the reformatory, an institution which involves manufacturing, farming and other industries, carried on under the exclusive jurisdiction of the State. For the reasons above stated with reference to the plumbing, I am of opinion that the rule of the board of health which prohibits the keeping of swine within six hundred feet of the highway does not apply to the land of the Commonwealth which comprises the reformatory.

Question 5, relating to the right of transfer of swill through the public streets, stands upon a different principle. There is no exclusive authority over the streets of Concord conferred upon the prison officers. When they leave the property set apart for the uses of the Commonwealth and travel upon the public streets, they should be, and in my opinion are, subject to all reasonable regulations and laws, whether of the Commonwealth or of the town or its officers, in regard to the use of such streets. And if swill is carried by the officers of the Commonwealth through the streets of Concord in violation of the regulations of the board of health, I think the persons so offending may be prosecuted and convicted, and that they cannot plead in justification any authority or direction of the officers of the institution.

The statutes of the Commonwealth (Pub. Sts., c. 102) provide for the registration, numbering, describing and licensing of dogs. This is a police regulation, made for the protection of the community. The license fee is not a tax. It is not authorized or designed for the purposes of a revenue, general or local, but is in the nature of a license under a special police regulation, and is an exercise of the police power rather than the power to levy excises. Desty on Taxation, 1404; *Blair*

v. *Forehand*, 100 Mass. 136, 142, 143. The object of the law may be said to be the identification and regulation of dogs running at large. There is, it is true, no exemption in the statutes of dogs which are not allowed to run at large, and it may well be that the Legislature contemplated the possibility that dogs, which, although not beasts *feræ naturæ*, are yet less under subjection than neat cattle and other like domestic animals, would run at large. I see no reason why dogs kept by the officers of the Commonwealth, even though they be the property of the Commonwealth, should not be registered, described and licensed; and, inasmuch as the fee is not in the nature of a tax, but for the registration and license, it should be paid as well in the case of dogs kept by officers of the Commonwealth, or owned by the Commonwealth, as in the case of other dogs. It would destroy the purpose of the law if any dogs were allowed to go at large unlicensed, and without the provisions for identification prescribed by the statutes relating to the licensing of dogs. The Commonwealth, of course, may not be prosecuted for the keeping of an unlicensed dog; but whoever, whether a State officer or other person, keeps a dog, in my opinion, must have him licensed and pay the fee therefor, and is subject to the penalties of the statute for failure so to do.

CORPORATION, — CERTIFICATE OF INCREASE OF CAPITAL, — FEE.

The Secretary of the Commonwealth has no authority to demand a fee from a corporation upon its filing a certificate of increase of its capital stock.

To the Secretary. 1895 December 10.

I take pleasure in acknowledging your request for my opinion whether a fee can be demanded from a corporation, subject to the provisions of Pub. Sts., c. 106, for filing and recording a certificate of increase of capital in any instance where fees aggregating two hundred dollars have previously been paid by such corporation for filing and recording its organization certificate and certificates of increase of capital.

The provisions of Pub. Sts., c. 106, § 84, regulate the collection of fees in such cases. Under the provisions of this statute you have no authority to demand a fee in the instance cited.

LABOR STATISTICS, — ENUMERATOR, — COMPENSATION.

An enumerator appointed under St. 1894, c. 224, who is directed to correct deficiencies in his returns, is entitled to payment for the time consumed by him in making such corrections.

To the Chief of the Bureau of Labor Statistics.
1895
December 14.

I have the honor to acknowledge your letter of the 4th inst., in which you inquire, first, in case the returns of an enumerator are found to be defective and not properly made, and he is directed to correct the deficiencies, whether he has a valid claim for payment for the time consumed by him in making such corrections; second, in case of a conflict of opinion as to the meaning of the instructions given to enumerators, so that a question arises as to whether the work of an enumerator has been done in accordance with the instructions or not, has the enumerator a valid claim against the decision of the chief, or is his decision in such cases conclusive?

St. 1894, c. 224, § 8, provides that the enumerators shall, before entering upon their duties, take and subscribe an oath or affirmation that they will faithfully perform the same to the best of their ability. The same section provides that in making their returns they shall sign and transmit therewith a certificate that the information reported in such returns is correct to the best of their knowledge and belief.

Section 4 provides that in any case where an enumerator shall be found incompetent or derelict in the performance of his duties his commission may at any time be revoked by the chief of the bureau and another enumerator may be appointed in his place.

Section 12 provides that if an enumerator is guilty of wilful deceit or falsehood in the discharge of his duties he shall forfeit a sum not exceeding two thousand dollars, or be imprisoned for not more than one year.

Section 14 provides that the sum of three dollars for each day of nine hours actually employed in the service shall be paid to each enumerator employed under the provisions of the act.

It is to be observed that under the above provisions the enu-

merator is paid not for piece work, but for the time during which he was actually employed. The statute makes ample provision for discharge in case of incompetency, and also for punishment in case of deceit or falsehood. In the ordinary employment of a day-laborer, the employer may discharge him if he is incompetent; but if he chooses to retain the employee, and directs him to do the work over again, the employee would have a good claim against his employer for the additional time employed. I am of the opinion, therefore, that an enumerator is entitled to payment for each day actually employed, whether it be in correcting mistakes, or otherwise. The chief has his remedy by the power of discharge and fine.

In view of my opinion upon the first question contained in your letter, I presume the second question becomes unimportant. If, however, such a question should arise, it would relate rather to the rights of the enumerator than to the duties of the bureau, and is therefore not one upon which I am called to advise.

APPROPRIATION, — EXPENDITURE.

St. 1894, c. 426, authorizes the State Board of Health "to expend during the current year a sum not exceeding twenty thousand dollars" for certain purposes. The Board may incur such expenses until the first Wednesday of January, 1896.

To the Auditor. 1895 December 21.

The question stated in your letter of December 11 is as follows: Under St. 1894, c. 426, § 1, it is provided that "The State Board of Health is hereby authorized and directed to expend during the current year a sum not exceeding twenty thousand dollars, in dredging the bars in the Concord and Sudbury rivers," etc. The Board of Health under the authority of this statute proceeded with the work assigned to it and made contracts for the performance thereof, which contracts expired Dec. 1, 1895. Is the expenditure of this appropriation limited to the year 1894?

St. 1894, c. 426, is to be construed in connection with Pub. Sts. c. 16, § 30, which provides substantially that an appropriation that is not expended within the political year in which it is

made, or within the succeeding year, shall revert to the general treasury; and that "An appropriation for a specific year shall not be construed to prevent the application of an unexpended balance in the following year to the same objects."

In view of the provisions of the general statute above quoted, I see no reason to doubt that the Board of Health may proceed with its work during the political year succeeding that in which the act was passed, or until the first Wednesday of January, 1896. It is to be presumed that the Legislature had in mind the provisions of the Public Statutes above quoted, and did not intend to limit the time within which the appropriation so specially made should be expended to the year for which it was made.

Savings Banks, — Guaranty Fund.

Savings banks have no right to maintain and hold as a guaranty fund more than five per cent. of the total amount of their deposits.

To the Savings Banks Commissioners. 1895 December 21.

The question stated in your letter of December 17 calls for a construction of St. 1894, c. 317, § 25, which provides substantially that every savings bank shall "reserve as a guaranty fund, from the net profits which have accumulated during the six months then next preceding, not less than one-eighth nor more than one-fourth of one per cent. of the whole amount of deposits, until such fund amounts to five per cent. of the whole amount of the deposits, which fund shall be thereafter maintained and held to meet losses in its business from depreciation of its securities, or otherwise." The question stated in your letter is whether it is legal for a savings bank to reserve and hold a larger guaranty fund than five per cent.

Savings banks are established and carried on for the benefit of depositors. The profits arising from the deposits are to be divided frequently among the depositors, reserving only such an amount as is consistent with safety. The Legislature in the section above quoted intended, in my opinion, to declare that a guaranty fund of five per cent. should be sufficient to protect depositors from losses arising from depreciation of securities or

otherwise. Whether in fact this is sufficient does not concern the inquiry. The management of savings banks has been carefully provided for by the Legislature, and it is within its province to establish the limit of a guaranty fund. It may well have been considered by the Legislature to be not for the interests of the depositors to permit the piling up of a large guaranty fund, and that to do so would be to defeat one of the principal objects of savings banks, which is to insure the division of the profits of the business among the depositors.

This intention is very clearly expressed in the section above quoted, and I am of opinion that savings banks have no right to maintain and hold more than five per cent. of the total amount of their deposits under the provisions of that section.

The other inquiry in your letter, as to what action, if any, it is requisite for the Board to take in case a larger guaranty is maintained and held by savings banks, is answered by the provisions of § 6 of the same chapter. Under that section I see no reason to doubt the power of your Board to require compliance with the provisions of the statutes by the savings banks.

Corporation, — Buying and Selling Intoxicating Liquor.

A corporation cannot be organized under the general laws for the purpose of buying and selling intoxicating liquor.

To the Commissioner of Corporations.
1896
January 2.

A corporation organized under the general laws may not sell intoxicating liquor in this Commonwealth.

Articles of association, therefore, which declare that the purpose for which the corporation is formed is the buying and selling of intoxicating liquor, are not within the scope of the statutes (Pub. Sts., c. 106, § 14) which permit the forming of corporations "for the purpose of carrying on any lawful business," etc.*

---

* But see *Enterprise Brewing Co.* v. *Grime*, 173 Mass., 251.

TRUSTEES OF LYMAN AND INDUSTRIAL SCHOOLS, — JURISDICTION TO DISCHARGE INMATE.

The trustees of the Lyman and Industrial Schools have no authority to discharge a girl from the State Industrial School for Girls to the overseers of the poor.

To the Trustees of the Lyman and Industrial Schools. 1896 January 4.

Your letter of Dec. 15, 1895, states that you have voted to discharge a girl from the custody of the State Industrial School for Girls to the overseers of the poor of a city. She was committed to the school by the police court of Lowell for stubbornness. She is twenty years of age, and her mother is living. The inquiry in your letter is whether you have a legal right to discharge the girl to the overseers of the poor.

Pub. Sts., c. 89, § 45, provides that "The trustees shall discharge and return to her parents, guardian or protector, any girl who, in their judgment, ought for any cause to be removed from the school." So far as I have been informed, this comprises the whole power of discharge vested in the trustees. The overseers of the poor cannot be regarded as the protectors of a girl, under any definition of their duties contained in the statutes. I am of opinion, therefore, that your Board has no right to deliver a girl in the State Industrial School to the overseers of the poor of a city or town.

GRADE CROSSINGS, — EXPENDITURE FOR ABOLITION OF, BY COMMONWEALTH.

By St. 1890, c. 428, § 10, not more than five hundred thousand dollars can be expended by the Commonwealth in any one year for the abolition of grade crossings.

To the Auditor. 1896 January 9.

I have your letter of the 9th inst., asking my opinion as to St. 1890, c. 428, § 10, relating to the expenditure for grade crossings. The section provides that "The amount to be paid under the provisions of this act by the Commonwealth in any one year shall not exceed five hundred thousand dollars." Your inquiry is whether, if in any given year less than five hundred

thousand dollars is expended, the balance may be added to the expenditure for the next year; so that if, for example, three hundred thousand dollars are expended in one year, seven hundred thousand dollars may be expended in the next year.

It is perfectly plain that the intent of the Legislature was to limit the expenditure to five hundred thousand dollars in any given year, regardless of the amount expended in any preceding year. It is difficult to conceive how such intent could have been better expressed in any possible form of words.

BUILDING LAWS, — THEATRE.

A room originally designed as a shop is altered into a hall containing seats for spectators and a stage with a drop curtain. The stage contains a table, mirror and other apparatus, designed for the purpose of producing illusions by means of reflection in the mirror, but is not to be used for plays or other like representations.

Such a hall is not a theatre within the meaning of St. 1894, c. 382.

To the Chief of the District Police. 1896 February 4.

St. 1894, c. 382, provides that in every building hereafter to be erected and "designed to be used in whole or in part as a theatre," and in every building to be altered "for the purpose of using the same as a theatre," there shall be exits of a specific width, with stairways from the second floor enclosed with fireproof walls, and not connected with the basement or first floor of the building. It is further provided that your department shall enforce the provisions of the said law.

Persons in Lynn are proposing to alter a room, originally designed for a shop, into a hall, which, when completed, shall contain seats for spectators, a stage with a drop curtain, and other appurtenances. The stage contains a table, a mirror, and other apparatus designed for the purpose of producing illusions by means of reflections in the mirror. There is said to be no purpose of using the stage for plays or other like representations.

The question on which you desire my opinion is, whether this hall when the alterations are completed will be a theatre, within the meaning of the statute above referred to, and subject to the provisions thereof.

The word "theatre" is defined, according to the dictionaries,

first, as a building appropriated to the representation of dramatic spectacles, and, secondly, as a room or hall, with a platform at one end, and ranks of seats rising as they recede from the platform, adapted to lectures, academic exercises, anatomical demonstrations, etc.

Undoubtedly the definition last given is more in accordance with the etymological meaning of the word. Its root is a Greek word, signifying a "view" or "sight;" and it is properly used to designate a place designed for exhibitions of whatever character, provided with seats for spectators.

But in construing statutes it is a safe rule to regard words in common use, which are used in statutes, as having their common and ordinary significations. It cannot be questioned that as the word "theatre" is usually employed it means a play-house, that is to say, a building with seats for spectators, containing a stage provided with curtains, scenery and other furniture, and adapted to the giving of dramatic entertainments. It is not usually employed to designate buildings of any kind in which mere exhibitions are given. In the larger sense of the word many buildings used for educational, literary, and even religious purposes, might properly be called theatres; but as the word is used in common speech it means a play-house. I think it must be taken to have been used in that sense in the statute under consideration.

This view is supported somewhat by the use of the word, and of the adjective "theatrical," in other statutes. Pub. Sts., c. 48, § 8, prohibits the employment of children under fifteen years of age "in any circus or theatrical exhibition, or in any public place whatsoever." Section 9 prohibits the granting of a license "for a theatrical exhibition or public show" in which children under fifteen years of age are employed. Pub. Sts., c. 102, § 115, provides that the mayor and aldermen, etc., may license "theatrical exhibitions, public shows, public amusements, and exhibitions of every description, to which admission is obtained on payment of money." Pub. Sts., c. 104, § 20, provides that "All churches, school-rooms, hotels, halls, theatres, and other buildings used for public assemblies, shall have means of egress," etc.

The foregoing statutes clearly recognize the distinction between circuses, exhibitions, concerts, public shows, etc., on the one hand, and theatrical exhibitions on the other. The essence of a theatre, not only as the word is used in common speech, but in the statutes as well, lies in the fact that it is used for dramatic purposes.

It may be said that St. 1894, c. 382, was enacted for the protection of spectators from the dangers of fire, and that the provisions of the statute in question would apply with great propriety to all sorts of public exhibitions. But the provisions of escape in case of fire prescribed by the statute require special methods of construction, which are expensive and not easily adapted to ordinary public halls. It is to be presumed that the Legislature, in view of the large expense which would be required to make buildings conform to the stringent requirements of the statute, considered that it would be inexpedient to make its provisions obligatory except upon public playhouses.

COUNTY ACCOUNTS, — REGISTERS OF DEEDS, — COMPENSATION, — CLASSIFIED INDEXES OF RECORDS.

County commissioners have authority to employ registers of deeds to make the classified indexes required by Pub. Sts., c. 24, § 25, and to pay them for such services in addition to their fixed salaries.

To the Controller of County Accounts.
1896
February 5.

Under Pub. Sts., c. 24, registers of deeds were paid by fees, and employed their own assistants and clerks.

Following the tendency of legislation in this Commonwealth, the fee system established by the Public Statutes was abolished by St. 1895, c. 493. Under the provisions of that statute, registers are now paid by fixed salaries. They are authorized to employ clerical assistance, with the approval of the county treasurer, and are required to account to the county for all fees received by them.

Pub. Sts., c. 24, § 25, provides for the making of classified indexes to the records. The county commissioners from time to time may "cause to be made at the expense of their several counties, by competent persons employed by them, copies of

indexes to the instruments recorded in the registries of deeds during the preceding year, in which copies the grantors and grantees shall respectively be assorted," etc. These classified indexes are in addition to the indexes required to be kept by registers of deeds as a part of their regular duties.

Under § 25 the county commissioners have frequently, and, perhaps, usually, employed registers of deeds and paid them therefor. This employment had no relation to the regular duties of registers, and the compensation was not paid out of the fees received by them.

The question contained in your letter of the 29th ultimo is, whether county commissioners may still continue to employ registers to make such classified indexes, and to pay them therefor in addition to the salaries fixed by St. 1895, c. 493. I see no reason why registers may not be so employed, and be paid therefor in addition to the salaries established for their regular duties. St. 1895, c. 493, did not enlarge the duties of registers. It merely provided that they should be paid by fixed salaries, instead of by fees. It did not include the making of classified indexes as a part of their regular work, and, if the county commissioners see fit to employ them in such work, they have the same right as before to pay them therefor. There is no provision in St. 1895, c. 493, that their duties as registers shall be exclusive.

Jurisdiction of Trial Justices.

A trial justice may sentence to a jail or house of correction in any county.

To the Clerk of the Third District Court of Bristol County.
1896
February 13.

I have your letter of the 4th, asking my opinion as to whether trial justices may sentence to a jail or house of correction in any county. You have no right to the opinion of this office, but, in view of the fact that the question is of importance throughout the Commonwealth, I have examined the matter, and beg to reply as follows: —

The first statute authorizing sentence out of the county was St. 1866, c. 280; which in § 2 provided that "the supreme judicial court or superior court, holden in any county," etc.,

might commit a person to a house of correction in any county in the Commonwealth. This was superseded by St. 1870, c. 370; which in § 4 provided that "the supreme judicial court, the superior court or any municipal or police court" might sentence "to any jail or house of correction of any county in the Commonwealth." This statute was re-enacted by Pub. Sts., c. 215, § 13, the language of which is: "A court may sentence any person, convicted before it of an offence punishable by imprisonment in a jail or house of correction, to a jail or house of correction of any county." This statute is still in force.

I am of the opinion that the word "court" in the section last quoted must be taken to be any tribunal having authority to impose a sentence under the laws of Massachusetts. It is true that the section in St. 1870, c. 370, of which this was a revision, limited the power of sentence out of the local county to the higher courts and to municipal and police courts. That itself, however, was an enlargement of the jurisdiction given by the prior statute to sentence out of the county, and I see no difficulty in holding that the Legislature intended by the Public Statutes still further to enlarge such jurisdiction. In many places in Pub. Sts., c. 215, the word "court" is used in such a way as to include by necessary implication trial justices. For example, in § 8 it provides that "When an offence is punishable by fine and imprisonment in the jail, or by fine and imprisonment in the house of correction, the offender may, at the discretion of the court, be sentenced to be punished by such imprisonment without the fine," etc., "in all cases where he shows to the satisfaction of the court that he has not before been convicted," etc. This section clearly applies to trial justices. Other sections might be cited to the same effect.

The proceedings of a trial justice are in the Public Statutes designated as a court. Pub. Sts., c. 155, § 12, provides that "Trial justices may severally hold courts," etc. Section 71 provides that "They may adjourn their courts in all cases, civil or criminal."

It is held in *Carter* v. *Burt*, 12 Allen, 424, that the statute authorizing sentence to be imposed in any house of correction,

instead of in the house of correction in the county in which the offence is committed, does not work an increase or aggravation of sentence. "In legal contemplation, a commitment to a house of correction in one county for a specific term cannot be regarded as a higher or lesser punishment than a commitment to a house of correction in another county for the same period of time." It follows, therefore, that there is no objection in principle to giving trial justices the same discretion as to the house of correction in which sentence is imposed as police and municipal courts. I think it must be held that the Legislature so intended.

LOBBY ACT, — LEGISLATIVE COUNSEL.

A person other than a lawyer may register as legislative counsel under St. 1890, c. 456.

To the Sergeant-at-Arms. 1896 February 15.

Your letter of January 28 asks my opinion upon the question whether any person not a lawyer may legally register as legislative counsel.

St. 1890, c. 456, entitled "An Act to regulate the employment of legislative counsel and agents," etc., provides in § 1 for two classifications of employment, the one of legislative counsel, the other of legislative agents. The functions of legislative counsel are clearly defined by the act. Section 2 provides that "In the docket of legislative counsel shall be entered the names of counsel employed to appear at a public hearing before a committee of the general court for the purpose of making an argument or examining witnesses." Section 3 further provides that "No person whose name is entered on the docket of legislative counsel shall render any service as legislative counsel or agent otherwise than by appearing before a committee, as aforesaid, and by doing work properly incident thereto."

The functions of legislative agents are not defined, excepting so far as they may be inferred from the language of § 2, as amended by St. 1891, c. 223, § 2, providing that "in the docket of legislative agents shall be entered the names of all agents employed in connection with any legislation, and of all persons employed for other purposes who render any services

as such agents." The history of the act, however, leaves no room for doubt that by the term "legislative agents" the Legislature intended to designate persons commonly called lobbyists.

These two functions are entirely distinct. The counsel appears before the committee, conducts the hearing and presents the cause of his employers. The agent, by other methods, aids in the passage, or in preventing the passage, of legislation that may affect the interests of those whom he serves.

The purpose of the act was to designate and identify those who are employed respectively as counsel and as lobbyists. A lobbyist may not act as counsel without entering his name in the docket of legislative counsel. Counsel, on the other hand, are expressly forbidden from acting as lobbyists, except upon proper registration as such.

There is nothing in the act which prevents a person not an attorney-at-law from being employed as counsel. By the entry of his name in the docket of legislative counsel a layman is entitled to appear for his employers before committees of the general court, to examine witnesses and to argue the cause; but under the provisions of the statute in question he must first register as such counsel. If the Legislature had intended to prohibit the employment of persons other than attorneys-at-law, it would undoubtedly have been so expressed in the act.

INSURANCE, — ASSESSMENT COMPANIES, — CONTRACT, — MINORS.

Assessment insurance companies organized under St. 1890, c. 421, have legal authority to issue policies of insurance to minors.

To the Insurance Commissioner.

1896

February 15.

I have your letter of the 29th ultimo, requesting my opinion upon the question whether, under the provisions of St. 1890, c. 421, assessment insurance corporations organized under that statute may issue policies of insurance to minors.

There is no prohibition at common law against the making of contracts by or with minors. Such contracts are lawful, and are voidable only by the act of the minor himself, or his duly constituted guardian. If the contract is for necessaries, or is manifestly for the advantage and benefit of the minor, and

has been performed by the other party, it is usually not even voidable by the minor himself.

Unless, therefore, there is something in the statutes prohibiting the making of a contract of insurance with a minor, it is a lawful contract, and one which may be enforced against the company. Whether it may be enforced against him depends upon the question whether it is for his advantage. This, however, is not a question which affects the validity of the contract, so far as the corporation is concerned; and if an insurance company sees fit to assume the risk of having the contract avoided by the minor, it may do so.

There is nothing in the statute in relation to assessment insurance which in terms forbids the making of contracts of insurance with minors. There is a prohibition against issuing a policy to a person more than sixty years of age, but no limit in the other direction. I am of the opinion, therefore, that a contract of insurance made by an assessment insurance company with a minor is not unlawful.

My attention has been called to the opinion of the court of appeals of the State of New York, in the case of the *Globe Mutual Benefit Assn.*, 135 N. Y., 280, in which it was held that co-operative or assessment life insurance companies, organized under the provisions of the statutes of New York, may not receive minors as members. That case turns upon the construction given to the New York statutes, which in many respects differ from those of Massachusetts. I infer from reading the opinion that under the laws of New York whoever is insured in a co-operative or assessment company becomes a member of the association, and as such a member is entitled to all the rights and privileges of a member of the association. The court also refer to other provisions of the statutes as showing the impracticability of permitting minors to become members of such associations, and conclude with these words: "We place our assent to the judgment below on the ground that it appears from a consideration of the statute of 1883, and the nature and object of co-operative insurance companies, and the relation which members hold to the corporation, that adult persons only were contemplated as entitled to membership. The law fixes

an arbitrary period when persons become clothed with general legal capacity, and while in many cases youths under twenty-one are capable of exercising an intelligent judgment and might properly be admitted to the advantage of membership in a company like that of the defendant, in many others they would be wholly unfitted to act as members of such an organization."

Without questioning the soundness of this opinion, it is yet obvious that the grounds upon which it is put do not apply to assessment companies organized under the laws of Massachusetts. These companies are not mutual in the sense in which that word is usually employed. St. 1890, c. 421, §§ 2–8, provide for the forming of corporations of this class. Seven or more persons may form such a corporation, and these persons may or may not be insurers; and there is no provision that persons with whom contracts of insurance are made thereby necessarily become members. It is true the word "membership" is used in § 10 as relating to policy holders. It provides that a policy shall specify the sum of money which it promises to pay upon the contingency insured against, "which shall not be larger than the amount of one assessment upon the entire membership." Taking the whole statute together, however, it is obvious that this word is used to designate the whole number of persons holding contracts, and not as indicating their relation to the corporation.

There is also a provision in § 12 that a corporation shall not transfer its risks unless the contract of transfer is first submitted to and approved by a two-thirds vote of a meeting of the insured called to consider the same. Although, if contracts with minors are permitted, this section may contemplate the exercise of the right of voting by minors, I do not think it is sufficient of itself to render the making of contracts with minors unlawful. There is no necessary difficulty in minors exercising the rights given them under § 12.

I can discover no reason which would prohibit the issuing of contracts of insurance by these companies to minors which would not apply equally well to mutual life insurance companies, the making of contracts by which with minors has universally been recognized as lawful.

INSURANCE, — FIRE COMPANY, — SINGLE HAZARD.

St. 1894, c. 522, § 20, provides that no insurance company shall insure in a single hazard a larger sum than one-tenth of its assets. The word "hazard" as here used signifies the chance of loss to which the insurance company subjects itself; and a single hazard means a single chance of loss, whether the company be called upon to pay upon one policy or upon more than one.

To the Insurance Commissioner.
1896
February 19.

St. 1894, c. 522, § 20, provides that "No fire insurance company shall insure in a single hazard a larger sum than one-tenth of its net assets." The question stated in your letter of January 17 is as to the meaning of the word "hazard" in that section. Is the expression "single hazard" to be taken to signify a single chance of loss, whether on one policy or more than one, upon the occurrence of which the insurance company may be called upon to indemnify the parties insured; or does it merely mean a single contract of insurance?

A hazard is a chance. Applied to insurance, it is a chance of loss, the incurring of the possibility of loss for the possibility of gain. It is not the contract under which the liability is incurred, but the liability itself. This is the usual meaning of the word, and I see no reason to doubt that this is its meaning in the section above quoted.

The plain purpose of the statute was to prevent insurance companies from staking an undue amount upon a single liability. This purpose would be defeated if it were intended to permit the issuing of separate policies, together aggregating a larger amount than the limit fixed by the statute, all payable upon the occurrence of the same loss. For example, if ten different part owners of a vessel could each insure in the same company his interest in the vessel to an amount equal to one-tenth of the net assets of the insurance company, the result would be that the entire net assets would be staked upon the loss of the vessel.

If the Legislature had intended to limit not the liability to loss but the amount of insurance in any given policy, the words "contract" or "policy" would undoubtedly have been used instead of the word "hazard." Whenever the policy itself

is referred to in the insurance statutes those words are employed.

The question has not been discussed in Massachusetts, but in the case of *German Am. Ins. Co.* v. *Commercial Fire Ins. Co.*, 95 Ala. 469, a similar construction was given to a contract which limited the liability of an insurance company to a certain sum "in any one building or risk."

I am of the opinion, therefore, that the word hazard as here used signifies the chance of loss to which the insurance company subjects itself; and a single hazard means a single chance of loss, whether the company be called upon to pay on one policy or more than one.

The remaining questions in your letter are specific rather than general. I understand, however, that they are put by way of illustration, and not because such cases have arisen. In applying the statute it may be difficult to lay down in advance any definite rule. It is better to deal with each case as it arises. It is not difficult, for example, to hold that all the cargo in one vessel, or all the goods in one warehouse, though held under separate ownerships, constitute, in insurance, one hazard. On the other hand, two buildings, though near each other, — so near, in fact, that the burning of one endangers the other, — are separate hazards. Whether two parts of the same building, separated by fire-proof partitions or otherwise, constitute a single hazard, is a question which may depend upon an examination of the circumstances of the case.*

* As to reinsuring for the purpose of reducing the hazard, see p. 25, *ante*.

STATE HIGHWAY, — STREET RAILWAY, — LOCATION, — JURISDICTION OF LOCAL BOARDS.

The jurisdiction and authority to grant a franchise or location for a street railway is vested as to towns in the board of selectmen and as to cities in the board of aldermen, and the establishment of State highways has not taken away this authority. The only modification thereof as regards State highways is in St. 1893, c. 476, § 14, which provides that a State highway shall not be dug up for laying railways except by written consent of the superintendent of streets or road commissioners, approved by the Highway Commission, and then only in accordance with the rules and regulations of said commission.

To the Highway Commission. 1896 February 28.

The question submitted by your Board for my consideration is as follows: "When a road is laid out as a State road, who has the granting of franchises for street railways, the commission or the town?"

The question suggests that towns have the right of granting franchises or locations for street railways in other than State highways. This is a misapprehension. Neither towns nor cities have any voice in reference to the location of street railways upon the ways within their limits. That jurisdiction is vested as to towns in the board of selectmen, and as to cities in the board of aldermen. See Pub. Sts., c. 113, §§ 7, 21–26 inclusive. These boards act not as agents of the town, but as public officers. Their duties are to determine what public convenience and necessity require with reference to the use of ways by street railway companies where such ways are laid out by towns or by counties. The municipality in which this way is situated has no authority in the matter. The selectmen cannot be compelled to grant a location, even if the town so votes; and a vote of the town instructing the selectmen to refuse the location is not binding upon that body.

The establishment of State highways has not taken away this jurisdiction of the selectmen. The only modification is in St. 1893, c. 476, § 14, which provides that a State highway shall not be dug up for laying railways, etc., "except by the written consent of the superintendent of streets or road commissioners of a city or town, approved by the Highway Commission, and then only in accordance with the rules and

regulations of said commission." The jurisdiction as to the question whether public convenience and necessity require the use of the streets for street railway purposes is still vested in the selectmen of towns and the board of aldermen of cities, whether such ways are laid out and maintained by towns, by counties or by the Commonwealth.

JUSTICE OF THE PEACE, — AUTHORITY TO ISSUE WARRANTS IN CRIMINAL CASES, — CONSTITUTIONAL LAW.

A justice of the peace authorized to exercise special powers under St. 1884, c. 286, is still within the exception of c. VI., art. II. of the Constitution, which declares that the office of justice of the peace shall not be reckoned as one of the two offices more than which one person may not hold.

To the Secretary. 1896 February 29.

I have your letter of the 25th inst., asking my opinion as to whether St. 1884, c. 286, creates an office within the meaning of c. VI., art. II. of the Constitution.

St. 1884, c. 286, provides that "The Governor, with the advice and consent of the Council, may from time to time upon the petition of, etc., designate and commission some justice of the peace residing, etc., who may issue warrants . . . in criminal cases . . . and take bail therein."

Chapter VI., art. II. of the Constitution, provides that "never more than any two offices, which are to be held by appointment of the Governor, or the Governor and Council . . . military offices, and the offices of justices of the peace excepted, shall be held by one person."

I understand your question to be whether a person commissioned to receive complaints, issue warrants and take bail, under St. 1884, c. 286, holds another office than that of justice of the peace so as to debar him from holding more than one other office in addition thereto; or whether he is to be regarded as still within the exception of the Constitution, which declares that the office of justice of the peace shall not be reckoned as one of the two offices more than which the same person may not hold.

The office of justice of the peace is of ancient origin. From the earliest times, until changed by recent legislation, it was one

of the functions of justices of the peace to receive complaints and issue warrants for the apprehension of persons charged with crime. That power was taken away by St. 1877, c. 211, and conferred upon certain other officers, to wit, trial justices and clerks of courts. It was found, however, to be inconvenient to require the inhabitants of a town in which neither a trial justice nor a clerk resided to go in search of such an officer in order to make complaint. To remedy this difficulty, St. 1879, c. 254, of which St. 1884, c. 286, is an amendment, was enacted, and the right to receive complaints and issue warrants was restored to such justices of the peace as might be designated and appointed therefor by the Governor.

Such being the history of this legislation, I think that neither St. 1884, c. 286, nor the acts of which it is an amendment, are to be regarded as creating a new office within the meaning of the Constitution. Persons holding commissions under this statute are still justices of the peace, but with more ample powers than those not so commissioned. It is true the incumbent is in receipt of two commissions from the Governor, but those commissions cannot be regarded, in my judgment, as investing him with two offices. It is more reasonable to hold that he is, notwithstanding his two commissions, still a justice of the peace, but with special powers.

SCHOOL LAW, — ACADEMY, — TUITION OF CHILDREN, — PAYMENT BY TOWN, — CONSTITUTIONAL LAW.

An act providing that any town in which a high school is not maintained may grant and vote money to pay the tuition of children residing in said town and attending an academy situated in the town, but not under the control of the town authorities, is unconstitutional.

For the same reason it is unconstitutional for a town to grant and vote money to pay the tuition of children attending such an academy outside of the said town.

To the President of the Senate.
1896
March 18.

I have the honor to acknowledge the receipt of a copy of an order adopted February 18, requesting the "opinion of the Attorney-General upon the following important questions of law: —

"1. Is it constitutional for a town to grant and vote money to pay the tuition of children attending an academy in said town in accordance with St. 1895, c. 94?

"2. Is it constitutional for a town to grant and vote money to pay the tuition of children attending an academy outside of said town?"

1. Section 1 of the act referred to in the first question (St. 1895, c. 94) is as follows: "Any town in which a high school is not maintained, but in which an academy of equal or higher grade is maintained may grant and vote money to pay the tuition of children residing in such town and attending such academy: *provided*, such academy is approved for that purpose by the state board of education."

So far as this act is in the exercise of the general power conferred by the legislative department to raise money by taxation for public purposes, there is no reason to doubt that it is within the authority of the Legislature. The education of the young has been from the earliest times regarded as one of the highest and most useful public purposes for which taxes may be levied. But the method by which money raised and appropriated for educational purposes may be expended was regulated and limited by art. XVIII. of the Amendments to the Constitution, which is as follows: "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school."

I am of opinion that the statute in question purports to authorize the expenditure of money raised by taxation in a manner prohibited by this article, and is therefore unconstitutional.

I assume that by the word "academy" is meant a school, incorporated or otherwise, which is not under the control of the municipal authorities. If the control is vested in the town to such an extent that it is "conducted according to law, under

the order and superintendence of the authorities of the town," then it becomes a public school, and tuition may not be collected from the children of the town in whose control it is vested; but if the control of the school is not vested in the authorities of the town, it is a private school, against which the prohibition of the constitutional amendment was plainly directed.

Pub. Sts., c. 44, § 2, provides that "Every town may, and every town containing five hundred families or householders, according to the last public census taken by the authority either of the Commonwealth or of the United States, shall, besides the schools prescribed in the preceding section, maintain a high school," etc. It has been held by the Supreme Judicial Court (*Jenkins* v. *Andover*, 103 Mass. 94, 97, 98) that high schools are a part of the system of public schools which the towns of the State may be required to provide for and maintain. The Legislature, however, has seen fit not to require of certain small towns the duty of maintaining high schools. The obvious purpose of St. 1895, c. 94, is to provide a means of high-school education for the children of such towns. This purpose is accomplished by authorizing the payment of money raised by taxation for the high-school education of the children in any such town in a private educational institution of equal or higher grade, which is approved by the State Board of Education.

The academy so approved, therefore, becomes in such a town a part of the system of education of the children of the town. It takes the place of the high school. For all practical purposes it is the high school of the town, supported, so far as the pupils of the town are concerned, by money raised by taxation. But it is still a school which is not "under the order and superintendence of the authorities of the town or city in which the money is to be expended."

It is of no consequence that the tuition of such pupils may not be paid from money especially appropriated by the town for the support of its public schools. The question is not one of mere appropriation. The purpose of the constitutional amendment was to prohibit the use of public funds for the education of the children of the Commonwealth in any institu-

tion, however conducted, and whether sectarian or not, the control of which is not in the municipal authorities. If the expenditure be for the purpose of the education of the children of the town, it is within the spirit of the prohibition of the amendment. *Jenkins* v. *Andover*, 103 Mass. 94.

Undoubtedly the statute in question may be in some cases of great benefit to the children of small towns, and, incidentally, to the tax payers of the towns, who are thus relieved from the disproportionate expense of maintaining a high school established for the benefit of a few pupils. The question, however, is not to be determined by considerations of mere convenience in special cases. If this statute is allowed to stand, the policy of paying the tuition of school children may be further extended, and it might even be possible to provide for the education of all the children of a town in sectarian schools and at the public expense; a proposition which the people of the Commonwealth would be slow, I apprehend, to accept, and against which, indeed, the amendment in question may be said to have been principally directed.

2. For the reasons already stated, I am of opinion that it would be unconstitutional for a town to grant and vote money to pay the tuition of children attending an academy outside of said town.

INSANE PERSONS, — PHYSICIANS' CERTIFICATES, — INSANE CRIMINALS, — TRANSFER, — BOARD OF LUNACY AND CHARITY.

A single certificate signed by two physicians may be issued under the provisions of St. 1895, c. 286, when the facts recited by both physicians are the same; otherwise, when such facts are not the same.

It is within the discretionary power of the State Board of Lunacy and Charity to transfer from the lunatic hospitals to the asylum for insane criminals committed under the provisions of Pub. Sts., c. 214, §§ 16 and 19.

To the Inspector of Institutions
1896
March 28.

I have your letter of the 16th, asking my opinion upon two questions.

First. — Under St. 1895, c. 286, is it lawful to issue one certificate signed by two physicians in the commitment of an insane person; or does the law require a separate certificate to be signed by each physician?

Pub. Sts. c. 87, § 13, of which St. 1895, c. 286, is an amendment, clearly provides for a single certificate to be signed by two physicians. This chapter was amended by St. 1892, c. 229, so as to require the oath of the subscribing physicians to certain facts of qualification; but the provision as to a single certificate to be signed by both physicians remains unchanged. The purpose of St. 1895, c. 286, is to require the incorporation of certain other statements in the certificate, and to provide for certain additional qualifications on the part of the certifying physician. The form of the certificate recited in the chapter apparently looks to a separate certificate by each of the two physicians; but by c. 429 of the same year (1895), which dealt with the same subject, it is provided that in the commitment of an insane person there must be filed with the judge "the certificate of two physicians certifying to such person's insanity, made in accordance with the provisions of section one of chapter two hundred and eighty-six of the acts of the present year."

Taking this statute in connection with c. 286, it seems to have been the intention of the Legislature not to require separate certificates, when the facts upon which the opinion given in the certificate is based are the same as to both physicians. A joint certificate of course cannot be issued where the facts recited by the two physicians are not the same.

Second. — Under St. 1895, c. 390, has the Board authority "to transfer from the lunatic hospitals to the asylum for insane criminals criminal insane other than those committed from jails, state prisons, houses of correction, etc."

I assume that your question relates to persons committed under the provisions of Pub. Sts., c. 214, §§ 16 and 19. Section 16 provides that a person under indictment, who is found by the court to be insane, may by order of the court be removed to one of the State lunatic hospitals for such a term, and under such limitations, as it may direct. Section 19 provides that when a person is acquitted by the jury by reason of insanity, the jury shall state that fact to the court, and thereupon the court, if satisfied that he is insane, may order him to be committed to a State lunatic hospital, etc. St. 1895, c. 390, establishing an

asylum for insane criminals at Bridgewater, provides in § 5 that the State Board may transfer to and from the State lunatic hospital, and the asylum for insane criminals, "any of the description of persons mentioned in this act." Section 4 of the same act provides expressly that insane male persons mentioned in Pub. Sts., c. 214, §§ 16 and 19, may be committed to the asylum for insane criminals.

I am of opinion, therefore, that the intention of c. 390 is to confer upon your Board authority to transfer persons committed under the provisions of Pub. Sts., c. 214, §§ 16 and 19, to and from the Bridgewater asylum, whenever, in its judgment, it shall be deemed proper to do so.

PAROLE LAW, — CONVICT, — CONSOLIDATION OF SENTENCES.

A convict was committed to the State Prison upon a sentence of ten years. Later in the same year he was sentenced for another offence to a term of five years, to take effect from and after the expiration of the sentence he was then serving. The two sentences cannot be added together and construed as one sentence, for the purpose of bringing the case within the terms of St. 1895, c. 252.

To the Prison Commissioners. 1896 April 4.

I have your letter of March 6, asking my opinion upon the facts therein stated, as follows, to wit: a convict was committed to State Prison February 10, 1890, upon a sentence of ten years; June 30, 1890, he was sentenced for another offence to a term of five years in the State Prison, "to take effect from and after the expiration of the sentence he was then serving."

The question stated in your letter is, whether the two sentences may be added together and construed as one sentence, for the purpose of bringing the case within the terms of St. 1895, c. 252.

The statute referred to provides that when it appears to the commissioners that a person "held in the State Prison upon his first sentence thereto has reformed, they may issue to him a permit to be at liberty during the remainder of his term of sentence upon such terms and conditions as they deem best."

It is obvious that the statute is inapplicable to the first sentence, taken by itself. It cannot be presumed that the Legis-

lature intended that a prisoner should be at large, engaged in the business of reformation, for a period of years, at the expiration of which he should return to enter upon a second sentence.

The only possible way, therefore, in which the statute can be made to apply, is in the manner suggested in your question, to wit, by regarding the two sentences as one sentence of fifteen years. I think that such a consolidation of sentences cannot be inferred. Such a thing could only be done by direct legislation, and the omission of any provision looking to any such consolidation is to my mind conclusive against such an assumption. I am, therefore, of opinion that the two sentences cannot be regarded as one.

The matter of successive sentences seems not to have been considered in this law, nor in another statute of the same year (St. 1895, c. 504), relating to indeterminate sentences. There seems to be need of further legislation upon the subject.

PUBLIC RECORDS, — TOWN DOCUMENTS, — WARRANTS FOR HOLDING TOWN MEETINGS.

St. 1894, c. 356, requiring the preservation of certain town documents for several years only, does not apply to warrants for the holding of town meetings. Such warrants should be permanently preserved.

To the Commissioner of Public Records. 1896 April 15.

Your letter of April 5 requests my opinion upon the question whether, under St. 1894, c. 356, town clerks are required to preserve warrants for town meetings longer than seven years.

Section 1 provides that certain documents shall not be destroyed; to wit, (1) books of record or registry; (2) original papers dated earlier than the year 1800; (3) deeds; and (4) reports of "any agent, officer or committee of any county, city or town relating to bridges, highways, streets, town ways, sewers or other county or municipal interests or matters." It is obvious that town warrants are not included within the provisions of this section. Section 2 prohibits the destruction of any other paper belonging to the files of the town until after

seven years. In answering your question literally, therefore, it is plain that, under the provisions of this statute, town warrants need not be kept longer than seven years.

But I do not regard this statute as intended to be comprehensive of all the duties of town officers relating to the preservation of documents. It prohibits the destruction of certain documents within seven years, but is not intended to require or permit such destruction, even at the end of seven years, if, for any reason, they should be preserved.

The warrant for the town meeting, and the return of service of it, are essential to give validity to the proceedings of town meetings. If there is no warrant, or it is improperly or insufficiently served, the title of the officers chosen at the meeting may be directly, and, in some cases, perhaps, collaterally, impeached. Most proceedings become of little importance after the expiration of the year, but some may be questioned even after the expiration of seven years, as, for example, town by-laws, or long-time loans. In such cases, the warrant and its service may at any time become of vital importance. It is evident, therefore, that the statute requiring preservation of town documents for seven years has no application to town meeting warrants, and that they should be permanently preserved.

It may be said that the recording of the warrant, and of the return of service upon it, sufficiently preserves the evidence essential to show the validity of the meeting. There is no statute, however, requiring the clerk to record the warrant; and, although the record when made has been accepted by the courts as evidence of the contents of the warrant and the manner of its service (*Commonwealth* v. *Sullivan*, 165 Mass. 183), it is not entirely certain that, if the question were directly raised, the record of the clerk would be competent evidence of the contents of the warrant, or of the service of it.

It is undoubtedly the safer course for town clerks to follow the practice of private corporations, in recording the call for the meeting with the proceedings of the meeting itself; but the warrant itself is, nevertheless, the best evidence, and should be preserved.

EMINENT DOMAIN, — PRIVATE CEMETERY CORPORATION, — CONSTITUTIONAL LAW.

A bill conferring authority upon a cemetery association to take land by right of eminent domain, said association being subject to Pub. Sts., c. 82, § 3, is unconstitutional.

To the Speaker of the House of Representatives. 1896 April 30.

At the request of the committee on rules, I have examined the bill entitled "An Act to enable the Central Cemetery Association of Randolph to take and hold additional real estate." *

This is a bill authorizing the selectmen of the town of Randolph, upon the request of the directors of the Central Cemetery Association, to take a tract of land by right of eminent domain, to be used by the cemetery association as a part of its burial ground. I understand the question upon which you request my opinion is as to the constitutionality of the bill.

The Central Cemetery Association was incorporated by St. 1878, c. 96, which provides that the corporation shall "have all the powers and be subject to all the duties, restrictions and liabilities set forth in all general laws which now are . . . in force applicable to similar corporations." Pub. Sts., c. 82, relates to cemetery corporations. It provides that ten or more persons who are desirous of establishing a cemetery, or the majority of the proprietors of an existing cemetery, may organize as a corporation. Section 2 provides that every such corporation may take and hold real and personal estate, such as may be necessary for the objects of the corporation, "may lay out such real estate into lots; and upon such terms, conditions, and regulations as it shall prescribe, may grant and convey the exclusive right of burial in and of erecting tombs or cenotaphs upon any lot, and of ornamenting the same." Section 3 provides that such lots shall be held indivisible, and upon the decease of a proprietor his heirs or devisees shall succeed to his privileges.

It follows, therefore, that, if the Central Cemetery Association is permitted to take land for the purposes of a cemetery, the land so taken will be its property, within its exclusive con-

* Enacted as St. 1896, c. 524.

trol, and which it may hold or grant to such individuals as it pleases for their own exclusive use, and under such restrictions as it may impose. There is no public right of burial in its cemetery.

I understand that it is claimed that this association has adopted a policy under which all persons, without discrimination, have the right to purchase burial lots. But the question of public use cannot thus be determined. The rights of the public cannot depend upon the liberality of individuals or of corporations. However generous the policy may be, it still remains a use by the public as matter of grace and not of right. If, under its charter and the laws applicable thereto, it may, if it sees fit, discriminate, there is no right of public use.

The right of eminent domain can be exercised only for the benefit of the public. The Declaration of Rights, art. X., expressly limits the right of taking the property of private citizens to cases where it is appropriated "to public uses." For example, it has been held that under the authority of the Legislature land may be taken for a railroad, a sewer, a schoolhouse, a highway, a post-office, a park or for water works, or the abatement of a nuisance. In each class of cases enumerated, and in all others in which the right of eminent domain has been upheld, the taking is for a use in which all citizens have the right, under reasonable conditions, to share, and the benefits of which they may enjoy. This is the condition of the right of taking the land of a private citizen. This test has always been applied when the attempt has been made to invade the rights of private property.

Pub. Sts., c. 82, §§ 10–14, provide that "when there is a necessity for a new burial-ground in a town, or for the enlargement of a burial-ground already existing in and belonging to a town," the land of a private citizen may be taken therefor. But these sections relate wholly, as will be seen, to cemeteries belonging to a town, and which, therefore, are for the use of all citizens of a town. This statute has been upheld by the court as within the authority of the Legislature. But there is no statute authorizing the taking of land by the right of eminent domain by a cemetery association, nor is there any deci-

sion of the court indicating that such authority would be upheld as constitutional.

Some confusion of thought has arisen over the peculiar *status* of burial grounds, and the sacredness with which they are properly regarded. The customs of civilized society not only sanction, but require, the burial of the dead. The same customs forbid that land which has been so appropriated shall afterwards be used for any other purpose; and it has been uniformly held that there is no authority but an act of the Legislature that can authorize an encroachment for other purposes upon a tract of land which has been dedicated to burial purposes. Once used as a cemetery, the land so used is perpetually devoted to the purposes of burial, and cannot be sold or appropriated to other uses. *Mount Auburn Cemetery* v. *Cambridge*, 150 Mass. 12, 17.

In *Evergreen Cemetery Association* v. *City of New Haven*, 43 Ct. 234, it was held that land which had been appropriated to the purposes of burial could not be taken for a public street, under the general power given to towns and cities to take land for such a purpose, but that there must be authority specially granted by the Legislature. In this case it was said by the court (page 241) that "The use of land for a burial ground is a public use, and, for such a purpose, it may be taken, if need be, under the right of eminent domain." But the sentence quoted was not necessary to the decision, and must be regarded as *obiter dictum*. All that the decision of the court required was the position that the sanctity of burial grounds could not be invaded for other uses, public or private, without the direct authority of the Legislature. And in a subsequent suit (*Evergreen Cemetery Association* v. *Beecher*, 53 Ct. 551), in which the corporation, apparently relying upon the dictum in the former opinion, undertook to acquire the land of the defendant by right of eminent domain, it was clearly held that no such right could be given to a corporation unless the cemetery was one in which there was a public right, to the extent, at least, that "all persons have the same measure of right for the same measure of money."

But this dedication of land for burial purposes to the extent that it must thereafterwards be used only for such purposes and

for no other is very far from being a "public use," as that expression is used with reference to the taking of land by the right of eminent domain. It may well be that, however dedicated, whether by public or private act, land once appropriated to the purposes of burial must be regarded as sacred, and not to be used for any other purpose whatever, excepting by authority of the Legislature. This, however, is not because it has been devoted to public uses, but from the peculiar nature of the use to which the land has been applied.

It cannot be said that a cemetery, the use of which is controlled by an individual or a corporation, rights of burial in which may be limited or prohibited at the pleasure of the corporation owning the land, or of the owners of lots therein whose rights have been obtained from the original proprietors, is devoted to a public use. It is still private in its nature. The public have no rights in it whatever. The use of it may be confined to persons of a particular religious faith, or even to the original incorporators. It is not a public use, because the right of burial is not vested in the public, or in the public authorities. *In re Deansville Cemetery Assn.* 66 N. Y. 569.

In my opinion, therefore, the Legislature has not the authority to grant to a cemetery association, however deserving, or however liberal the policy of its management, the right to take the land of private citizens without their consent. I am aware that such acts have been passed by the Legislature heretofore, and my attention has been expressly called to St. 1888, c. 183, which was an act similar in its purposes to the present bill. But I am not aware that the question now presented has been raised or passed upon.

STATE SCHOLARSHIPS, — MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

The sum of $2,000, already paid to the Massachusetts Institute of Technology for the year 1896 under authority of Res. 1895, c. 70, is not to be considered as part payment of the sum of $4,000 payable for the year 1896 under St. 1896, c. 310.

To the Auditor. 1896 May 1.

Res. 1895, c. 70, provides that annually for the term of six years there shall be paid from the treasury of the Commonwealth to the treasurer of the Massachusetts Institute of Tech-

nology the sum of $2,000 for scholarships, which sum was made payable from and after the first day of January in the year 1896. I understand from your letter that the sum of $2,000 has already been paid for the year 1896, an appropriation therefor having been made.

St. 1896, c. 310, provides for the payment of the sum of $4,000 annually for scholarships, beginning on the first day of September in the year 1896. By the same act Res. 1895, c. 70, was repealed.

The question stated in your letter is whether the $2,000 already paid is to be considered as part payment of the $4,000 provided for by St. 1896, c. 310.

I am of opinion that St. 1896, c. 310, was not intended to supersede Res. 1895, c. 70, as to the payment already made. Under the terms of the resolve, the amount appropriated was payable from and after the first day of January in each year. The Legislature must have had in view the fact that the payment for the year 1896 had been made. Having made no deduction by reason thereof for the year beginning Sept. 1, 1896, it is inferred that the Legislature did not intend any deduction to be made.

Representative Districts.

The division of the Commonwealth into districts containing as nearly as practicable an equal number of inhabitants in accordance with U. S. Rev. Sts., § 23, should be made with reference to the number of inhabitants as ascertained by the United States census.

To the Chairman of the Committee on Public Health. 1896 May 4.

The Constitution of the United States, art. I., § 2, provides that "The House of Representatives shall be composed of members chosen every second year by the people of the several States." It further provides that representatives "shall be apportioned among the several States which may be included within this Union according to their respective numbers." Art. XIV. of the Articles of Amendment does not affect the questions suggested in your letter. It is further provided in said art. I., § 2, that the "numbers" shall be determined by an enumeration to be made every ten years under the authority of Congress.

U. S. Rev. Sts., § 23, provides that representatives shall be elected "by districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants."

Congress has further provided since the last national census that the number of representatives to which Massachusetts is entitled is thirteen.

I believe the foregoing comprise all the limitations imposed upon the several States as to the election of representatives, to wit: they must be chosen by the people at an election held on the Tuesday after the first Monday of November; there shall be thirteen from Massachusetts; and they shall be elected by districts composed of contiguous territory, and containing, as nearly as practicable, an equal number of inhabitants.

The apportionment of the number of representatives being by the United States census, I am of opinion that the division into districts "containing, as nearly as practicable, an equal number of inhabitants," must refer to the numbers as ascertained by the United States census.

Your question, "how far the joint committee can go in regard to changes, etc., and conform to the order attached," is one of policy rather than of law. If the committee conforms to the provisions of the United States Constitution and statutes above set forth, the whole matter of boundary lines, etc., is in their discretion.

I need not say that the division into districts, although usually made once in ten years, may be made from time to time if the State sees fit.

Boston Terminal Company, — Bonds, — Taxation.

The bonds of the Boston Terminal Company secured by a mortgage upon its real estate are not taxable under the general law of the Commonwealth.

To the Committee on Railroads.
1896
May 13.

I am of the opinion that the bonds of the Boston Terminal Company, provided for in the proposed bill* for a southern union station, are not taxable. They are secured by a mortgage of the real estate of the corporation, and are therefore

* Enacted as St. 1896, c. 516.

debts secured by mortgage. *Knight* v. *Boston*, 159 Mass. 551. There is no difference in principle, as far as the tax laws are concerned, between the bonds of the Boston Water Power Company, which were in issue in that case, and the proposed bonds of the Boston Terminal Company.

They are not railroad bonds which are bonds issued by a railroad corporation.

Railroad bonds, whether secured by mortgage or not, are taxable under the statutes of Massachusetts. Gen. Sts., c. 11, § 4, enumerated the different classes of personal property subject to taxation. Among other things were enumerated "money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for;" also as an additional class "public stocks and securities." In *Hall* v. *County Commissioners*, 10 Allen, 100, it was held that public stocks and securities were not included in the class of "money at interest and other debts due the person to be taxed." Metcalf, J., in his opinion says: "As the statute enumerates debts due to the tax payer and stocks and securities, as distinct and separate subjects of taxation, the latter are not to be included in the former."

Some time after this decision the assessors of the town of Northampton assessed a tax payer for certain railroad bonds held by him as a distinct class of property. The tax payer claimed that he had the right to deduct therefrom, for the purposes of taxation, debts due from him under the provisions of the statute which authorizes the deduction of debts due from a person from the debts due to him. The court, however, held that railroad bonds were not public stocks and securities; and, not being enumerated as a separate class of property for the purpose of taxation, they were to be included in the class of "debts due the persons to be taxed;" and therefore only to be taxed for the balance remaining after the deduction of the debts due from the holders thereof. *Hale* v. *County Commissioners*, 137 Mass. 111.

In consequence of this decision St. 1888, c. 363, was enacted, by which railroad bonds as such were made a separate and distinct class of property, subject to taxation. There can be no

question that this was the clear intent of the Legislature; and that under this statute railroad bonds were taken out of the class of "debts due the persons to be taxed" and made a class by themselves, in the same way that public stocks and securities had theretofore been.

The provision with relation to the exemption of debts secured by mortgage, as it appears in the Public Statutes, applies solely to the class of taxable property designated by the phrase, "money at interest, and other debts due the persons to be taxed," etc. It has no reference to the other classes of property, such as public stocks and securities, turnpike bonds, railroad bonds, etc. The same considerations which led the court to hold that the provision which authorizes the deduction of debts due from the tax payer from debts due to him did not include bonds separately enumerated as distinct subjects of taxation, apply with equal force to the provision in regard to debts secured by a mortgage.

Whether the tax assessed upon the real estate of the Terminal Company should be deducted from its franchise tax is a question of legislative policy upon which I do not feel competent to advise. I may be permitted to suggest, however, that, if the terminal bonds are made taxable like railroad bonds, then the deduction of the real estate tax from the franchise tax would make the whole bill consistent with existing legislation. Whatever objections might be urged against such a deduction would apply with equal force to the general law upon the subject.

TRUST COMPANY, — INTERNATIONAL TRUST COMPANY, — TRUST FUND, — DEPOSIT.

The International Trust Company has no authority to deposit in its banking department any portion of the fund held by it in trust.

To the Savings Banks Commissioners. 1896 May 11.

Your letter of February 17, which was duly received, requests my opinion upon the following state of facts.

The International Trust Company was chartered by St. 1879, c. 152. By this charter it is authorized, among other things, to receive deposits of money, and to invest the same in certain

specified securities. Acting under this authority, it carries on a business of a bank of deposit, subject only to the limitations imposed by its charter.

By St. 1883, c. 222, it was further authorized to carry on a trust business, and to act as trustee. Acting under this authority, it has established a trust department, the books of which are kept in due form, and separate and distinct from the books relating to its general business. From time to time money has been paid to it in trust under the authority of said statutes. It has been the custom of the company, when any part of the principal of a trust fund is uninvested, to deposit the amount in the banking department of the company, and issue therefor a certificate of deposit to itself as trustee, for the account of the particular trust to which the money belongs. These certificates are filed with the papers relating to the trust, and are treated as an investment thereof. When any portion of the income of any trust remains undistributed, it is likewise deposited in the banking department, itemized and particularized, and entered to the credit of "trust deposits income," on the same ledger and in the same manner as the general deposits of the company. The money so deposited, both the uninvested portion of the trust fund and the uninvested income, is merged with the funds of the general depositors and the capital and surplus of the company.

The question stated in your letter is, whether this method of doing business is authorized by the statutes governing the company.

St. 1883, c. 222, which allows the company to accept trusts, provides in § 2 that a portion of the capital shall be set apart as a trust guarantee fund. This trust guarantee fund, and all moneys or property received in trust, "shall be loaned or invested only in such securities as savings banks chartered in this Commonwealth are now or may hereafter be authorized to invest in." The section further provides that such money held in trust, including the trust guarantee fund, "shall constitute a trust deposit, and such funds and the investment or loans of them shall be especially appropriated to the security and payment of such deposits, and not be subject to any other liabili-

ties of the corporation." It is also provided in said section that, "for the purpose of securing the observance of this proviso," the corporation shall have a trust department in which "all business pertaining to such trust property shall be kept separate and distinct from its general business."

The plain purpose of these provisions is that the trust business of the company shall be absolutely separate from the banking business of the company. The company claims that by keeping separate books of its trust department, and by identifying deposits of trust funds in its banking department by means of the certificates referred to, it sufficiently complies with the provisions above quoted. But I do not think the purpose of the statute is accomplished merely by keeping separate books. Books of account must obviously be kept, both of the banking business and of the trust business; and the entries pertaining to one department are, of necessity, separate and distinct from those relating to the other department, whether kept in the same or different books. The statute does not look to the comparatively unimportant matter of book-keeping. It was framed to provide for the security of trust funds, by keeping them separate from the hazards of the general banking business in which the company engages. The business of receiving deposits subject to check, while not, necessarily, a hazardous enterprise, was yet regarded by the Legislature as an unsafe investment of trust funds; otherwise, there would have been no occasion for providing so carefully for the separation of the trust department from the banking department. But, if there is an actual mingling of trust funds with ordinary deposits, the only separation being in the method of book-keeping, the trust funds are exposed to the same hazards as ordinary deposits. It is true, special certificates of deposit are issued by the banking department, and filed in the trust department. It will scarcely be claimed however, that in the event of insolvency in the banking department these certificates would have any priority over other deposits. If a loss occurred, the trust department would stand, at most, with other depositors, as a general creditor. In so far, therefore, as the company, under any form of deposit, mingles trust

funds, and the income thereof, with the funds of its banking department, it fails to comply with the letter and the spirit of the statute, which requires that "all business pertaining to such trust property shall be kept separate and distinct from its general business."

It may be claimed that deposits of uninvested trust funds and undistributed income are temporary only, and that, inasmuch as such uninvested balance may properly be deposited with some sound financial institution, like a national bank, the company, being a sound bank, may well deposit them in its own banking department. I am not prepared to say, and the limits of your inquiry do not require me to determine, what the duty of the company is with reference to such uninvested balance. It is undoubtedly true that in the management of trust funds there will necessarily be on hand from time to time uninvested balances. These may arise from the sale of securities before opportunity of reinvestment occurs; and, also, from the fact that it is sometimes impracticable to invest at once the whole of a trust fund. As to what shall be done with such uninvested balances, the law seems to be silent. Savings banks are expressly authorized (St. 1894, c. 317, § 21, cl. 5) to deposit five per cent. of their funds in national banks. This provision, however, does not appear to be applicable to trust companies. I do not think that it can be said that the provision requiring trust companies to invest or loan trust funds in such securities as savings banks are authorized to invest in, can be said to include the depositing of such funds in national banks. A deposit subject to check is neither a "loan" nor an "investment," as those words are used by business men with reference to financial matters; nor is a deposit book a "security," in the sense in which the word is used in the statute.

But, whatever may be the duty of the trust company with reference to uninvested balances of trust funds, whether it is to keep such moneys in its vault, or to deposit them in some secure bank of deposit, I am still of the opinion that the intent of the statute is to forbid it to deposit such balances in its own bank. If it may deposit any portion of its trust funds in its banking department, the trust business to that extent, at

least, is not kept "separate and distinct" from the banking business.

That this is the intent of the statute, further appears upon general considerations of policy. It is a matter of common knowledge that when there is a stringency in the money market banking institutions are often in sore need of funds to maintain their ordinary loans. If the cashier of such an institution were at liberty to add the uninvested balances of trust funds in his custody to his banking funds, the temptation would be very great at times to allow trust funds to remain uninvested, that they might thus be used. It is upon the same considerations of public policy that the law has required the separation of savings banks and general banking institutions. The sound discretion as to the investment of trust moneys which is necessarily imposed upon the trustee can only be safely exercised when he is free from all temptation to use any portion of the moneys either for his own purposes or for the purposes of the business in which he is engaged.

I understand that the company also claims that its proceedings are authorized by St. 1883, c. 222, § 1, which provides, among other things, that any "corporation" may deposit in trust, or otherwise, with the International Trust Company, money or other property upon such terms as may be agreed upon. Under this provision it is claimed that the International Trust Company, being a "corporation," may therefore deposit its own trust funds in trust with itself. If I understand the claim of the company in this respect, it appears to be clearly fallacious. It is not for a moment to be supposed that the Legislature, in so carefully guarding the trust business, and providing that it should be kept separate and distinct, from its general business, intended to provide that as trustee it might deposit in its general banking department its own trust moneys in trust, to be used in such banking business. This section is to be read in connection with § 2, which regulates the manner of such deposits; and, if it were to be held, as is ingeniously claimed by the corporation, that it might deposit its own trust funds with itself in trust, said trust deposits would immediately be subject to the provisions of § 2, which still require the same

separation of such funds from the general banking business that had already existed before the deposit was made. In other words, if the company were to take trust funds, which the law requires to be kept separate from its banking business, and under the authority of § 1 deposited them with itself as trustee, such deposit must immediately go back to the trust department from which it came.

Upon the whole, therefore, I am of the opinion that the company may not deposit any portion of the funds held by it in trust not otherwise invested, whether principal or income, in its banking department.

FOREIGN CORPORATION, — RIGHT TO FILE PAPERS WITH COMMISSIONER OF CORPORATIONS.

A foreign corporation organized for the purpose of carrying on business as a wholesale and retail dealer in wines, malt and spirituous liquors, cigars and tobacco, and also as a licensed victualler, is entitled to file with the Commissioner of Corporations the power of attorney and other papers provided for by St. 1884, c. 330.

To the Commissioner of Corporations. 1896 May 25.

Your letter of the 18th inquires whether the Boston Wine and Spirits Company, a corporation organized under the laws of West Virginia, may, under St. 1894, c. 381, be allowed by you to file in your department the papers provided for by St 1884, c. 330.

The company in question appears by its charter to be organized "for the purpose of carrying on business as a wholesale and retail dealer in wines, malt and spirituous liquors, cigars and tobacco, and the business of a licensed victualler."

The corporation cannot lawfully sell intoxicating liquors in this Commonwealth. Attorney-General's Opinion of January 2, 1896.* The business of selling cigars and tobacco, and the business of a licensed victualler, are lawful, and may be carried on by the corporation in this Commonwealth.

It is to be presumed that the corporation will in this Commonwealth engage in only such business as it may be permitted by law to do here. Inasmuch, therefore, as one of the purposes for which it is incorporated is lawful in this Common-

* See p. 304, *ante*.

wealth, I am of opinion that it is your duty to file the papers provided for by St. 1884, c. 330. The prohibition of St. 1894, c. 381, is only against the filing of papers of corporations "doing a business in this Commonwealth, the transaction of which by domestic corporations is not there permitted by the laws of the Commonwealth." Attorney-General's Opinion of August 25, 1894.*

CIVIL SERVICE, — VETERANS' PREFERENCE ACT, — CONSTITUTIONAL LAW, — PUBLIC OFFICERS.

The case of *Brown* v. *Russell*, 166 Mass. 14, decided only so much of St. 1895, c. 501, commonly known as the Veterans' Preference Act, to be unconstitutional as relates to the preference of veterans in filling public offices.

The decision does not embrace positions which are in the nature, not of public offices, but of public employments; and as to such positions it is the duty of the Board of Civil Service Commissioners to assume that the law is still in force.

A public officer is one who, by the authority of the Legislature, either through appointment or election, is charged with a duty public in its nature, and which concerns the administration of the affairs of the Commonwealth and the rights of its citizens.

To the Civil Service Commissioners.
1896
May 26.

Your letter of May 6 calls for my opinion as to whether St. 1895, c. 501, §§ 2 and 6, in view of the case of *Brown* v. *Russell*, 166 Mass. 14, are in force with respect to certain offices and employments set forth in your letter. The four questions you propound comprehend practically the entire classification of offices and employments which by your rules are required to be filled by certification from your department, excepting such as are plainly included within the terms of the decision in the case above quoted.

The opinion of the court in *Brown* v. *Russell* does not hold that the Veterans' Preference Act is unconstitutional as to positions in the service of the Commonwealth which are mere employments, and are not offices. It only decides that the sections under consideration, "so far as they purport absolutely to give to veterans particular and exclusive privileges distinct from those of the community in obtaining public office, cannot be upheld as enactments within the constitutional power of the

* See p. 181, *ante*; *Enterprise Brewing Co.* v. *Grime*, 173 Mass., 251.

General Court." How far the Legislature may give preference to veterans in disposing of the many employments which it creates and provides for, but which do not constitute the employee a public officer, the court in express terms refrains from deciding.

But the reasoning of the court deals almost exclusively with the question of public offices. Throughout the opinion a clear distinction is made between public offices and public employments: and the decision of the court may be fairly said to turn upon the proposition as stated in the opinion, that "it is inconsistent with the nature of our government, and particularly with arts. VI. and VII. of our Declaration of Rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class in preference to all others, without the exercise on its part of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices."

There is no intimation in the opinion that the considerations which apply to public officers would also be applicable to mere employments. It is even suggested that such positions might be given to veterans "partly in consideration of the service they render, and partly in recognition of and as a reward for the services which they have rendered to the Commonwealth in the past."

Without venturing to express an opinion whether the distinction suggested is sound, or will be sustained by the court when the question is directly raised, I think, inasmuch as positions which are employments merely, and are not public offices, are expressly excluded not only from the reasoning of the opinion but from the decision, that it is the duty of your Board to assume that the law is still in force as to such positions. The presumption in favor of legislative acts still binds your Board, excepting so far as the court has plainly instructed you to the contrary.

This raises the important question, What are public offices? Here, again, the court abstains from laying down any general

rule. Indeed, Field, C. J., expressly says, "it is sometimes difficult to make a distinction between a public office and an employment." As is stated by the court, the terms "public office" and "public officer" are often used, and have acquired a well-understood signification. The difficulty lies in the application of general definitions to particular cases. The determination of an individual case, especially one that is near the line, may require an examination not only of the statutes bearing upon it, but of all the facts and circumstances connected with it. I prefer, therefore, to answer your questions generally, leaving particular cases to be determined as they arise.

Among those who are declared with more explicitness by the court to be public officers may be mentioned the following: sheriff, *Fowler* v. *Beebe*, 9 Mass. 231; deputy sheriff, *Buckman* v. *Ruggles*, 15 Mass. 180; coroner, *Nason* v. *Dillingham*, 15 Mass. 170; constable, *Elliott* v. *Willis*, 1 Allen, 461; public weigher of vessels, *Commonwealth* v. *Woods*, 11 Met. 59; field driver, *Gilmore* v. *Holt*, 4 Pick. 258; assessor, *Pease* v. *Smith*, 24 Pick. 122; surveyor of highways, *Upham* v. *Marsh*, 128 Mass. 546; postmaster, *Keenan* v. *Southworth*, 110 Mass. 474; commissioners appointed by the Governor, *Fitchburg Railroad Co.* v. *Grand Junction, etc., Co.*, 1 Allen, 552; town liquor agent, *Drinnels* v. *Parsons*, 98 Mass. 470; county commissioners, *New Haven and Northampton Co.* v. *Hayden*, 117 Mass. 433; district attorney, *Bullock* v. *Aldrich*, 11 Gray, 206; city physician, *Commonwealth* v. *Swasey*, 133 Mass. 538; city engineer, *Chandler* v. *Lawrence*, 128 Mass. 213; town clerk and moderator, *Attorney-General* v. *Crocker*, 138 Mass. 214; road commissioner, *Clark* v. *Easton*, 146 Mass. 43; police officer, *Phillips* v. *Boston*, 150 Mass. 491, 494; and master of house of correction, and superintendent and instructor thereof, *O'Hare* v. *Jones*, 161 Mass. 391. On the other hand, the court says, in *Brown* v. *Russell*, that "every copying clerk or janitor of a public building is not necessarily a public officer." From these illustrations, and upon general considerations, it may be said that a public officer is one who, by the authority of the Legislature, either through appointment or election, is charged with a duty public in its nature, and which

concerns the government of the State and the rights of its citizens. Whoever is entrusted with powers which concern the administration of the affairs of the Commonwealth, or the rights of the public, and is appointed or elected to that duty under legislative authority, may be said to be a public officer. Whatever just criticism may be made upon this definition is yet, I apprehend, more properly directed against the attempt to define than the definition itself. It is not easy to lay down any rule which may not be subject to modifications in view of specific facts.

Applying these principles to the classifications referred to in your letter of inquiry, it is not difficult to decide that those included in the second division, schedules C and D, to wit, laborers, are not public officers. Nor can it be properly said, in my judgment, that those described in schedule A, which includes clerks, copyists, recorders, book-keepers, agents, etc., hold public offices. So far as I am informed of the facts, I do not see how it may be said that foremen of laborers, engineers, janitors, persons having charge of steam boilers in school buildings, turnkeys, watchmen, drivers of prison wagons, gatemen, or guards in public parks and ferries, are public officers. The duties of all these are rather in the nature of employments than offices. They take no part in government. They do the work of the Commonwealth. They are its employees, not its officers.

On the other hand, truant officers, although exercising a limited jurisdiction, are yet charged with responsible and important duties. They are directed (St. 1894, c. 498, § 20) to make complaint for truancy, and to carry into execution the judgment thereon; to serve all legal processes issued by the court; also (§ 23) to apprehend and take to school without a warrant all truants found wandering about the streets. They are clothed with authority, and "have and exercise some powers of government." Field, C. J., in *Brown* v. *Russell*, *supra*.

The position of drawtender is also one which directly concerns the rights of the public. Pub. Sts., c. 53, § 30, provides that a drawtender shall have full control of passing vessels through the draw, having due regard for the public travel, and

shall enforce the ordinances or by-laws relating to the same. This makes him, in my judgment, a public officer. See *Nowell* v. *Wright*, 3 Allen, 166.

I am aware that in the foregoing distinctions I have not exhausted the list of positions upon which your letter calls for my opinion. To do so would require a more intimate knowledge of the statutes relating to those I have omitted, and the facts bearing upon their duties than I now have. In referring to some classes, I did so rather by way of illustration of the general principles stated than as attempting to cover the whole ground. If cases arise, which, notwithstanding the foregoing principles, seem to you to be doubtful, I will attempt to deal with them specifically, if desired.

INSANE PAUPER, — REIMBURSEMENT OF TOWN BY COMMONWEALTH FOR SUPPORT.

Under St. 1892, c. 243, the town of Plainfield may be reimbursed by the Commonwealth for the support of an insane pauper, including interest on the amount due, if payment was withheld for any reason; but not for costs of court in defending a suit in which the settlement of the pauper was determined, nor for fees of witnesses and attorneys in said suit.

To the Lieutenant-Governor, acting Governor.
1896
June 4.

I have the honor to acknowledge the receipt of your letter of the 3d, asking my opinion as to the extent to which the Commonwealth may reimburse the town of Plainfield for the support of one Ida Thayer, an insane pauper, under the provisions of St. 1892, c. 243. The bill accompanying your letter is for support for one hundred and eighty-one weeks; for interest paid by the town upon the bill for said support; for costs of court in defending a suit in which the settlement of the pauper was determined; and for the fees of witnesses and attorneys in the same case. The case is reported. See *Northampton* v. *Plainfield*, 164 Mass. 506.

The statute in question provides that the Commonwealth may reimburse towns under a certain valuation the amounts expended by them for the support of insane paupers. Plainfield is within the terms of the act. The amount expended, therefore, for sup-

port, including, perhaps, interest on the amount due, if payment was withheld for any reason, is a proper charge against the Commonwealth, and a warrant therefor may lawfully issue.

But the items for costs of court and attorneys' and witnesses' fees are not, in my judgment, within the terms of the statute. It is true the suit was decided with the hope of establishing the settlement of the pauper in Northampton rather than in Plainfield; and if the town had prevailed, the Commonwealth would have been relieved from the burden of her support. However just it might be considered to be on general principles for the Commonwealth to pay the expense of litigation, there seems to be no authority for it in the statute. The word "maintenance" refers to the support of the pauper, and does not mean the maintenance of a law suit.

INSURANCE, — NATURE OF CONTRACT, — THEFT.

A contract with the owner of a bicycle to furnish him a substitute in the event of his own being stolen, the bicycle to be a duplicate of the original and to be returned only upon the recovery of the latter, is an insurance contract within the meaning of St. 1894, c. 522, § 3.

To the Insurance Commissioner. 1896 June 15.

I have your letter of the 12th, asking whether, in my opinion, the contract of the American Wheelmen's Protective Association, a copy of which is submitted with the letter, is an insurance contract, under St. 1894, c. 522, § 3.

From an examination of the copy submitted it appears to be an undertaking by the association, in consideration of a stipulated payment in cash, to furnish to the holder of the contract, whenever his bicycle is stolen from him, another bicycle. It is expressed in the contract to be a loan of a duplicate of the stolen bicycle, the same to be returned upon recovery of the original. The use of this expression, however, does not in any way modify the essence of the contract. It is, in fact, an undertaking to insure the holder of the policy against the loss of his bicycle by theft. This is insurance at common law. An insurance contract is a contract of indemnity against possible loss, whether the loss occurs by injury, destruction, death or theft; and whether the agency of destruction is fire, water, disease or

burglary. See *Wilson* v. *Hill*, 3 Met. 66, 68; May on Insurance, vol. 1, c. 1, § 1, c. 6, § 73; vol. 2, c. 30.

The only possible doubt upon the question stated is whether the definition of insurance given in St. 1894, c. 522, § 3, is intended to limit the meaning of the word as it is understood at common law. Insurance in that statute is defined to be "an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction or injury of something in which the other party has an interest."

This definition first appears in St. 1887, c. 214, § 3. It was taken from an opinion of Gray, C. J., in *Commonwealth* v. *Wetherbee*, 105 Mass. 149, and was undoubtedly adopted by the Legislature as a judicial interpretation of the meaning of the word; but an examination of the case cited shows that it was not intended in the opinion to limit the common-law definition of insurance. In the same opinion the chief justice said: "All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract." A strict construction of the word "insurance," used by the chief justice, would exclude loss by theft; but it is obvious from an examination of the whole opinion that the chief justice intended no such limitation. See May on Insurance, vol. 1, § 1.

The established legislative practice also has been to regard such contracts as insurance contracts. St. 1894, c. 77, was "An Act to incorporate the New England Burglary Insurance Company" for the purpose of guaranteeing individuals against "loss and damage by burglary or housebreaking." See St. 1895, c. 474.

As commonly used, the words "destruction or injury" do not include "theft;" but, in view of the origin of the definition, and of the ordinary meaning which attaches to the word insurance, I am of opinion that insurance against loss by theft is to be regarded as within the statutory definition. The possession of the bicycle is property which vests in the owner; this possession is destroyed by theft of the bicycle.

MEMBER OF LEGISLATURE, — ELIGIBILITY FOR OTHER OFFICE, — INSURANCE EXAMINER.

A member of the House of Representatives is ineligible for appointment to the office of insurance examiner, created by St. 1896, c. 335, during the term for which he is elected.

To the Insurance Commissioner. 1896 July 2.

I have your letter of the 30th ultimo, inquiring whether the office of examiner for the insurance department, created by St. 1896, c. 335, is such an office as is described in Pub. Sts., c. 2, § 33, so that a member of the House of Representatives for 1896 is ineligible to appointment.

Pub. Sts., c. 2, § 33, provides: "No member of the Senate or House shall, during the term for which he is elected, be eligible to any office under the authority of the Commonwealth created during such term, except an office to be filled by vote of the people." The obvious purpose of this statute is to remove from a member of the Legislature any temptation to be influenced in his vote by reason of the possibility that he may be a candidate for the place created by the Legislature of which he is a member.

The office of insurance examiner, created by St. 1896, c. 335, is plainly within both the spirit and the letter of the Public Statutes. It is an office the appointment to which must be approved by the Governor and Council, and the salary of which is to be paid out of the treasury.

As to your further inquiry, whether a representative can resign his office after the prorogation of the Legislature, so as to become eligible to such an office, the statute provides that he shall be ineligible "during the term for which he is elected." A representative is elected for the political year beginning the first Monday in January; he is therefore ineligible during the entire year. It is unnecessary to consider whether he can resign without the consent of the body of which he is a member, although the authorities are against such a proposition. See *Fitchburg Railroad Co.* v. *Grand Junction Railroad & Depot Co.*, 1 Allen, 552.

LYMAN SCHOOL FOR BOYS, — PROPERTY.

The property acquired under Res. 1896, c. 118, is to be used as part of the Lyman School.

To the Secretary, Trustees of Lyman and Industrial Schools.
1896
July 7.

I have the honor to acknowledge your request for an opinion as to whether the property acquired under Res. 1896, c. 118, can be used as a part of the Lyman School.

The resolve in question is entitled a "Resolve to provide for the purchase of additional property for the Lyman School for Boys," and reads as follows: "*Resolved*, That there be allowed and paid out of the treasury of the Commonwealth a sum not exceeding eight thousand five hundred dollars, to be expended under the direction of the trustees of the Lyman school for boys, for the purchase of the so-called Flagg farm in the town of Berlin, and for the proper repairing and furnishing of the buildings situated thereon."

The enactment means what it says, namely, that it is for the purpose of providing for the purchase of additional property for the Lyman School. Additional property of the Lyman School is to be used as a part of the Lyman School.

INSURANCE, — ACCIDENT COMPANIES.

In St. 1896, c. 515, the specific exceptions of accident companies in §§ 5 and 7 are not to be regarded as annulled by the general exception in § 10 of the same, but are confirmed thereby, and the act is to be construed as though no such specific exception had been made.

To the Insurance Commissioner.
1896
July 13.

Your letter of June 19 requests my opinion upon the construction of St. 1896, c. 515, §§ 5, 7 and 10. Section 5 provides that no assessment corporation except those "engaged in the business of accident insurance" shall enter into certain contracts. Section 7 provides that policies shall not be issued upon the life of any person more than sixty years of age, provided "that such corporations which insure against accident only may issue policies or certificates on the lives of persons not over seventy years of age." Section 10 provides, gen-

erally, that the provisions of the act shall not apply to companies "transacting only an accident or casualty business upon the assessment plan." Your inquiry is, "in what condition these apparently contradictory sections leave accident companies as regards the provisions of §§ 5 and 7 of said act."

I do not consider the sections as being even "apparently" contradictory. They are not well drawn; but the meaning of the whole act is not difficult to discover. Sections 5 and 7 specifically except accident insurance companies from the provisions of those sections; while § 10, apparently ignoring the fact that such exceptions had been made in §§ 5 and 7, exempts accident insurance companies from all the provisions of the act. The specific exceptions in §§ 5 and 7 are not to be regarded as annulled by the general exemption in § 10, but are confirmed. The act is to be construed as though no specific exceptions had been made in §§ 5 and 7.

CAPE COD SHIP CANAL, — MASSACHUSETTS SHIP CANAL COMPANY, — DEPOSIT OF MONEY WITH TREASURER.

The extension of time limits provided for in St. 1895, c. 464, § 8, entitled "An act to incorporate the Massachusetts Ship Canal Company," does not extend the period of six months within which the company was required to make its deposit with the Treasurer and Receiver-General; and a failure to make such deposit within said six months renders the charter null and void.

To the Treasurer. 1896 July 13.

Your letter of the 27th asks whether, in my opinion, it is your "duty, as Treasurer and Receiver-General of the Commonwealth of Massachusetts, to receive the deposit required by St. 1895, c. 464, from the Massachusetts Ship Canal Company at the present, or at any subsequent time."

The Massachusetts Ship Canal Company was incorporated by St. 1895, c. 464. Section 23 of said act is as follows: "The provisions of this act shall be null and void unless said canal company deposits with the treasurer of the Commonwealth the sum of one hundred and fifty thousand dollars within six months after the passage of this act, which sum shall be forfeited to the Commonwealth unless the work of construction is commenced

within one year and completed within five years from the passage of this act. Said sum of one hundred and fifty thousand dollars shall be refunded to said canal company when said canal is in operation, if not forfeited under the provisions of this section." The act took effect June 4, 1895. No deposit, or tender of deposit, was made within six months thereafter. The charter, therefore, is void unless the time has been otherwise extended.

I understand it to be claimed, however, by the company that the time is extended by the provisions of § 8. That section provides that the corporation shall within six months from the passage of the act apply to the boards of Railroad Commissioners and the Harbor and Land Commissioners, as a joint board, "to determine what provision shall be made by the canal company for the crossing of said canal by the New York, New Haven & Hartford Railroad Company, and at what point such crossing shall be made by a railroad drawbridge, and for crossings for the public where the canal cuts through highways." It is further provided that said joint board shall determine said matters, and shall decide what arrangements shall be made for the temporary crossing of the location of the canal company while the drawbridge is being built, and shall further decide at what time the railroad company shall commence to use the new bridge and its approaches. The section then provides that "the time taken by said joint board, from the date of said petition to said joint board to the date of their decision, shall be taken as additional time to all time limits and requirements set forth in this act."

I am further informed that a petition was duly filed, as required by said § 8, with the boards of Railroad Commissioners and the Harbor and Land Commissioners, to wit, on the ninth day of November, 1895; and that no decision has been filed by said joint board. If, therefore, the time taken by the joint board from the date of the petition to the date of its decision is to be added to the limit of six months within which the deposit is to be made, as provided in § 23, then the company may still make the deposit.

The question raised by the company, therefore, is, whether the provision that the time so taken by the joint board "shall

be taken as additional time to all time limits and requirements set forth in this act" includes the limit of six months within which the deposit is to be made. If the provision in § 8 be construed literally, the contention of the company is correct, for undoubtedly the period of six months within which it is provided the deposit is to be made is one of the "time limits and requirements set forth in this act."

I am of the opinion, however, that the section is not to be construed as referring to all time limits set forth in the act, but only to such time limits as would be affected by delay in the action of the joint board. For example, the act provides that work shall be begun within one year, and that the canal shall be completed within five years. It may be said, however, that the company could not reasonably be expected to begin its work until the determination of the questions raised by the petition to the joint board; and, further, that, if the board should be a long time coming to a decision, it might prevent the canal company from completing its work within the prescribed period of five years. The Legislature, therefore, undoubtedly intended that these limitations as to beginning and completing the work should be increased by whatever time might be occupied by the joint board in coming to a decision.

It cannot be said, as claimed by the company, that the expression "all time limits and requirements set forth in this act" is to be construed literally as covering all such limitations. Section 19 of the act provides that no taxes are to be paid either to the Commonwealth or to the towns until the expiration of three years after the canal shall have been opened for use. It is obvious that whatever loss of time might be caused by the delay of the joint board in coming to a decision has no effect upon this limitation as to taxation. Indeed § 8 provides that the petition to said joint board shall be filed within six months from the passage of the act. Although this is a time limit, it would not, of course, be claimed that it is extended, or could be extended, by the time occupied by the joint board in reaching a decision.

It is matter of history that many companies have been granted charters for the construction of canals across Cape Cod,

and that without exception all have failed to carry out the purposes for which they were incorporated. Some of them have encroached upon private and public rights; and in more than one case the holding of an unused charter by a corporation has been the means of preventing the incorporation of another enterprise. This being so, it is obvious that the Legislature, in granting a charter to the Massachusetts Ship Canal Company, intended to impose upon the company the performance of certain things as a guarantee of its good faith, and of its purpose to carry out the work it was chartered to do. The construction of a canal across the Cape is a work which would benefit the public; and, many companies having been chartered and having failed to carry out their work, these conditions and limitations were imposed upon this company so that it should soon be known whether the company intended to build the canal; and, if so, to make it expensive for the company to abandon the work having once entered upon it.

It was provided by § 4 that the corporation should file its location within six months from the passage of the act, defining courses, distances, and boundaries; by § 8, as above stated, that it should apply to the joint board provided by said section for the location of railroad and highway crossings; by § 20, that $500,000 of the capital stock should be subscribed for before the first day of December, A.D. 1896, and $100,000 be paid in and actually used for the construction of the canal; and by § 23, that the sum of $150,000 should be deposited with the treasurer, to be returned without interest when the canal was in operation, but to be forfeited unless the work was begun within one year and completed within five years from the passage of the act. All these provisions are intended to secure the actual inception of the undertaking within six months, undoubtedly so that the enterprise should not stand in the way of a new charter, if the conditions imposed upon this company were unfulfilled before the beginning of the next Legislature. The location of the railroad and highway crossings provided to be decided by the joint board is a matter which has nothing to do with the inception of the work, and is only incidental to its progress and completion. The filing of

the location, which must be done within six months after the passage of the act, not only would not be delayed by the action of the joint board, but, on the other hand, no petition could well be filed with the joint board until the location itself were determined. Nor is the subscription to the capital stock in any way related to the action of the joint board. It may be that the provision that $100,000 should be actually used for the construction of the canal before the first day of December, 1896, might be said to have some relation to the decision of the joint board; also, as above stated, the provision that the work should be begun within one year and completed within five years.

But the provision that a deposit should be made in the treasury is required as a guarantee that the corporation had a bona-fide intention to carry out the work it was chartered to do. To accept the contention of the company would require me to hold that the Legislature intended that the company need not pledge itself to build the canal until the decision of the joint board was filed. This was not, in my judgment, the intent of the provision.

I am of opinion, therefore, that the extension of time limits and requirements provided for in § 8 only relates to such time limits and requirements as would be affected by delay in the action of the joint board, and that it does not extend the period of six months within which the company was required to make a deposit with the Treasurer and Receiver-General.

The charter, therefore, under the conditions set forth in § 23, has become null and void, and the company incorporated by said charter has no right to make the deposit with you.*

CIVIL SERVICE, — FOREMAN OF LABORERS, — SUPERINTENDENT INCOME DIVISION OF WATER DEPARTMENT OF BOSTON, — SUPERINTENDENT OF INSPECTORS IN PERMIT DIVISION OF STREET DEPARTMENT.

A foreman of laborers as classified in Class 6 of Schedule B of Civil Service Rule VI. is a person who has immediate charge and oversight of a gang of laborers, directing them in their work and seeing that they keep at work.

---

* Affirmed in *Massachusetts Ship Canal Co.* v. *Shaw*, 170 Mass. 572.

The duties of the superintendent in the income division of the water department of the city of Boston and those of the superintendent of inspectors in the permit division of the department of streets, as appears from the facts stated, are not such as to bring those officers within the classification established by the civil service rules.

To the Civil Service Commissioners.
1896
July 17.

Your letter of May 16 states certain facts with relation to three persons recently appointed to office in the city of Boston, without certification by your Board, and asks my opinion as to whether, upon those facts, they were legally appointed in view of the statutes and rules relating to the civil service. Your letter further asks "what, if any, is the distinction between a 'superintendent' in a city department, under a commissioner or head of the department, and a 'foreman,' as classified in Class 6 of Schedule B of Civil Service Rule VI.'"

It is not always practicable to lay down general definitions sufficiently broad and precise to cover all possible cases that may arise. It has been the practice of this office to refrain from attempting to reply to inquiries calling for a statement of general principles, but rather to determine specific questions as they arise. The general question in your letter above quoted is within this rule. To undertake to lay down in advance a clear distinction between a superintendent and a foreman is not practicable nor necessary. It is possible, however, to establish some general principles of construction of the meaning and intent of the civil service statutes, and of the rules created by your Board in pursuance of those statutes, which may be of assistance in the consideration of specific cases.

The civil service rules have, and are intended to have, only a limited application. Your board has not undertaken, in the classification established by its rules, to comprehend all the departments of public service with which under the statutes it is authorized to deal. This right of limited application is recognized by the court. See *Opinion of the Justices*, 138 Mass. 601. Certain officers are excepted from the operation of the civil service rules by law. St. 1893, c. 95, expressly exempts, among others, "heads of any principal departments of the Commonwealth or of a city." Subject to this and perhaps to some other exception in the same statute, all the

appointive officers in a city government may be classified by your rules. I do not understand, however, that you have attempted so to include the entire civil service of cities. On the contrary, there are many officers, not heads of principal departments, who are not classified under your rules. There are officers exercising duties of supervision, superintendence and inspection, who, on the one hand, do not come within the exception of the statutes exempting them from your rules; and who, on the other hand, are clearly not within the classifications established by the rules. Attorney-General's opinions of Oct. 12, 1892,* and Dec. 4, 1894.† So far as the question under discussion is concerned, your rules only attempt to classify such officers as are designated as "foreman and sub-foremen of laborers" and "inspectors of work."

I assume that your general inquiry is intended to suggest the question whether there is any intermediate ground between persons who are "heads of principal departments," under the statute of 1893, and who are thereby exempted from the rules, on the one hand, and "foremen and inspectors," on the other hand, who are in the classified service. If the classification of your Board were intended to be comprehensive, there might be some ground for holding that it was intended to include all persons doing the work of superintendents between the grade of a head of a principal department on the one hand, and actual laborers on the other hand. But your rules, as before stated, are intended to have a limited application only; and it cannot be said, therefore, that such intermediate superintendents are to be classed as foremen unless the meaning of the words "foremen" and "inspectors" actually requires such an interpretation.

There is no absolute line of distinction between a superintendent and a foreman. A foreman is a superintendent in one sense of the word; and a superintendent may not improperly be called a foreman. But the word "foreman," in your rules, is to be taken in its usual and ordinary signification. As the word is commonly employed, it undoubtedly means a person who has immediate charge and oversight of a gang of laborers,

* See page 71, *ante*. † See page 194, *ante*.

directing them in their work and seeing that they keep at work. On the other hand, a superintendent, as applied to civil officers, is one who has charge and oversight of a department of government, either a principal or a subordinate department. He is an officer to whom is entrusted responsibility, judgment and skill. The distinction between a foreman under your rules and a superintendent was well suggested by my predecessor, Mr. Pillsbury, when he said, speaking of the rules of your Board, "it appears to me that the civil service act and the rules should, in general, be so construed as to distinguish between positions of routine, so to speak, which ordinarily do not involve administrative or discretionary powers, on the one hand; and, on the other, positions which involve the exercise of judgment, discretion, authority, and responsibility; and that the general scheme is to include the former and not to include the latter class within the system." *

This general distinction seems to me to be sound. A foreman of laborers is entrusted only with the duty of seeing that his men keep at work. The meaning of this word is fixed and modified by the clause "of laborers" which follows and limits it. A superintendent has the general charge and oversight of the work of a department, especially in its relation to the public, for whose benefit the department was created; and under the authority of his chief, if he, himself, is not the head of the department, represents the administration of the government.

The foregoing principles appear to me to be conclusive of two of the three cases submitted in your letter.

M. J. O'Brien has been appointed "superintendent in the income division" of the water department. His duties, as they appear by the letter annexed to your communication, the statements of which for the purposes of this inquiry I am to take as conclusive, are to have charge of the Deacon system and waste of the water department. This division employs twenty or thirty laborers, some of whom are experienced, two to four foremen, some inspectors, a clerk and an engineer. This division is intended to enforce the provisions of St. 1895,

* See page 71, *ante*.

c. 488, § 10, which provides that the Board "may inspect the water works and fixtures in any city or town supplied wholly or in part from the works under their charge, and may take all proper measures to determine the amount of water used and wasted and to prevent the improper use or waste of water.

On these facts, I do not think that it can properly be said that O'Brien is merely a foreman of laborers. He has charge of a department of work comprising laborers, inspectors, a clerk and an engineer. His duties are not merely to see that laborers work faithfully; they comprehend the administration of the powers and duties of the government, so far as they relate to waste in the public water supply.

Edward Hayden has been appointed "superintendent of inspectors in the permit division" of the department of streets. His duties, as stated in the letter annexed to your communication, comprise the control and supervision of the force of inspectors, clerks and messengers, working on permits issued by the permit division to any other department of the city, or to any corporation or company which requires a permit for the opening or use of the public streets. A number of this force are paid by corporations requiring the opening of the streets, although they are appointed by the superintendent of streets and are under his control. It is stated to be the further duty of Hayden to go about the city and superintend the work being done under the inspectors, and report to the superintendent of streets upon the condition of the work.

These duties obviously require not merely vigilance in keeping laborers at work, but oversight, discretion and judgment as to the general plan of the work to be done. On the facts I am unable to say that Hayden is within the classification of foreman of laborers; he is that, and much more.

Timothy F. Murphy has been appointed "superintendent of the patrol division" of the street department. The letter annexed to your communication states that "he has full charge of the push-cart division of the entire city, and is responsible for the faithful performance of the work done by this division, personally visiting the several districts covered by the regular men daily."

This somewhat meagre enumeration of the duties of Murphy is not sufficient to enable me to determine whether he is anything more than a foreman, or not. Apparently his duties consist merely in seeing that the men under him keep at work. If so, he is a foreman of laborers, with sub-foremen under his charge, and should be appointed under the civil service rules.

It is further stated, in the letter which purports to enumerate his duties, that an extension of the system is contemplated, under which the entire city will be included in Murphy's department, and an additional force of foremen and inspectors employed. The letter to which I refer was dated May 9. Whether any such extension as is proposed in the letter has been made, or not, I have not been informed. If further consideration of Murphy's case is desired, I must request to be advised more fully upon the facts.

HIGHWAY COMMISSION, — ROAD MACHINES FOR TOWNS.

The number of steam rollers and portable stone crushers which the Massachusetts Highway Commission may be required to furnish under the provisions of St. 1896, c. 513, is to be decided by the applicants and not by the commission.

Upon a request made in conformity with said chapter for road machines other than steam rollers and portable stone crushers, the said commission is vested with discretionary power either to comply with or to refuse such request.

To the Highway Commission. 1896 July 22.

I take pleasure in acknowledging your communication of July 21, requesting an interpretation of St. 1896, c. 513.

The first question is, whether your commission has any discretion in the matter of granting requests made by the county commissioners for steam rollers and other machines, or whether it is obligatory upon it to comply with each request as made.

The power of the Massachusetts Highway Commission in relation to this matter is to be gathered from St. 1895, c. 486, and St. 1896, c. 513. Under c. 486, just cited, the Commonwealth was obliged to furnish one steam road roller whenever an application conformable to law was made by a town. St. 1896, c. 513, repeals this act, and enacts that "Upon the application to the

Massachusetts Highway Commission of the county commissioners of any county, made at the request of any town of not more than twelve thousand inhabitants within said county, there shall be furnished by said Highway Commission to said county, at the expense of the Commonwealth, one or more steam rollers, portable stone crushers and such other road machines as the said Highway Commission may deem necessary for the construction and maintenance of better roads in the town making such request."

I can see nothing in this sentence, or the rest of the act, which leads me to believe that the duty of furnishing at least one steam roller, whenever a legal application has been made, is not obligatory upon the commission.

Furthermore, I am of the opinion that the number of steam rollers and portable stone crushers needed is to be decided by the applicants, and not by the Highway Commission. The grammatical construction of the sentence, and the purport of the law taken as a whole, coincide in my mind in justifying this construction. The position of the words, and particularly the use of the words "such other road machines," leads me to believe that the discretionary power vested in the Highway Commission applies only to "such other road machines as the said highway commission may deem necessary." Furthermore, the necessity of speed in the construction is essentially of local importance, and is generally guided entirely by local considerations. Taking this into consideration, with the fact that the town is ultimately to pay for the maintenance and management of the machines, I am of the opinion that the commission has no discretion upon any given occasion to decide upon the number of steam rollers and portable stone crushers which shall be required.

In reference to requests for road machines other than steam rollers and portable stone crushers, my opinion is that the commission is vested with discretionary power in the matter of granting or refusing such requests.

In your second question you ask whether your commission has any control over the machines furnished in accordance with St. 1896, c. 513, after they have been delivered to the county

commissioners. In reply to this only a general answer can be given. The machines still remain the property of the Commonwealth, but such control as is necessary for their management and maintenance is vested in the county commissioners. Whether in a given case the control sought to be exercised is one of management and maintenance, or not, is a question that can be answered only when a specific case arises.

METROPOLITAN PARK ACTS, — APPROPRIATIONS FOR PARK PURPOSES.

The Auditor of the Commonwealth is required, under St. 1896, c. 550, to charge to the account of the fund created by the metropolitan park loans heretofore authorized such a sum as will be sufficient to meet the interest and sinking fund requirements up to and including the first day of January, 1900, and also to charge to the said account all amounts heretofore appropriated for the care and maintenance of metropolitan parks.

He is not required under the said statute to set apart any portion of the said fund for the future care and maintenance of the said parks.

To the Auditor. 1896 July 23.

Your letter of June 22 requests my opinion as to the construction of St. 1896, c. 550, relative to the metropolitan parks and boulevards. In order to understand the questions raised it is necessary to review the legislation relating to metropolitan parks.

The Metropolitan Park Commission was created, and authorized to lay out and construct parks, by St. 1893, c. 407. By § 9 of that act a loan of one million dollars was authorized for a term not exceeding forty years, "to meet the expenses incurred under the provisions of this act." It was not the purpose of the Legislature, however, to impose the burden of the laying out, construction or maintenance of the metropolitan parks upon the Commonwealth. A policy of reimbursement from the cities embraced within the metropolitan parks was established in the original act, which has never been departed from in any subsequent legislation. The act in question provided that a special commission should be appointed, for the purpose of determining substantially the proportion in which

the expenses of metropolitan parks should be borne by the cities and towns in the metropolitan district. The proportion assessed upon Boston was to be fifty per cent. of the whole. The proportion to be assessed upon the other cities and towns was to be determined by this special commission so constituted. A sinking fund was created by the act authorizing the loan, the annual contributions to which should be sufficient to extinguish the debt at maturity. Section 12 of the act provided that the amount of money required each year from the cities and towns in the district to meet the interest, sinking fund requirements and expenses for each year, should be estimated by the Treasurer in accordance with the proportion established by the special commission, and assessed upon such cities and towns as a portion of their State tax. By the operation of this plan, therefore, although all the moneys required for metropolitan parks was to be raised by the Commonwealth by means of a loan, and advanced when necessary, the whole of the principal and interest of said loan, and the expenses of maintaining the parks, were eventually to be assessed as a tax in the proportion thus ascertained upon the cities and towns in the district.

A special commission was thereupon appointed by the Supreme Judicial Court, which proceeded to hear the parties, and to assess the proportion to be paid by each city and town within the district. This report was ultimately confirmed by the court. From time to time additional authority to expend money in laying out and constructing parks and parkways was granted to the commission, and loans for corresponding amounts authorized to be made by the Treasurer to meet the expenses thereof, the whole amount of loans, so authorized, being $4,300,000. The last loans voted were by St. 1896, cc. 466 and 472. By c. 466 the Park Commission was authorized to "expend the further sum of one million dollars, in addition to all sums heretofore authorized to be expended by it;" and to meet the expenditures so authorized to be incurred the Treasurer was directed to issue a corresponding amount of scrip or certificates of indebtedness. By c. 472 the commission was authorized to expend the further sum of five hundred thousand dollars for roadways and boulevards, and a corresponding loan was au-

thorized to be made by the Treasurer. The acts were approved June 4, 1896, and took effect upon their passage.

Under the act creating the Park Commission (St. 1893, c. 407) it was directed to estimate annually the expense of preservation and care of the parks for the ensuing year, and certify the same to the Treasurer, such expenses to be apportioned among the cities and towns in the same manner as the expenses of location and construction. This estimate was limited in the original act at twenty thousand dollars, but the limitation was afterwards removed. In pursuance of this authority, estimates have been made by the commission from time to time, and the legislature has each year appropriated sums of money to be paid out of the ordinary revenue for the care and maintenance of the parks, to wit: 1894, $20,000; 1895, $37,000; 1896, $40,000. Under the statutes of appropriation these sums were not taken from the park loans, but were imposed upon the cities and towns in the district, in addition to the amounts authorized for laying out and construction.

Complaint was made by some cities and towns that the apportionment established by the commission was necessarily premature, being made before the completion of the work of laying out and constructing the parks, and, therefore, possibly unfair. The statute under consideration (St. 1896, c. 550) was undoubtedly passed in recognition of the justice of these complaints. It does not undertake to change or modify the purpose originally declared by the Legislature of assessing the expenses of the laying out, construction and maintenance of metropolitan parks upon the cities and towns within the district, but it abolishes the work of the special commission above referred to. It further directs the Park Commission to lay out and construct all the parks which it is authorized to construct before the first day of January, A.D. 1900; and further provides that during the year 1900 a new special commission shall be appointed to assess the proportions to be paid by the several cities and towns in the district, in the same manner as was provided by the original act. The necessary intent of this law is, not to impose any part of the burden of metropoli-

tan parks upon the Commonwealth, but to postpone the time when the cities and towns shall begin to reimburse the Commonwealth for the money advanced by it for that purpose. But, inasmuch as it would be onerous to require the cities and towns in the district to pay in one sum all the interest and fixed charges, and expenses of maintenance incurred from the beginning of the enterprise up to the year 1900, the act provided that all these charges and expenses should be paid by the Treasurer out of the loans authorized. The result of this will be that in the year 1900 the only demand upon the cities and towns will be the bonds then outstanding, the interest, sinking fund requirements and all expenses of care and maintenance accruing prior to that time having been paid out of the loan itself. It follows that the time of beginning reimbursement to the Commonwealth by the cities and towns is thus postponed for four years; but, as a necessary result of this, either the amount to be expended for parks and boulevards must be reduced, or the amount to be paid by the cities and towns must be increased. This is because the whole sum which the cities and towns assume from and after the first day of January, 1900, includes all interest and sinking fund requirements and expenses of maintenance to that date, these sums being necessarily either added to the whole loan, which is thus made greater, or taken from the loans now authorized.

The question stated in your letter is this, substantially: Is it the intent of the act that the loans heretofore authorized shall be increased by the amount of the interest, sinking fund requirements and expenses of maintenance already incurred, and to be incurred between now and the year 1900, or are those expenses to be deducted by you from the fund created by the loans already authorized? The question is one of importance, because the necessary result of deducting all the charges and expenses so imposed upon the loan itself is to cripple seriously the work of the Park Commission by diminishing the amount of money placed at its disposal by previous acts, the last of which was enacted June 4, only five days before the act in question took effect. If you are to reckon only such expenses as already have been authorized, and the interest and sinking fund require-

ments now contracted for, the amount to be deducted from the fund created by the park loans will be, I am informed, about $700,000. If the statute requires you to go further, and deduct such sums as you estimate will be required for expenses from this time until the year 1900, the amount to be deducted will be about $950,000, or nearly the whole amount which the commission was authorized to expend upon parks, under the authority of the act of June 4 passed by the same Legislature.

It is claimed by the Park Commission that it is inconceivable that the Legislature on the fifth day of June should authorize the commission to expend the sum of one million dollars, and on the ninth day of June practically take away this power. The act of June 5 was passed after a careful consideration of the purposes and needs of the commission. I am told that it was stated by the Park Commission to the Legislature that the sum of one million dollars was needed to complete the parks according to the plans under consideration before them; and the statute of June 5 giving them that sum must be taken to be a recognition by the Legislature of the needs of the commission at that time.

The Park Commission claim that both acts must be construed to stand rather than fall, and that the latter act must be taken to be an authority, express or implied, for an additional loan by the Treasurer to meet the charges and expenses so imposed upon the loan itself.

There is much force in this contention, but the difficulty in the way is that it is not sustained by the plain language of the last statute, being the one under consideration. Section 1 of this statute provides, in express terms, that "the Treasurer of the Commonwealth shall pay from the proceeds of the *loans authorized*" all moneys required up to and including the first day of January, 1896, to meet interest and sinking fund requirements, and cost of maintenance. The Legislature of 1896 cannot be said to have required the Treasurer to speculate upon the chances that a future Legislature would authorize an additional loan. The words "loans authorized" cannot be construed to mean loans hereafter to be authorized. A loan is not authorized until the act therefor is passed by the Legislature;

and I cannot advise you that the Legislature of 1896 gave you any ground by the language of § 1 to expect that an additional loan would be authorized by a future Legislature. A legislative body cannot bind its successor, nor can it authorize the officers of the government to act in anticipation of what may be authorized by a succeeding Legislature.

Still less can the section be said to be a present authority for an additional loan. The language not only does not warrant such an inference, but it plainly points to the contrary; it directs the Treasurer to pay the charges in question out of the "loans authorized," not out of loans to be created therefor.

I am of opinion, therefore, that it is your duty to transfer to the account of the fund created by the metropolitan park loans heretofore authorized, such a sum of money as will be sufficient to meet the interest and sinking fund requirements up to and including the first day of January, 1900.

It is probable that, so far as the intent of the Legislature can be ascertained from the language of the section, it was expected that further expenses of care and maintenance of the parks, as "annually authorized" by the Legislature, should also be paid out of the same fund. In my judgment, however, it is impossible for you to carry out this intent. You cannot even estimate what may be the action of future Legislatures. It is not sound logic to estimate from the action of previous Legislatures what will be the amount appropriated by future Legislatures for care and maintenance. The General Court is the sovereign, and no citizen or officer can presume in advance what its action will be. If you were to undertake to reserve any sum of money out of the park loan fund for future care and maintenance, there is no middle ground. It would be your duty to reserve the entire loan to await the action of future Legislatures up to the first day of January, 1900. The result of this would be to stop all work upon the parks. Notwithstanding the evident meaning of the language of the act, I am of the opinion that you are not called upon at this time to set apart any portion of the fund for future unascertained and unascertainable contingencies. It is your duty to charge the fund with all the amounts heretofore appropriated for care and

maintenance. When you have done this, your duty in this respect is discharged. If a succeeding Legislature shall, in the exercise of its sovereign power, appropriate a sum of money for care and maintenance of the parks, and, under the authority given by previous Legislatures, all the then available proceeds of park loans have been expended by the commission for the purposes of park construction, it is to be presumed that the Legislature which makes the appropriation will provide the means for its payment, either out of the ordinary revenue or by authorizing a new loan.

BALLOT LAW, — MCTAMMANY VOTING MACHINES.

The Secretary of the Commonwealth may not omit from the McTammany voting machines, furnished under the provisions of St. 1896, c. 498, the name of any candidate duly nominated for office.

To the Secretary. 1896 August 5.

I have your letter of the 15th, asking to be advised whether it is within the power of the Secretary of the Commonwealth to omit from the McTammany voting machines, to be furnished under the provisions of St. 1896, c. 498, the names of any candidates who are duly nominated for office. The importance of the inquiry arises from the fact that the McTammany machines which have been prepared for use are capable of being used for the names of fifty candidates only; whereas, in the election to be held in November it is probable that the whole number of candidates duly nominated will be one hundred and fifty. If, therefore, machines are provided for the voters' use, in order to vote thereby it will be necessary to furnish three machines in each voting place, — a contingency which it may well be supposed the Legislature did not foresee.

The statute in question directs the Secretary, upon the request of the board of aldermen of a city or selectmen of a town, to furnish to the said city or town a sufficient number of McTammany voting machines "to enable all candidates for all offices (national, State, city or town) to be filled at such election to be voted for on such machines." I am of the opinion that, in view of the provisions of the statute above quoted, the

name of no candidate who is duly nominated for office under the provisions of the statutes of Massachusetts may be omitted from the machine.

I am aware that under the provisions of the Australian ballot law all candidates for election shall be voted for upon one ballot. If, therefore, the McTammany machine were a mere device for expressing the will of the voter, each upon a separate ballot, there would be much force in the contention which might be made that more than one machine could not be used; but the McTammany voting machine does not produce distinguishable individual ballots. The choice of the voter is made by punching a hole in a certain place upon a long cardboard, the location of the punch indicating the person for whom he voted. Many voters record their choice upon the same cardboard, and there is nothing by which one individual ballot can be designated. Consequently, it is of no consequence whether the cardboards which contain the punches which stand for votes shall be large enough to receive the votes for all the candidates; or whether, on the other hand, part of the candidates are voted for on one tally sheet and part upon another, if all of the candidates for any given office are voted for upon the same sheet. The provision of the Australian ballot law which requires all candidates to be voted for upon one ballot is therefore inapplicable to machine voting.

Your letter states that it is claimed that, under the provisions of St. 1893, c. 465, § 6, authority may be found for such omission. This section provides that at any election where the ballot machine is used blank ballots shall be provided for the voters, on which any voter may vote "instead of on the machine." The object of this provision is to make the use of the McTammany voting machine by the voter permissive instead of compulsory; so that, if he prefers not to use the machine, he may write out his vote. It does not, in my opinion, authorize the establishment of voting arrangements whereby the voter may use the machine in the discharge of a portion of his duty of voter, but must resort to a paper ballot for the remainder.

STATE HOUSE ADDITION, — CONTRACT FOR ELECTRIC LIGHTING, — ADVERTISING FOR PROPOSALS.

A statute requiring proposals for work or material exceeding a certain sum in value to be advertised for cannot be regarded as requiring a useless and unnecessary formality, where no good will result to the Commonwealth thereby; and such a statute does not render it necessary to advertise when there is no possible competition, and but one customer for the contract.

The State House Construction Commissioners are not required to advertise for proposals for furnishing electric lights to the intermediate portion of the State House extension.

To the Lieutenant-Governor, acting Governor.
1896
August 11.

I have the honor to acknowledge the receipt of your request for my opinion as to whether the State House Construction Commissioners are required to advertise for proposals for furnishing electric lights to what is called the intermediate portion of the State House extension. St. 1889, c. 394, § 4, provides that all work done by the commissioners shall be "by express contract," and "proposals for work or material exceeding one thousand dollars in value shall be advertised for," etc. I am informed that the proposed work will cost more than one thousand dollars, and that it is therefore within the letter of the statute quoted.

The commissioners have called upon me and stated facts bearing upon the question as follows. What is known as the intermediate portion of the State House addition is that part which connects the State house annex, so-called, to the original State House. Work upon this intermediate portion was not begun until the portion of the addition now in use was completed and occupied. The whole structure, including the intermediate portion, strictly speaking, is the State House addition, and as such is included in the provisions of the statute authorizing the work. The whole work was not constructed together, because the Governor and Council, in 1891, in view of the pressing need of additional accommodations, instructed your Board to proceed with and complete the northern part before beginning upon the intermediate work.

When it became necessary to contract for electric lighting for the part now in use, proposals were issued and duly

advertised, and a contract was made with the General Electric Company, they being the lowest bidder, for constructing a plant and furnishing electric lights to the annex building. This contract was for a gross sum. At the time it was supposed that the plant contracted for would be sufficient to furnish all the lighting needed for the intermediate portion and the old State House as well, but it has been found to be sufficient only for the part of the addition now in use. It becomes necessary, therefore, to provide for electric lighting for the intermediate portion.

I am informed that it would be impracticable to contract with any other person or company for an addition to the present plant sufficient to furnish lighting for the intermediate portion and for the old State House. Each electric lighting company has its own machinery and methods of producing light, and the methods of other companies cannot be used conjointly in this plant.

The commissioners, therefore, are driven to one of two alternatives. Either they must establish a new and independent plant for the intermediate portion and for the old State House, thus providing for two engines, boilers, dynamos and other apparatus, or the addition necessary for the new work must be made by the present company, as an extension of their present contract. The former alternative is not to be considered, by reason of the great additional expense which would be involved by the establishment and maintenance of two electric lighting plants under one roof.

It follows, therefore, that the only practicable course open to the commissioners is to extend the present plant sufficiently to provide for the lighting of the whole building. This being so, to advertise for proposals would be a needless form, there being but one possible bidder. It would also be an injustice to other possible bidders, who might not understand that their bids could not be considered in any event.

I am further informed that the commissioners are able to make a contract with the company now lighting the larger portion of the annex for such an extension of its plant as will be sufficient for all the new work, upon the basis of the present price.

Upon these facts, I am clearly of the opinion that the commissioners are not required to advertise for proposals for lighting the intermediate portion, that being the specific matter to which my attention is called. I do not understand that at present they have any authority for the lighting of the Bulfinch front. While the law is explicit in providing that contracts shall be made after advertisement, I am of opinion that, in view of all the facts, the proposed work may properly be regarded as an extension of work already contracted for in accordance with the provisions of law, and therefore such as need not be advertised for. The law cannot be regarded as requiring a useless and unnecessary formality, where no good will result to the Commonwealth. It cannot be necessary to advertise when there is no possible competition, and but one customer for the contract.

STATE HIGHWAY ACTS, — CONTRACTS BETWEEN HIGHWAY COMMISSION AND CITIES AND TOWNS, — SUB-CONTRACTORS, — EMPLOYMENT OF CITIZENS OF COMMONWEALTH.

A town having contracted with the Massachusetts Highway Commission for the construction of a State highway under the provisions of St. 1894, c. 497, § 4, may make contracts with other contractors for the performance of the work or any part thereof for which it has so contracted.

St. 1896, c. 481, § 2, which provides that no persons except citizens of the Commonwealth shall be employed on the work of constructing State highways, applies to employees actually employed on the work of repairing or constructing; and a contractor who is an employer only is not within the prohibition of said section.

No contractor may employ persons in the work of constructing State highways who are not citizens of this Commonwealth.

To the Highway Commission. 1896 August 11.

I have your letter of the 29th, requesting my opinion upon two questions stated therein.

First. — Whether a town having a contract with your commission has the right to sublet its contract or any part thereof to other contractors.

St. 1894, c. 497, § 4, provides that, when the commission is about to construct a highway, it shall give to each city and

town in which said highway lies a copy of the plans and specifications; and such city or town shall have the right without advertisement to contract with said commission for the construction of so much of such highway as lies within its limits, in accordance with the plans and specifications and under its supervision and subject to its approval, at a price agreed upon between the commission and the city or town. It was not the purpose of this section to secure the services of town officials in constructing State highways in preference to those of other persons. It cannot be said that town authorities have any such special skill or experience in the construction of highways as makes it advantageous to the Commonwealth to have its roads built by them. The purpose of the statute was rather to favor towns in the performance of the work, to the end that its citizens might have employment on the work, as they would have had if the road had been built by the town instead of by the State. The section is in the interest of the town and its citizens, rather than the Commonwealth.

This being so, it is of little consequence to the Commonwealth whether the town shall perform the work which it contracts to do for the State, or shall sublet the whole or any part thereof to others. The work contracted for by the commission must still be done "under its supervision and subject to its approval," by whomsoever has the contract. I see no reason why towns may not, if they see fit to, make contracts for the performance of the work or any part thereof which they may contract to do for this Commonwealth.

The second question in your letter is as follows: "If a town having a contract with this commission has a right to legally sublet any portion of the work to a contractor living out of the State, and if it would make any difference whether the contractor employs citizens of this Commonwealth, or not."

St. 1896, c. 481, § 2, provides that "No persons except citizens of this Commonwealth shall be employed on the work authorized by this act." The work referred to is the construction of State highways, for which the sum of $600,000 was appropriated. I do not think a contractor is necessarily a person employed in the work. That expression as used in the

statute refers to employees actually employed on the work of repairing or constructing. A contractor is usually an employer, not an employee. If the contractor is an employer only, he is not within the prohibition of the section quoted. Whether he is a citizen of the Commonwealth or not, however, he may not employ persons in the work who are not such citizens.

CONTAGIOUS DISEASES AMONG DOMESTIC ANIMALS, — QUARANTINE, — PAYMENT OF EXPENSES BY COMMONWEALTH.

St. 1894, c. 491, § 27, as amended by St. 1895, c. 496, § 9, which provides for the payment, in certain cases, by the Commonwealth of the expenses of quarantined animals, applies only to such animals as are of the class that yield edible products while living, and not to animals no product of which while living could be sold for food purposes.

To the Cattle Commissioners. 1896 August 12.

Your letter of the 22d ultimo requires my opinion upon the question whether the Commonwealth is liable for the expenses of quarantined animals held upon the premises of the owners thereof for more than ten days.

St. 1894, c. 491, § 7, provides that, when an inspector upon examination of a domestic animal suspects or has reason to believe that the animal is affected with a contagious disease, and whenever directed to do so by the Board of Cattle Commissioners, he shall immediately cause said animal to be quarantined or isolated upon the premises of the owner. Section 26 of the same chapter provides that the boards of health of cities and towns, in case of the existence of any contagious disease among domestic animals, shall cause the animals which are or which they have good reason to believe are infected with any contagious disease to be quarantined in some suitable place within the limits of such city or town. Section 45 provides for quarantine, by the Board of Cattle Commissioners, of all domestic animals affected with contagious disease, whenever satisfied that the public good requires it. Section 27 of the same act, as originally enacted, provided that, when any animals were quarantined upon the premises of the owner, the expense thereof should be paid by such owner or person in possession.

By St. 1895, c. 496, § 9, the section last referred to (§ 27) was amended by adding thereto the provision that "Whenever specific animals are quarantined or isolated under the provisions of sections seven, twenty-six and forty-five of this act more than ten days upon such premises (of the owner), as suspected of being afflicted with a contagious disease, and the owner is forbidden to sell any of the product thereof for food . . . the expense of such quarantine shall be paid by the Commonwealth."

Acting under the above provisions of the statutes, I am informed that your Board has issued two forms of orders of quarantine, one for all animals except cows in milk suspected as tuberculous, and the other for cows in milk. In the order for cows in milk, the owner is expressly forbidden to sell or dispose of the milk therefrom in any market. No such prohibition is contained in the other form of order. The question to which my attention is directed by your letter is whether, in the cases where bulls, oxen and dry cows are quarantined without the prohibition above referred to (to wit, against selling the milk), the Commonwealth is liable for the expenses of quarantine after the period of ten days mentioned in the statute. It is claimed by some owners of cattle so quarantined that, although no express prohibition is inserted in the order, they have in fact no right to sell the meat from such cattle, if killed by them, and that consequently they are within the provisions of the amended statute, which provides for the payment of the expenses by the Commonwealth when the owner is "forbidden to sell any of the product thereof for food."

If it be conceded that the owner may not sell the meat products of cattle so quarantined, after being killed, for food purposes, and that the word *product* as used in the amended section includes the flesh and other products of the carcass, then the contention of the owners is correct. It may further be said that, if such is the construction of the law, it was not necessary to limit payment when quarantine extends more than ten days to cases where the owner is forbidden to sell the product for food, for then the owner would be entitled to compensation in all cases of quarantine after the expiration of ten days. If this

were the intention of the Legislature, it could have been much more simply and directly expressed.

I do not concede, however, that the law in terms forbids the selling of meat from cattle which have been quarantined as suspected of being affected by contagious disease. Throughout the statute a clear distinction is made between cattle and carcasses, and the provisions as to each are distinct. When cattle are quarantined upon the premises of the owner, they are declared by § 34 to be "deemed to be affected with a contagious disease." This obviously refers to the cattle while living. It is not possible in all cases to determine whether a living animal is affected with disease or not. The law therefore has provided for action by the Cattle Commissioners without requiring of them definite proof as to the existence of disease, and has further provided that when they are quarantined under suspicion they shall be deemed to be what may be termed constructively affected with contagious disease. While so branded, the cattle themselves cannot be sold, nor can the milk or other food products which they produce while alive.

But, although the owner is forbidden to sell an animal quarantined upon his premises, or any of the food products thereof, he may kill it. After the animal has been slaughtered, the existence of contagious disease can be conclusively determined. If, upon examination, as provided in § 21, it appears that the animal was not affected with disease, he may sell the meat and other food products which may be obtained from the carcass. If, on the other hand, the examination discloses that the animal was diseased, its owner may not sell the meat of the carcass. But this prohibition does not arise from the fact of quarantine, but from the disease.

It follows, therefore, that, while it is true that the owner may not sell animals quarantined upon his premises or the milk therefrom, for the reason that they are suspected of being affected with contagious disease, and are therefore by the provisions of the act deemed to be so affected, yet, if he exercises his right of ownership in the cattle by killing them, and it turns out that they had not in fact been affected with disease, he is

not prohibited from selling the meat or other products of the carcass.

The word product is used in the statute in two connections; one as applied to carcasses, and the other as applied to animals. Section 17 speaks of "the carcass or any of the meat or product of" cattle. Section 22 also forbids the slaughtering of cattle with the intent of "selling the carcass or any of the meat or product thereof for food," without having obtained a license. On the other hand, in § 15 a penalty is imposed upon a person who sells or has in his possession with intent to sell for food "any diseased animal or any product thereof, or any tainted, diseased, corrupted, decayed or unwholesome carcass." In this section, the word "product" obviously means the product of a living animal. The section under consideration providing for the quarantine of cattle is one relating not to carcasses but to living animals, and the obvious meaning of the word "product" therein is the product of such living animals, to wit, milk, butter, cheese, etc.

I am of opinion, therefore, that it was the intention of the Legislature in the section in question to provide for the payment of the expenses of quarantined animals by the Commonwealth only when animals are quarantined which are of the class that yield edible products while living, as, for example, milch cows; and that it was not the intention of the Legislature to authorize the payment of such expenses in the case of animals no product of which while living could be sold for food purposes, and as to which consequently there could be no occasion for prohibition against such sale by the commissioners.

In the foregoing opinion I have dealt with the question only so far as it relates to your right under the statutes, as officers charged with the administration thereof. Whether for any reason the owners have an equitable claim upon the Commonwealth, independent of the specific provisions of the statute, involves questions which it is unnecessary to consider at this time.

BALLOT LAW, — MCTAMMANY VOTING MACHINES.

It is the duty of the Secretary of the Commonwealth to provide McTammany voting machines which are required to be furnished by him under the provisions of St. 1896, c. 498, § 1, containing, so far as presidential electors are concerned, knobs for groups of electors only, and not a separate knob for each candidate for presidential elector.

To the Secretary, 1896 September 30.

You have requested my opinion upon the question whether, under St. 1896, c. 498, § 1, it is your duty to provide the McTammany voting machines, which you are required under that statute to furnish to towns and cities, with separate knobs for each candidate for presidential elector; or whether you may provide only knobs enabling the voter to vote for each group of electors.

Upon a careful examination of the capacity of the McTammany machine in its present form, I do not think all the requirements of law relating to voting can be satisfactorily carried out, whichever course is adopted. I assume it to have been the intention of the Legislature to substitute the McTammany machine for the Australian ballot, preserving, however, in so doing, all the essential provisions of law relating to the Australian ballot, so far as they can be made applicable to machine voting. The McTammany machine as now constructed is provided with fifty knobs, each of which on being pressed will register a punch in a roll of paper. By certain devices, not necessary now to mention, these holes may be counted as votes for the persons whose names are connected with the knobs so pressed. There is and can be no provision in such a machine by which it can be used by a voter who wishes to vote for a candidate other than those upon the official ballot. The law has therefore provided (St. 1893, c. 465, § 6) that blank sheets of paper shall be provided for the voters, and that "any voter may vote on one of said blank ballots instead of on the machine."

As preliminary and incidental to the main inquiry, it becomes necessary to consider whether the machines can be used in connection with the blank ballots, so that a voter may perform part of his duty upon the machine, and vote for such

other candidates as he desires upon the blank ballots. In my opinion, this is impracticable, for the reason that, as I am informed, there is no way of preventing a voter from voting upon the machine for any given office, and then voting again for the same office upon the blank ballot. Even if the Ballot Commissioners should, under the authority given them to make rules, provide that no candidate upon the official ballot should be voted for upon the blank ballots, it would still be possible for a voter to vote for an official candidate upon the machine, and then for another independent candidate upon a blank ballot. It is true that this would nullify his vote to a certain extent, but it would still enable him to indicate his preference for two candidates out of those to be voted for, which would be a discrimination against the other candidates, that the spirit of the law seems to forbid. I am of opinion, therefore, that the intention of the Legislature was that a voter should elect, before beginning to exercise his right of suffrage, whether he would use the machine, or write his ballot upon the blanks provided. If any part of his voting were done upon the machine, he could not supplement it by voting upon a blank ballot. This is not only the literal meaning of the language above quoted, but is the only way in which double voting can be prevented. A voter cannot vote for the same candidate twice upon the machine. There is nothing in the structure of the machine, however, to prevent him from voting for different candidates for the same office. I am told, however, that, to a limited extent, — that is to say, where there are less than ten candidates who may be voted for for any given office, — double voting may be detected and the vote thrown out. But in the case of presidential electors, where the voter has the right to cast his ballot for fifteen, there appears to be no way of preventing the voter from voting for more than fifteen, or for all the electors who are on the official ballot.

It has been suggested that knobs might be provided both for voting by groups, and also for each elector, so that a voter could either vote in groups, or make his selection among the various candidates. This is impracticable, however, for the reason that there is no way of preventing a voter from pressing

the knob with stands for the group, thus voting for the fifteen electors to which he is entitled, and also pressing the knobs for fifteen electors, thus voting for his electors twice. This plan, therefore, cannot be considered.

If separate knobs are provided for each elector, several difficulties arise. The voter is put to great inconvenience. I am informed that there will be upon the official ballot five groups of candidates for presidential electors, being seventy-five in all. The voter, therefore, is called upon to select his candidates from seventy-five names, for which there are provided seventy-five knobs; and he is thus required, if desiring to vote the straight ticket, to vote fifteen times. But the Legislature of 1892 provided (St. 1892, c. 279, § 2) that "A voter who desires to vote for an entire group of candidates for electors shall place a cross mark in the square at the right of the party or political designation immediately above such group, and such cross mark shall count as a vote for all the candidates in such group." The plain intention of this law is to rid the voter of the annoyance of carrying in mind all the candidates for presidential electors, and to enable him to vote for his candidate for president and vice-president by a single act. Nearly all the voters take advantage of this law. The number of those who desire to separate their votes for presidential electors is almost infinitesimal. Moreover, if separate knobs are provided for each elector, I do not understand that there is any method of preventing a voter from voting for more than fifteen electors, or of detecting the fact in the count of the ballots.

On the other hand, if knobs are provided only for the separate groups of presidential electors, a voter who desires to scatter his vote for electors is driven to the necessity of using the blank ballots for all the votes he desires to cast. As is before stated, I do not think it is practicable to provide for a partial use of the machine by any voter. Nor does this method fully comply with the provisions of St. 1896, c. 498, requiring you to furnish a sufficient number of McTammany voting machines to enable "all candidates for all offices" to be voted for on such machines. It is not a substantial compliance with this

provision to provide a machine which only enables a voter to vote for such candidates by groups, and not individually.

I have suggested the difficulties which will arise, whichever form of machine you adopt. All the provisions of law cannot be carried into effect, and fraudulent and double voting effectually guarded against, by the use of the machine as now constructed, under any method. It is to be borne in mind, however, that the Legislature desired the experiment of using the McTammany machines to be fairly and fully tried. The law is to be construed to that end rather than to the abrogation of its provisions. In my opinion, therefore, you will discharge your duty if you adopt such method as will best secure the convenience of the greatest number of voters, and give to the largest number the rights and privileges which belong to them. If you provide knobs only for groups of electors, you best serve the great majority of voters, and put to the inconvenience of writing ballots only the comparatively small number who desire to vote other than by groups. If, on the other hand, you provide a separate knob for each elector, you take away from the vast majority of voters the privilege which belongs to them of voting for electors by groups, and also open the door to the possibility of double voting.

It has been suggested that machines could be constructed which would obviate some if not all of these objections. Here, again, we meet with an obstacle in the fact that it would be impossible between now and election time to construct a machine upon a pattern which would overcome the difficulty suggested; and, if McTammany voting machines are to be used at all, those now under consideration must be adopted.

Upon the whole, therefore, in view of all the circumstances and difficulties which I have suggested, I am of the opinion that you will best carry out the intention of the Legislature by providing machines containing, so far as presidential electors are concerned, knobs for groups of electors only, leaving to the voter who desires to scatter his vote the privilege of writing it upon the blank ballots.

BULFINCH STATE HOUSE, — SUB-BASEMENT. — BOILER ROOM.

The State House Construction Commission is not required by St. 1896, c. 531, § 1, to provide for a sub-basement story in the so-called Bulfinch State House, as suggested in the report of the prior commission made to the Legislature April 13, 1895; but the construction of the said sub-basement story is left to the discretion of the commission.

The said commission, in reconstructing the Bulfinch State House, may make such use as they deem proper of the boiler room, which is part of the same, although it lies without the walls of the structure.

To the State House Construction Commission.
1896
October 3.

My opinion has been orally requested upon two matters connected with the duties of your commission.

First. — St. 1896, c. 531, § 1, makes it the duty of your commission to "consider and decide upon a plan for preserving, restoring and rendering practically fireproof the so-called Bulfinch State House, substantially in accordance with the report and specifications of the commission appointed by Governor Greenhalge for the preservation of the Bulfinch State House, made to the Legislature on the thirteenth day of April, in the year 1895." In the report of that commission is the following recommendation, being the last paragraph but one of the report, to wit: "In view of the fact that the removal of the mezzanine floors would reduce the available space of the building, it is perhaps not improper to suggest that the underpinning of the foundation walls may readily be carried to a depth sufficient to allow of a sub-basement story, which would afford ample space for storage, and leave some of the upper rooms now used for that purpose available for other uses."

The question proposed by your commission is whether, in view of the statute above quoted, you are required to provide for a sub-basement story, as suggested in the report of the prior commission. I am of the opinion that the construction of a sub-basement story is left to your discretion. The essential features of your work require you to provide a plan which shall (1) preserve, (2) restore and (3) render practically fireproof the old State House. The construction of a sub-basement story is not essential to any of these results. It was suggested by the commission as a convenient way of providing additional

storage room; but was obviously not regarded by them, as, indeed, it is not, an essential feature of the reconstruction proposed.

Second. — The commission also desire my opinion upon the question whether they have the right to convert a basement room, now used as a boiler room, into a storage basement. The only doubt in relation to this question arises from the fact that the boiler room is practically outside and west of the present western wall of the old State House. It is, however, a part of the Bulfinch State House, which you are called upon to reconstruct. If the question were whether you should construct an independent basement outside the walls of the State House, it might be seriously doubted whether such an undertaking would be within the scope of your authority; but I see no reason why, as incidental to the work of restoring and reconstructing the old State House, you may not properly make such use of the boiler room referred to as you deem proper, even though it is without the walls of the structure. It is, nevertheless, a part of the building you are called upon to repair.

Citizen, — Naturalization.

One who has declared his intention of becoming a citizen of the United States, but has not been naturalized, is not a citizen of the United States, and therefore not a citizen of Massachusetts.

To the Highway Commission. 1896 October 8.

I understand that the Highway Commission desires my opinion upon what constitutes a citizen of the State of Massachusetts; particularly with reference to the case of a man who has declared his intention of becoming a citizen, but has not been naturalized.

No man is a citizen of the United States, and, therefore, not a citizen of Massachusetts, until he has been naturalized. What are called the first papers do not amount to naturalization. After a man has been naturalized, if he is a resident in Massachusetts, he at once becomes a citizen of Massachusetts.

GYPSY MOTH, — EXPENSES OF INVESTIGATING EXISTENCE OF, OUTSIDE LIMITS OF COMMONWEALTH.

The Board of Agriculture may not incur the expense of sending an agent to another State for the purpose of investigating the question of the existence of the gypsy moth in that State.

To the Board of Agriculture. 1896 October 9.

I do not think a proper construction of the laws creating your Board and defining its duties, and the subsequent acts making appropriations for the work thereof, can be said to authorize the expense of sending an agent to another State for the purpose of investigating the question of the existence of the gypsy moth in that State.

The duties of your Board, briefly stated, are to carry on the work of extermination of the insect, and prevent, so far as possible, its introduction and dispersion throughout the Commonwealth. This does not properly include the making of investigations in other parts of the country. If the Legislature had intended to authorize such expenses, the authority would have been conveyed in express terms.

CIVIL SERVICE COMMISSIONERS, — EXPENSES OF TRAVELLING OUTSIDE LIMITS OF COMMONWEALTH.

Under the provisions of St. 1884, c. 320, § 20, the necessary travelling expenses which may be paid to the chief examiner appointed by the Civil Service Commissioners consist only of such travelling expenses as are incurred in performing the work of the commission within the Commonwealth.

To the Civil Service Commissioners. 1896 October 9.

I have been called upon in several instances to consider the statutes of the Commonwealth relating to its commissions and heads of departments, with reference to the question how far they authorize travelling expenses without the Commonwealth. In some instances such expenses are expressly provided for. But where the duties of such commissions are to be performed within the Commonwealth, and do not in terms require visits to other parts of the country, I am unable to say that such travelling expenses are properly within the scope of the statutes.

The expression "necessary travelling expenses," specified in St. 1884, c. 320, § 20, means, in my judgment, expenses incurred in performing the work of the commission within the Commonwealth. Whenever the Legislature has intended that its officers and servants should travel beyond the limits of the Commonwealth, it has given such authority in express terms.

PAUPER, — SETTLEMENT LAWS, — TERRITORIAL EFFECT.

The settlement laws of each State relate to the citizens of such States, and to the relative obligation of the municipalities on the one hand and of the State upon the other hand as to such citizens.

Such laws have no extra-territorial effect, are not binding upon any other of the States of the Union, and cannot be enforced by said States.

Between different States there can be no such thing as a place of legal settlement within the contemplation of the pauper laws.

A person having removed from another State to Massachusetts, with the intention of residing here, and having taken up his residence here, becomes a citizen of Massachusetts and ceases to be a citizen of the State from which he removed. Such a person becomes bound by the provisions of the settlement laws of Massachusetts, and ceases to have any settlement in the State from which he removed, so far as Massachusetts is concerned.

The father of an infant pauper removed from Lubec, Me., to Boston, Mass., in June, 1895, with the intention of becoming a citizen of Massachusetts, bringing the said pauper with him, and was at the date of this opinion residing in said Boston. He had before removal therefrom a legal settlement in Lubec.

A State officer of Massachusetts who should take the said pauper to Lubec for the purpose of having her supported by said town would violate the provisions of the Statutes of Maine, 1891, c. 1, p. 8, providing a penalty for bringing into a town of Maine where he has no settlement a poor, indigent or insane person, with intent to charge such town with his support.

To the Superintendent of In-Door Poor. 1896 October 12.

Your letter states that the father of the pauper in question removed from Lubec, Me., to Boston, Mass., June 2, 1895, and is now residing at Maverick Square, East Boston. I assume, although it is not stated in the letter, that this removal was made with the intention on his part of becoming a citizen of Massachusetts.

A person being a citizen of the United States, and of any of the States of the Union, has the right to remove from one State to another, and to become a citizen of the State to which the

removal is made. No length of time is necessary to acquire such citizenship in the State to which the removal is made. As soon as the party in question arrived in Massachusetts, having formed the intention to reside here, and took up his residence here, he became a citizen of Massachusetts, amenable to its laws and entitled to their protection.

The settlement laws of Massachusetts, as well as those of other States of the Union, comprise a body of rules adapted to determine the respective rights of the Commonwealth and its municipalities, and the rights of such cities and towns as to each other. The Commonwealth is bound to support and maintain such of its citizens as fall into distress. This burden must be discharged by the Commonwealth, unless the person so receiving aid has in some way provided by law acquired a settlement in one of the towns of the Commonwealth. The rules of settlement are arbitrary. They are not based upon contract, but may be changed from time to time, at the pleasure of the Legislature. The purpose of them, however, is to insure relief to every citizen of the Commonwealth, either by the Commonwealth or by the town or city in which the pauper has acquired a settlement. These rules have no extra-territorial effect. They are not binding upon any other of the States of the Union, and cannot be enforced by said States. On the other hand, the settlement laws of such other States have no binding force in Massachusetts. The settlement laws of each State relate to the citizens of such States, and to the relative obligation of the municipalities, on the one hand, and of the State, upon the other hand, as to such citizens. But between different States there can be no such thing as a place of legal settlement, within the contemplation of the pauper laws. A person having removed from another State to Massachusetts becomes a citizen of Massachusetts, and ceases to be a citizen of the State from which he removed. He becomes bound by the provisions of the settlement laws of Massachusetts, and may cease to have any settlement in the State from which he removed.

Your letter states that the person in question had before removal therefrom a legal settlement in Lubec, Me. That, however, was a settlement which affected his rights so long as he

remained a citizen of Maine, and determined the relative duty of the State of Maine, and of the other towns in Maine, on the one hand, and the town of Lubec, on the other, as to his support and the support of those dependent upon him. Such a settlement, however, is not a settlement within the contemplation of the Massachusetts pauper laws. It cannot be enforced as to a citizen of Massachusetts at the instance of this Commonwealth.

It is true the statutes of Maine provide that "whenever a person having a proper settlement in any town in this State [Maine] shall hereafter live for five consecutive years without the limit of this State, without receiving pauper supplies from any source within this State, he and those who derive their settlement from him lose their settlement in such town." This, however, does not give any rights to the Commonwealth of Massachusetts. It is simply a provision which relieves the town of Lubec as against the State of Maine from the force of a settlement acquired in that town, and which has been discontinued by a residence of five years elsewhere. It does not purport to, and could not, continue to give rights of settlement in Lubec to a citizen of Massachusetts, who before becoming such a citizen had been settled in Lubec.

The principles above stated are well set forth in the case of *Dover* v. *Wheeler*, 51 Vt. 160. It has been suggested, however, that the Vermont statute, upon which *Dover* v. *Wheeler* is decided, prohibits the bringing of paupers into the State of Vermont, even when settled there; while the Maine statute only prohibits the bringing in of non-settled paupers. This, however, is not an essential distinction, for, as I have already stated, when the man in question removed from Lubec to Massachusetts, and became a citizen of Massachusetts, he ceased to have a settlement in Lubec, so far as the Commonwealth of Massachusetts is concerned. The only settlement he could then have had in Lubec was one which would be binding upon that town in case he fell into distress in any other town in the State of Maine. It was not a settlement which compelled the town to receive and support him as a citizen of another State.

I am of opinion, therefore, that a State officer of Massachusetts who should take the pauper in question to Lubec, for the purpose of having her supported by the town of Lubec, would violate the provisions of the statutes of Maine (St. 1891, c. 1, p. 8), which provides that "Whoever brings into and leaves in a town where he has no settlement, any poor, indigent or insane person having no visible means of support, or hires or procures such person to be so brought, or aids or abets in so doing, knowing such person to be poor, indigent or insane, as aforesaid, with intent to charge such town in this State with the support of such person, shall be fined not exceeding three hundred dollars or imprisoned not exceeding one year."

EXTRADITION, — FUGITIVE FROM JUSTICE.

An affidavit accompanying an application to the Governor for the surrender of an alleged fugitive from justice contained a statement that the person sought was a "fugitive from justice." Such a statement is a conclusion of law and not a statement of fact, and does not comply with the requirements of Pub. Sts., c. 218, § 1, providing that such an application shall be accompanied by sworn evidence that the person sought to be extradited is a fugitive from justice.

To the Lieutenant-Governor, acting Governor.
1896
October 24.

I have the honor to acknowledge your request for my opinion upon the sufficiency of the requisition papers accompanying the application for the surrender of E. E. Wilson, an alleged fugitive from the justice of the State of Missouri.

Pub. Sts., c. 218, § 1, provides as follows: "The Governor of this State, in any case authorized by the Constitution and laws of the United States, may, on demand, deliver over to the Executive of any other State or Territory any person charged therein with treason, felony or other crime . . . *provided*, that such demand . . . is accompanied by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, or of a complaint made before a court or magistrate authorized to receive the same."

This statute is not in contravention either of the Constitution of the United States or the Revised Statutes of the United States, § 5278, in so far as it makes provision for the evidence

to be submitted to the Governor upon whom the application for extradition is made, that the person charged is, in the words of the Constitution, "a fugitive from justice." Both the Constitution and the United States Statutes are silent concerning what proof is required. It is necessary therefore, that applications for extradition made upon Your Excellency shall be accompanied by sworn evidence that the party charged is a fugitive from justice.

The expression "a fugitive from justice" means that a person having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for this offence has left its jurisdiction and is found within the territory of another. *Roberts* v. *Reilly*, 116 U. S. 80, 97. The affidavits accompanying the application must, therefore, establish (first) that the person charged was within the State when the crime was committed; and (second) that since the commission of the crime he has left its jurisdiction, and is found within the State upon which the extradition is made.

The only affidavit that refers to this fact accompanying the application is that of one Stanton B. Wilcock, who swears that the facts stated in the petition of the district attorney are true. The petition of the district attorney states that the "said E. E. Wilson is a fugitive from justice from said State of Missouri, and your petitioner has reason to believe, and does believe that the said E. E. Wilson is now in the city of Boston in the State of Massachusetts, a fugitive from justice." Assuming that this is sufficient evidence that the person sought to be extradited is now within the Commonwealth of Massachusetts, there is yet no allegation that he was ever in Missouri. The statement in the affidavit that he is a fugitive from justice is a conclusion of law and not a statement of fact, and cannot be received by Your Excellency as an affidavit of fact. *Jones* v. *Leonard*, 50 Iowa, 106. The only suggestion that Wilson was ever in Missouri is contained in the fact that the indictment charges him with having committed a crime in Missouri on the date named therein. But the indictment, while to be taken as conclusive evidence that the person is charged with crime, is not "sworn evidence"

of any other fact, not even of the fact that he was in the place where the crime was committed at the time of its commission.

I am constrained, therefore, to advise Your Excellency that the requirements of our statute, which provides that there shall be submitted sworn evidence that the person sought to be extradited is a fugitive from justice, to wit, that he was in the State making the application when the crime was committed, and has left its jurisdiction and is now in Massachusetts, are not complied with, and that you have no authority to surrender the said E. E. Wilson as a fugitive from justice.

AUSTRALIAN BALLOT LAW, — COUNTING OF VOTES.

The name of a candidate for Governor who was nominated as such by three political parties appeared three times upon the official ballot. The vote of any person placing a mark on the ballot against his name each time it appeared should be counted as one vote for said candidate, but such vote cannot be counted for any political party.

To the Secretary. 1896 October 28.

St. 1893, c. 417, § 75, provides in substance that any political party which at the preceding annual election polled for Governor at least three per centum of the entire vote is entitled to have its nominees placed upon the official ballot. In order to carry out the provisions of this section it is necessary, if two or more parties nominate the same candidate for Governor, to print his name upon the official ballot as many times as he has been nominated by different parties, adding in each case the political designation of the party so making the nomination; and in making return of the votes cast to include not only the total number of votes cast for the candidate, but the number cast by each party of which he is the nominee.

Your letter states that George Fred Williams of Dedham has been nominated by three political parties as candidate for Governor, and that consequently his name will appear three times upon the official ballot. Your letter, in view of the fact that there may be voters who inadvertently, and contrary to the instructions of the ballot, will place a mark against his name

each time it appears, requests my opinion as to whether such votes should be counted and how.

I am of the opinion that such votes should be counted for Mr. Williams as one vote, but that they must be returned as without political designation.

The provisions of the statutes are designed to give every voter the opportunity of voting in secret, and to have his vote counted if he has made his intention clear. Where through his own fault he has left it doubtful for whom he intended to vote, his ballot cannot be counted. But a voter who marks the name of the candidate three times does not thereby obscure his intention. On the contrary, he makes it more emphatic. No possible room for doubt is left as to whom he intended to vote for. It would be a technical and unreasonable construction of the provisions of the ballot law that would forbid the counting of his vote when he had not only expressed his intention plainly, but reiterated it.

A voter, however, who so duplicates his markings, obscures his intention as to parties. His vote can be counted but once to make the necessary three per centum of any party, and, as he has marked for more than one party, it cannot be counted for any party. His vote must be returned as one vote for Governor, without party designation.

Australian Ballot Law, — Counting of Votes.

Two political parties nominated the same candidates for president and vice-president, whose names headed two groups of presidential electors upon the official ballot. Some of the electors in each group were indentical, but not all.

A voter who makes a cross in both blank spaces designated by the names of the said candidates is not entitled to have his vote counted as one vote for such electors as are indentical in the two groups, but his entire vote for electors must be rejected.

To the Secretary. 1896 October 31.

My opinion is requested upon the following question, viz. : in accordance with the provisions of St. 1893, c. 417, § 163, the names of the presidential electors are grouped upon the official ballot by parties, and each group is headed by the

names of the candidates for president and vice-president, for whom such groups of electors are expected to vote. A blank space is left at the right of the names of the candidates for president and vice-president; and if a voter places a cross in such space, he votes for the group of electors representing the party whose candidates for president and vice-president stand opposite his cross. Two groups of electors appear upon the official ballot, both of whom are nominated by political parties whose candidates for president and vice-president are respectively Bryan and Sewall. Consequently there are two spaces on the official ballot where a voter may mark for Bryan and Sewall, each representing a group of electors. Some of the electors in each group are indentical, but not all. Your question is, in case a voter inadvertently marks a cross in both places designated by the names of Bryan and Sewall, whether his vote for such electors as are indentical in the two groups can be counted as one vote for such electors.

The statute above quoted provides that in case one cross is made for a group of electors as above provided, such cross shall count as a vote for each candidate in the group. A voter, therefore, who marks in both spaces, thereby votes for thirty electors, less such number of electors as are indentical in both groups. There are three names which appear in each group. Even counting such a vote for two groups of electors as one vote for such names as are indentical, the voter has still voted for twenty-seven electors. He is entitled to vote for but fifteen. Following the rule of construction which has uniformly prevailed as to the Australian ballot, which is, that a person voting for more candidates than he has a right to thereby destroys his vote, one who has voted for twenty-seven electors when he is entitled to vote for but fifteen has not expressed his intention with sufficient clearness to entitle him to have his vote counted.

The present case differs from that considered in my letter of the 28th,* where two or more crosses were placed against the name of the candidate for Governor. In that case the voter, notwithstanding the fact that he had made more crosses than he was entitled to, voted in fact but for one man, and, for the

* See page 388, *ante*.

reason stated, his vote must be counted. In the present case, however, he has expressed his preference for twelve more electors than he is entitled to vote for. His entire vote for electors must, therefore, be rejected.

COUNTY ACCOUNTS, — AUTHORITY OF COUNTY TREASURERS TO PAY BILLS.

County treasurers may not legally pay any bills in excess of the amounts specifically authorized by law except in the cases specified in St. 1896, c. 357, § 2.

To the Controller of County Accounts. 1896 November 6.

Your letter of November 2 proposes the following questions for my opinion thereon: —

First. — Can the county treasurer pay any bills for salaries or expenses in excess of the amounts specifically authorized for the same; and can the county commissioners transfer from unexpended appropriations, or from unappropriated money, to appropriations which have been exceeded, such sums as may be necessary to balance the same, otherwise than for such purposes as are enumerated in St. 1896, c. 357, § 2?

Second. — Is Pub. Sts., c. 23, § 26, still in force?

Third. — If said § 26 is still in force, can the county commissioners under it make provision so as to enable the treasurer to pay any bills in excess of the amounts authorized by Res. 1896, c. 59?

The purpose of St. 1896, c. 357, is plainly expressed. It requires annual authorization for the expenditure of money by the several counties, and a specification of detail of the purposes for which such expenditure is to be made. It further provides that "no expenditure for any purpose shall be made in excess of the amount so specified; and no bill in excess of such amount shall be paid by the county treasurer," except as provided in the act.

The exceptions are contained in § 2. They relate to appropriations (1) for interest or debt due from the county, (2) for costs in criminal prosecutions, (3) expenses of the courts, and (4) the compensation or salaries of county officers established by law. For various and obvious reasons the law excepts these

classes of expenditures from the general provisions above stated, and provides that county commissioners may make payment for such purposes out of any money in the county treasury. As to some of them, to wit, the county debt, and the salaries of officers fixed by law, the intention of the Legislature manifestly was that no limitation of appropriation should be allowed to prevent their prompt payment, for the reason that the indebtedness is fixed and absolute. As to others, to wit, costs in criminal prosecutions, and the expenses of the courts, in view of the fact that the amount of such expenses might be increased beyond the estimates of the Legislature without fault of the county commissioners, it was obviously deemed by the Legislature proper that such increase of expenses should be provided for.

But no exception is made for salaries or expenses that are not fixed and established by law. These being within the control of the county commissioners, it was the intent of the law that as to them they should keep within their appropriation. The reasons for the passage of the law look to the prevention of precisely this class of unauthorized increased expenditures.

I am clearly of the opinion that county treasurers may not pay any bill in excess of the amount authorized, excepting in the cases specified, as above stated, in § 2 of the act.

In view of my opinion as above expressed, it is unnecessary to consider whether or how far Pub. Sts., c. 23, § 26, is repealed. Whether or not it is in all respects repealed by implication, it certainly does not operate to give county commissioners power to borrow money to meet expenses in excess of the amounts which they are authorized by law to incur.

STATE HIGHWAY ACTS, — ALTERATION OF LOCATION OF TRACKS OF STREET RAILWAY IN STATE HIGHWAY.

While a State highway is in process of construction, the Massachusetts Highway Commission, under St. 1896, c. 541, has exclusive jurisdiction to determine what changes shall be made in the location and construction of a street railway located on such a highway. But when the highway is constructed, the jurisdiction as to such changes conferred upon the town and municipal authorities by Pub. Sts., c. 113, revives.

The Massachusetts Highway Commission may order the tracks of a street railway to be moved, and pay for such removal out of the amount appropriated for the construction of State highways.

It seems that, before ordering a change in the tracks of a street railway company, the Massachusetts Highway Commission should give notice of the hearing, as provided in Pub. Sts., c. 113, § 21.

To the Highway Commission. 1896 November 18.

In your letter of August 21, you propose several questions touching the jurisdiction of the commission and of cities and towns over street railways located upon State highways.

The first question is as follows: "Do the selectmen of a town lose their powers to direct a railway company to move its tracks or make any other changes, under Pub. Sts., c. 113, § 22, on the passage of St. 1896, c. 541?"

In order to arrive at an understanding of the relative rights of the commission on the one hand, and of the officers of cities and towns on the other hand, over railroads upon State highways, it is necessary to consider what powers were conferred upon municipal authorities by the provisions of the existing laws before the enactment of the statutes relating to State highways. These provisions are found in Pub. Sts., c. 113, §§ 7, 21 and 22. Under these sections the right of adjudication as to the necessity and public convenience of permitting street railways to encumber highways is given in cities to the mayor and aldermen, and in towns to the selectmen. These boards act not as agents of the city but as public officers and their determination is final upon questions of public convenience and necessity. Under § 7, it is for them as such officers to determine whether a location shall be granted in a public way to a street railway corporation. They must give a hearing to parties interested after due notice and they may refuse the location or grant it under such restrictions as they deem the necessity of the public requires. Under § 21, the same tribunals may authorize an extension of the tracks of existing railway companies upon such conditions as they may deem proper, first giving notice as provided in § 7. They are further authorized under the provisions of § 22 to alter the location and position of such tracks "by the same authority and in the same manner as is provided in the preceding section (21) for the location of an extension." In all these cases the munic-

pal boards are the tribunals to whom is committed the question of public convenience and necessity. Their decision is final, and cannot be directed nor abrogated by the action of the city or town itself.

I do not think that the jurisdiction so conferred upon the boards of aldermen in cities and upon the selectmen was intended to be taken away by the statutes authorizing the construction of State highways. It may be that under the provisions of St. 1893, c. 476, § 14, the consent of the commission must be also obtained, in addition to the authority given by the municipal boards, before a State highway can be dug up for the construction of a street railway. This is confirmed by St. 1894, c. 497, § 2, which provides that "all openings and placing of structures in any such road (State highway) shall be done in accordance with a permit from said commission.

The work of constructing a State highway, however, is conferred by the statutes upon the Highway Commission, and they alone have jurisdiction over such work. Having determined that public necessity and convenience so require, and having thereupon decided that the Commonwealth should lay out and take charge of a given road as a State highway, the commission (St. 1894, c. 497, § 2) shall proceed to construct the way. They may contract with the city or town therefor, or, if the town does not desire to do the work, they may contract with other parties for its construction. The entire responsibility of this work is vested in the commission. The statute referred to in your question (St. 1896, c. 541) is intended to confirm this authority, so far as relates to street railways. It provides that "Whenever in the construction of a State highway it becomes necessary, in the opinion of the Massachusetts Highway Commission, to change the location, relay or change the grade of that part of any street railway located on said highway, or to place different material between its tracks, or to make any other change in the location and construction of said railway," the commission may thereupon proceed to make such change in the manner provided as above stated by Pub. Sts., c. 113, § 22, for boards of aldermen and selectmen. While the highway is in process of construction it

is under the sole and exclusive jurisdiction of the Highway Commission, and it would be very inconvenient to confer the right of making any such necessary changes in the location, etc., of street railways, as the work of construction might require, upon another tribunal. St. 1896, c. 541, therefore, gives jurisdiction during such construction to the Highway Commission, and while the work is going on they alone have the right to determine what changes are to be made. This prevents a divided or double responsibility. But when the highway is constructed, the jurisdiction of the municipal board revives, and is to be exercised in the interest of public convenience and necessity, as provided by Pub. Sts. c. 113.

The second question of your commission is as follows: "Can the Highway Commission, under St. 1896, c. 541, without an appropriation for the purpose, order the tracks of a street railway to be moved, and pay for it out of the amount appropriated for the construction of State highways?"

The alterations in the location and construction of a street railway provided for by St. 1896, c. 541, are such as are deemed necessary in the course of the construction of a State highway under St. 1893, c. 476, and St. 1894, c. 497. The making of such alterations is as much a part of such construction and included therein as the filling or grading of a highway. The phrase "construction of a State highway," used in St. 1896, c. 541, is equivalent to the phrase "construction of a State highway under the provisions of St. 1893, c. 476, and St. 1894, c. 497." There is nothing in St. 1896, c. 541, showing that the Legislature intended that the cost of making the necessary alterations provided for by said statute should be paid for in any other way than out of the appropriation for the construction of State highways. I am of opinion, therefore, that the commission may order the tracks of a street railway to be moved, and pay for such removal out of the amount appropriated for the construction of State highways.

The third question proposed by the commission is as follows: "If the previous question is answered affirmatively, what are the steps necessary for the commission to take in order to assure itself of the actual cost of the construction of the road, and in

order to bring the matter into the proper channels for securing the future repayment of the money to the State?"

The commission is concerned with the question asked only when it is necessary by the provisions of St. 1896, c. 541, that the cost of making the changes provided for therein shall be paid by the commission. It is not concerned where the company itself pays the expense of the changes at the time of making the same. If the changes are made by the railway, and the cost is to be paid by the commission, as provided by St. 1896, c. 541, the method of payment is similar to that employed where the commission itself makes the changes. The actual cost of such changes is to be ascertained by the commission. To enable itself to do this, the commission may avail itself of the provisions of St. 1893, c. 476, § 1, which provides that the commission "may establish rules and regulations for the conduct of business and for carrying out the provisions of this act." Under this section the commission is undoubtedly entitled to require any evidence which is reasonable and necessary to enable it to assure itself of the actual cost. Furthermore, under the provisions of Pub. Sts., c. 16, § 65, the head of the commission may require affidavits from claimants in proof of the validity of any claims presented by them, and the commission may undoubtedly require similar proofs and statements from the railway company. In either event, whether the changes are made by the commission or by the company, if the cost is to be paid by the commission it is clearly intended by the statute that the usual bills and statements of work done and materials furnished in making such changes, properly approved and sworn to if necessary, shall be presented to the Auditor of the Commonwealth, whose duty it is to ascertain the actual cost of such changes and certify the same to the Tax Commissioner.

The fourth question proposed by the commission is as follows: "Is the commission required under the law to give a hearing as provided in Pub. Sts., c. 113, § 22, before giving the order to change the tracks?"

St. 1896, c. 541, provides that, when the commission proposes to change the location of a street railway, it must proceed in the manner provided by Pub. Sts., c. 113, § 22, for

making such changes by boards of aldermen and selectmen. The section referred to itself authorizes the municipal board to proceed "in the same manner as is provided in the preceding section for the location of an extension." On reference to the preceding section, it appears that before acting "at least fourteen days' notice of the hearing shall be given to all parties interested, by publication in such newspapers as the board of aldermen or selectmen may determine, or otherwise." If the provision of St. 1896, c. 541, above quoted, requiring the commission to proceed in the manner provided in § 22, does not require notice, it is difficult to say what the provision means. I doubt whether the framers of the statute had anything more in mind than a general reference to the authority conferred by § 22 upon municipal boards, and whether it was intended to require notice as was provided in that section; but the words of the statute seem to require your Board to proceed in the manner required in § 22, and I am of opinion that the safer course is to give notice as provided in that section.

STATE HIGHWAY ACTS, — CONTRACTS FOR CONSTRUCTION OF STATE HIGHWAYS.

Under the provisions of St. 1894, c. 497, § 4, the Massachusetts Highway Commission is authorized to make contracts only for the entire construction of State highways or portions thereof, and it is not authorized to make separate contracts with different persons for a portion of the work of such construction.

To the Highway Commission. 1896 November 28.

My opinion is requested upon the following question: "Can this commission, under St. 1894, c. 497, § 4, enter into contracts with outside parties or individuals for separate items that enter into the construction of a State highway, or are we required under the law to advertise and accept bids only for the complete construction of a State highway?"

The statute referred to in the foregoing question, after providing that a city or town may without advertisement contract for the construction of so much of a highway as lies within its limits, further provides that, if the city or town shall not so

elect, the commission shall advertise "for bids for the construction of said highway under their supervision and subject to their approval, in accordance with plans and specifications to be furnished by said commission." The section further provides that said proposals shall be open to public inspection after the proposals have been accepted or rejected. The commission may reject any or all of such bids; or, "if a bid is satisfactory they shall, with the approval of the Governor and Council, make a contract in writing on behalf of the Commonwealth for said construction, and shall require of the contractor a bond for at least twenty-five per cent. of the contract price, to indemnify any city or town in which such highway lies, against damage while such road is being constructed."

These provisions seem to look to one contract for the entire work. There is no reference to contracts for a part of the work in the statute, and no such authority is conferred upon the commission, at least in express terms. Furthermore, the condition of the bond to be given by the contractor would seem to negative any right to contract for partial construction. The contractor, as above stated, must give bond to indemnify the city or town in which the highway lies against damage while the road is being constructed. If contracts were given to one person for materials, to another person for teaming and to still another person for the actual work of building the road, it might be difficult to determine which contractor, if any, would be liable, in case the city or town were called upon to pay damages for an injury growing out of the construction of the way.

For the reasons above stated, I am of opinion that the intention of the Legislature was to authorize the commission to make contracts only for the entire construction of State highways, or of portions of State highways, and not to authorize them to make separate contracts with different persons for a portion of the work of such construction.

COUNTY ACCOUNTS, — EMPLOYMENT OF ATTORNEY-AT-LAW BY COUNTY COMMISSIONERS AS LEGISLATIVE COUNSEL.

The county commissioners of Norfolk County employed an attorney-at-law to appear for them before the joint legislative committee on counties at its hearing relative to the estimates of the commissioners as to the amount of county taxes to be levied for the year 1896; to prepare the statement of the commissioners as to the items in said estimates; and also to appear for the commissioners before the legislative committee on metropolitan affairs.

The county commissioners were authorized to employ an attorney-at-law at the expense of the county for the purposes above specified.

The Controller of County Accounts has no authority to revise the bill of an attorney-at-law rendered to the county for services performed as above specified.

To the Controller of County Accounts.
1896
December 12.

Your letter of the 25th ultimo states that the treasurer of Norfolk County has paid by order of the county commissioners the bill of an attorney-at-law for attendance before the committee on county estimates, with items for three days at Dedham and for arranging and preparing statement, and another item for attendance before the metropolitan committee. You further state that the attorney-at-law was employed by the county commissioners to appear for them before the joint committee on counties "at its hearing relative to the annual estimates of said commissioners as to the amount of county taxes to be levied for the year 1896;" and that this bill is "for his services there, and in preparing the statement of the commissioners as to the items of the amount of their estimates," excepting the last item, which was for appearance for the commissioners before the committee on metropolitan affairs.

Your letter proposes the following questions: —

1. "Were the county commissioners authorized to employ said attorney at the expense of the county for the purposes so specified?"

2. "Has the Controller of County Accounts any obligation or authority to consider or decide as to whether the bill is a reasonable or proper one as to its charges or amount for the services rendered?"

The duties of county commissioners, as far as such duties

concern the question now submitted, are prescribed by Pub. Sts., c. 22, § 20, cls. 2 and 4.

Under these statutes they are to represent the county in all cases which are not specially provided for, and to do such other acts as may be necessary to carry into effect the powers given the commissioners by law. They are in brief to execute the powers conferred upon the corporate body and more especially, among other things, to attend to the laying out of streets, assessment of betterments, erection of certain buildings, making contracts, conveying property, and the management of law suits which the county may bring or in which it may be a defendant.

It is apparent that, while some of these acts may be done personally by the commissioners, in others they must employ assistance. When a conveyance of land is to be made by or to the county, the commissioners cannot be expected to make a personal examination of the title, or where a suit is brought, they cannot be expected to conduct it personally. Whenever professional services are required, it is the right and duty of the commissioners to secure professional assistance.

This being so, the question is whether in the case stated professional assistance was required. It is not unusual for parties appearing before legislative committees to be represented by counsel. It may well be that, in the hearings for which the charges in the bill under consideration were rendered, the county commissioners in presenting their claims needed professional services. In the absence of any statute restricting or controlling their discretion, I am of opinion that, if the commissioners thought that the interests of the county which they were charged to represent would be promoted by the employment of counsel to assist them in presenting the claims of the county, they had the right so to do.

Replying, therefore, to your first question, I am of opinion that they were authorized to employ an attorney-at-law for the purposes specified.

There is no law conferring upon the controller any authority to revise the bill under consideration.

CO-OPERATIVE BANK, — SALE OF REAL ESTATE ACQUIRED BY FORECLOSURE OF MORTGAGE.

The Board of Commissioners of Savings Banks has no authority to extend the time within which a co-operative bank must sell real estate acquired by it.

To the Savings Banks Commissioners 1896 December 12.

Your letter of December 9 requests my opinion upon the question whether your Board has authority to extend the time within which a co-operative bank must sell real estate acquired by it.

Pub. Sts., c. 117, § 19, provides that a co-operative bank may purchase real estate upon which it has a mortgage. It further provides that "All real estate so acquired shall be sold within five years from the acquisition of title thereto."

St. 1894, c. 317, § 21, cl. 9, contains a similar provision with relation to property mortgaged to savings banks, with the addition of this proviso, "*provided, however*, that the Board of Commissioners of Savings Banks may, upon the petition of the board of investment of any such corporation, and for good cause shown, grant an additional time for the sale of the same."

Pub. Sts., c. 117, relating to co-operative banks, provides in § 20 that "The Commissioners of Savings Banks shall perform in reference to every such corporation the same duties, and shall have the same powers, as are required of or given to them in reference to savings banks." It is the provision last quoted, under which, if at all, any authority of your Board can be found to extend the time within which co-operative banks must sell mortgaged real estate which they have acquired.

The history of the legislation upon this subject shows that it was not intended to confer any such authority upon your board as to co-operative banks. At the time of the enactment of the Public Statutes no additional time could be granted, even to savings banks, for the sale of mortgaged real estate acquired by them. The provisions limiting the time for holding such real estate were substantially the same both as to savings banks and as to co-operative banks; and without any provision for extension of time in either case. But by St. 1882, c. 200, § 1,

the time within which savings banks might sell such property was extended to the first day of July in the year 1883. By St. 1883, c. 52, a further extension was made to the first day of July, 1884, with a proviso, which appears for the first time in the history of the legislation, that the Commissioners of Savings Banks may grant additional time, not exceeding two years, for the sale of such real estate. St. 1886, c. 77, further extended the time of sale to the first day of July, 1888, and re-enacted the proviso contained in the statute last quoted. St. 1894, c. 317, § 21, cl. 9, which is a substantial codification of existing laws relating to savings banks, re-enacted the proviso giving your Board power to grant additional time. It clearly appears, therefore, that the authority given to your Board by the proviso in question was intended by the Legislature to be limited to sales by savings banks.

I am of opinion, therefore, that your Board has no authority to extend the time of sale for co-operative banks.

METROPOLITAN WATER ACT, — COMMONWEALTH'S LAND, — TAXATION.

Certain lands lying in the towns of Boylston and West Boylston, purchased by the Metropolitan Water Board, are not liable to taxation.

To the Metropolitan Water Board.
1896
December 16.

Replying to your favor of the 9th, inquiring as to whether certain lands purchased by your Board in West Boylston and Boylston are liable to taxation, I am of opinion that the question should be answered in the negative.

If these lands are subject to taxation, it must be by virtue of some positive and express legislative enactment. They are not liable under Pub. Sts., c. 11, because by § 5, cl. 2, the property of the Commonwealth is expressly exempted, with certain exceptions, which are not applicable in this case. The land is not liable to taxation under St. 1893, c. 352, § 1, which relates to property taken by purchase or otherwise by any city or town and situate in another city or town, and provides for certain payments from one to the other. The last-mentioned statute

does not seem to be incorporated by reference by § 30 of the metropolitan water act (St. 1895, c. 488), providing that "All general laws relating to the water supplies of cities and towns or the lands and other property used for such supplies shall, so far as they are not inconsistent with the provisions of this act, apply to and be observed in carrying out the purposes of this act." Furthermore, § 16 of the same statute contains a provision for the payment by the Commonwealth of certain sums to these towns (Boylston and West Boylston) at times therein specified, and concludes as follows: "and shall pay no tax or other payment to either of said towns on account of any property held by said water board for the purposes of a water supply."

I have found no other statutes than those above mentioned under which it might be claimed that a tax should be levied. If there is any statute relating to the matter which has escaped my attention, I shall esteem it a favor if you will call my attention to it.

TOPOGRAPHICAL SURVEY COMMISSION, — RIGHT TO ENTER UPON PRIVATE LANDS.

The agents of the Topographical Survey Commission are authorized to enter upon private lands in the discharge of their duties, if the entry is reasonably necessary, is but temporary in its nature, and is accompanied by no unnecessary damage.

To the Topographical Survey Commission. 1896 December 19.

I have the honor to acknowledge the receipt of your letter of December 7, requesting, among other things, my opinion upon the following question: "Under the act under which this commission is now acting, have we authority to enter private grounds in making the survey?"

The first authority given to your Board was under Res. 1884, c. 72, under which provision was made for a commission "to confer with the director or representative of the United States geological survey and to accept its co-operation with this Commonwealth in the preparation and completion of a contour topographical survey and map of this Commonwealth hereby authorized to be made." By Res. 1885, c. 29, an appropria-

tion was made for "the determination by triangulation of the boundary lines of the cities and towns in the Commonwealth," the work to be done under the direction of the commission. Additional appropriations have been made from time to time for the same purpose. By St. 1888, c. 336, the commission was authorized to propose changes in the boundary lines of contiguous towns, to locate and define the changes made, and to determine what monuments shall be placed for such lines.

The performance of the duties imposed by these statutes obviously makes it necessary for the commissioners from time to time to enter upon private lands. No such authority is given in terms in any of the statutes; but when an act of the Legislature imposes duties upon a public officer, it confers upon him by implication whatever authority is necessary to the performance of such duties.

The commission and its agents are public servants, authorized by statute to make a survey and map of the Commonwealth and to establish boundary lines between the towns. In the discharge of their duties as such it may become necessary to enter temporarily upon private lands. If the entry is reasonably necessary, is but temporary in its nature, and is accompanied by no unnecessary damage, such an entry does not constitute a trespass, but is within the authority of the commissioners. *Winslow* v. *Gifford*, 6 Cush. 327. See also *Cavanagh* v. *Boston*, 139 Mass. 426, 435; *Brigham* v. *Edmands*, 7 Gray, 359, 363.

The foregoing opinion renders it unnecessary to consider the other questions in your letter.

FIRE MARSHAL'S AIDS, — WITNESS FEES IN CRIMINAL CASES.

The salaries of the aids employed by the State Fire Marshal are fixed by law, and they are not entitled to witness fees while attending the trial of a criminal case.

To the Fire Marshal.
1897
January 9.

Pub. Sts., c. 199, § 36, provides that "No person employed as a district police officer, and no officer of the State whose salary is fixed by law, shall be entitled to a witness fee before any

court or trial justice of this Commonwealth in a cause where the Commonwealth is a party." In some cases the word "officer," as used in the penal statutes, includes only officers authorized to serve process; but, in my opinion, the section the language of which I have quoted gives to the word a broader signification, and is to be construed according to the usual and obvious signification of the words used.

The salaries of your aids are fixed by St. 1895, c. 452, § 1. They are officers of the State, because the positions are created by the Legislature, and their compensation is payable from the treasury of the Commonwealth. They are, therefore, not entitled to witness fees.

JUVENILE OFFENDERS, — AUTHORITY OF COMMITTING MAGISTRATE.

Under the provisions of Pub. Sts., c. 89, § 22, a court or magistrate is not authorized to place juvenile offenders in the custody of the State Board of Lunacy and Charity except upon its request.

To the Superintendent of In-Door Poor.
1897
January 11.

Confirming my oral opinion to you given this day in reply to the question contained in your letter of the 8th, I have to say that in my opinion Pub. Sts., c. 89, § 22, which provides that the court or magistrate before whom a boy or girl is brought "upon request of the state board, may authorize said board to take and indenture . . . such boy or girl," does not authorize such courts to place juvenile offenders in the custody of the State Board of Lunacy and Charity except upon its request. The object of the statute is to authorize the Board to become practically guardians of such offenders whenever in its judgment their welfare will be thereby promoted. The discretion as to whether it shall assume such duties is vested in the first instance in the Board, and, if it does not desire to assume the charge of the boy or girl, the court has no right to impose the duty.

CORPORATION, — AGRICULTURAL SOCIETY, — VOTING BY PROXY.

At a meeting of the Hampden Agricultural Society, at which proceedings were held for the election of a member of the State Board of Agriculture, the balloting resulted as follows: the whole number of votes cast was 46, of which B had 41, F. 4 and P 1. Of the votes cast for B, 39 were cast by proxy.

There being no provision in the charter or by-laws of the society regulating the mode of voting by proxy, or conferring the right so to vote, no member had such right; and, since no quorum voted, the votes cast by proxy being thrown out, no person was duly elected by said society as a member of the State Board of Agriculture.

To the Board of Agriculture. 1897 January 16.

In obedience to your request for my opinion upon the legality of the proceedings of the Hampden Agricultural Society in electing a member of the State Board of Agriculture, I beg leave to reply as follows: —

Pub. Sts., c. 20, § 1, provides that certain other persons and "one person appointed from and by each agricultural society" shall constitute the State Board of Agriculture.

The Hampden County Agricultural Society is one of those described in Pub. Sts., c. 114, § 1. Section 9 of the same act provides that it "shall admit as members, upon equal terms, citizens of every town in the county in which it is located."

The Hampden County Agricultural Society was incorporated by a special act, St. 1844, c. 56. It is not a stock company, and there is no capital stock. The constitution provides in art. 3 that "any male may become a member of this society by paying to its treasurer the sum of five dollars; females by the payment of two and fifty one-hundredths dollars." Art. 4 provides that ten members shall constitute a quorum. Art. 5 provides for the election of officers, and further provides as follows: "all of whom shall be elected by ballot or otherwise, as the society shall direct, at the annual meeting." There is no provision with regard to the mode of election of the member of the State Board. By-laws, art. 8, provides that the delegate to the State Board of Agriculture shall be a member *ex officio* of the board of directors.

The annual meeting of this society was duly called and held November 18, 1896. The records do not show the number

present. The presiding officer states that a quorum was in fact present. The election of president was first had, and the records show whole number of ballots cast 49, of which Abbe had 42 and Sanford 7. At this stage of the proceeding the tellers reported that, of the 49 ballots cast, 39 of them were represented by proxies, which were placed on file. Abbe was declared elected. Ballot for two vice-presidents was recorded as follows: whole number of votes cast, including 39 proxies, 48; Hawkins and Wright each had 42, Porter had 5, Smith had 4, 2 scattering. The first two were declared elected. The treasurer was chosen by *viva voce* vote, also the secretary without opposition. Balloting for the member of the State Board resulted as follows: whole number of ballots cast, including 39 proxies, 46; Bernie had 41, Fowler 4, William H. Porter 1. Bernie was declared elected.

No protest against the use of proxies was made until the close of the meeting, when Mr. Clark of Wilbraham said that he believed the proceedings were illegal and void; that proxies had never been used before to his knowledge in the election of officers; and he entered his protest.

An examination of the proxies shows that they were written for the most part on forms usually used for stockholders of corporations, signed and witnessed, and were made to George H. Gould, who voted upon them in each instance for the person declared elected.

The general rule is that, in the case of elections in public and municipal corporations and in all other elections of a public nature, every vote must be personally given; but in the case of moneyed corporations, instituted for private purposes, it has been held that the right of voting by proxy may be delegated by the by-laws of the institution where the charter is silent. 2 Kent Com. 294, 295. By another eminent authority it is held that the members of the corporation must vote personally, and cannot lawfully vote by proxy unless the right to vote by proxy is expressly conferred by the company's charter or by-laws. 1 Morawetz on Private Corporations, 2d ed. § 486.

I know of no express authority on the subject in Massachusetts; but Pub. Sts., c. 105, § 5, provides that "Every corpo-

ration may by its by-laws, where no other provision is especially made, determine . . . the mode of voting by proxy." In § 1 of the same chapter it is said that "The provisions of this chapter, unless expressly limited in their application, shall apply to all corporations organized under or by the laws of this Commonwealth."

The provisions of § 1 are sufficient to include such a corporation as the Hampden Agricultural Society. It is, therefore, bound by the provisions of § 5. No by-laws have been made which regulate the mode of voting by proxy, or which confer the right so to vote. In the absence of such by-law it is clear that under the statutes no member has the right to vote by proxy. This is also in accordance with the general principles of law as above stated.

The person who was elected at the annual meeting of the society by proxy votes was, therefore, not duly chosen.

It would seem further that no one was chosen, for if the proxies be thrown out, no quorum seems to have voted.

It follows that no person was duly elected a member of the State Board of Agriculture.

This opinion does not deal with the duties of the State Board in the premises. Upon this question different considerations may arise, which need not be at present discussed.

Veteran, — Honorably Discharged Soldier, — Funeral Expenses.

A person who enlisted and served in the United States army in the war of the rebellion and was honorably discharged therefrom, enlisted again before the end of the war and deserted.

He does not come within the provisions of St. 1896, c. 279, providing that certain persons who served in the war of the rebellion shall be buried at the public expense if they die without leaving sufficient means to defray their funeral expenses.

To the Adjutant General.
1897
January 16.

St. 1896, c. 279, provides that "any honorably discharged soldier, sailor or marine who served in the army or navy of the United States during the war of the rebellion," who dies without leaving sufficient means to defray his funeral expenses,

shall be buried at the public expense. This statute is one of a series of acts passed by the Legislature in recognition of the services of veterans in the war of the rebellion. Other statutes have provided that veterans shall be preferred in appointments to office. All these acts without doubt have in mind the same class of persons, and are based upon the same considerations. St. 1896, c. 517, which is an act relative to the employment of veterans in the public service, defines in § 1 the word "veteran" as meaning "a person who served in the army or navy of the United States in the time of the war of the rebellion and was honorably discharged therefrom." The language used in this definition of the word veteran is equivalent to that employed to designate the persons who may be buried at the public expense.

The plain intent of these acts, including that in relation to the burial of veterans, is to recognize the debt of gratitude due to those who served in the army in the war of the rebellion faithfully and honorably, and deserved well of their country. *Opinion of Justices*, 166 Mass. 589, 595. None of them were intended to include those who served dishonorably, or who failed in the performance of their duty. The words "honorably discharged" are used to restrict the recognition accorded by these statutes to soldiers who performed their duty, and whose honorable discharge is therefore to be taken as evidence of that fact.

This being so, the words "honorably discharged" can only fulfil the intent of the Legislature when they are taken to mean "(finally) honorably discharged." One who enlisted for a term of service and was honorably discharged therefrom, and who then enlisted again and deserted, was not finally honorably discharged, and is not within the class of persons whom the Legislature intended to recognize and reward. He was not faithful to his duty. The literal meaning of the words of the act undoubtedly apply to his case, for he was a soldier in the war of the rebellion and was honorably discharged. Statutes, however, are not always to be construed literally, especially when such construction is plainly against the intent of the Legislature. The honorable discharge in the case put was

before the whole term of service in the war of rebellion was complete. Before the completion of that entire term he failed in the performance of his duty, and is not, therefore, within the class entitled to be rewarded.

I am of opinion, therefore, that the case you put, to wit, of a man who enlisted and was honorably discharged, and before the end of the war enlisted again and deserted, does not come within the provisions of St. 1896, c. 279.

COUNTY ACCOUNTS, — AUTHORITY OF COUNTY TREASURER TO PAY BILLS AFTER EXPIRATION OF YEAR IN WHICH THEY WERE INCURRED.

Bills for any specific county purpose incurred during a given year may be paid out of the appropriation for that year, whether before or after the 1st of January of the succeeding year.

To the Controller of County Accounts.
1897
January 16.

The question stated in your letter of January 9 is this. A certain sum of money is appropriated for a specific county purpose for the year 1896. Can the county treasurer, on the order of the county commissioners, after January 1, 1897, lawfully pay a bill incurred for that purpose during the year 1896 out of the appropriation for that year? The second question is the same in effect, although it assumes that the books of the treasurer have been closed before the bill is ordered paid.

There can be no possible doubt that bills for any specific county purpose incurred during a given year may be paid out of the appropriation made for that year, whether before or after the 1st of January of the succeeding year, and whether before or after the closing of the books of the treasurer. While the law limits the incurring of the expenditure to the year for which the appropriation is made, it does not limit the time of payment. If money remains in the hands of the treasurer out of the appropriation, he may pay the bill upon the order of the commissioners out of that appropriation whenever it comes in, provided the expenditure was incurred during the year of the appropriation.

In view of the above, your third question does not require to be answered.

INSURANCE, — FRATERNAL BENEFICIARY CORPORATION, — VOTING BY PROXY, — BY-LAWS.

The members of a fraternal beneficiary corporation may not vote at its meetings by proxy, in the absence of any by-law of the corporation to that effect.

Such corporation may, however, by its by-laws determine the mode of voting by proxy.

To the Insurance Commissioner. 1897 January 23.

Your letter of January 20 requests my opinion as to whether, under St. 1894, c. 367, members of a fraternal beneficiary corporation can vote at the meetings of the corporation by proxy.

In the absence of any by-law to that effect, proxies cannot be used. But I understand from an oral interview that you further desire to know whether such companies may establish by-laws which shall provide for voting by proxy.

I have recently considered the subject of proxy voting in an opinion to the Board of Agriculture.* The statutes of the Commonwealth clearly recognize the right of voting by proxy under certain conditions. As to many corporations it is either specifically authorized or specifically limited as to the number of proxies. See, as to manufacturing corporations, Pub. Sts., c. 106, § 27; as to railroad corporations, Pub. Sts., c. 112, § 54; street railway corporations, Pub. Sts., c. 113, § 12; as to banks, Pub. Sts., c. 118, § 10; as to stock insurance companies, St. 1894, c. 522, § 32; and as to mutual companies, St. 1894, c. 522, §§ 40 and 74.

There is nothing in the statute concerning the incorporation of fraternal beneficiary organizations (St. 1894, c. 367) which authorizes voting by proxy; but Pub. Sts., c. 105, "of certain powers, duties, and liabilities of corporations," is declared in § 1 to be applicable "to all corporations organized under or by the laws of this Commonwealth, except so far as they are inconsistent with other provisions of these statutes concerning particular classes of corporations." Section 5 of this chapter provides that "Every corporation may by its by-laws, where no other provision is specially made, determine . . . the mode of voting by proxy."

* See page 406, *ante*.

Inasmuch as the provisions of this chapter are applicable to all corporations organized under the laws of Massachusetts, they must be taken to be applicable to fraternal beneficiary organizations. Such corporations may, therefore, by their by-laws determine the mode of voting by proxy.

LICENSE TO FILL FLATS, — TRANSFER OF LICENSE, — RIGHTS IN SEA-SHORE, — TIDE WATERS, — HISTORY OF LEGISLATION.

A license to fill flats in tide water, granted by the Board of Harbor and Land Commissioners under the provisions of Pub. Sts., c. 19, is not a personal trust, but the rights conferred by it pass with the property to which it relates, and are not terminated by the death of the licensee or the transfer of the property.

To the Harbor and Land Commissioners.
1897
January 25.

Your letter of December 4 requests my opinion upon the following question, to wit: "When a license to fill upon flats in tide water within certain bounds has been granted to a person under the provisions of Pub. Sts., c. 19, does the death of the licensee or the transfer of the property terminate the license? Would the purchaser of the land have a right to fill under that license, in the absence of any attempt to assign the license to the purchaser and an assent thereto by the Board?"

By the common law of England the soil of the shore between high and low water marks, and all arms of the sea, coves and creeks, where the tide ebbs and flows, are the property of the sovereign, unless appropriated to a private person by grant or prescription.

The company which undertook the settlement of Massachusetts was made a body politic by the letters-patent and charter of Charles I., having absolute property in the land within the limits of the charter, the power of making laws for the government of the colony, and full dominion over all ports, rivers, creeks and havens, in as full and ample a manner as they had before been held by the crown of England.

Among the earliest acts of legislation in Massachusetts was an exercise of sovereignty with respect to the shore or flats of coves, etc., occasioned by the desire and necessity for wharves, quays and piers. To encourage the building of such struct-

ures, the government, by the Colony ordinance of 1641–47, transferred its property in the shore of all creeks, coves and other places upon the salt water where the sea ebbs and flows to the proprietors of the upland, giving to them in fee the property of the soil to low-water mark not exceeding one hundred rods. But by this grant those who acquired this property were restricted from such use of it as would impair the public right of passing over the water in boats, and other vessels through any sea, creeks or coves, to other men's houses or lands. Under this statute the owner of flats could lawfully erect nothing on them which would obstruct or hinder such passage, though he might build wharves toward the sea, if he did not thereby straighten or interrupt the passage over the water so as to constitute a public nuisance. Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 77, quoting *Commonwealth* v. *Charlestown*, 1 Pick. 180.

This ordinance vested the property of the flats in the owners of the upland in fee, to be held subject to a general right of the public for navigation until built upon or enclosed; and subject also to the reservation that it should not be built upon or enclosed in such manner as to impede the public right of way over it for boats and vessels. Shaw, C. J., *ibid.*, p. 79.

The rights of the owners of flats are limited by and subservient to the general rights of the public, to have control over the shores of the sea and navigable waters, for the security and protection of rights of navigation. These rights, held by the king before the revolution, in trust for the public, and relinquished after the Declaration of Independence, vested in the several States, to be exercised by their respective Legislatures. They are founded on the consideration that all real estate derived from the government is subject to certain restraints for the general good, and that seashore estate, though held in fee by the riparian proprietors, is yet, on account of the peculiar nature and character, position and relation of the estate, and the great public interests associated with it, especially subject to the exercise of the rights of the public. Shaw, C. J., in *Commonwealth* v. *Alger*, 7 Cush. 95. To declare and protect these rights the Legislature has power by a general law affect-

ing all riparian proprietors to make reasonable regulations, declaring the public right, and providing for its preservation by reasonable restraints, and to enforce these restraints by reasonable penalties. *Henry* v. *Newburyport*, 149 Mass. 582, 585; *Attorney-General* v. *Boston & Lowell R.R.*, 118 Mass. 345, 348.

Before the passage of the statute requiring a license to be procured for the filling of flats in tide waters the owner of flats might, unless prohibited by the Legislature, reclaim them by building wharves or otherwise so as to exclude navigation, provided he did not wholly cut off his neighbors' access to their houses or lands. Note to *Commonwealth* v. *Roxbury*, 9 Gray, 451, 519, and cases cited; *Shively* v. *Bowlby*, 152 U. S. 1, 18, *et seq.* For a case where flats were so filled upon by the owner apparently without a license or other authority from the Legislature, see *Henshaw* v. *Hunting*, 1 Gray, 203 (1854); also *Kean* v. *Stetson*, 5 Pick. 492, 495.

The first general statute abridging this right to fill upon flats, or erect structures on soil beneath tide waters owned by private persons, was St. 1866, c. 149. It is true that by an earlier statute, Res. 1859, c. 103, it was provided that riparian owners desiring to use their property by extending wharves or otherwise might buy from the Commonwealth the right so to do; but no express prohibition was placed upon filling upon flats, etc., without buying such right or without license. Apparently any one so filling upon flats did so at his peril, and was liable to indictment if the work interfered with the means of access to other persons' lands. This statute of 1866 provided for the appointment of five persons, to constitute a Board of Harbor Commissioners, to have "the general care and supervision of all the harbors and tide waters, and of all the flats and lands flowed thereby, within the Commonwealth . . . in order to prevent and remove unauthorized encroachments and causes . . . liable to interfere with the full navigation of said harbors . . . or cause any reduction of their tide waters."

The Board was also empowered to prescribe harbor lines, — an authority previously granted to another commission, Res. 1864, c. 46. By § 4 it was enacted that all persons that might

have been or might be authorized by the Legislature to build over tide waters any bridge, etc., or to fill upon any flats, should notify the Board of the plan of work they proposed to adopt, and no such work should be begun until the said plan was approved by a majority of the Board. By § 5 of the said statute all erections and works made after the enactment of the act without authority from the Legislature, or in any manner not sanctioned by the Board where their direction was required, within tide waters flowing into or through any harbor, were declared a public nuisance and liable to indictment.

The obvious reasons for the enactment of this statute were the growth of commerce, the tendency to fill upon flats and erect wharves, as had been the custom, without the authority of the Legislature, and the necessity of protecting the waters of harbors. *Attorney-General* v. *Boston & Lowell R.R.*, 118 Mass. 345, 349. The right upon which the Legislature acted in passing the statute was undoubtedly the right mentioned above, viz., that of regulating the use and control of the shores of navigable waters for the protection of public interests depending upon free and uninterrupted opportunities for navigation. This statute required the procuring a license from the Legislature for filling upon flats, whether or not such filling would cut off other persons' access to their houses or lands. To require the action of the Legislature must have been felt to be an inconvenience which was remedied by St. 1872, c. 236, § 1, referred to later.

The next statute relating to this subject is St. 1869, c. 432, which prescribed certain conditions to be attached to all licenses thereafter granted to fill upon flats; among others, that they should be revocable by the Legislature at any time, and should expire at the end of five years from their date, except where valuable structures had actually been built.

St. 1872, c. 236, § 1, was enacted apparently to relieve the Legislature of the duty of granting licenses to fill upon flats, etc., in tide waters, and to impose such duties upon the Harbor Commissioners. Section 1 of this statute provided that "Any person may build or extend a wharf, or construct a pier, dam, sea-wall, road, bridge or other structure, fill land or

flats, or drive piles in or over tide water below high-water mark, within the line of riparian ownership, on any shore, and within whatever harbor lines there may be at the time established by law along such shore; *provided*, the license of the board of harbor commissioners is first obtained in a manner provided by the fourth section of chapter one hundred and forty-nine of the acts of the year eighteen hundred and sixty-six." The statute further provided (§ 2) for the granting of licenses to fill upon flats, etc., beyond the line of riparian ownership where harbor lines had been established, the license to set forth the terms and specify the limits, etc., of the work to be performed. The power to grant such licenses beyond the line of riparian ownership where no harbor line had been established, was also given to the said Board by St. 1874, c. 347, subject to certain restrictions.

The later statutes relating to this subject are St. 1877, c. 213, changing the organization of the Board of Harbor Commissioners, but making no change in their powers and duties; St. 1879, c. 263, again changing the organization, consolidating the boards of Harbor and of Land Commissioners into one Board, to exercise the powers conferred upon each Board, and to be called the Board of Harbor and Land Commissioners; and St. 1878, c. 74, requiring the amount of tide water displaced by filling upon flats, etc., to be ascertained and compensation to be made.

In the Public Statutes the acts referred to above appear as follows: —

St. 1866, c. 149, § 2, defining the general powers of the commission, substantially corresponds to Pub. Sts., c. 19, § 6; § 3 of said statute to Pub. Sts., c. 19, § 7; § 4 (first half) to Pub. Sts., c. 19, § 8. Pub. Sts., c. 19, § 9, is constructed from St. 1872, c. 236, §§ 1 and 2, and St. 1874, c. 347.

I have thus reviewed the history of legislation respecting tide waters and flats between high and low water marks, for the reason that it has, in my judgment, an important bearing in the determination of the question proposed. At common law a license, so far as the word concerns real estate, is an authority to do a particular act upon land of another without acquir-

ing any estate therein, and is terminated at the death either of the licensor or licensee, and may not be assigned without the assent of the licensor. *Cook* v. *Stearns*, 11 Mass. 533; *Johnson* v. *Carter*, 16 Mass. 443; *Ruggles* v. *Lesure*, 24 Pick. 187; *Hodgkins* v. *Farrington*, 150 Mass. 19. The statutes of Massachusetts, however, provide for the granting of many classes of licenses, as to some of which the act licensed is regarded as a personal trust and therefore unassignable, while as to others it has been held that the right to do the act for which the license is granted may be assigned without the assent of the authority granting the license. Examples of the first class are licenses to sell intoxicating liquor, and to carry on the business of an innholder. As to such cases, it is obvious that the principal thing to be considered in the granting of the license is the character of the person to whom the trust is committed. As to these the rules of common law prevail, and they may not be assigned without consent.

On the other hand, it has been held that a license to set up and run a stationary steam engine may be assigned at the will of the licensee. *Quinn* v. *Middlesex Electric Light Co.*, 140 Mass. 109. The opinion in the case quoted is brief, and the reasons of the decision reached are not given. But it is obvious that the reason for requiring a license for the running of a steam engine in thickly populated places is that those living near the place where the engine is established, as well as the general public, are concerned in the question whether the setting up and maintaining of a steam engine is hazardous. The license is granted not as a personal trust, but upon consideration of the fact that it is deemed by the licensing authority not to be dangerous to the community to operate a steam engine in the locality for which the license is granted.

Applying these distinctions to the question proposed, it is obvious that licenses to fill upon flats between high and low water marks belonging to that class where the principal consideration is the rights of the public, rather than the character of the licensee. As has already been shown by the history of the legislation upon the subject, the purpose of committing to your Board the jurisdiction of granting or refusing such licenses

is so to regulate the filling upon flats by riparian proprietors that the rights of the public, and of adjoining riparian owners, may be preserved. Gray, C. J., in *Attorney-General* v. *Boston & Lowell R.R.*, 118 Mass. 345, 349; *Attorney-General* v. *Cambridge*, 119 Mass. 518; *Attorney-General* v. *Woods*, 108 Mass. 436, 440. A license to fill upon flats is not granted upon any consideration affecting the character of the licensee, or as a personal trust to him, but because your Board, upon consideration of all the circumstances, is of opinion that the acts licensed will not materially interfere with the rights of the public or with adjoining riparian owners. Such a license is in the nature of a regulation of the use of flats by the riparian owner. The statute requires that the extent of the flats to be filled upon must be described by metes and bounds, and that the method of filling must be determined upon beforehand, and a plan filed with the commissioners and recorded in the registry of deeds. The period during which the acts licensed may be done is limited to five years, and is revocable only by the Legislature. All these provisions add to the force of the proposition that the rights granted by the license have no necessary connection with the personality of the licensee, but are granted as appurtenant to the ownership of the soil. For these reasons I am of opinion that the license is not to be regarded as a personal trust, but that the rights conferred by it pass with the property, and are not terminated by the death of the licensee or by the transfer of the property.

MUNICIPAL INDEBTEDNESS, — AUTHORITY OF TOWN TO ISSUE NEW NOTES IN SUBSTITUTION FOR OLD ONES, — EXHAUSTION OF LEGISLATIVE AUTHORITY.

The town of North Brookfield, having issued notes under the authority conferred upon it by St. 1889, c. 424, for the purpose of paying the expenses incurred under said statute in supplying said town with water, has no authority, even with the assent of the Commonwealth, the holder of the said notes, to issue new notes in substitution for those already existing.

To the Treasurer. 1897 February 11.

St. 1889, c. 424, is an act to supply the town of North Brookfield with pure water. Section 5 of said chapter provides that, for the purpose of paying the expenses and liabili-

ties incurred under the act, the town may issue from time to time notes to an amount not exceeding in the aggregate $100,000. By St. 1893, c. 326, this amount is increased to $150,000. Said section provides for the creation of a sinking fund; but under § 6, instead of establishing a sinking fund the town may "at the time of authorizing said loan, provide for the payment thereof in such annual payments as will in the aggregate extinguish the same within the time prescribed in this act; and when such vote has been passed, the amount required shall without further vote be assessed by the assessors of said town in each year thereafter until the debt incurred by said loan shall be extinguished."

I understand by your letter that the town may desire to substitute for those notes other notes, so that the annual charge upon the town should be less; and your letter requires my opinion as to whether, with the assent of the Commonwealth, which holds said notes, such substitution may be made.

I am of opinion that the town has exhausted the authority to borrow money given it by said act. New notes cannot be issued without vote of the town; and there is no authority for the town to vote to issue such new notes. The town having exercised the authority given by the act to issue its notes, it has thereupon become the duty of the assessors to assess the amounts due upon said notes each year. No different arrangement can be made which will be binding upon the town excepting by authority of the Legislature.

Ordinarily, a debtor and creditor may agree between themselves to postpone payment of a debt, and to substitute new notes, or evidences of indebtedness, in place of those existing; but a town can only issue its notes in pursuance of legislative authority. Its authority in respect to the expenses incurred by the introduction of pure water has been exhausted. Notes to the full amount of such expenses have been issued, by vote of the town, and the payment of them has been provided for. Only the Legislature, which created, has power to alter the situation.

SAVINGS BANKS, — BANK BUILDING.

The provisions of St. 1894, c. 317, § 21, par. 8, authorizing a savings bank to invest five per cent. of its deposits, but not exceeding $200,000, in a suitable site and building for the transaction of its business, limit the amount which such a bank may spend for such purpose, but do not prohibit it from providing for stores, halls, business offices, etc., in the structure which it is then authorized to erect.

To the Savings Banks Commissioners.
1897
February 26.

I do not think that St. 1894, c. 317, § 21, par. 8, relating to savings banks, which provides that "Five per cent. of the deposits of any such corporation, but not exceeding two hundred thousand dollars, may be invested in the purchase of a suitable site and the erection or preparation of a suitable building for the convenient transaction of its business," is to be construed as so limiting the bank that it may not provide for stores, halls, business offices, etc., in the structure which it is authorized to erect under said statute.

The intent of the statute is to limit the expenditure, not the method of occupancy. In many, if not in most cases, it would be better judgment to construct a building part of which could be rented.

STATE PAUPERS, — EXPENSE OF NURSING IN PEST HOUSE, — REIMBURSEMENT TO TOWNS.

A city or town should be reimbursed by the Commonwealth for all reasonable expenses of caring for State paupers sick with dangerous diseases in a pest house, and the amount of such reimbursement is not limited by the proviso contained in St. 1891, c. 153, to a sum not exceeding five dollars per week.

To the Board of Lunacy and Charity.
1897
February 26.

Your letter of February 9 requests my opinion as to whether a hospital for small-pox patients, established under the provisions of Pub. Sts., c. 80, §§ 70–83, is "a hospital maintained for the care of the sick," in the sense in which those words are used in St. 1891, c. 153. Under the provisions of the sections of the Public Statutes above referred to, a town may establish within its limits "one or more hospitals for the reception of persons having a disease dangerous to the public health." Pro-

vision is made for the conduct and regulation of such hospitals in such way as to prevent the spread of small-pox or other dangerous disease. Section 83 provides that "All reasonable expenses . . . incurred by the board of health of a city or town, in making the provision required by law for a person infected with small-pox or other disease dangerous to public health, shall be paid by the person himself, if able; otherwise . . . if he has no settlement, by the Commonwealth." Pub. Sts., c. 86, relating to State paupers and their removal to the State Almshouse, provides in § 25 that no city or town officer shall "send to the (State) almshouse any person infected with small-pox or other disease dangerous to the public health, or any other sick person whose health would be endangered by removal; but all such persons liable to be maintained by the Commonwealth shall be supported during their sickness by the city or town in which they are taken sick." Section 26 of the same chapter as it stood in the Public Statutes provided that the expense incurred by maintaining a person under the provisions of § 25 should be reimbursed by the Commonwealth.

Section 26 above referred to was amended by St. 1891, c. 153, by the addition of the following proviso, to wit: "*provided*, that when any person liable to be supported by the Commonwealth shall have received assistance in a hospital maintained for the care of the sick, the entire expense incurred by any city or town for said hospital aid, not to exceed five dollars per week, shall be reimbursed to said city or town by the Commonwealth in the manner herein provided."

A pest house (as a hospital maintained under Pub. Sts., c. 80, §§ 70–83, is commonly called) is undoubtedly "a hospital maintained for the care of the sick." But, if it were the intention of the proviso under consideration to modify or limit the provisions in Pub. Sts., c. 80, § 83, that "*All* reasonable expenses . . . incurred by the board of health in making the provision required by law for a person infected with small-pox" shall be paid by the Commonwealth, the language of the proviso is singularly ill chosen. It limits the expense of five dollars to cases where the person to be supported "shall have received assistance in a hospital maintained for the care of the

sick," and authorizes the reimbursement to the city or town of a sum not exceeding five dollars for the "expense incurred by any city for said hospital aid." The plain intention of this proviso is that when a person afflicted with a dangerous disease, or whose condition is such that he cannot be removed, is in a hospital, the city or town shall be reimbursed for the hospital charges incurred thereby; but, inasmuch as hospital charges are often considerable, no greater sum than five dollars shall be allowed. The expressions in the proviso, "shall have received assistance in a hospital," and "incurred by any city or town for such hospital aid," plainly refer to hospitals not maintained by the city, but to public or charitable hospitals where a charge is made to the city or town for patients placed therein.

The language of the proviso is not applicable to the case of a pest house, where the city does not incur the expense for "hospital aid," as contemplated in the proviso, but assumes the entire charge and expense of caring for the person infected. The statutes relating to the establishment of pest houses make special and extraordinary provisions for the care and sequestration of persons afflicted with small-pox or other dangerous diseases. They are to be cared for and sequestrated under established regulations from possible contact with the community, the Commonwealth undertaking to pay the entire expense of such care and sequestration in the case of State paupers. The expense of such care and sequestration would ordinarily be very much more than five dollars a week; and the mere cost of maintaining the pest house would be but a small portion of the whole charge for nursing and medical attendance. If the Legislature of 1891 had intended to limit the amount of such expense, apt language would have been employed for the purpose. The language of the proviso is not apt for that purpose; but, upon consideration of the language of the proviso itself, and taking it in connection with the provisions of Pub. Sts., c. 80, it obviously refers to cases where the patient is committed to a hospital not maintained by a town, to be supported there at the expense of the town.

This view is strengthened by consideration of Pub. Sts., c. 80, § 75, under which, where diseases like the small-pox break out in a town, the board of health therein are obliged "immediately" to provide a hospital for the reception and care of persons so afflicted; and when the condition of patients is such that they cannot be removed, the house in which they are to be sick is to be considered a "hospital," and subject to all the regulations prescribed for pest houses. Having thus imposed so extraordinary and imperative a duty upon the municipality, and practically required every patient to be put in a special and necessarily expensive hospital, and having declared that *all* expenses of providing for such cases shall be borne by the Commonwealth, in case of State paupers, it is unreasonable to suppose that, by the proviso above quoted, it was intended to relieve the Commonwealth of a great portion of the expenses so directed to be incurred.

I am of opinion, therefore, that a city or town is to be reimbursed for all the reasonable expenses of caring for persons sick with dangerous diseases in a pest house, and is not limited by the proviso of St. 1891, c. 153, to an amount not exceeding five dollars per week.

INSURANCE COMPANY OF FOREIGN COUNTRY, — BEST EVIDENCE OF AUTHORITY OF RESIDENT MANAGER, — POWER TO MAKE ANNUAL STATEMENT.

An attested copy of a document executed by an insurance company of a foreign country, appointing a resident manager in this country, is not the best evidence of such appointment, and in court proceedings would be subject to the limitations relating to the use of secondary evidence.

A duplicate of a document executed by an insurance company of a foreign country, appointing a resident manager in this country, is not a copy, but an original document, and may properly be received by the Insurance Commissioner as evidence of the authority of the person named therein.

In proving by documentary evidence alone the appointment of a resident manager in this country by an insurance company of a foreign country, acting through an executive officer, upon whom authority to make such appointment was conferred by vote of the directors, such vote shall be proved by producing the books of the company containing the record thereof, and an attested copy of the record of such vote would be subject to the limitations relating to the use of secondary evidence.

Under the powers conferred upon the resident manager in this country of the London Assurance by a certain power of attorney, he has power to make the annual statement to the insurance department required by St. 1894, c. 522, § 96.

To the Insurance Commissioner. 1897 February 26.

I have your letter of February 1, requesting my opinion upon four questions relating to a power of attorney executed by the London Assurance, conferring upon one William W. Travell authority to carry on and manage a branch office of the said corporation in New York for the purpose of transacting the business of marine insurance. The first question asked is, whether an attested copy of this document should be received by the insurance department as evidence for its own use and for possible use in the courts that Mr. Travell was duly appointed United States manager for the company.

So far as concerns the question of what your department shall regard as sufficient evidence of the authority of Mr. Travell, it is of no consequence whether the original or a copy is deposited in your office. Mere inspection of the document may be sufficient, if thereby you are satisfied with his authority. But the question of what proof you may require in case his agency be put in issue in court proceedings, should such be instituted against him or the corporation, is a more serious one.

A copy of the paper, however attested, would not be such evidence. Where a power of attorney is contained in a document the instrument itself is the best evidence of that power. To prove the contents of such an instrument in a court of law it would in most instances be necessary to produce it before the court. In certain cases, however, such proof might be had by secondary evidence, as by a copy, but these cases are limited in number and clearly defined. They are: (1) when the original writing is destroyed or lost; (2) when its production is physically impossible, or when at least highly inconvenient, as in the case of inscriptions on walls, surveyors' marks, etc., documents deposited in a foreign country the laws of which do not permit their removal, and records of a judicial court, or entries in any other public books or registers; (3) when the document is in the possession of the adverse party, who refuses, after notice, or in some cases without notice, to produce

it; (4) when it is in the hands of a third party who is not compellable by law to produce it, and, being called as a witness with a subpœna *duces tecum*, relies upon his right to withhold it; (5) when the law raises a strong presumption in favor of the existence of the document, — *e. g.*, the appointment of a person to a public office may be proved by showing that he has acted in fact in such a capacity, without showing the written appointment; (6) when the papers are voluminous, and it is only necessary to prove their general results; (7) when the question arises upon the examination of a witness on the *voire dire*, an almost obsolete process. Taylor on Evidence, § 428.

Before such secondary evidence is admitted, the foundation for introducing it must be laid by showing facts sufficient to bring the case within the exceptions above stated.

The question asked must be decided by the rules of common law. There are many statutes of this Commonwealth making what would otherwise be secondary evidence admissible equally with the original of which they are copies. Pub. Sts., c. 106, § 22, — certificates of incorporation; Pub. Sts., c. 169, § 70, — books, papers, etc., in the departments of the Commonwealth; Pub. Sts., c. 73, § 3, — power creating a resident agent of a foreign express company to receive service of process; St. 1894, c. 522, § 78, — instrument appointing the Insurance Commissioner attorney to receive service of process for foreign insurance companies. But there is no statute making admissible a copy of a power executed by a foreign insurance company to its resident manager.

The use of an attested copy of this document in court proceedings would be subject to the limitations named above. It is not the best evidence of the facts to be proved.

The second question is, whether a duplicate of this document from the home office of the company would be a proper paper for the Insurance Commissioner to receive as evidence of the authority of Mr. Travell to act as manager.

A duplicate would not be a copy, but another original document, containing the original evidence of the action of the company, and it would have all the efficacy of the original now in your possession.

The third question is, would an attested copy of the records of the company, whereby the directors give authority to an executive officer or some other person to appoint a United States manager, be a necessary document to complete the evidence?

If the fact of the appointment by the company of a United States manager is desired to be proved by documentary evidence alone, it would be necessary to show that any executive officer purporting to make the appointment had power so to do, either under the charter and by-laws of the company, or by special authority conferred upon him by the board of directors, who are presumed to have the usual powers of directors to attend to the active management of the company's affairs. But it would often be more convenient to prove the fact of appointment by showing the exercise of the powers and authority of such office openly, with the consent of the company. If documentary evidence were relied on, the actual record of any vote of the directors empowering an executive officer to appoint a United States manager would be required to be shown by producing the books of the company. An attested copy of the records of the company would be secondary evidence of their contents, and as such would be subject to the limitations mentioned above, if it were desired to be used in court.

The last question asked is, whether, under the powers conferred upon the manager as evidenced by the document above referred to, he has authority to collect and collate returns for the annual statement of the United States branch of the company to the insurance department, and to make oath to the same.

The annual statement referred to is that required to be made under the provisions of St. 1894, c. 522, § 96, for the purpose of exhibiting its financial condition. The said section provides that "The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business."

The document referred to above, after reciting that the London Assurance have appointed William W. Travell "to be their manager or general agent for the transaction of the business of marine insurance in the State of New York, and have author-

ized him to appoint such other agents for the said corporation in the State of New York as he may deem necessary for the purpose of transacting the business of marine insurance in the said State, and . . . the said corporation are desirous of conferring on the said . . . Travell special and further powers," proceeds to authorize the said Travell "to institute, carry on, and manage in New York a branch office of the said corporation to carry on the business of a marine insurance . . . and for the purposes aforesaid in the name of and on behalf of the said corporation . . . ," in conformity with directions to do any or all of certain specified acts. These powers are such as are necessary to carry on the business of marine insurance at the company's branch office in New York. In the fifth clause the language used is as follows: "for any of the purposes aforesaid, to sign, or sign, seal and deliver any deeds and instruments, and to do any other acts whatsoever which may be necessary or proper in reference thereto." The filing of the annual statement of the company with the insurance department is an important part of its business. If this duty is neglected, the transaction of any new business by the company is declared unlawful (St. 1894, c. 522, § 96); and the authority of such company may be revoked (§ 82). It is clear that the document referred to was intended to give power broad enough to enable the United States business of the company to be managed by the said Travell. I am of opinion, therefore, that he has power, under the document, to make the return referred to.

HIGH SCHOOL, — POWERS INSTITUTE OF BERNARDSTON, — CONSTITUTIONAL LAW.

The Powers Institute in the town of Bernardston is a school conducted according to law under the order and superintendence of the authorities of said town within the meaning of the eighteenth amendment of the Constitution of the Commonwealth, and may be approved by the State Board of Education as a high school under the provisions of St. 1895, c. 212, providing for the repayment to towns by the Commonwealth of the expenses for the tuition of scholars attending therein.

To the Board of Education. 1897 March 8.

The questions stated in your communications of March 1 and 4 relate to the authority of your Board to approve the Powers

Institute in Bernardston as a high school, within the meaning of that term as used in St. 1895, c. 212, § 2. By St. 1894, c. 436, a town in which no high school is maintained shall, under certain conditions, pay the tuition of children living in that town and attending the high school of another town or city. By St. 1895, c. 212, when the valuation of such town does not exceed $500,000, the expenses of such tuition shall be repaid from the treasury of the Commonwealth, provided (in § 2) that such repayment shall not be made excepting when such high school shall have been approved by the State Board of Education.

I had the honor to advise the Senate, in an opinion transmitted March 18, 1896,* that it would be unconstitutional for a town to pay the tuition of children living in a town and attending a private academy, either in the same or any other town, for the reason that such payment would be in violation of the provisions of the eighteenth amendment of the Constitution. I understand your question to be whether the Powers Institute is such a private institution, or whether it is "conducted according to law, under the order and superintendence of the authorities of the town." If the latter, then it is such a school as may be approved by the Board of Education, and one to which children may be sent by towns having no high school, at the expense of the town.

For convenience of reference I quote the article of the Constitution in question (Art. XVIII. of the Amendments): "All moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the State for the support of common schools, shall be applied to, and expended in, no other schools than those which are conducted according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended; and such moneys shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school."

The spirit of this amendment is undoubtedly to be drawn from the concluding sentence. It was the intention of the constitu-

* See page 319, *ante*.

tional convention to prevent the appropriation of public moneys to the support, directly or indirectly, of sectarian schools, and to require that schools supported by taxation should be under the control of the authorities of the town. It is not of the essence of the constitutional provision that such schools shall be in all respects identical in name or management with the different grades of public schools established by law.

Upon the facts submitted to me, the Powers Institute, although nominally an academy, and founded and largely supported by private charitable bequests, is, nevertheless, for all purposes in fact a town school. By the will of Mr. Powers the bequest which founded the school was given to the town of Bernardston "to maintain and support a grammar or high school." The legacy was accepted by the town by vote. The money was paid to the authorities of the town, and a part of it was expended for a school building. The organization of the academy was created by vote of the town. It provided for a board of trustees to be elected by the inhabitants of the town, and who were required to make annual report to the town. Under the original vote of the town it was provided that a minority of the trustees should be chosen from the inhabitants of adjoining towns; although as I am informed, no trustees have in fact been chosen excepting inhabitants of Bernardston. Whether this fact would be important or not is not now of consequence, as I am informed by your second letter that a vote has been passed providing that the trustees shall all be chosen from the inhabitants of Bernardston. I am of opinion, upon these facts, that the Powers Institute is a school "conducted according to law, under the order and superintendence of the authorities of the town" of Bernardston, and as such is a high school within the meaning of the statutes relating to the payment of tuition by towns for scholars attending therein.

USE OF PUBLIC PROPERTY FOR SECTARIAN RELIGIOUS PURPOSES, — EFFECT OF PROPOSED AMENDMENT TO THE CONSTITUTION.

The proposed article of amendment to the Constitution, set forth in House Doc. No. 428 of 1897, prohibiting sectarian legislation and the support of sectarian institutions from public funds, would prevent cities or towns from allowing a school-house or school-houses therein to be used from time to time for the purpose of religious worship by religious sects or denominations, even if the permission to use the same for the said purpose were granted without discrimination to the various different religious denominations and sects applying therefor.

To the House of Representatives.
1897
April 2.

I have the honor to acknowledge the receipt of a copy of an order of the House of Representatives, adopted March 11, requesting the opinion of the Attorney-General in writing upon the question "whether the proposed article of amendment to the Constitution, set forth in House Document number four hundred and twenty-eight of the present session, would prevent cities or towns, or the authorities of cities or towns, from allowing a school-house or school-houses therein to be used from time to time for the purposes of religious worship, provided the permission to use the same for said purpose were granted without discrimination to the various different religious denominations and sects applying therefor."

Although the question submitted, in terms, relates to the use of a school-house "for purposes of religious worship," I assume it is intended to be limited to the right of such use by religious denominations and sects. I do not understand that I am called upon to consider whether the use of a school-house for religious worship not conducted or controlled by any religious denomination or sect would be forbidden by the proposed amendment, but whether the amendment prohibits the use of public property for sectarian religious purposes, even when such use is granted indiscriminately to all sects and denominations applying therefor.

The plain purpose of the proposed amendment is to prevent the use of public property for sectarian religious purposes. Rejecting words which have no reference to the question submitted, the proposed amendment provides, specifically, that no city or town shall authorize its property to be used for the pur-

pose of aiding in any manner any church, religious denomination or religious society which is under sectarian control. This language is broad enough to include the use of a public building as a place of worship by a religious sect. Such a use would be aiding a religious organization for religious services, for a church society or organization cannot well be conducted without a place provided for such a purpose. To provide a place of worship for a religious sect is to aid it materially.

The question submitted supposes a case where public property is granted without discrimination to the various different religious denominations and sects applying therefor. The proposed amendment, however, is not directed against discrimination in favor of one sect as against any particular sect, but is intended to prevent any sectarian religious use whatever of public property. The use of such property by all sects who apply therefor would be as clearly in violation of the spirit of the amendment as would be the exclusive use by any particular sect.

Replying, therefore, specifically to the question submitted as I understand it to be intended, I am of opinion that the proposed article of amendment would prevent cities or towns from allowing a school-house or school-houses therein to be used from time to time for the purpose of religious worship by religious sects or denominations, even if the permission to use the same for said purpose were granted without discrimination to the various different religious denominations and sects applying therefor.

INSURANCE, — FIRE COMPANY, — EXPLOSION.

A fire insurance company may not add to its policies a slip or rider containing an agreement that in consideration of the payment of an additional premium the policies shall cover loss or damage by explosion to the property thereby insured, whether fire ensues or not.

To the Insurance Commissioner. 1897. April 3.

Your letter of March 15 submits the following question. Certain insurance companies are proceeding to add to the standard form of policy provided by the Massachusetts statutes a slip or rider, a copy of which is contained in your letter, by

which it is agreed in substance that in consideration of an additional premium the policy shall cover "loss or damage by explosion to the property hereby insured, whether fire ensues or not;" may such a slip or rider be lawfully attached to such fire policies?

The Massachusetts insurance act (St. 1894, c. 522) provides in § 60 that "No fire insurance companies shall issue fire insurance policies on property in this Commonwealth, other than those of the standard form herein set forth," except in certain cases stated in the seven following clauses. Of these, cl. 7 provides that "A company may write upon the margin or across the face of a policy, or write or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form . . ."

It is apparent that these regulations are meant to control merely the form of the contract of fire insurance, not the substance, and to protect the public from becoming bound by stipulations in these contracts difficult to discover, in the absence of such regulations, except by careful examination, and the existence of which would often escape detection. Such stipulations, if inserted in the contract of insurance in the manner provided by cl. 7, above quoted, would at once attract the attention of persons desiring to take out policies. It cannot be said, however, that § 60, above quoted, was intended to limit or define the contracts which fire insurance companies may make, or to prescribe that no terms inconsistent with those contained in the standard form of policy should be incorporated in contracts of insurance made by such companies. If this were the meaning of the section, it would be impossible to give any effect to cl. 7, allowing additions or modifications to be made to the provisions contained in the standard form. Whatever limitations fire insurance companies are subject to, so far as concerns the kind of business in which they are allowed to engage and the substance of the contracts which they make, must arise from the terms of their charters and the provisions of the statutes. Notwithstanding the fact, therefore, that the standard form of policy contains the clause that the amount

insured against is "not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only," this fact is not to be taken as determining the present question, although it may have some bearing upon it.

St. 1894, c. 522, § 3, as amended by St. 1897, c. 66, provides that "it shall be unlawful for any company to make any contract of insurance upon or concerning any property . . . in this Commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act . . ."

It is furthermore provided by St. 1894, c. 522, § 29, which as finally amended appears in St. 1896, 447, § 1, that insurance companies may be formed as provided in the following section for any *one* of certain purposes enumerated in the nine following clauses. Of these, the first reads as follows: "To insure against loss or damage to property by fire, lightning, or tempest on land, upon the stock or mutual plan." St. 1894, c. 522, § 30, prescribes the procedure for organizing such a corporation; and § 31 of the same chapter, as finally amended by St. 1896, c. 447, § 2, provides that "No corporation so formed shall transact any other business than that specified in its charter and articles of association."

The slip or rider in question purports to incorporate into a contract of fire insurance a clause insuring property against "loss or damage by explosion, . . . whether fire ensues or not." It is nowhere provided in the statutes of this Commonwealth that such a contract of insurance may be made. Loss or damage caused by explosion of steam boilers may be insured against (St. 1896, c. 447); also loss caused by accident other than by fire to apparatus used for extinguishing fires, among which causes of damage explosion might and probably would be included. But insurance companies can be organized only for *any one* of certain purposes defined by law; they cannot combine the business of several kinds of insurance. St. 1896, c. 447, § 1. It is clear, therefore, that a fire insurance company

must confine itself strictly to the business purposes set forth in its charter, viz., insurance against loss or damage by fire, and may not go outside of this limit in issuing its policies insuring against loss by explosion without violating the provisions of St. 1894, c. 522, § 31, as amended by St. 1896, c. 447, § 2. I am of opinion, therefore, that fire insurance companies may not add to their policies slips like that above mentioned.

SAVINGS BANKS, — AUTHORIZED INVESTMENTS, — FIRST MORTGAGE OF REAL ESTATE, — BONDS SECURED BY MORTGAGE.

A savings bank may not purchase bonds which are a portion of a larger number secured by a first mortgage of real estate executed by the obligor to a third person as trustee for the benefit of bondholders.

To the Savings Banks Commissioners.
1897
April 8.

Your letter of March 17 submits the following question, to wit: "The owners of a tract of land with buildings thereon in Boston, propose to mortgage the premises to a trust company as trustee to secure an issue of bonds made by the owners of the property amounting in the whole to less than 60 per cent. of the value of the property. Is it lawful for a savings bank to invest in some of these bonds?"

St. 1894, c. 317, § 21, provides that "Deposits and the income derived therefrom shall be invested only as follows: *First.* On first mortgages of real estate, situated in this Commonwealth, to an amount not to exceed sixty per cent. of the valuation of such real estate." The question submitted, therefore, is, whether the purchase by a savings bank of bonds which are secured by a first mortgage of real estate of the obligor, executed to a trust company as trustee for the security of the bondholders, is a loan "on a first mortgage of real estate," within the meaning of the section quoted.

The restrictions as to the investments of savings bank deposits, so far as they relate to mortgage loans, were first enacted in the form in which they now appear in St. 1876, c. 203, when mortgages of real estate to trustees to secure bonds issued by the owners thereof were comparatively unknown. It is very probable that the question of investments by savings banks in

such bonds was not considered by the Legislature at that time. It does not follow, however, even if such investments were not known when the law was enacted, that its language may not be broad enough to include loans of the character in question. It not infrequently happens that statutes enacted in view of existing facts are found to be comprehensive of new conditions as they arise in the growth of business. The question submitted by your letter, therefore, requires me to consider whether a form of investment which may be assumed not to have been within the contemplation of the Legislature when the provisions now in force were enacted, is included within the intent and meaning of such provisions. The question is one of importance, for the increase in the number of great business enterprises has made it frequently necessary to resort to the form of bonds in question for the purpose of negotiating large loans. Many enterprises require the use of more capital than can be supplied by any one individual or corporation, and by making a mortgage to a trustee to secure bonds, and then selling the bonds indiscriminately, larger loans can be floated than would be practicable under a mortgage made directly to the person loaning the money.

I am of opinion, however, that the purchase of bonds by a savings bank, which are a portion of a larger number secured by a mortgage given by the obligor to a third person as trustee for the benefit of bondholders, is not a "loan upon mortgage," within the meaning of the statutes relating to savings banks. Those statutes deal with various classes of loans, and the language employed is that used by business men in commercial transactions. In certain cases loans may be made upon bonds or notes not secured by a mortgage; upon mortgage bonds; upon notes secured by collateral; upon personal notes; and upon mortgages of real estate. A bond of the character in question would not ordinarily be termed a mortgage, but a bond; and the holder thereof would not be a mortagee, but a bondholder. It is in this sense that the language of the section quoted is to be taken. "Loans upon first mortgages of real estate," as that expression is used in the statute, are loans made to an individual or a corporation upon the security of a

mortgage given by the borrower to the savings bank. Certain rights attach to the holder of a mortgage which do not appertain to the holder of a bond secured by a mortgage in the hands of a trustee. It was in my opinion, the intention of the statute to authorize savings banks to loan upon mortgages only when the full and unrestricted rights of mortgagees are conferred upon the bank, to the end that the entire control and custody should be in the hands of the bank.

But in the case of the purchase of bonds this would not be so. For example, in the particular instance upon which the question arises, in which a copy of the mortgage and declaration of trust have been submitted to me, the trustee has the discretion to foreclose or not, as he deems best. A bondholder cannot act except in concert with a certain percentage of the bondholders. The trustee, before foreclosing, may require reasonable indemnity from the bondholders. The trustee has a prior lien upon the property for his charges, and may act by agents and shall not be held responsible for the negligence or wrong-doing of such as may be selected with due care. It is further provided that where doubts arise as to the authority of the trustee the holders of a majority of the outstanding bonds may instruct the trustee.

These provisions and limitations are certainly not equivalent to the absolute control conferred by a mortgage upon a mortgagee. The holders of bonds so secured, as was stated by Mr. Justice Morton in *Knight* v. *Boston*, 159 Mass. 551, 555, "cannot release, assign, or foreclose the mortgage, nor do any of the other things that mortgagees may do. They are bondholders, and not mortgagees. The bonds do not constitute a loan on mortgage by the petitioners in the ordinary acceptation of those words." The quotation, it is true, is from a dissenting opinion, but the majority opinion in the case proceeds upon grounds which clearly distinguish it from the present question, and to which I will hereafter call attention.

The savings bank statute looks to the absolute protection of depositors in savings banks, and doubts as to the meaning of the language used are, when practicable, to be resolved in favor of the depositors. When a savings bank loans money and

takes a mortgage, it has the right of release, assignment and foreclosure, limited only by the conditions of the mortgage. It may also purchase the property at the foreclosure sale. St. 1894, c. 317, § 21, cl. 9. It has immediate, absolute, and practically unlimited, right of action whenever necessary to protect its interests. It was this form of loan in which the Legislature intended savings banks might invest sixty per cent. of the money of their depositors. The purchase of a bond, although secured by a mortgage of real estate, the holding of which gives only an equitable interest in the mortgage, and the right only upon certain conditions to call upon the mortgagee to act for the protection of the bondholders, is not an equivalent security, as matter of law, nor necessarily so in fact. In my opinion, it is not within the intent and scope of the provision in question.

I am aware that in the case of *Knight* v. *Boston*, above cited, it was held by a majority of the court that for the purposes of taxation such bonds were to be regarded as loans upon mortgage, and consequently to be exempt from taxation. This decision, however, proceeds upon the ground that the statutes exempting loans upon mortgages from taxation were enacted for the purpose of preventing double taxation. As the law stood before the exemption was made, the real estate was taxed to the owner, and the mortgage loan to the mortgagee. The result of this was that in many cases the same property was twice taxed. It was for this reason that loans upon mortgages were by statute exempted from taxation. The reason of this exemption, however, would apply with equal force to loans made upon bonds secured by a mortgage to a trustee.

The decision, therefore, cannot be regarded as authority, for the contention that for the purposes of investment of deposits by savings banks such bonds are to be regarded as loans upon mortgage of real estate. On the contrary, as I have attempted to show, the purpose of the limitations provided for savings bank investments clearly point to the opposite conclusion.

Whether, as is suggested in the able brief submitted by counsel upon the subject, the bonds in question would be a safe and prudent investment for savings banks, and would have

practically all the safeguards which attach to mortgage loans, is for the consideration of the Legislature rather than for your Board. If, as is stated, such forms of loans are becoming more frequent, and are a desirable investment for savings banks, it may be that the Legislature will authorize savings banks to purchase them. But the question I am called upon to consider is whether they are included within the plain meaning and intent of the statutes now in force. For the reasons above stated I am of opinion that they are not.

LAW LIBRARY ASSOCIATION, — FEES OF CLERKS OF COURTS, — NATURALIZATION FEES.

The county treasurer of Worcester County may not pay to the County Law Library Association either the fees received from clerks of courts or those received in naturalization cases, but he is authorized to pay, on account of county law libraries, only a sum not exceeding two thousand dollars, the amount named in Res. 1897, c. 40.

To the Controller of County Accounts.
1897
March 12.

The question submitted in your letter of April 26 relates to the construction of certain statutes and resolves of the Commonwealth which are apparently inconsistent, unless the earlier statutes are to be regarded as repealed by the later statutes.

Under the provisions of Pub. Sts., c. 40, § 6, as amended by St. 1882, c. 246, county treasurers were required annually to pay to law library associations in their respective counties for the maintenance of law libraries, all money paid into the treasury during the year by clerks of courts, to an amount not exceeding two thousand dollars in any one year, and also such further sums as the county commissioners might deem necessary and proper. It was further provided by St. 1885, c. 345, § 6, that all fees received by clerks of courts in the Commonwealth in naturalization cases should be paid to the county treasurers, to be paid by them in turn to the treasurers of county law libraries, which sums were stated to be "in addition to the sums which such associations are now entitled to receive by law." St. 1897, c. 153, after providing that the expenditure of money by counties shall be authorized by the

General Court by appropriation, annual or special, declares in § 9 that "No county expenditure shall be made nor liability incurred, nor bill paid for any purpose, in excess of the amount appropriated therefor, except as hereinafter provided." Under the resolve granting a county tax for the county of Worcester (Res. 1897, c. 40) there is appropriated "For law libraries, a sum not exceeding two thousand dollars."

The question in your letter is, whether the county treasurer should pay to the Law Library Association the fees received from clerks of courts, including naturalization fees, which in the county of Worcester exceeds the sum of two thousand dollars; or whether the amount to be paid over to the Law Library Association is limited to the sum of two thousand dollars appropriated by the resolve.

The law libraries in the several counties substantially belong to and are maintained by such counties. St. 1842, c. 94, was the first act in relation to law library associations. Under this act the practising attorneys in the several counties were constituted corporations to hold and manage the law libraries belonging to the counties, and the act provided a method of organizing such corporation within a certain time, which was extended by St. 1844, c. 157. It was not until St. 1856, c. 71, that any express provision was made for the maintenance and enlargement of such libraries. That act authorized the county commissioners to pay from the county treasuries to the treasurers of the law library associations for their maintenance such sums as they might deem necessary and proper, not exceeding the amount paid into such treasuries by clerks of courts. St. 1859, c. 172, required the county treasurers to pay on January 1 of each year to the treasurers of the library associations one-quarter of the amount received from the clerks of the courts during the preceding year, not exceeding one thousand dollars; but this act expressly declared that it should not be construed to prevent county commissioners from authorizing other payments from the county treasuries under St. 1856, c. 71. No change was made in the law relating to this subject in the General Statutes. Gen. Sts., c. 33, § 6. By St. 1863, c. 215, the whole amount received by county treas-

urers from clerks of courts was to be paid to the law libraries up to the amount of four hundred dollars, and one-quarter of the surplus in addition, the whole amount paid not to exceed one thousand dollars. St. 1874, c. 156, repealed St. 1863, c. 215, and provided that the law libraries should receive the whole amount received from the clerks of courts up to the amount of one thousand dollars, and one-quarter of the surplus in addition, the whole amount not to exceed two thousand dollars. St. 1881, c. 89, gave to the law library associations all sums paid to county treasurers by clerks of courts, not exceeding fifteen hundred dollars, and authorized the payment of such further sums as the county commissioners might deem necessary and proper. In this form the statute appears in the Public Statutes (Pub. Sts., c. 40, § 6). The only other changes in the statutes relating to this subject have been quoted above.

During the time covered by the statutes cited relating to law library associations, there was no definite policy of legislative control over county finances. The amount to be expended for different purposes rested largely in the discretion of the county commissioners. But, by St. 1895, c. 482, the policy was adopted of bringing the management of the finances of the counties within the control of the Legislature. This policy has been extended by later statutes, to wit: St. 1896, c. 357, and St. 1897, c. 153. By St. 1895, c. 482, it was provided that the expenditure of money by the several counties should be authorized annually by law, that the purposes for which such expenditure might be made should be specified in detail, and that no expenditure for any purpose should be made in excess of the amount specified except as therein provided. The act allowed the county commissioners, when they thought it proper, to spend money in excess of the amount appropriated, by permitting them to transfer from one appropriation to another, or to make the expenditure out of any unappropriated money in the treasury; but in all such cases the commissioners were obliged to cause the reasons for such transfer or expenditure to be placed upon their records. The commissioners by the said act were further authorized to incur debts, after the close of the financial year, and before the making of the next annual appro-

priation by the Legislature, to an amount not exceeding the debts incurred in the previous year for the same period and purpose.

The next statute relating to this subject — St. 1896, c. 357, which, though it expressly repealed the statute of 1895, re-enacted its essential provisions — still further restricted the power of county commissioners. By this act the expenditure of money by counties in excess of the amounts appropriated, instead of being within the discretion of the county commissioners, was authorized only for certain well-defined purposes. The statute of 1896 was followed by St. 1897, c. 153. This act provides that the county treasurers of each county, except Suffolk, shall annually publish a report of county receipts and expenses for the previous year, in detail, which shall contain a table showing the appropriation made by the Legislature for each specific object, the amount expended out of each appropriation, the unexpended balance of each such appropriation, and, if payments have exceeded the appropriation, the amount of the excess. It further provides that the county commissioners shall annually prepare estimates of county receipts and expenditures for the next year, which are to be reported to the Legislature. By § 7 the expenditure of money for the several counties, except Suffolk, is to be authorized by the Legislature by appropriations. The appropriations are to be of two kinds, annual and special. A separate appropriation is to be made for each expenditure.

By § 8 it is provided that the amount to be levied as the county tax shall be authorized annually by the Legislature, and shall be computed by adding together the amounts of the annual and of the new special appropriations, if any (so far as the money therefor was to be raised by taxation, and not by borrowing), and then, by deducting "so much of the probable receipts from all sources, except loans, and of the unappropriated balance in the county treasury at the closing of the treasurer's books for the previous financial year, as may be deemed by the General Court advisable."

Section 9 is as follows: "No county expenditure shall be made nor liability incurred, nor bill paid for any purpose, in

excess of the amount appropriated therefor, except as hereinafter provided."

Section 10 authorizes the making of any expenditure required by law in excess of the appropriation out of any money in the treasury; and § 11 provides for the payment of bills to a certain amount, incurred after the close of the financial year, and before the making of the regular annual appropriations by the Legislature.

I am of opinion that the statutes last referred to, to wit, those of 1895, 1896 and 1897, must be taken to have repealed all provisions in relation to county expenditures inconsistent therewith. It follows that the provisions of the earlier statutes, which required the payment by the county treasurers to law library associations of fees received from clerks of courts, including naturalization fees, are no longer in force. They were a part of the system of legislation which prevailed at the time such laws were enacted, and under which the control of the expenditure of money was vested in the county commissioners with certain limitations, of which the acts in question were an instance, all of which are superseded by the statutes of 1895, 1896 and 1897. The policy of county expenditures has been radically changed. The Legislature has undertaken to limit by annual appropriation the amount which may be expended by counties for any specific purpose. The method of computing the amount to be levied annually as the county tax illustrates this change. Such computations are made substantially by taking the difference between the amounts appropriated and so much of the probable receipts, together with the unappropriated balance in the treasury, as the Legislature shall deem advisable. The receipts referred to are to be "from all sources." St. 1897, c. 153, § 8. No exception is made of receipts from clerks of courts or receipts on account of naturalization fees, and no such exception is intended. The purpose of the Legislature to define the sums to be expended for all purposes, including law library associations, is clearly manifest.

Your question relates specifically to the resolve (Res. 1897, c. 40) granting a tax for Worcester County. By that resolve certain sums are appropriated for the expenses of the county

of Worcester for 1897, among which is an item of "a sum not exceeding two thousand dollars for law libraries;" and the county commissioners of that county are authorized to levy a certain sum as county tax, to be expended, as the resolve says, "together with the cash balance on hand and the receipts from other sources, for the above purposes." This resolve is in conformity with existing statutes. All receipts, from whatever source, including, of course, the fees of clerks of courts and naturalization fees, together with the amount raised as county tax, are to be expended for the purposes specified in the resolve, and the amount to be expended is clearly limited by the terms of the resolve. It is not to be presumed, and the statutes clearly forbid such an assumption, that an implied exception was made in favor of the receipts from clerks of courts, and in naturalization cases, which under the former statutes were to be paid to law library associations.

I am of opinion, therefore, that, in accordance with the provisions of St. 1897, c. 153, § 9, the county treasurer of Worcester County may not pay to the County Law Library Association either the fees received from the clerks of courts or those received in naturalization cases, but that he is authorized to pay on account of county law libraries only a sum not exceeding the amount named in Res. 1897, c. 40, to wit, two thousand dollars.

COUNTY ACCOUNTS, — PERSONS EMPLOYED TO PUT PROBATE RECORDS AND FILES IN ORDER, — MODE OF PAYMENT.

Persons employed to put probate records and files in order, pursuant to the provisions of St. 1891, c. 225, should be paid for their services directly from the county treasury.

To the Controller of County Accounts.
1897
May 13.

St. 1891, c. 225, provides that the county commissioners in each county are authorized to cause the files and records of the probate court therein to be rearranged, indexed and docketed, dockets worn or defaced to be renewed, and the indexes to be consolidated, under the direction and supervision of the registers of said court, when in the judgment of said commissioners public convenience demands it.

Action having been taken under this statute in certain counties the question arises whether the persons so employed are to be paid by the register from funds supplied to him for that purpose by the treasurer, or by the county treasurer.

It is claimed that, inasmuch as clerks employed under statutes authorizing registers to employ extra clerical assistance in the performance of their duties are paid by the registers, persons employed under this statute should follow the same rule, and be placed on the register's pay roll. The analogy, however, is not good. The statute authorizing extra clerical assistance for registers, like Pub. Sts., c. 158, § 24, St. 1887, c. 39, and St. 1889, c. 209, are intended to provide for clerical assistance to the registers in the performance of the duties imposed upon them by the statutes defining such duties. The question whether such persons should be paid by the registers in the first instance, or by the county treasurer, is not raised and need not be considered. But the work provided for by the statute of 1891, above quoted, is no part of the duty of the register as prescribed by Pub. Sts., c. 158, or by any other statute. It is no part of his duties to cause the files and records to be rearranged, or to have worn dockets renewed, or indexes consolidated. It is special work which the Legislature has seen fit to authorize to be done under the direction of the county commissioners. Although the work is done under the direction and supervision of the register, it is still done under the employment of the county commissioners, and is to be paid as other expenses incurred by the county commissioners are paid, to wit, from the county treasury to the persons employed to do the work, and upon their vouchers.

MARRIAGES, — AUTHORITY OF CLERGYMAN OR RABBI TO SOLEMNIZE.

A clergyman or rabbi, duly authorized as such to solemnize a marriage in this Commonwealth, may perform the marriage ceremony anywhere within the Commonwealth, regardless of the place of his residence or of that of the contracting parties.

To the Secretary. 1897 May 19.

The question upon which you desire the opinion of the Attorney-General is as to the construction of St. 1894, c. 409, § 5.

Pub. Sts., c. 145, § 22, provides that "every marriage shall be solemnized in the city or town in which the person solemnizing it resides, or in which one or both of the persons to be married reside." The statute in question (St. 1894, c. 409, § 5) provides that "Any clergyman or rabbi duly authorized to solemnize a marriage in this Commonwealth may perform the ceremony anywhere within the same." The question you suggest is, whether the latter statute authorizes such a clergyman or rabbi to perform the marriage ceremony anywhere within the Commonwealth, without regard to the place of residence of himself or either of the persons to be married.

If the question be answered in the negative, then it is not difficult to see that no change has been made in pre-existing laws by St. 1894, c. 409, § 5; and the section in question means nothing whatever.

Such a construction is not to be favored. Statutes are not to be construed, unless the terms plainly require such a construction, so as to render their provisions absurd or meaningless. This is especially true in regard to remedial statutes, like this in relation to marriages. It is the policy of our legislation to favor marriages rather than to hamper them by limitations and restrictions. This principle is carried so far that a marriage ceremony performed by a person whom the parties supposed to be authorized to solemnize marriages shall be regarded as valid, although the magistrate had no jurisdiction in fact. The regulations relating to contracting and solemnization of marriages are, for the most part, to be construed, not as conditions precedent to the validity of the marriage ceremony, but rather as penal statutes affecting the officials concerned in such marriages. It is the policy of the law to make it easy for

persons to get married, and to confirm and establish a marriage, however contracted, if in good faith, rather than to throw doubt upon it.

The statute in question is to be taken as intending to further this policy. Literally construed, it authorizes a clergyman or rabbi to perform marriages anywhere within the Commonwealth, regardless of the residence of the contracting parties. Before the passage of the statute a clergyman duly authorized to solemnize marriages could perform the ceremony in the place of residence of the parties or either of them. This statute must be taken to have given him larger license, and to authorize him to perform the duties of his office wherever he may be found within the Commonwealth. Any other construction leaves the law precisely as it existed before the statute was enacted.

The act applies, of course, only to clergymen authorized to solemnize marriages; that is, to a minister of the gospel, ordained according to the usages of his denomination, residing in the Commonwealth and continuing to perform the functions of his office; and to a duly licensed rabbi of an Israelitish congregation, who has filed with the clerk of the town or city where he resides a certificate relating to his official position, and a certificate of the establishment of the synagogue of which he is rabbi, and the term of his engagement, as required by St. 1896, c. 306.

I am of opinion, therefore, that St. 1894, c. 409, § 5, is to be construed as authorizing a clergyman or rabbi, duly authorized to solemnize a marriage in this Commonwealth, ordained according to the usages of his denomination, who resides in the Commonwealth, and continues to perform the functions of his office, to perform the marriage ceremony anywhere within the Commonwealth, regardless of the place of his own residence or of that of the contracting parties.

METROPOLITAN SEWERAGE ACT, — EXPENSE OF SYSTEM, — ASSESSMENT UPON CITIES AND TOWNS, — RIGHT TO ASSESS, FOR CURRENT YEAR, AMOUNTS REQUIRED IN THAT AND PREVIOUS YEARS.

The amount which should have been assessed in 1896 upon the cities and towns included in the metropolitan sewerage district on account of the expenses of the metropolitan sewerage system was not assessed in that year, because the commission appointed according to law to apportion the amount of such assessments for the five years beginning in 1896 did not report until too late for such assessment to be made.

It is both the right and the duty of the Auditor of the Commonwealth to assess upon the cities and towns included in the metropolitan sewerage district, for the year 1897, the whole amount of the assessments required for both the years 1896 and 1897.

To the Auditor. 1897 May 20.

In your letter of May 13 you state that the amount which should have been assessed upon the towns in the district on account of the metropolitan sewerage system for 1896 was $307,000; that the commission appointed under the provisions of St. 1889, c. 439, § 14, to apportion the amount of said assessment for the five years beginning in 1896, did not report until too late to assess the towns during that year, and that consequently no assessment was made in that year. The question submitted by your letter is, whether you have the right now to assess upon said towns the amount of the assessment for 1896 and 1897, both to be paid this year.

The general scheme of metropolitan sewerage provides for the construction of a system of sewers by a commission acting under the authority of the Commonwealth, and whose expenses and disbursements are to be paid out of the treasury of the Commonwealth from the proceeds of loans made therefor. Provision is made for a sinking fund sufficient to take care of the loans when they mature. Eventually the whole expense is to be borne by the cities and towns included in the system, in the following manner: the amount of money required each year to meet the interest charges, the requirements of the sinking fund, and the expenses of maintenance, is to be assessed upon the cities and towns within the district served. This assessment is to be apportioned by a commission appointed every five years by the Governor and Council, to determine the amount of the

apportionment for the succeeding five years. The report of this commission when accepted by the court is binding upon all parties.

Under § 13 of the act quoted a commission was appointed to assess the expenses for the first five years. The report of this commission having been accepted by the court, assessments were made for this five years and collected from the several cities and towns.

Section 14 of the same act provides that before the expiration of said term of five years another commission shall be appointed to make the apportionment for the next period of five years; which apportionment is in like manner binding upon all parties. But inasmuch as this commission failed to make its report seasonably, no assessment could be collected during the year 1896.

Assuming that it is constitutional to collect the expenses of the sewerage system from the cities and towns within the district, I do not think that it is unlawful to collect from such cities and towns the amount required each year, even if by reason of circumstances not within the control of the Treasurer it becomes necessary to collect assesments for two years in one year. The purpose of the act is to impose all the expenses of the system upon the cities and towns within the district. The charges are so distributed as to be annual, but there is no express provision in the statute that the assessments are necessarily to be annual. It is, of course, the duty of the Treasurer to make the assessments as soon as he may lawfully do so; and to compute the amount required for a given year, together with the deficiency in the assessment of the previous year, and to make his assessment in accordance with the apportionment fixed by the commission. The fact that he was prevented from doing this in the year 1896 does not relieve the cities and towns in the district from the obligation to pay the assessment due for the year 1896. They are charged with no additional burden if the amount which should have been assessed in 1896 is added to the amount to be assessed for 1897, and both assessments collected together. The law is not to be construed so that the burden of any year shall for any reason fall upon the Commonwealth. The towns and cities under the act owe the Com-

monwealth the expenses incurred under the scheme of the act for the year 1896. The fact that you were unable to collect the tax for that year does not discharge the debt.

Whether the Legislature shall deem it equitable to require payment of the expenses of two years in one year is not for your consideration. If no provision is made for the relief of the towns, I am of opinion that it is your duty to assess for the current year the whole amount required both for 1896 and 1897, and that you may lawfully do so.

MILITIA, — BRIGADIERS-GENERAL, — TERM OF OFFICE, — CONSTITUTIONAL LAW.

Senate Bill No. 188 of 1897, entitled "An Act relative to the term of office of brigadiers-general in the militia," is not in violation of any provision of the Constitution of Massachusetts or of the United States.

To the Governor. 1897 May 26.

In response to your verbal request I have examined the bill entitled "An Act relative to the term of office of brigadiers-general in the militia" (Senate Bill No. 188),* upon the question of its constitutionality.

It has been suggested that the bill is unconstitutional for the reason that it is in violation of the prerogatives of the Commander-in-Chief, who, it is claimed, has the exclusive right under the Constitution of discharge of officers of the militia.

In my opinion this objection is not well taken.

The office of brigadier is recognized in the Constitution of Massachusetts. Chapter II., sec. I., art. X., provides for the manner of election of brigadiers; and a subsequent paragraph in the same article further provides that, having been elected and commissioned, they shall not be removed from office but by the address of both houses to the Governor, or by fair trial and court-martial. This portion of the article relating to removal, however, was repealed by art. IV. of the Amendments, which provides that "All officers commissioned to command in the militia may be removed from office in such manner as the Legislature may, by law, prescribe." Conceding that the

* Enacted as St. 1897, c. 438.

words in the Amendment "by law" are to be interpreted as limiting the Legislature to general laws upon the subject, and not as authorizing special acts of removal directed against individuals, I cannot yet interpret the Amendment otherwise than authorizing the Legislature to make such general laws relating to the removal of officers of the militia as in its wisdom it deems expedient. The Amendment confers the power of removal upon the Legislature, to be exercised in such manner as it may provide.

I am aware that by c. II., sec. I., art. VII., of the Constitution the Governor is made Commander-in-Chief of the militia, with all the powers and duties incident thereto. If this provision stood alone, it might be construed, as giving the Governor the right of removal of officers of the militia. But to hold that no officer of the militia can be removed excepting by act of the Governor, is to deny any meaning or effect to the Amendment of the Constitution above quoted. The plain intent of the Amendment was to confer upon the Legislature the right to provide for removal of officers of the militia. This may be done by a general law fixing a time limit, by a general law retiring officers at any given time or age, or in such manner as the Legislature may prescribe. It is well settled that the Legislature has the power to shorten the term of office of any officer the tenure of whose office is not fixed by the Constitution. *Taft* v. *Adams*, 3 Gray, 126.

The bill in question provides, substantially, that all brigadiers who, on the first day of August, 1897, shall have held their positions for seven years or more, shall be placed on the retired list on that day. The bill is general in its terms, and applies to all of a class of officers created by the Constitution. The fact that there are but two brigadiers in commission, and that both of them happen to have been in commission for more than seven years, does not make the bill special in its character. Special legislation is that which operates to deprive individuals specifically of their rights, privileges and immunities, discriminating between them and others in the same situation. Legislation which applies equally to all of a class is not made special by the fact that the number in the class is limited.

It has further been suggested that under St. 1893, c. 367, § 63, a method of discharge was provided, and that this bill is in violation of the provisions of that act. It scarcely need be said, in reply to this objection, that, in so far as the bill in question is inconsistent with the provisions of the statute of 1893, it operates as a repeal of that statute.

The bill in question does not differ essentially from St. 1876, c. 204, § 4, by which all the general and field officers were removed from office. No serious question was ever made of the constitutionality of this act. Moreover, it was discussed in an *Opinion of Justices*, 132 Mass. 600. The section discharging the line officers was referred to without criticism.

It is further suggested that the bill is in violation of art. I., sec. 9 of the Constitution of the United States, providing that no bill of attainder shall be passed; and also of art. XII. of the Declaration of Rights, providing that no subject shall be "deprived of his property, immunities or privileges, etc., but by the judgment of his peers, or the law of the land."

It is claimed that the bill is in effect judgment passed upon the present brigadiers-general, convicting them of inefficiency, and removing them from office therefor. If this were so, it would undoubtedly be in conflict, for that reason, both with the Constitution of the United States and the Constitution of Massachusetts. It may well be added that the Legislature could make charges against an officer, try him therefor, and punish him by removing him from office and making him ineligible for re-election.

But this objection takes into account rather the causes which may have led to the passage of the bill than to the language of the bill itself. Its constitutionality is to be determined not by its history, but by its provisions. The courts have no right to infer that the reason which animated the Legislature in passing the bill in question was to punish certain officers of the militia for previous acts or omissions by them.

The bill is in terms a declaration by the Legislature that the term of office of brigadiers-general should be limited to seven years. This limitation is fixed thereupon not only for those who shall hereafter be elected to the office, but for those who

are now in office for an indefinite tenure. As already stated, it has been held that the Legislature had the right to abridge the term of office of any officer whose tenure is not fixed by the Constitution. Moreover, as I have already stated, the Legislature has the power under the Constitution to provide for the removal of the officers of the militia. It is to be presumed that this bill is passed in exercise of the right so conferred upon the Legislature. Indeed, the idea of punishment or attainder is clearly negative, by reason of the fact that the bill is general in its terms, and applies to officers hereafter elected. Those who are removed from office by the provisions of § 2 may not justly complain that their removal is in the nature of censure or punishment, but rather in the exercise of a policy concerning the tenure of offices of the militia established by the bill.

It remains to consider another objection to the bill, which to my mind presents far greater difficulties than those heretofore considered. Section 2 provides that the officers who cease to hold office on the first day of August shall be ineligible for reelection; and the same ineligibility is imposed upon all future brigadiers-general after one term of service. It is claimed that this is in violation of art. IX. of the Declaration of Rights, which is as follows: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

I have no doubt that the clear purpose of this article is to confer upon every citizen, having the qualifications prescribed by the Constitution, the right to vote for offices of the government and the further right to be elected to such offices. It has uniformly been held that the Legislature has no authority to limit the right of suffrage by imposing qualifications in addition to those fixed by the Constitution. On the other hand, I do not know of any instance where the right of every citizen to be a candidate for all offices of government has been attempted to be abridged or limited by imposing qualifications or restrictions not found in the Constitution. For example, c. II., sec. I., art. II. of the Constitution provides that no person shall be eligible

to the office of Governor unless at the time of his election he shall have been an inhabitant of this Commonwealth for seven years next preceding. It would, in my opinion, be unconstitutional to add to that provision by enacting that the term of residence must be ten years, or any term longer than seven years. For the same reasons, an act which should attempt to limit the number of times to which a citizen could be elected to the office of Governor, or to fix an age limit between which he could not be elected, would be in violation of the spirit if not the letter of art. IX. of the Declaration of Rights above quoted. The purpose of the article was to give every citizen possessing the constitutional qualifications the right to be a candidate for office. To say that one could not hold the office of Governor if over a given age, or if he had been Governor a certain number of years, would be to deprive that citizen of the right assured to him by the article quoted.

In discussing this article, Chief Justice Field, in *Brown* v. *Russell*, 166 Mass. 14, 21, says that "the article, so far as it extends, does declare the principle that all persons having the requisite qualifications have an equal right to elect and to be elected to public office."

If, therefore, the office of brigadier-general is included within the scope of this article, the bill in question cannot stand. No qualifications limiting the eligibility of citizens to the office of brigadier are found in the Constitution. If, therefore, every citizen has the constitutional right to be a candidate for the office of brigadier-general, the bill in question takes away that right by denying to those who have held the office for seven years the right to be a candidate for election thereto.

The political rights of citizens are not lost by any number of elections to office. One who is elected to the office of Governor has still the same right to be a candidate for re-election. So one who may be a candidate for the office of brigadier-general under the Constitution may be a candidate again, and his right in this respect cannot be abrogated by the Legislature.

But, upon such consideration of the subject as I have been able to give in the limited time allowed me, I am unable to reach the conclusion that the provisions of art. IX. of the

Declaration of Rights apply to officers of the militia. It is true that they are recognized in the Constitution. The manner of their election is provided, as well as the manner of their removal from office; but they are not officers of the civil government, to which primarily, at least, the "Declaration of Rights and Frame of Government" was intended to apply. That instrument was declared in the preamble to be the forming of "a new constitution of civil government."

The election of military officers is not such an election as is referred to in art. IX., which declares that "all elections ought to be free." The electors of officers of the militia are by the Constitution "the members of the trained band and alarm list," who alone have the right to elect captains and subalterns; the latter being the electors of the field officers, who themselves elect the brigadiers. It may be assumed that the members of the Massachusetts volunteer militia, an organization differing essentially from the enrolled militia, constitute what is termed in the Constitution as "the trained band and alarm list;" and therefore the Constitution has observed it by placing the election of militia officers in their hands. But every citizen has not the right to be a member of the active militia. Numerous qualifications for enlistment have been enacted by the Legislature, and the policy has long since been adopted of permitting companies to choose their own members. There is scarcely any analogy between the militia and the departments of the civil government. While the Constitution clearly recognizes the militia, it by no means makes the holding of office therein a political right. On the contrary, while, as I have already said, no attempt has ever been made to impose qualifications upon the rights of citizens to be elected to civil office, the Legislature has from time to time prescribed the qualifications of those who should be elected to the office of brigadier. See Gen. Sts., c. 13, § 36; Pub. Sts., c. 14, § 33; St. 1893, c. 367, § 32. If an office in the militia is to be regarded as one which every citizen has the constitutional right to be elected to, then the qualifications imposed by the statutes referred to are unconstitutional. That it has not been so considered is obvious upon consideration of the history of legislation in re-

gard to the militia. If the Legislature may prescribe that a person under conviction of crime, or a common drunkard, a pauper, or a person disqualified by law from enrolment in the militia shall be ineligible to military office, it certainly has the right to affix other qualifications; as, for example, that the candidate shall be taken from the ranks of the militia, or that he shall be below a given age, or, as in the case of the bill in question, that he shall not have held office for a certain number of years.

It may well be doubted, therefore, whether art. IX. of the Declaration of Rights applies to officers of the militia; and whether it should not be construed as referring only to civil and political offices. This view is much strengthened, as I have already stated, by the fact that it has been so uniformly construed by the Legislature. While, therefore, I am unable to say that the question is free from doubt, I am yet of opinion that the presumption of constitutionality which attaches to legislative acts is to be invoked in favor of the bill.

Upon consideration, therefore, of all the objections which have been suggested against the bill, I am constrained to advise Your Excellency that it is not in violation of any provisions of the Constitution of Massachusetts or of the United States.

INSURANCE, — ASSESSMENT CONTRACT, — ADMISSION OF FOREIGN COMPANY.

A contract of insurance, providing for the payment of a fixed sum for annual dues to cover expenses and limiting the maximum number of assessments of a fixed amount that may be levied per month to cover losses, is not a contract of insurance upon the assessment plan, under St. 1890, c. 421.

A foreign insurance company, that writes contracts on that plan in other States, should not be admitted to do business in this State, although it agrees to write contracts in this State, on the assessment plan, according to our law; because, the policies issued in Massachusetts being payable out of the receipts of the company generally, are payable, in part at least, from other sources than the premiums received "by assessment upon other persons holding similar contracts.

To the Insurance Commissioner. 1897 May 28.

Your letter of April 1 requires my opinion upon two questions: first, whether the form of limited term policy, with the limitations provided therein, a copy of which is submitted with

your letter, is a level premium or an assessment contract: and, second, whether a foreign corporation can properly be admitted upon its agreement not to issue contracts in Massachusetts which it issues to members elsewhere.

The form of policy submitted with your letter is that issued by the Knights Templars and Masons Life Indemnity Company of Chicago, a foreign corporation. The company professes to issue policies upon the assessment plan, so-called. The object of the company is stated in its constitution to be "to furnish life indemnity or pecuniary benefits to the widows, orphans, heirs, relatives, devisees or legatees of deceased members, or to members physically disabled." Article 4, § 4, of the constitution provides that "upon the death of any member an assessment, increasing with age, shall be made upon the surviving members, provided an assessment is needed, according to the following table of rates." There is also provision for annual dues to cover expenses, of one dollar per one thousand dollars. The board of directors are further authorized to issue limited term policies of insurance, such limited term not to exceed five years, on such conditions as the Board of Directors shall deem for the best interests of the company. The form of policy submitted is conditioned upon the payment by the insured of "all dues and assessments made upon him as such member, in pursuance of the constitution and by-laws of the company."

So far the plan of assessment insurance is followed. But in the form submitted with your letter there is a further contract that "the said member shall pay only one assessment per month, according to the table printed on the back of this policy, in addition to the annual due of one dollar per thousand, as hereinafter provided, unless such an emergency should arise that the said one assessment per month would not be sufficient to pay his proportion of the losses of the company on policies that are not over five years old; in which event extra assessments may be levied for a sufficient sum to comply with the law of the State of Illinois." This provision is in effect a contract limiting the maximum number of assessments for losses arising under a certain class of policies to one per month.

This contract of limitation of the number of assessments is plainly a departure from the plan of assessment insurance. The essential difference between the so-called "level premium" and "assessment" forms of insurance, is that in "level premium" insurance, the company, whether mutual or stock, makes its own computations as to the probable amount required of the insured to enable it to fulfil its contract with him, and establishes a rate of premium based upon such calculation. The insured takes no responsibility of the accuracy of the computation. He is entitled to have the amount of his policy paid upon the fulfilment of the event insured against, whether the premiums are sufficient to pay it or not. If they are in excess of the amount required, the company, unless there is some statutory or contract provision to the contrary, may retain the excess; and, on the other hand, if they fall short, the company must make up the deficiency.

Assessment insurance proceeds upon a basis essentially different. The company attempts no computation. It agrees with the insured that when a death or disability happens, under which a policy becomes payable, it will make an assessment upon all other persons insured in the company for the purpose of paying the loss. By the statutes of Massachusetts, it is authorized to make a contract limiting the amount of each assessment, but may not make a contract limiting the number of assessments. Under the operation of this form of insurance no premiums are payable by the insured until a death happens; consequently, in the earlier years of such a company the amount of assessments called for may be expected to be comparatively inconsiderable; while, on the other hand, as members grow old, and mortality increases, the number of assessments will proportionately increase, so that eventually the aggregate of assessments in any given year will greatly exceed the amount which would have been payable under a level-premium contract. The company under the form of its establishment, as well as by its contract of the insured, should have no other resources to pay losses, excepting assessments. It is claimed that this method is more equitable, inasmuch as the insured pays the exact cost of insurance and not an arbitrary sum fixed by contract, as in the case of a level-premium insurance.

It is obvious, therefore, that when a company makes contracts containing a provision like that submitted with your letter, in which it agrees to a limitation of the maximum number of assessments, it is no longer insurance upon the assessment plan. The company is not a mere agent to collect assessment as losses occur, which is the theoretical position of an assessment company. It goes further and agrees that a limited number of assessments will be sufficient to pay all losses. This being so, one of two things must happen. Either it must make its assessments larger than the amount actually required to pay death losses as they occur so that it may be able to provide for the contingency of more than one death per month, or it incurs the risk of being unable to pay all the losses that may occur.

Whether such a contract is in all respects a level-premium contract, it is not necessary to consider. It is sufficient for the purposes of your inquiry to say that it is certainly not a contract upon the assessment plan. It is not within the terms of the definition given to assessment insurance by St. 1890, c. 421, in which it is said that "every contract whereby a benefit is to accrue to a party . . . named therein, which benefit is conditioned not upon fixed payments but upon the collection from time to time of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan."

For these reasons, I am of opinion that the form of policy submitted with your letter is not an "assessment" contract, within the meaning of that word as used in the statutes of the Commonwealth relating to insurance.

Your letter further states that the company will waive the issuance of this form of insurance in Massachusetts, and confine itself here to the business of insurance upon the assessment plan. Your second question is, whether it may properly be admitted to do business in Massachusetts upon such an agreement.

The difficulty with this proposition is that the company is still at liberty, and presumably will continue, to issue policies in other States in the form prohibited here. The losses incurred on policies issued in Massachusetts will be paid out of

the assessments received by the company, including those received on such term policies. I have already stated the reasons which lead me to the conclusion that such term policies are not contracts of insurance upon the assessment plan. It follows that the benefits accruing to the policies issued upon the assessment plan in Massachusetts are not conditioned upon the "collection of assessments upon persons holding similar contracts."

If one form of policy is issued in Massachusetts, and another is issued elsewhere, those issued in Massachusetts, being payable out of the receipts of the company generally, are payable, in part at least, from other sources than the premiums received "by assessment upon persons holding similar contracts." The Massachusetts policies, therefore, cease to be policies upon the assessment plan, within the statutory definition given above. That being so, they should not be authorized in this Commonwealth.

VAGRANT, — COMMITMENT, — STATE FARM, — HABEAS CORPUS.

Vagrants other than those committed in accordance with the provisions of Pub. Sts., c. 88, § 5, may not lawfully be sentenced to the State Farm for a period of less than six months, unless transferred thereto as authorized by law; but a person committed as a vagrant to the State Farm by a court of competent jurisdiction for a period less than six months may be lawfully held therein; and is not entitled to be discharged therefrom on *habeas corpus*.

To the Superintendent of the State Farm.
1897
May 29.

Your letter of May 4 requires my opinion upon the question whether you may legally hold a vagrant committed to the State Farm for less than six months, other than one committed in accordance with the provisions of Pub. Sts., c. 88, § 5.

St. 1884, c. 258, § 1, which is the only statute authorizing the direct commitment of vagrants to the State Farm, provides that they may be sentenced to the State Workhouse (now the State Farm) for not less than six months nor more than two years. Pub. Sts., c. 207, § 42, provides that vagrants may be sentenced to the workhouse for a term not exceeding six months. But the word "workhouse" in this statute obviously refers to the local, and not to the State, workhouse. The sec-

tion is a re-enactment of St. 1866, c. 235, § 3, under which vagrants "shall be committed for a term not exceeding six months to the house of correction for the county, or the house of industry or workhouse, where the conviction is had."

Under the system of transfers authorized by the statutes of the Commonwealth a vagrant transferred to the State Farm may be held there for the remainder of the term of his sentence, whether that is for less than six months or not. Male vagrants committed to a house of correction may be removed therefrom by the Commissioners of Prisons to the State Farm (St. 1885, c. 35, § 1), "there to be kept during the remainder of the sentence in the same manner as if such person had been originally committed thereto." Pub. Sts., c. 219, § 6. Male vagrants may also be punished by imprisonment in the Massachusetts Reformatory under St. 1886, c. 323, § 5, and may then be transferred to the State Farm, there to serve the remainder of their original terms of sentence. St. 1887, c. 292.

It follows that, unless transferred under the provisions of the statutes quoted in the preceding section, vagrants cannot lawfully be sentenced to the State Farm for a period of less than six months.

It does not follow, however, that you may not legally hold a vagrant committed for less than six months. I assume that the person so committed was sentenced by a court having jurisdiction of the person and of the offence charged; the only irregularity being that the sentence was for a less time than the minimum sentence to the State Farm. This is an error, which may be corrected by the court on writ of error by increasing the sentence to the minimum period if the person imprisoned so desires. *Lane* v. *Commonwealth*, 161 Mass. 120. But he is not entitled to relief from sentence on *habeas corpus*, nor to recover damages from the committing officer or from the keeper of the State Farm, because there is error in his sentence. Inasmuch as the court has jurisdiction of the offence, his only remedy is, as I have indicated, by suing out a writ of error, the result of which will be that his sentence will be corrected, as authorized by Pub. Sts., c. 187, § 13. *Sennott's Case*, 146 Mass. 489.

INSURANCE, — MASSACHUSETTS BENEFIT LIFE ASSOCIATION, — COMMISSION OF INVESTIGATION, — EMPLOYEES OF COMMISSION, — COMPENSATION, — ATTORNEY-GENERAL.

The agents, examiners, experts and counsel employed by the special commission appointed under the authority of St. 1896, c. 515, to investigate the affairs of the Massachusetts Benefit Life Association have no valid claim upon such association for their compensation.

Such commissioners do not incur any personal liability in employing agents, examiners, experts and counsel under the authority of St. 1896, c. 515, if such employment is made and expressed to be made in accordance with the provisions of the said statute.

St. 1896, c. 515, authorizing such commissioners to employ agents, examiners, experts and counsel, and providing for the payment by the said association of the expenses and compensation of the commissioners and of persons so employed, furnishes no certain means of collecting the same from the said association.

It is the business of the Attorney-General to deal with questions of law only, and he is not called upon to answer the inquiry whether it is the duty of each commission to continue its investigation without certain and adequate means being provided to pay for its services and expenses.

St. 1897, c. 415, does not relieve the special commission appointed under the authority of St. 1896, c. 515, of any duties imposed upon it by the latter statute, but simply imposes a limitation of time upon it regarding the performance of such duties.

To the Governor. 1897 June 3.

I have the honor to acknowledge the receipt of the letter of Hon. H. W. Bragg, chairman of the special commission appointed to investigate the affairs of the Massachusetts Benefit Life Association, addressed to Your Excellency, and referred to me for reply.

St. 1896, c. 515, provides in § 3 that the commission shall have the power to employ agents, examiners, experts and counsel. The provision as to their compensation is as follows: "The reasonable compensation of and expenses incurred by such commission for such examination, including the payment of expenses and compensation of all persons employed by said commission, shall be paid by the company or association, after the same have been first approved by the governor and council."

The first question contained in the letter is, whether the agents, examiners, etc., employed by the commission "have any valid claim for their compensation upon the association." Clearly not. Their contract is with the commissioners and not

with the association, and they would have no privity to maintain suit against the association thereon. If the association refuses to pay the commissioners' bills, they having been approved by the governor and council, whatever remedy, if any, exists by reason of such neglect is by suit by the Commonwealth, under whose authority the commission acts. This matter will be further discussed in my answer to your third question.

The second question contained in said letter is whether the commissioners "incur any personal liability in so employing such persons." Not if the employment is made and expressed to be made under the provisions of St. 1896, c. 515.

The third question is as follows: "Does the act provide any certain and adequate means for paying such persons so employed?" The practice of collecting from Massachusetts corporations expenses of supervision and investigation is not new. Pub. Sts., c. 112, § 12, provides that the expenses of the Board of Railroad Commissioners shall be borne by the several railroad corporations according to their gross earnings, and to be apportioned by the Tax Commissioner, who shall assess such expenses due from each upon said corporation, "and such assessments shall be collected in the manner provided by law for the collection of taxes upon corporations." There is also a provision in St. 1894, c. 522, § 6, par. 3, under which the expenses of examination of any foreign insurance company by the Insurance Commissioner shall be paid by the company. No provision for the enforcement of this assessment is made, but, as the admission of the company is within the control of the Insurance Commissioner, none is needed.

I know of no certain and adequate means of collecting the expenses and services of the commission from the Massachusetts Benefit Life Association, and herein is the principal defect in St. 1896, c. 515.

The fourth question inquires whether it is the duty of the commission to continue its investigation without certain and adequate means being provided to pay its expenses and services. I do not think the Attorney-General is called upon to answer this inquiry. His business is to deal with questions of law only. How far the commission may feel authorized to abstain

from performing the work assigned to it by the statute in consequence of the lack of effective provision for payment of its services, may be a question for the consideration of Your Excellency, under whom the commission exists, but not of the law officer.

The fifth and last question contained in the letter submitted inquires whether St. 1897, c. 415, relieves the commission from the provisions of St. 1896, c. 515. I can see no reason for answering this question in the affirmative. The last-named statute simply imposes a limitation of time, but no limitation of duty.

TOWN PAUPERS, — "TOWN" IN STATUTE NOT CONSTRUED TO INCLUDE CITIES, — INSANE PAUPERS, — CHILDREN, — OVERSEERS OF POOR.

The provisions of St. 1897, c. 374, entitled "An Act relative to the support of the poor in towns," apply to towns only, and not to cities.

Pub. Sts., c. 28, §2, which enacts that all laws relating to towns shall apply to cities so far as they are not inconsistent with the general or special provisions relating thereto, was not intended to provide that in all statutes in which duties were imposed upon towns the word "town" should include cities, but only in such general laws as relate to towns themselves considered as municipalities.

The provisions of St. 1897, c. 374, are applicable to such children as come within the meaning of the word "paupers."

The provisions of St. 1897, c. 374, do not apply to inmates of the State institutions for the insane supported therein by cities and towns.

The provisions of St. 1897, c. 374, are not applicable to persons who are assisted to a greater or less extent by the overseers of the poor, on account of their partial inability to care for themselves.

The provisions of St. 1897, c. 374, are not applicable to paupers provided for at the State Farm or State Almshouse.

Under the provisions of St. 1897, c. 374, each overseer of the poor in a town is required to visit each place where the town paupers are provided for, in person, and may not make such visits through an agent.

To the Board of Lunacy and Charity. 1897 June 14.

Your letter of May 24 submits a number of questions relating to the interpretation of St. 1897, c. 374, to which I beg to reply specifically as follows: —

1. "Do the provisions of the law apply to the cities of the Commonwealth, as well as to its towns?"

The statute is entitled "An Act relative to the support of the poor in towns." It provides that "In towns where paupers are provided for otherwise than in a workhouse or almshouse

the overseers of the poor shall investigate each place where the town paupers are to be supported, and shall make such contract for the support of town paupers as in the judgment of the overseers of the poor will secure proper care and maintenance for such paupers." It further provides for a record of each case, containing the terms and conditions of the support agreed upon; and for a certificate to be made by a majority of the overseers of the poor that an investigation has been made, and that they are satisfied that the poor of the town will be well and properly cared for. In terms the act applies to towns, and I am of the opinion that it is intended to apply to towns only, and not to cities.

The only possible doubt arises from the provisions of the Public Statutes, one of which is c. 3, § 3, cl. 23, declaring that "The word 'town' may be construed to include cities;" the other is c. 28, § 2, to wit: "Chapter twenty-seven and all other laws relating to towns shall apply to cities so far as they are not inconsistent with the general or special provisions relating thereto." It is to be observed, however, that the chapter of the Public Statutes relating to the support of paupers (c. 84) makes repeated use of the expression "cities and towns." That, being in the same statutes as the two provisions referred to (making the word "town" inclusive of cities), is significant. Unless we are to conclude that the Public Statutes were carelessly drawn, there must have been in the minds of the legislators some reason for making the statutes relating to the support of poor apply in terms to cities as well as to towns; for otherwise the general provisions of c. 27 would have rendered it unnecessary to repeat so often the expression "cities and towns." It is clear, therefore, that the word "town" does not include cities in all the statutes which have to do directly or indirectly with towns. The distinction may be thus stated. Chapter 27, in which it is provided that the word "town" should include cities, deals directly with privileges, duties and obligations of towns as municipalities. Chapter 84 of the Public Statutes, on the other hand, deals principally with the support of paupers, and the mere fact that paupers must be supported by towns does make it in terms an act "relating to towns." It is an act

relating to a specific matter of legislation, to wit: the support of paupers, and as to which it may, and in fact does, happen that the duties imposed upon towns and upon cities are different. In my opinion, therefore, it was not the purpose of Pub. Sts., c. 28, § 2, to provide that in all statutes in which duties were imposed upon towns the word "town" should include cities, but only such general laws as related to towns themselves considered as municipalities.

The act under consideration is binding upon towns, but the subject of legislation with which it deals is indicated by its title, to wit: "An Act relating to the support of poor in towns." The words "in towns" limit what otherwise would have been the general scope of the act, and make it applicable not to cities, but to towns only.

2. "Does the word 'paupers' in the law include children as well as adults?"

The word "paupers" in art. III. of the Amendments to the Constitution of the Commonwealth was defined in *Opinion of Justices*, 11 Pick. 539 (February 14, 1832), to mean "persons claiming assistance for themselves or families from the provisions made by law for the poor." It was there said that the word had acquired a precise and technical meaning. See also *Opinion of Justices*, 124 Mass. 596; *Sturbridge* v. *Holland*, 11 Pick. 459; *Fiske* v. *Lincoln*, 19 Pick. 473; *Commonwealth* v. *Cambridge*, 20 Pick. 267.

Such meaning, therefore, is to be given to the word paupers in the act of 1897. Pub. Sts., c. 3, § 3, cl. 3. But "paupers" is a word broad enough to include children, even taking its meaning to be as technical as is above stated. Provision is made by law for the settlement of children under the pauper law. The provisions of the statute in question are certainly as important in their application to children as to adults; perhaps even more so. I can see no reasonable ground to suppose that the act does not include such children as come within the meaning of the word "paupers."

3. "Do the provisions of the law apply to the inmates of the State institutions for the insane supported therein by the cities and towns?"

The purpose of the laws is to take precaution (1) against paupers being supported in improper places by providing for investigation by the overseers of each place where such paupers are supported, and for compulsory periodical visits by the overseers to such places, and by allowing the State Board permission to visit such places; and (2) against paupers being placed out upon terms and conditions not conducive to their proper care and maintenance, by compelling the overseers to keep a full record of all cases "where paupers are provided for otherwise than in a workhouse or almshouse," and to certify upon the records that they have made investigation in each case, and are satisfied that the paupers will be well and properly cared for; and furthermore by allowing the State Board to determine in what manner overseers of the poor shall contract for the support of town paupers.

In the case of paupers supported in the State lunatic institutions, it is clear that, though such persons may be technically within the letter of the act of 1897 as being provided for "otherwise than in a workhouse or almshouse," yet the spirit of the law does not apply to them. None of the precautions provided for by the act is necessary in such cases. Ample provision is made by law to secure the proper management of these institutions (Pub. Sts., c. 87, §§ 6, 7, 9), and to provide for the payment of the expenses of the support of inmates. Pub. Sts., c. 87, § 31. Where the language of the statute in its ordinary meaning leads to a manifest inconvenience or absurdity, other words may be interpolated; and when the real intent of the Legislature is plain, the language of the statute must be given such a construction as will carry that intent into effect. The absurdity of requiring overseers of the poor, under pain of a fine of one hundred dollars, to investigate and visit State lunatic hospitals once every three months, if any town pauper happens to be there, is apparent, and cannot have been intended by the Legislature.

4. "Does the law apply to paupers partially supported, as well as to those fully supported?"

I assume that this question refers to cases where persons are assisted to a greater or less extent by the overseers of the poor,

on account of their partial inability to care for themselves. In these cases the town takes no responsibility of their surroundings or of the proper care and attention given to them. They still remain in the control of their own affairs, free to live where and how they please. The act does not in terms include such persons, and in my opinion is not intended to include them.

5. "Do the words 'workhouse or almshouse,' in § 1, exclude the State Farm, as well as the State Almshouse, from the operation of the law?"

It is clear that the words "otherwise than in a workhouse or almshouse" are sufficiently comprehensive to exclude the State Farm and the State Almshouse from the operation of the statute. Before the passage of St. 1887, c. 264, the State Farm was called the State Workhouse. Pub. Sts., c. 88. The reason, moreover, which I have suggested for excluding State lunatic hospitals from the scope of the statute, applies with equal force to the State Farm and to the State Almshouse.

6. "Are the overseers of the poor required by the law to make visits in person, or can such visits be made by an agent appointed by them?"

I am of opinion that the duty imposed by the statute is personal, and is imposed upon each overseer; that is to say, each overseer of the poor in the town is required, once at least in three months, to visit each place where the town paupers are provided for, and to make a record of his visit and of the condition of the paupers visited.

ASSISTANT CLERK OF COURT PRO TEMPORE, — COMPENSATION.

The salary of an assistant clerk of courts appointed by the clerk of courts under authority of Pub. Sts., c. 159, § 9, must be paid by the clerk and cannot legally be paid from the county treasury under the provisions of Pub. Sts., c. 159, § 33, making an allowance to clerks of courts for extra clerical assistance.

To the Controller of County Accounts.
1897
June 18.

The clerk of courts for the county of Berkshire may, under Pub. Sts., c. 159, § 9, appoint an assistant clerk *pro tempore;* but the same section expressly provides that the compensation of such assistant shall be paid by the clerk.

This express provision is not controlled by § 33 of the same chapter. The assistant so appointed does not come within the classification of extra clerical assistance, referred to in the latter section. The duties and authority of an assistant clerk are much more extensive than those of a person rendering extra clerical assistance. He may perform all the duties of a clerk. Pub. Sts., c. 159, § 9. Unless the Legislature specially authorizes the payment of the salary of an assistant clerk, the clerk making the appointment must pay it himself.

INSURANCE, — ASSESSMENT COMPANY, — MASSACHUSETTS BENEFIT LIFE ASSOCIATION, — "BENEFIT MEMBERS," — EXPENSE FUND, — RIGHT OF ACTION BY COMMONWEALTH.

Policies of insurance, issued to persons other than the original incorporators, and those whom they voted to associate with them, by the Massachusetts Benefit Life Association, a corporation organized under St. 1874, c. 375, as amended by St. 1877, c. 204, the company having repealed the by-law making each policy holder a member thereof before it issued any policies, were issued illegally till the enactment of St. 1885, c. 183, which ratified what had been done by the company, and authorized the continuance of just such business.

Policies first issued described the holders thereof as members. These were recalled and new policies substituted, describing the holders as "benefit members" There is no such thing in the law as a "benefit member" of a corporation, and they were not members; yet it cannot be said that the legal rights of the policy holders were infringed by the change.

All the policies issued by the company, after providing for the collection of an annual assessment for expenses, stipulated that the expense fund should be "at the sole disposal of the officers of the association;" and, although the assessments were largely in excess of the expenses, yet the levying of them cannot in law be said to be an infringement of the rights of the policy holders.

The statutes of the Commonwealth provide for the making of annual returns by the company to the Insurance Commissioner. Since the business of the company was legalized by St. 1885, c. 183, the Commonwealth has no right of action against the company unless its annual returns were untrue; if untrue, the remedy is by indictment.

To the Governor. 1897 June 29.

Your letter of April 30 requests the opinion of the Attorney-General upon two questions, to wit: —

First. — Whether the rights of the policy holders in the Massachusetts Benefit Life Association have been improperly infringed upon; and

Second. — If so, whether any remedy exists for such condition of affairs under our law.

In view of the fact that the report of the commission referred to in your letter was not the final report of that body, I have delayed replying in order that I might have the benefit of all the facts stated in its final report.

The company was organized February 8, 1878, under the provisions of St. 1874, c. 375, as amended by St. 1877, c. 204. The former statute is entitled "An Act concerning associations for charitable, educational and other purposes," and is substantially re-enacted in Pub. Sts., c. 115, §§ 1–10. This statute authorizes seven or more persons to form a corporation for various educational, benevolent and religious purposes. It contained no reference to the business of insurance of any kind. St. 1877, c. 204, provided that associations organized under the statute of 1874 might, "for the purpose of assisting the widows, orphans or other dependents of deceased members, provide in their by-laws for the payment by each member of a fixed sum, to be held by the association until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto." It was further provided that the provisions of the general insurance laws should not be applicable to such beneficiary corporations. The company in question derived its authority from the statute above quoted. Its purpose, as stated in its articles of association, was to "assist the widows, orphans, or other dependents of deceased members by providing for the payment by each member of a fixed sum to be held until the death of a member, then to be paid to the person or persons entitled thereto."

The association began to issue policies to other than members of the corporation in October, 1879. All the policies so issued, from that time till the enactment of St. 1885, c. 183, relating to insurance upon the assessment plan, were illegal. Only seven persons were named in the articles of association as members of the corporation. The original by-laws submitted to the Commissioner of Corporations provided that each policy holder should be a member of the corporation. This by-law, however, was repealed before any policies were issued, and

there never were any other members of the corporation (until the change in the by-laws procured by the special commission appointed by the policy holders in 1896) excepting the seven original incorporators, and those whom they voted to associate with them.

Membership in a corporation is confined to the persons named in the charter, and those whom they associate with themselves under the by-laws or by their votes. Mutual fire and life insurance companies are by statute made an exception to this general rule. In those companies, under the provisions of the statutes, every policy holder thereby becomes a member, and is entitled to receive notice of meetings of the corporation. There was no such law applicable to associations of this kind; and by the repeal of the by-law above referred to the membership was limited and remained limited to the original incorporators and their associates.

The repeal of this by-law, by virtue of which incorporation was obtained, constituted the first infringement, not only upon the rights of the policy holders, but upon the laws of the Commonwealth. When that by-law was repealed the association had no authority to issue policies excepting to the seven incorporators. The pretext devised of calling policy holders "benefit members" did not avail to cure the mischief. There is no such thing known to the laws of Massachusetts as a "benefit member." It is a misleading term. Its only possible effect is to deceive the policy holder, on the one hand, into the supposition that in some way he is a member of the corporation; or, on the other hand, to evade the laws of the Commonwealth providing that policies of insurance in associations of this character should be issued only to members of the association.

The business of the association in issuing policies to "benefit members" could, and undoubtedly would, have been enjoined by the Commonwealth, but for the fact that the by-laws submitted to the Commissioner of Corporations had provided otherwise, and no notice of any change such as was made was given.

Notwithstanding the repeal of this by-law, the first twelve hundred policies issued described the holders as members of the

corporation. Such description did not constitute them members, and the association must have known that it did not, for they had repealed the by-law which would make that statement effectual. Here again the rights of the policy holders were infringed upon, for a representation was made to them in their policies which was not true, and which must have been known to the association not to be true.

Fearing that trouble might come from this description of policy holders as members, it was determined by the association that the policies should be recalled. Advantage was taken of the fact that it be expedient to change the policies in another respect, to wit: in relation to the payment of the amount secured by the policy in case of death of the beneficiary, by the substitution of the word "heirs" instead of the word "representatives." Having secured an opinion of the Insurance Commissioner that this change was advisable, the association issued a circular to the policy holders, calling attention to the letter of the commissioner, and asking them to return their policies, to have them changed to conform to the suggestions made by the Insurance Commissioner.

This invitation was accepted, and, relying upon the recommendation of the Insurance Commissioner, all the original policies were returned to the association to be changed. New policies were thereupon issued, making the change for which the return had been asked. At the same time the inaccurate description of the policy holders as members was also changed, and in the new policies they were described as "benefit members," — an expression having no useful purpose except so far as it was misleading. Nothing was said in the circular inviting the return of the policies about this change, and it is probable that few of the policy holders knew that such a change was to be made.

In my view of the law of membership in corporations, as above stated, this change did not constitute in law an infringement upon the rights of the policy holders, for they never had any rights of membership. But to ask the return of the policies for the purpose of making a specified change in them, intending at the same time to make another change which was

not disclosed in the invitation, was a breach of good faith to the policy holders, especially in view of the fact that the official sanction of the Insurance Commissioner was obtained to procure the return of the policies.

The policies first issued, as well as all that have been subsequently issued, provided in express terms for the collection of an annual assessment for expenses; and it was stipulated in the policy that the proceeds of these assessments should be at the sole disposal of the officers of the association. Inasmuch as the officers were practically the members and owners of the corporation, this was an indirect way of notifying the policy holders that the proceeds of this assessment belonged to the corporation, and that they as "benefit members" had no right thereto. The collection of this annual assessment for expenses has continued from the beginning down to the present time, and under it large sums have been received from the policy holders; much larger, I am informed, than the actual and legitimate expenses of conducting the association, the excess above such expenses having been divided from time to time among the members of the association.

It cannot be said, however, that this assessment was in law an infringement of the rights of the policy holders. They may have been, and undoubtedly were, in most instances misled by the indirect language used in their contracts. They were described as "benefit members," and were not told that the expression meant nothing excepting that they were not members; and they were also led to believe that the assessment was for actual expenses, and not for the profit of the real members. Yet if they had taken the trouble, which most people do not take, to read their policies, they would have learned that it was therein provided that the expense fund "is at the sole disposal of the officers of the association." This was in their contracts, and, however misled they may have been by the fact that the corporation assumed to be a "fraternal benefit association," organized under the law authorizing the forming of corporations for "charitable" purposes, and by the statement that they were "benefit members," they could nevertheless, easily have learned that the assessments for expenses which they agreed to pay

might be used by the members of the association for their own profit, if any remained after paying the expenses.

Moreover, they were so told, so far as the Commonwealth could tell them. Insurance Commissioner John K. Tarbox took occasion from time to time to inform the Legislature in his annual reports of the true character of this and other like associations. In his report for 1884, speaking of such associations, he said: "Others are simply close corporations, with a very limited membership, and organized and carried on for profit by a few stockholders or individuals who constitute the corporation. The insured pay to the corporation certain fees and dues, which produce the expense fund, and whatever is left of it after the payment of expenses, is divided between the corporators as profits. . . . I find no warrant in the law for corporations of this sort. The statute authorizes the forming of associations for the purpose of rendering assistance to its members and their dependents. It does not authorize corporations to make contracts of assessment insurance with persons other than members, and the persons insured by the corporations referred to are not members in the sense of the statute." Undoubtedly, if Mr. Tarbox had had the statutory power to do so, he would have instructed the Attorney-General to cause such corporations conducting illegal business to be enjoined and dissolved. He had no such authority, however, and could only report the situation to the Legislature, which he did in unmistakable terms.

Instead, however, of providing for the wiping out of such unlawful associations, the Legislature proceeded to enact, in 1885 (St. 1885, c. 183), a statute which not only authorized the formation of corporations to carry on the very business which the commissioner had condemned, but which even went further, and in § 3 provided that any corporation engaged in the transaction of life or casualty insurance on the assessment plan might "continue to exercise all the rights, powers and privileges" conferred by that chapter.

So, therefore, what had been illegal was thus ratified and made valid by this act. The practices condemned by the commissioner were authorized to continue and increase by the

Legislature. It was the very condition of things which now is most vehemently complained of against this association, to wit: the association of a limited number of persons as an insurance corporation, without capital, without responsibility, without effectual supervision, without any laws restraining them as to the character of their contracts, without even a guarantee of permanency, and authorized to contract with the insured for the payment of money under the guise of expenses which they might divide among themselves as profits. If this is bad business, as it now seems to be, no more blame can be attached to the members of this corporation than to the Commonwealth which permitted it.

Subsequent statutes went even further. By St. 1890, c. 421, § 20, it is provided that expenses incurred in investigating and contesting cases believed to be fraudulent may be considered as a part of the mortuary expenses; in other words, that all such expenses could be deducted from the amount of the assessment collected for the payment of death and disability benefits. The direct result of this provision is to saddle a portion of the expenses of these companies upon the mortuary assessments, thus reducing the amount to be paid from the proceeds of assessments for expenses, and thereby increasing the profits to be divided out of such assessments for expenses. The Massachusetts Benefit Life Association took advantage of this provision, and, although expenses for contesting disputed claims were first paid out of the expense fund, transfers to cover such expenses were made from time to time from the amount held for the purpose of paying death benefits.

The facts may be thus summarized. Under the form and guise of an association for charitable and benevolent purposes, seven persons formed a corporation for the purpose of carrying on business for profit. They obtained a charter under by-laws which they proceeded forthwith to change in a way which, if known, would have prevented them from obtaining a charter. They invited the co-operation of the public in this so-called charitable enterprise, first by describing the policy holders as members, which was untrue, and afterwards as "benefit members," which was misleading. Despite the protestations of the

Insurance Commissioner they continued to carry on this business until it was legalized by the Legislature in 1885. It is impossible to believe that the policy holders knew how profitable the business was in the corporation; and it is entirely probable that the members of the corporation understood the ignorance of their policy holders, and took no pains to inform them. And when, subsequently, the burden of assessments was likely to increase, instead of reducing their profits, they took advantage of a permissive statute to draw upon the fund available for death benefits in a way which still further enlarged their profits.

Thus far I have considered Your Excellency's first question, as to how far the rights of the policy holders had been infringed upon. It remains as to this portion of the history of the company to consider the question whether the laws afford any remedy. For the reasons I have heretofore stated there appears to be no remedy to recover for the benefit of the policy holders the sums so collected and distributed among the members of the corporation as profits. The illegality of the business of the company prior to 1885 seems to have been ratified and legalized by the Legislature. Whether any remedy exists for the old policy holders, of whom I am informed there are some remaining, it is unnecessary to consider, as that is a matter exclusively for the policy holders themselves, and in respect to which the Commonwealth has neither duties nor rights. The Commonwealth has never undertaken to settle matters of private difference arising upon the contracts of its corporations.

I have recently been informed by the present officers of the corporation that upon investigation they learn that "there is due a large accumulation of unpaid death claims pending against the association, these claims being over and above the current death claims which are to be met out of the proceeds of current assessments;" and that this accumulation has been going on since 1890. They further state that the purpose of the former management in thus postponing the payment of this large accumulation of death claims must have been to keep down assessments, regardless of future consequences; and that, if assessments in the past had been made at the proper time

large enough to meet such claims, the situation would now be much more encouraging.

I am informed that this situation has been made known to the Insurance Commissioner for his consideration, and that the association has voted an assessment upon the policy holders large enough to meet this deficit, and has submitted the same to the Insurance Commissioner for his approval. With his duties in the matter the present opinion is not concerned.

If this method of conducting the business of the association has obtained, it has been a serious infringement upon the rights of the policy holders. They had the right to suppose that the assessments being levied from time to time were sufficient to meet death claims, and to make their arrangements accordingly, It was unjust to the beneficiaries to withhold payment of their claims, for under the statutes such claims are absolutely due at the time expressed in the policies; and it was unfair to the policy holders to postpone the levying of assessments, the result being to necessitate inordinate assessments in the future.

If this course of business was pursued, it was in plain violation of law. It was the duty of the corporation to keep the assessments up to a parity with the accumulation of death claims. Moreover, St. 1890, c. 421, § 15, provides that the officers of a corporation who shall refuse or neglect to levy an assessment for a space of sixty days after the filing of satisfactory proof of the death of a certificate or policy holder, where the same so received is not disputed on account of fraud or want of validity, and where the death or emergency fund is not sufficient to pay the claim, shall thereby become liable to the beneficiary under said certificate or policy to the amount of the claim. This remedy is solely in the hands of the beneficiary, and cannot be enforced for him by the Commonwealth.

It is further made the duty of the Insurance Commissioner, by § 10 of the same chapter, when he is satisfied that the corporation has refused or failed to pay a death claim for thirty days after it becomes due and after proper demand, to notify the corporation to suspend business until the claim is paid, and to proceed forthwith to make such an examination of the affairs

of the corporation as will satisfy him whether it is able to pay its accrued indebtedness in full.

Since 1885 the Insurance Commissioner has been vested with powers of visitation and examination into the affairs of these corporations. St. 1885, c. 183, § 13, provided that the commissioner in person or by his deputy should have "the powers of visitation of and examination into the affairs of any such corporation [assessment insurance company] which are conferred upon him in the case of life insurance companies by chapter one hundred and nineteen of the Public Statutes." That chapter makes it the duty of the commissioner to visit each domestic company at least once in three years, and whenever he deems it necessary for the protection of the policy holders, and thoroughly to inspect and examine all its affairs, and especially its financial condition and ability to fulfil its obligations, and to ascertain whether it has complied with all provisions of law applicable to it and to its transactions. This statute remained in force until St. 1890, c. 421, in which it is provided (§ 22) that "The insurance commissioner may personally or by his deputy or chief clerk visit each domestic insurance corporation doing business on the assessment plan whenever he shall deem it necessary, and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfil its obligations, and whether it has complied with the laws." Under both statutes he was further authorized, whenever upon investigation he became satisfied that any such corporation had exceeded its powers or failed to comply with any provision of law, to report the fact to the Attorney-General for the purpose of having the corporation restrained from the further prosecution of its business. Whether the exercise of these powers by the Insurance Commissioner would have enabled him to learn the condition of the company which the present officers now report, I have no means of knowing. If they were insufficient, then the remedy is by additional legislation which will enable the officers of the Commonwealth to know what is going on in corporations carrying on business under the shield of its protection.

The statute further provides (St. 1890, c. 421, § 22) that the officers of the corporation shall annually return to the Insurance Commissioner, in such manner and form, and including such information as he may require, a sworn statement of the affairs of the year ending on the preceding thirty-first day of December. Returns were made by this association to the Insurance Commissioner, as required by law. Whether these returns truly stated the accumulation of unpaid death claims, which are now reported to me by the officers of the association, I have no means of knowing. If not, the remedy is by indictment.

BIRDS, — PROTECTION.

St. 1897, c. 524, does not prohibit the having in possession or the wearing of the body or feathers of birds taken or killed without the Commonwealth.

To the Chief of District Police.
1897
August 10.

Your letter of the 9th inst. requires my opinion upon the question whether, under the provisions of St. 1897, c. 524, it is unlawful for a person in Massachusetts to have in his possession the body or feathers of any bird whose taking or killing is prohibited by St. 1886, c. 276, § 4, provided the bird itself was taken or killed outside the Commonwealth of Massachusetts.

The words of the statute, as far as they affect this question, are as follows: "Whoever has in his possession the body or feathers of any bird whose taking or killing is prohibited by section four of chapter two hundred and seventy-six of the Acts of the year eighteen hundred and eighty-six, or wears such feathers for the purpose of dress or ornament, shall be punished as provided in said section." St. 1886, c. 276, § 4, to which this statute refers, provides that "Whoever takes or kills any wild or undomesticated bird [with certain exceptions] shall be punished by a fine of ten dollars." Taken together, these statutes prohibit the killing of certain birds, and the possession of the bodies or feathers of the birds whose taking is so prohibited.

Penal statutes are to be construed strictly, and their scope is not to be enlarged. The statutes in question in terms prohibit

the possession of the bodies and feathers, only, of birds whose killing is prohibited. There is, and obviously could be, no prohibition against killing birds without the limits of the Commonwealth. It follows, under a strict construction of the statutes, that the possession of the bodies and feathers of such birds, whose killing is not prohibited, is, itself, not prohibited.

There is nothing in the legislative purpose, so far as it can be gathered from the act, which necessarily requires a broader construction. The earlier statute is aimed against the killing of birds in this Commonwealth. The later statute is further intended to discourage such killing by destroying the market for bodies and feathers of birds unlawfully killed. This purpose is fully accomplished, without the necessity of supposing that the Legislature intended to include birds killed elsewhere. The fact that the narrower construction makes the law more difficult of enforcement does not concern the question.

St. 1879, c. 209, § 1, was a penal statute of similar character. It provided that whoever in this Commonwealth takes or kills any woodcock, or other specified birds, during certain portions of the year, "or within the respective times aforesaid sells, buys, or has in his possession, or offers for sale, any of said birds, shall be punished," etc.

This statute was construed in *Commonwealth* v. *Hall*, 128 Mass. 410, as a prohibition against having possession of the birds named in the statute only when killed in this Commonwealth. It was claimed in that case by the Attorney-General that the intention of the statute was to prohibit the buying, selling or having in possession such birds which had been lawfully killed in another State. This construction was not sustained. Gray, C. J., in the opinion said that "To adopt such a conclusion, when not imperatively required by the language of the act, would be inconsistent with the ordinary rules of construction of penal statutes." The doctrine of that case applies to the statute in question.

It is interesting to observe that after this decision the statute quoted was amended by the addition of the words "whether taken within this Commonwealth or elsewhere." The absence of these words in the statute of 1897 is significant, and leads

to the conclusion that it was not the intention of the Legislature to prohibit the having in possession or the wearing of the body or feathers of birds which were not killed in violation of the laws of this Commonwealth.

I am of opinion, therefore, that St. 1897, c. 524, is not to be construed as prohibiting the having in possession, or the wearing of the body or feathers of birds taken or killed without the Commonwealth.*

TIDE-WATER LANDS, — HARBOR AND LAND COMMISSIONERS, — JURISDICTION, — BOSTON TERMINAL COMPANY.

St. 1896, c. 516, authorizes the Boston Terminal Company to take land in fee within certain limits and to do whatever is necessary for the building of a union station within the limits of the lands taken by it for that purpose, whether above or below high-water mark.

The sanction of the Board of Harbor and Land Commissioners is required, under the provisions of Pub. Sts., c. 19, § 8, — not under § 9. Pub. Sts., c. 19, § 16, does not apply to the work of the Boston Terminal Company.

To the Harbor and Land Commissioners.
1897
August 30.

Your letter of June 25 submits a series of questions relating to the Boston Terminal Company, which can best be answered by a consideration of the general policy of the Legislature in regard to that company, and the relation which its act of incorporation bears to pre-existing statutes.

The Boston Terminal Company was incorporated by St. 1896, c. 516. It is authorized by that act to take land in Boston within certain limits, including lands over which the tide ebbs and flows, and to build a passenger station thereon. In pursuance of the authority conveyed by this act, it has taken a tract which includes land over which the tide ebbs and flows, and has applied to your Board for its approval of the plans which have been formed for filling solid the tide-water lands taken.

The lands taken by the Terminal Company under the authority of its charter were, before the passage of St. 1896, c. 516, subject to the public rights of navigation. That statute is,

* St. 1897, c. 524, was amended by St. 1898, c. 339, by adding the words " whether taken in this Commonwealth or elsewhere "

therefore, a grant of power to take for one public use land already appropriated to another public use. This form of legislation has been frequent in this Commonwealth, and is clearly within the powers of the Legislature. *Springfield* v. *Connecticut River R.R. Co.*, 4 Cush. 63; *Commissioners* v. *Holyoke Water Power Co.*, 104 Mass. 446; *Commonwealth* v. *Old Colony & Fall River R.R. Co.*, 14 Gray, 93.

The charter of the company, therefore, gives it the right to take in fee lands covered by tide water, even though belonging to the Commonwealth, and to occupy the same for the purposes of its act. It does not follow, however, that this grant is so far absolute as to give the company the right to ignore the general provisions of the Public Statutes relating to the filling or improvement of lands upon which tide waters ebb and flow. These provisions are contained in Pub. Sts., c. 19. Section 8 provides that "All persons that are or may be authorized by the General Court to build over tide waters a bridge, wharf, pier, or dam, or to fill flats, or drive piles below high-water mark" shall before beginning work give written notice to the Board of Harbor and Land Commissioners of the work they intend to do, and shall submit plans of any proposed structure, and of flats to be filled, and of the mode in which the work is to be performed, for the approval of the Board. Jurisdiction is given to the Board to alter such plans in their discretion and to prescribe "to any extent that does not diminish or control the Legislative grant" the direction, limits and mode of building the wharves and other structures. Section 9 provides for the issuing of a license by the Board to any person to build a structure in tide water, or to fill land or flats, or to drive piles in or over tide water below high-water mark, upon such terms as may be approved by the Board.

I am of opinion that § 8, a portion of which I have quoted, is applicable to the present case, and that it was not intended by the Legislature that the supervision of the work of filling, occupying or improving tide-water lands by the Boston Terminal Company, given by this section to your Board, should be taken away. The section is general in its terms, and applies to all work done below high-water mark, authorized by legisla-

tive grant. The obvious intention of the section was to confer upon your Board the jurisdiction so far to supervise and control the performance of the work for which legislative grant had been made as to prevent damage to tide waters outside of the limits of the grant, and to insure the efficiency of navigable waters and public water ways.

I am aware that in the case of *Attorney-General* v. *Cambridge*, 119 Mass. 518, it was held that the defendant city, which had been authorized by St. 1866, c. 149, § 5, to fill a portion of Miller's River, was not required to submit its plans for the approval of the Board of Harbor Commissioners. The decision was based upon two propositions: first, that the work required by the statute was to be done not by private individuals for their own benefit, but under the direction of the boards of mayor and aldermen of two cities for the abatement of a nuisance; and, second, that the work contemplated was but the carrying out of a plan which had been devised by the Board of Harbor Commissioners, acting jointly with the State Board of Health. It is doubtful if the first ground would warrant the decision arrived at by the court. However that may be, the second ground stated clearly distinguishes it from the present case.

Your Board have not the power in any way "to diminish or control the legislative grant," but within that limit have the right to pass upon the plans submitted, and to require plans of the work to be done, whether of filling, driving piles or building structures, to be submitted to your Board for its approval.

St. 1896, c. 516, does not, it is true, in terms authorize the driving of piles, the filling of flats or the building of a bridge, wharf, pier or dam, these being the classes of work for which the approval of your Board is required. This is not, however, in my opinion, of importance, for the act authorizes the building of a union station, and therefore is authority for the doing of whatever work is necessary to the building of such a station, including any or all of the classes of work specified in § 8, for the doing of which plans are required to be submitted to your Board.

Pub. Sts., c. 19, § 16, does not apply to the present case. That section provides that "When an authority or license is granted by the General Court or by said board to any person or corporation to build a wharf or other structure upon, or to fill or otherwise occupy land in tide water, where the title to such land is in the Commonwealth, such person or corporation shall," etc. The section obviously refers to those cases where license is granted either by the Legislature or your Board to occupy lands of the Commonwealth below tide water, the fee remaining in the Commonwealth. The charter of the Boston Terminal Company, on the other hand, authorizes the taking of land in fee, including lands of the Commonwealth below tide water; and the company should be restrained from occupying any flats or deep-water lands that it has not first taken in fee, in accordance with the provisions of its act.

The foregoing considerations answer the various questions contained in your letter. For the sake of clearness, however, I reply to them specifically, as follows, to wit: —

1. Assuming that filling in tide water under the rights conferred by St. 1896, c. 516, required approval under Pub. Sts., c. 19, should the license be framed under § 9, and has § 16 any application?

The license should be framed under § 8.

2. Does St. 1896, c. 516, authorize the Boston Terminal Company to build over tide waters a bridge, wharf, pier or dam, or to fill flats or drive piles below high-water mark?

The statute authorizes the Boston Terminal Company to do whatever is necessary for the building of a union station within the limits of the lands taken by it for that purpose, whether above or below high-water mark.

3. If it does, is it authorized so to do without the sanction provided in Pub. Sts., c. 19?

4. If the sanction of the Board of Harbor and Land Commissioners is required before the Boston Terminal Company can fill in tide waters, should it be granted under the provisions of Pub. Sts., c. 19, § 8, or § 9?

The sanction of the Board of Harbor and Land Commission-

ers is required under the provisions of § 8, but not under the provisions of § 9.

5. Is the authority granted by St. 1896, c. 516, subject to the requirements of Pub. Sts., c. 19, § 16?

This section does not apply to the work of the Boston Terminal Company.

PUBLIC RECORDS, — REPAIR, — EXPENSE.

St. 1897, c. 439, § 6, requires every person having the custody of the public records of a county, city or town, to keep them in repair, and such county, city or town must bear the expense, whether it has appropriated money for that purpose or not.

To the Commissioner of Public Records.
1897
September 21.

I have your letter of the 7th, inquiring whether, under St. 1897, c. 439, § 6, any person having the custody of any public records can lawfully incur expense which a county, city or town will be obliged to pay, unless an appropriation for the purpose has previously been made by the county, city or town.

The statute in question provides that "Every person having the custody of any public records of a county, city or town, consisting of written or printed books, shall, at the expense of the county, city or town, have all such books properly and substantially bound," etc. This statute makes the duty of the custodian imperative, whether an appropriation is made by the county, city or town, or not, and even if no such appropriation be made. He must obey the law. Failure to perform this duty by him is punishable under the provisions of § 12 of the same act.

The liability of the county, city or town for the expense so incurred does not arise from any act of the corporation itself, but exists by virtue of the statute provision. It is plainly the duty of the county, city or town to appropriate money for the purpose specified in the act; but if it fails to perform its duty it does not thereby escape its liability therefor.

STEAM BOILER PLANTS, — ENGINEERS AND FIREMEN, — LICENSES.

St. 1896, c. 546, § 1, making it unlawful for any person to have charge of or operate a steam boiler or engine without a license, does not require men employed merely as coal shovellers, under the superintendence of a licensed fireman, to be licensed.

Examiners of engineers have authority to issue firemen's licenses for such class of boilers as they find the applicant qualified to take charge of or operate.

To the Chief of the District Police. 1897 September 29.

Your letter of August 12 requires my opinion upon a number of questions touching the interpretation of St. 1895, c. 471, and St. 1896, c. 546.

1. In a large boiler plant, where many men are employed as firemen, simply putting coal under the boilers, with a fireman in charge to take care of the water for the boilers, whether these men are required to have licenses under the statutes.

St. 1896, c. 546, § 1, makes it unlawful for any person "to have charge of, or to operate a steam boiler or engine" (with certain exceptions) unless he holds a license therefor, as provided in said chapter. The statute is intended for the security of the public, and those employed or having business in the vicinity of steam boilers, by providing that those who have charge of such boilers shall possess the skill necessary for their safe operation. The word "operate," as used in the statute quoted, is to be taken as meaning the directing or superintending of the working of the boiler. It does not apply to mere laborers, who have no responsibility or authority in the matter. Men who are employed as coal shovellers cannot be said to be in charge of or to be operating a boiler. They are not required to be licensed.

The foregoing considerations make it unnecessary to reply to the second and third questions in your letter.

4. Have the examiners the authority to issue firemen's licenses for low-pressure boilers only, marked, "Good only for low-pressure heating boilers?"

St. 1895, c. 471, § 2, provides that "Any person desiring to act as engineer or fireman shall make application to so act to an examiner of engineers . . . and if upon examination the

applicant is found trustworthy and competent a license shall be granted to said applicant to have charge of or to operate such steam plants as the examiner may find him qualified to have in keeping." Section 3 of the same act provides for three classes of engineers' licenses, and further provides that "A fireman's license shall be issued to any person who, after having passed an examination, as hereinafter provided, shall have been found competent to take charge of or to operate any steam boiler or boilers." If in the provision last quoted "any steam boiler or boilers" is equivalent to all boilers, then these provisions are inconsistent with the provisions of § 2, which authorizes the granting of a license to a fireman "to operate such steam plants as the examiner may find him qualified to have in keeping." This being so, I am of opinion that the expression "any steam boiler or boilers" is not to be taken as meaning all steam boilers, but rather "any steam boiler or boilers" which the examiners find the applicant competent to operate. Under this construction of the statute it follows that the examiners have authority to issue a fireman's license for such class of boilers as they find the applicant qualified to have charge of; and if they find him qualified to have charge of low-pressure heating boilers, they may issue a license accordingly. There is nothing in the provisions of St. 1896, c. 546, inconsistent with this interpretation.

HIGHWAY COMMISSION, — RULES, — PENALTIES.

The Massachusetts Highway Commission has no power to impose penalties for the infringement of its rules.

To the Highway Commission. 1897 September 29.

Authority is given to the Massachusetts Highway Commission, by St. 1892, c. 338, § 3, to establish rules for the conduct of its business. The question submitted by your letter of September 20 is, whether the commission has the right to impose penalties for the infringement of said rules.

Your commission has no power to impose penalties. That can only be done under direct and explicit authority from the Legislature.

DIPSOMANIACS AND INEBRIATES, — ABSENT PATIENTS, — FINAL DISCHARGE.

The trustees of the Massachusetts Hospital for Dipsomaniacs and Inebriates have authority, under St. 1897, c. 474, "to finally discharge" a patient who is absent from the hospital, as well as one who is present.

To the Trustees of the Massachusetts Hospital for Dipsomaniacs and Inebriates. 1897 October 4.

I have your letter of September 30, asking my opinion upon the question whether the trustees have the authority, under the provisions of St. 1897, c. 474, "to finally discharge" a patient who is in fact absent from the hospital on a permit to be at liberty, issued in accordance with the provisions of St. 1889, c. 414, § 8, or who is absent by elopement.

I see no reason why a final discharge may not be issued to a patient who has been committed or admitted to the hospital, and whose connection with such hospital has not been formally terminated, whether he is in fact at the hospital at the time of the final discharge or not.

COMMISSIONERS OF PRISONS, — VACANCY IN THE BOARD, — PAROLE OF PRISONERS.

Pub. Sts., c. 219, § 1, provides that there shall be five Commissioners of Prisons; but if for any reason a vacancy occurs, it is still a lawful Board, and has a right to parole a prisoner from the State Prison, under St. 1897, c. 206, § 1.

To the Commissioners of Prisons. 1897 October 4.

Your letter of the 2d inst. requests my opinion upon the question whether the present Board has the right to parole a prisoner from the State Prison, under the provisions of St. 1897, c. 206, § 1, there being a vacancy in the Board.

Under the provisions of St. 1894, c. 440, as amended by St. 1895, c. 252, a prisoner in the State Prison could be paroled by the Commissioners of Prisons. Unanimous action by the Board was not in terms required, but it was necessary to have the approval of the Governor and Council thereto.

The existing statute (St. 1897, c. 206, § 1) dispenses with the approval of the Governor and Council, and in place thereof

requires that the parole be granted "by the unanimous vote of all the members of the Board."

The Board at present consists of but four members. It is still, however, the Board of Prison Commissioners, and has all the rights, powers and duties of the Board of Prison Commissioners. It may, therefore, by a "unanimous vote of all the members of the Board" issue a parole to a prisoner in the State Prison. Pub. Sts., c. 219, § 1, provides, it is true, that there shall be five Commissioners of Prisons. This, however, is a directory provision merely; and if for any reason the Board is composed of four, it is still a lawful Board of Prison Commissioners. The act of all the present members of the Board is the unanimous act of the Board and of all its members, as required by the statute.

NAVIGABLE RIVER, — BRIDGE, — SPECIAL LEGISLATION.

The Saugus River being navigable tide water, the Massachusetts Highway Commission has no authority to construct a bridge over it without special authority from the Legislature.

To the Highway Commission. 1897 October 5.

Your letter of September 24 requires my opinion upon the following question: "Has the Highway Commission, under the authority given it in general statute law, the right to construct a bridge across the Saugus River below the lower bridge already existing there, with or without permission from the Harbor and Land Commissioners, or is a special act of the Legislature necessary before the commission can build such bridge?"

The Saugus River, being navigable tide water, is a public highway, subject to the public right of navigation. This right is not to be taken away or diminished without clear legislative authority. A bridge may be built over tide water above an existing bridge by license from the Harbor Commissioners, under certain conditions; but there is no general law specifically authorizing the construction of a bridge over navigable waters below the limit of existing encumbrances.

The authority of your commission to lay out and construct public highways (St. 1894, c. 497), does not give your Board broader powers than those already delegated to county and

municipal boards. It has been held that such boards are not authorized to lay out a way across a navigable river. *Boston* v. *Brookline*, 156 Mass. 172, 175; *Commonwealth* v. *Coombs*, 2 Mass. 489. In the latter case it was held that the general authority given to the court of general sessions to lay out highways does not extend to the laying out of a highway over a navigable river, so as to obstruct the same by a bridge; and that a general authority to lay out a new highway is not to be extended so as to give the power to obstruct an open highway already in the use of the public. See also *Arundel* v. *McCulloch*, 10 Mass. 70; *Kean* v. *Stetson*, 5 Pick. 492.

I am of opinion, therefore, that your commission has not the authority to construct the bridge in question without special authority from the Legislature.

STATE HIGHWAYS, — LOCATION AND CONSTRUCTION OF STREET RAILWAYS THEREIN, — JURISDICTION OF LOCAL BOARDS.

Municipal boards have the discretion of determining, under Pub. Sts., c. 113, §§ 7, 21 and 22, whether public convenience requires the construction of street railways in State highways; but under St. 1897, c. 355, their grants are subject to the veto of the Massachusetts Highway Commission.

To the Highway Commission. 1897 October 5.

In your letter of September 24 you require my opinion as to how far St. 1897, c. 355, amending St. 1894, c. 497, § 2, affects the opinion heretofore given to the Board, dated November 18, 1896.*

In that communication, and for reasons therein set forth, I stated it to be my opinion that the statutes authorizing the construction of State highways did not operate to repeal the provisions of Pub. Sts., c. 113, §§ 7, 21 and 22. These sections delegated to municipal boards the discretion of determining, after due notice and hearing, whether necessity and public convenience requires the construction of street railways in highways. I do not think this jurisdiction is affected by St. 1897, c. 355.

In my former opinion, however, I suggested, without decid-

* See page 392, *ante*.

ing, that it would probably be necessary to obtain not only a grant from the municipal board, but a permit from the Massachusetts Highway Commission, before constructing street railways in the State highways or altering tracks therein. The effect of St. 1897, c. 355, is to remove all doubt upon that subject, and to require the approval of and a permit from your commission before constructing or altering a street railway in a State highway. The authority, powers and duties of municipal boards in respect to street railways remain unchanged, but their grants are subject to the veto of your Board.

INSANE PAUPERS, — TRANSFER, — REGULARITY OF COMMITMENT PAPERS.

The State Board of Lunacy and Charity has authority to transfer pauper inmates from any institution devoted to the care of insane persons to any other of like character.

Under St. 1895, c. 286, superintendents or other officers of insane hospitals have no authority to pass upon the regularity of commitment papers which accompany the order of commitment issued by the court; that is a question for the courts alone.

To the Inspector of Institutions.
1897
October 15.

Your letter of the 4th inst. requires my opinion upon two questions, to wit: —

First. — Has the Board (of Lunacy and Charity) authority to transfer insane paupers from the State Asylum for Insane Criminals at Bridgewater to the Medfield Insane Asylum?

Among the powers originally given to the Board of State Charities, which was created by St. 1863, c. 240, was that of transferring pauper inmates "from one charitable institution or lunatic hospital to another." The Board of State Charities was superseded in 1879 (St. 1879, c. 291) by the Board of Health, Lunacy and Charity; and in 1886, when the State Board of Health was re-established, the name of the Board was changed, and was thereafterwards denominated the State Board of Lunacy and Charity. But the right of transfer of pauper inmates of charitable institutions and lunatic hospitals has been continued in the same terms until the present time.

At the time of the original enactment (St. 1863, c. 240) there were but three receptacles provided by the State for the

reception of insane persons, all of which were called lunatic hospitals. The term "lunatic hospital," therefore, as originally used was intended to cover all receptacles for the insane under the State's charge. It was undoubtedly the intention of the Legislature, in creating the Board of State Charities, to give full authority to the Board to classify, divide and separate paupers, whether insane or not, under the control of the State, wherever they were kept or maintained. Since the first use of the words "lunatic hospital" in connection with the right conferred upon the Board as to transfer of paupers, other institutions for the receptions of insane persons have been created, some of which are not called lunatic hospitals, to wit, the Worcester Insane Asylum, the Medfield Insane Asylum and the State Asylum for Insane Criminals. But all of these are institutions established for the care and maintenance of insane persons; and I am unable to discover any essential distinction, so far as this question is concerned, between those State institutions which are called lunatic hospitals, and those which are called insane hospitals, insane asylums and asylums for insane criminals. All of them are charitable institutions, and are alike under the supervision of the State Board.

I am of opinion, therefore, that the provisions of Pub. Sts., c. 79, § 9, authorizing the transfer of pauper inmates by the State Board from one charitable institution or lunatic hospital to another, are intended to be general in their nature, applicable to all the institutions under the State Board, and to authorize the transfer of pauper inmates from any institution devoted to the care of insane persons to another of like character.

The foregoing considerations dispose of the question submitted, unless there is something in the statutes specially relating to the Medfield Insane Asylum or to the State Asylum for Insane Criminals, which limits this general authority. The charter of the Medfield Insane Asylum (St. 1892, c. 425, § 4) provides that "all the laws relative to State lunatic hospitals, and to persons committed thereto on the ground of insanity, so far as they may be applicable, shall apply to said asylum and to the persons committed thereto: *provided*, that no patient

shall be admitted to said asylum except as transferred thereto by the State Board of Lunacy and Charity from one of the State lunatic hospitals or the Worcester Insane Asylum." These provisions clearly put the Medfield Insane Asylum into the class of existing lunatic hospitals, excepting that it is not intended as a place of original commitment, but only of transfer from other institutions. The provision in relation to such transfer was not intended to be a limitation of the powers of transfer already existing in the State Board, but rather a confirmation and extension of them to the asylum thus created.

The act establishing the State Asylum for Insane Criminals (St. 1895, c. 390) contains sundry provisions relating to the commitment and transfer of insane criminals to said asylum; but there is nothing in the act which seems intended to limit the general authority already existing in the State Board to transfer insane paupers from one charitable institution or lunatic hospital to another.

I am of opinion, therefore, that the State Board has authority to transfer insane paupers from the State Asylum for Insane Criminals to the Medfield Insane Asylum.

Second. — How far have officers of insane hospitals the authority to pass upon the regularity of commitment papers, particularly the physicians' certificates which accompany the order of commitment issued by the court?

St. 1895, c. 286, regulates the commitment of persons to lunatic hospitals. It provides that no one shall make a certificate to the court of the insanity of a person unless he shall state under oath that he is a graduate of a legally chartered school, that he has been in practice for three years, and that he is duly registered. The physician making the certificate must have examined the person alleged to be insane within five days of his signing the certificate, and shall state in the certificate that in his opinion said person is insane, and shall specify the facts on which his opinion is founded. It is further provided that a copy of this certificate, attested by the judge, shall be delivered by the officer making the commitment to the superintendent of the hospital, to be filed with the order of commitment. The statute further provides a form of certificate which

"shall be deemed sufficient if substantially followed;" but it does not prohibit the use of other suitable forms containing the required statements of fact.

These provisions are intended for the guidance and control of the committing magistrate. They specify and limit the character of the evidence to be submitted for his adjudication. His determination of the sufficiency of the evidence or the certificate submitted is final and binding upon committing officers and keepers of State institutions, to whom his precepts are directed. They are not called upon, nor have they the right, to question his adjudication in the matter. They are not judicial officers.

The provisions requiring a copy of the certificate to be filed are obviously for the benefit of the person committed, and are not intended to require the determination of the superintendent as to its sufficiency before obeying the order of commitment.

VETERANS' BOUNTIES, — PROMISES OF TOWNS AND CITIES TO PAY BOUNTIES DURING WAR OF REBELLION.

St. 1897, c. 179, applies only to such promises of bounty as were made to induce enlistment, and which in fact wholly or in part did induce enlistment; it, therefore, does not apply to drafted men or their substitutes.

It is immaterial whether the promise to pay a bounty in consideration of enlistment was for a cash payment at the beginning or at the end of the service, or whether it was the promise of monthly or periodical payment, or was a valid promise in law when made or not.

To the Bounty Commission. 1897 October 20.

Your letter of September 9 requires my opinion as to the construction of St. 1897, c. 179, entitled "An Act to provide for the payment of bounties to Massachusetts soldiers from the treasury of the Commonwealth in certain cases." The specific questions submitted can better be answered by a consideration of the scope and purpose of the act.

The duty of the commission is to investigate claims for unpaid bounties presented by veterans of the late war for the suppression of the rebellion. The act provides that when the commission finds that the veteran in whose name the claim is presented "was promised a bounty for military or naval ser-

vice by any city or town in this Commonwealth, that said veteran afterwards duly complied with the conditions under which said bounty was to be paid, and that said bounty has not been paid," it may certify the claim for payment from the treasury of the Commonwealth. The language quoted defines and limits the class of claims included within the provisions of the act. They are claims in which (1) the veteran was promised a bounty by a city or town in the Commonwealth, (2) the promise was made in consideration of military or naval service, (3) the service was rendered in consideration of which the bounty was promised, and (4) the bounty has not been paid.

The statute intended to include cases only in which the promise of bounty was made in consideration of military or naval service to be rendered by the person to whom the bounty was promised. The word "consideration" is not used; but a promise of a bounty "for military or naval service" is a promise in consideration of such service. In the recent case of *Brown* v. *Russell*, 166 Mass. 14, art. VI. of the Declaration of Rights, which provides that "No man, nor corporation, or association of men, have any other title to obtain advantages . . . distinct from those of the community, than from what arises from the consideration of services rendered to the public," was considered by the court; and it was held that the words "consideration of services rendered to the public" did not mean or include services which had been rendered to the public in the past, but services to be rendered. I think a similar interpretation is to be given to the words of the act in question, and that a promise of a bounty for military or naval service, in the absence of any explicit declaration to the contrary, is to be taken to mean a promise in consideration of military or naval service to be rendered. This view is strengthened by the subsequent expression in the statute, to wit, "that said veteran afterwards duly complied with the conditions under which said bounty was to be paid." The word "afterwards," taken in connection with all of the words used, makes it plain that the Legislature had in mind only such promises of bounty as were made to induce enlistment, and which in fact wholly or in part induced such enlistment.

The act expresses the purpose of the Commonwealth to fulfil such promises as were made by the cities and towns of the State to induce persons to enter the service of the United States; but which promises, for any reason, have not been fulfilled. Cases where the promise was not the consideration of entering the service are not included within the provisions of the act. It cannot properly be said that a soldier, to whom a bounty was voted by a city or town after his enlistment, made a contract with a town under which he went into service, or that any promise was made him as a consideration of such service. The language used points clearly to a promise made upon consideration of service to be performed, and not to a gratuity voted or promised which was not an inducement to the soldier or sailor to enter the service.

This being so, it is the duty of the commission to disallow all claims for bounty where the vote of the town was not the inducement to service. The promise of a bounty to a man already in the field, and not in consideration of enlistment, or made after the expiration of service, is not such a promise as is included in the meaning of the act.

The foregoing conclusions are reached without considering whether it would be constitutional for the Commonwealth to assume the payment of bounties not promised as a consideration for enlistment, but voted as a gratuity to men in the service. *Brown* v. *Russell*, 166 Mass. 14; *Meade* v. *Acton*, 139 Mass. 341. It is not necessary to determine how far, in view of the decision of the court in *Brown* v. *Russell*, *ubi supra*, the Legislature may constitutionally go in the way of gratuities to men who have served honorably the State, but whose service has long since ended; for by this act, in my opinion, for the reasons stated above, the Legislature did not intend the payment of such gratuities, but rather the fulfilment of executory promises, which, for any cause, have not been performed.

For the same reasons I am of opinion that a vote of a town to pay a bounty to men drafted into the service and credited to the town, or to those whom they should employ as substitutes, is not within the intent of the act. A conscript could not make a contract for service with the town. He served, or furnished

a substitute, because he was compelled to by reason of the draft made upon him, and any promise in consideration of such service to be rendered was without consideration. It cannot be said that one who was drafted rendered military or naval service in consideration of a promise made by the city or town to which he was credited that he should be paid a bounty. The language of the act in question does not include this class of persons. The same is true of substitutes. His contract was with the man whose place he filled. He was hired to take the place of a man who could make no contract with the town, and he could not stand in any better situation than the man whom he represented.

The word "bounty" has been defined by Chief Justice Bigelow, in *Fowler* v. *Danvers*, 8 Allen, 80, 84, as signifying "money paid or a premium offered to encourage or promote an object, or procure a particular act or thing to be done." This definition agrees with the meaning given to the word in dictionaries of approved authority. There is nothing in the history of the legislation relating to bounties, or in the act now under consideration, tending to show that this is not the meaning to be given to the word in this statute. It is immaterial whether bounty promised in consideration of enlistment was in the nature of a cash payment at the beginning or at the end of the service, or whether it was a monthly gratuity in the form of wages. If the city or town, not being under obligation to pay wages, promised as a consideration for enlistment that it would pay a monthly sum either to the soldier or to his family, in addition to the wages paid him by the government of the United States, and this promise was made as a consideration of and before enlistment, and the enlistment was induced wholly or in part by such promise, the monthly or periodical payment so promised must be regarded as a bounty within the meaning of the act.

In *James* v. *Scituate*, 11 Allen, 93, a promise made by the town "to pay to each volunteer soldier raised in this town and being an inhabitant therein and mustered into the service of the United States, . . . and having a family, fifteen dollars per month in addition to the sum allowed by the United States per

month and during such service, and to each soldier not having a family the sum of ten dollars per month for like service," was held by the court to be a bounty. Mr. Justice Gray, in delivering the opinion, speaking of this promise, said: "The town offered him a bounty if he would volunteer and be mustered in. He accepted the offer by entering into an organization of militia which was liable to be called into the national service."

I am of opinion that, whenever a volunteer was promised, as an inducement to his enlistment, a gratuity of a fixed sum per month, during his service, or for any other time, such promise was the promise of a bounty, and is within the spirit of the act in question.

Whether the promise of a bounty referred to in the act is intended to include every promise made by a town or city, even though unlawful, or is limited only to such promises as the town had the right under existing laws to make, or which were ratified by subsequent legislation, is a question of much difficulty. In some cases promises were made by towns without authority, or even against express prohibition by the Commonwealth. Promises to pay monthly wages during the term of service were by subsequent legislation ratified for a period of ninety days, and declared to terminate at the end of that period. St. 1861, c. 222, § 2. If the intention of the Legislature in passing the act in question was to obligate the Commonwealth to the fulfilment of such void or prohibited promise, it is unfortunate that such intention was not more clearly expressed, for ordinarily the word "promise" used in a statute would be taken to mean only a lawful promise.

On the other hand, it is not to be presumed that the cities and towns were not ready to fulfil, and did not when requested fulfil, all promises for bounty which they had lawfully made. I am not informed that any such attempt at repudiation was made by any of the municipalities in the Commonwealth. Indeed, if it had been attempted, the promises made might have been enforced in the courts. It has been repeatedly held that a lawful promise to pay a bounty could be enforced in an action of contract against the town. *Grover* v. *Pembroke*, 11 Allen, 88; *Carr* v. *Warren*, 98 Mass. 329.

If, therefore, the scope of the act be limited only to such promises as the town could lawfully make, or which were ratified by subsequent legislation, the number of persons benefited under the act would be very limited. It would include only those who had for any reason failed to seasonably present their claim. Such a construction of the statute would practically make it merely an act for the relief of veterans whose claims are barred by the statutes of limitations. Such a narrow and limited construction is not to be presumed, unless clearly made necessary.

On the contrary, the history of legislation upon the matter of unpaid bounties points to a more liberal construction of the act. From time to time special acts have been passed giving bounties to certain soldiers whose claims against their towns or cities were for any reason void. For example, in *Marsh* v. *Scituate*, 153 Mass. 34, judgment was rendered for the defendant upon four actions to recover bounty money, upon the ground that the promise of the town relied upon was void. Thereupon, by Res. 1895, c. 125, the plaintiffs in said suits, together with twenty-three other persons, were voted a sum to be paid out of the treasury of the Commonwealth equivalent to the bounty promised them by the vote of the town, which had been adjudged illegal. There are many similar resolves upon the statute books. See Res. 1895, cc. 123, 124, 126; Res. 1896, cc. 103, 104, 106, 107, 108, 109, 110, 115, 117. Many, if not all, of these special resolves were for the payment of bounties to soldiers, promised by votes of cities or towns which were void under the statutes of the Commonwealth. Other like claims were presented to the Legislature of 1897, which passed the act in question.

It is to be presumed that the Legislature, in the enactment of a general law providing for the payment of bounties from the treasury of the Commonwealth to veterans who had enlisted under promises made by towns and cities, had in mind the numerous special acts upon the same subject which had been passed by previous Legislatures, and the petitions for further grants of the same character which were then pending before it. It is a familiar principle of the construction of statutes that the

history and general system of legislation upon any given subject may be taken into consideration in order to aid the construction of a statute relating to the same subject. *Church* v. *Crocker*, 3 Mass. 17, 21. In view of the numerous special acts granting bounties to veterans of the civil war in cases where promises made to them by the towns were unauthorized and therefore void, it is beyond doubt that the purpose of the act in question was to pass a general law covering the whole subject matter by the appointment of a commission to adjudicate and pass upon all such claims.

I am of opinion, therefore, that it is not the duty of your commission to determine whether the promises of the towns were valid in law, or not. If a bounty was promised by a town or city, and the service was performed in consideration of such promise, the veteran is entitled to be reimbursed from the Commonwealth, if for any reason the bounty has not been paid by the town.

REGISTERED PHARMACIST, — SELLING LIQUOR, — PLEA OF GUILTY, — CONVICTION.

A plea of guilty in the superior court by a registered pharmacist charged with selling liquor in violation of the terms of his license is a "conviction" within the meaning of St. 1896, c. 397, § 9, and the Board of Registration in Pharmacy has authority to revoke or suspend his license after due hearing.

To the Board of Registration in Pharmacy.
1897
November 10.

St. 1896, c. 397, § 7, provides that your Board shall hear all complaints made to them against any person registered as a pharmacist, charging him with suffering or permitting the use of his name or certificate of registration in the conduct of the business of pharmacy when he himself is not the owner and actively engaged in such business; or engaging in, aiding or abetting the violation, or, in his business as a pharmacist, violating any of the laws of the Commonwealth now under the supervision of the Board of Registration in Pharmacy, and especially the laws relating to the sale of intoxicating liquor. Section 9 provides that, if the Board find the person complained against to be guilty of the charges, they may suspend or revoke

his registration, "but the license or certificate of registration of a registered pharmacist shall not be suspended or revoked for a cause punishable by law until after conviction by a court of competent jurisdiction."

The question stated in your letter of October 28 is whether a plea of guilty made by a person complained against in the superior court is a "conviction," within the meaning of that word as used in § 9, the material words of which are quoted above.

It is well settled that in its ordinary legal sense of the word "conviction," as used in the statutes of the Commonwealth, signifies that the defendant has pleaded guilty, or has been found guilty by the verdict of a jury. The exhaustive opinion of Chief Justice Gray, in *Commonwealth* v. *Lockwood*, 109 Mass. 323, leaves no doubt that such was the meaning of the word "conviction," not only in the common law, but as it was used in the Constitution, and, for the most part, in the statutes of the Commonwealth. Moreover, it is expressly provided, in Pub. Sts., c. 200, § 5, that "No person indicted for an offence shall be convicted thereof, unless by confessing his guilt in open court, by admitting the truth of the charge against him by his plea or demurrer, or by the verdict of the jury accepted and recorded by the court."

In some statutes, however, the word is used as implying the judgment and sentence of the court upon a verdict or confession of guilt. For example, the provisions of the statutes (Pub. Sts., c. 169, § 19), that the conviction of a witness of crime may be shown to affect his credibility, has been held to be limited to cases where final judgment has been entered upon the verdict. *Commonwealth* v. *Gorham*, 99 Mass. 420. So also in case of the plea of *autrefois convict*. *Commonwealth* v. *Lockwood*, 109 Mass. 323, 329. These and other cases in which the word "conviction" is used in a more comprehensive sense as implying a judgment may be regarded, however, as exceptions to the general rule, arising in most instances from the fact that the record of the judgment is to be used as evidence in some other proceeding.

If in the statute under consideration the word "conviction"

is to be taken to mean final judgment, it must be because of some special reason taking the case out of the general rule, as above stated. Elsewhere in the statute (§ 16) the word "conviction" is used in its ordinary signification; and it is not to be presumed that the same word would be used in two senses in the same statute, unless there is some manifest reason therefor.

The purpose of the Legislature in the provision under consideration is not wholly clear. The conviction itself is not made evidence for the consideration of the Board, as in the case in Pub. Sts., c. 100, § 18, where the conviction operates as a forfeiture of license, and where, presumably, the word is used in the more comprehensive sense. The provision in question was probably intended to prevent the Board from trying the question of the guilt of the person complained of before he had had opportunity to defend himself before a jury. If this is so, there is no reason why the Board should be required to wait until judgment be entered before taking jurisdiction. If a person has confessed guilt in open court, or has been found guilty by a jury, it cannot properly be said that the Board are prejudicing his right to a fair trial in court by proceeding to try a complaint pending before them charging the same offence as that to which he has pleaded guilty, or upon which he has been found guilty by a jury. If it were otherwise, it would be in the power of the court or the district attorney to prevent indefinitely the revocation of the license of one who has violated the provisions of the statute. This, obviously, the Legislature did not contemplate, for the sole jurisdiction over pharmacists' licenses, and over the granting and revoking of them, is in the Board.

It is to be observed that the statute does not make the conviction of the person complained of a conclusive or adequate cause for revocation of his license by the Board, as doubtless would have been the case if the word "conviction" implied a final judgment. Notwithstanding the proceedings in court, the Board must still proceed to hear the case, and find for themselves, upon the evidence before them, that "the person is guilty of the acts charged against him."

I am of opinion, therefore, that after plea or verdict of guilty rendered against the complainant the Board have jurisdiction to suspend or revoke the license of the person complained against, upon due hearing as provided in the statutes.

MEMBER OF LEGISLATURE, — CONTRACT IN WHICH STATE IS INTERESTED, — PAYMENT.

A contract made by the trustees of the Massachusetts Hospital for Epileptics with a member of the Legislature for the installation of a boiler and other heating apparatus in the hospital subjects the member to a fine, under Pub. Sts., c. 205, § 12, is illegal, and the member cannot recover upon it in an action at law; yet, the work under it having been nearly completed before either party knew of the provision of the statute forbidding the member from making it, the trustees may waive the right to insist upon the defence of illegality, and pay to the contractor the amount they find equitably due him on the contract.

To the Trustees of the Hospital for Epileptics
1897
November 17.

Your letter of November 11 discloses the following facts. Acting under the authority of St. 1895, c. 483, § 2, the trustees of the Massachusetts Hospital for Epileptics, having duly advertised for proposals, made a contract with the lowest responsible bidder for the installation of a boiler and other heating apparatus for the hospital being erected under the supervision of the Board, the contract price being about $1,600. The contract was awarded to the lowest responsible bidder, after due investigation of his ability. He has practically completed the work in accordance with the terms of the contract, and to the satisfaction of the Board. It thus appears that all the requirements of the statute binding upon the trustees have been complied with, and that the contractor would be entitled to receive his money unless prevented by the following facts.

The contractor is a member of the Legislature of 1897, and under the provisions of Pub. Sts., c. 205, § 12, the making of such a contract was prohibited to him. The section substantially provides that if a member of the Legislature is personally interested in a contract in which the State is a party interested, which is made by a State commission or by authority derived therefrom, he is liable to punishment by fine or imprisonment. I am informed that when the contract was signed, and until

within a short time before the completion of the work, neither the contractor nor the trustees were aware of this provision; and that when the matter was called to the contractor's attention he immediately ceased work. This, however, was not until the contract was substantially performed.

It is well settled that no recovery can be had in law upon an illegal contract. *Miller* v. *Post*, 1 Allen, 434; *Goddard* v. *Rawson*, 130 Mass. 97. This is true not only in a suit upon the contract, but also upon open account for the value of services or materials furnished. In other words, the contractor or purchaser may retain the proceeds of an illegal contract, and cannot be sued for the price thereof by a person who in making the contract was guilty of a violation of law. One who is benefited by a contract made upon the Lord's day could not be held liable in a suit brought upon such contract, even though the fruits of the contract remained in his hands. *Ladd* v. *Rogers*, 11 Allen, 209; *Cardoze* v. *Swift*, 113 Mass. 250. The trustees, therefore, may retain the results of the work done under the contract, and defend the Commonwealth against any suit brought therefor in whatever form by the contractor.

But this is a matter of defence only. The trustees have committed no offence, the prohibition being against a member of the Legislature only. It is not illegal for one who has received the proceeds of a contract which is so prohibited to pay the price agreed upon. He may waive his rights in law, and treat the contract as subsisting. For example, one who buys coal which was not duly weighed by a sworn weigher, might, prior to a statute altering the principles of the common law, keep the coal and successfully defend a suit for the price of the same. But if the person receiving the benefit of such a prohibited or illegal contract sees fit to pay the price of what he has received, he commits no offence, and is not guilty of violating any statute.

The trustees, having complied with all the provisions of the statute applicable to them, have the right in their discretion to pay to the contractor the amount which they find equitably due him thereon, waiving their right to insist upon any defences that would be open to them by reason of the illegality of the contract on his part.

INSURANCE, — FOREIGN COMPANY, — REINSURANCE OF MASSACHUSETTS RISKS.

An insurance company organized under the laws of another State or government, and admitted to do business in this Commonwealth, has no authority to effect reinsurance on risks taken by it in Massachusetts in companies not authorized to do business in this Commonwealth.

To the Insurance Commissioner.
1897
December 1.

Your letter of November 4 requires my opinion upon the following question: Have insurance corporations, organized under the laws of another State or government, and duly admitted to do business in this State, authority to effect reinsurance on Massachusetts risks in corporations not authorized to do business in this Commonwealth?

St. 1894, c. 522, § 84, provides in terms that "no company of another State or government shall directly or indirectly contract for or effect reinsurance on any risk in Massachusetts with any company not authorized to do business therein." If this provision is not modified by any other statute, it furnishes a conclusive answer to your question.

It is probable that your question was suggested by the apparently contradictory provision of § 20 of the same statute from which the above provision is quoted. That section is as follows: "If any company authorized to transact the business of insurance in this Commonwealth shall directly or indirectly contract for or effect any reinsurance of any risk or part thereof taken by it, it shall make a sworn report thereof to the Insurance Commissioner at the time of filing its annual statement, or at such other time as he may request; and such reinsurance, except so far as it is in companies authorized to do business in this Commonwealth, shall not reduce the reserve required of it or the taxes to be paid by it, or increase the amount it is authorized to have at risk in any town or fire insurance district." Inasmuch as this provision seems to recognize reinsurance with companies not authorized to do business in this Commonwealth, there is an apparent contradiction between the two provisions.

It is to be observed, however, that the section last quoted is not limited to insurance in Massachusetts. I am of opin-

ion, therefore, that the provision in § 84 above quoted is to be construed as a proviso or limitation of the general provisions in § 20. Taking the two sections thus together, they amount to a requirement that in all cases of reinsurance by a company of any risk, whether within or without the Commonwealth, a sworn report thereof shall be made to the Insurance Commissioner; and that such reinsurance (excepting in companies authorized to do business in the Commonwealth) shall not reduce the reserve required or the taxes to be paid; provided, that no reinsurance by a foreign insurance company of any risk in Massachusetts shall be made with any company not authorized to do business in the Commonwealth. Thus construed, the provisions are not inconsistent.

Your question is, therefore, to be answered in the negative.

INSURANCE, — ASSESSMENT COMPANY, — SICK-BENEFIT BUSINESS.

St. 1890, c. 421, does not allow the Berkshire Health and Accident Association, an assessment insurance company, to continue to contract to pay benefits for disability caused by illness, although its charter and previous statutes did allow it to make such contracts.

To the Insurance Commissioner. 1897 December 4.

Your letter of the 1st inst. requires my opinion upon the question whether the Berkshire Health and Accident Association, a Massachusetts corporation, is authorized to contract for the paying of weekly benefits for disability caused by illness.

The Berkshire Health and Accident Association was incorporated January 15, 1885, under the provisions of Pub. Sts., c. 115, as amended and enlarged by St. 1882, c. 195. The purpose of the organization as set forth in its articles of association was the "providing a weekly benefit for its members in case of total disability from accident or illness." This purpose was a legal one under the provisions of statutes then in force, and under which it was incorporated.

By St. 1885, c. 183, assessment insurance was defined and regulated, and all companies carrying on the business of assessment insurance were declared to be subject to the provisions of that statute, excepting only the so-called fraternal beneficiary corporations. This corporation is not, and never was, a fra-

ternal beneficiary corporation. The statute of 1885, c. 183, in § 1 provided that "Every contract whereby a benefit is to accrue to a party or parties named therein upon the death or physical disability of a person, which benefit is in any degree or manner conditioned upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance on the assessment plan." The act further provided that the business involving the issuance of such contracts should be carried on only by duly organized corporations, subject to the provisions and requirements of said act. The same section further provided as follows: "If the benefit is to accrue through the death of the insured person, the contract shall be of life insurance; if through the accidental death only, or the physical disability from accident or sickness of the insured, it shall be casualty insurance." Under these provisions the corporation in question could lawfully provide for the payment of benefits to persons disabled by illness.

St. 1890, c. 421, was another general law relating to assessment insurance superseding the statute of 1885, and all other laws, theretofore passed upon the subject of assessment insurance. This statute, which is practically the existing law relating to assessment insurance, contained an important modification of the provisions of the previous law upon the subject (St. 1885, c. 183), the provisions of which I have quoted above. This modification consisted in the elimination of contracts for benefits to be paid in consequence of physical disability arising from sickness. The exact words of § 1 are as follows: "If the benefit is to accrue through the death of the insured person, the contract shall be of life insurance; if through the accidental death only, or the physical disability from accident of the insured, it shall be of casualty insurance." The words "or sickness" contained in the statute of 1885 are omitted in the statute of 1890. The omission of these words plainly indicated that the Legislature did not intend longer to authorize the making of contracts of insurance providing for the payment of benefits to persons disabled by illness. The reasons for thus omitting what are commonly called "sick benefits" it is not necessary now to consider, although they seem sufficiently obvious.

It remains to consider whether the statute of 1890 has made any exceptions in favor of existing companies like the one in question, which by their original charters were authorized to pay benefits to persons disabled by illness. Upon this question the provisions of the statute of 1890 seem to be sufficiently explicit. Section 1, after defining assessment insurance, provides in terms that "the business involving the issuance of such contracts (to wit, contracts of insurance upon the assessment plan) shall be carried on in this Commonwealth only by duly organized corporations subject to the provisions and requirements of this act." Then, after providing for two forms of contracts, to wit: first, where benefit accrues from the death of the insured person, and: second, where it accrues through accidental death or disability from accident of the insured, the section provides that "such business shall be lawful only as defined and permitted by this act." The eight following sections provide for the formation of corporations to transact the business of life or casualty insurance, arising from accident or death, on the assessment plan; and § 9 provides that "Corporations so organized may transact the business of life or casualty insurance arising from accident, or both, on the assessment plan." Section 25 of the same act is as follows: "Any corporation existing under the laws of this Commonwealth and now engaged in transacting the business of insurance on the assessment plan, may re-incorporate under the provisions of this act: *provided*, that nothing in this act contained shall be construed as requiring or making it obligatory upon any such corporation to re-incorporate, and any such corporation may continue to exercise all the rights, powers and privileges conferred by this act, or its articles of incorporation *not inconsistent herewith*, and shall be subject to the requirements and penalties of this act the same as if re-incorporated hereunder."

Taking these and the other provisions of the statute of 1890 together, it is plain that the Legislature intended to authorize the business of assessment insurance to be carried on only in the two ways specified in § 1, viz., life insurance and casualty insurance; meaning by casualty insurance contracts for the payment of benefits in cases of accidental death, or of disability

arising from accident. No other forms of assessment insurance were intended to be recognized or authorized. Corporations thereafterwards organized could carry on either or both of the specified classes of assessment insurance. Corporations already in existence and carrying on assessment insurance business of any kind could re-incorporate under the act, or could continue their business, exercising all the rights conferred by their articles of incorporation not inconsistent with the provisions of the statute of 1890.

While it is undoubtedly true that the purpose of the Legislature to prohibit the business carried on under the common designation of "sick benefits" could have been more plainly expressed, its purpose, upon consideration of all the provisions of the act, is sufficiently clear and unmistakable.

I am of opinion, therefore, that the corporation in question may not make contracts providing for the paying of benefits for disability caused by illness.*

MILITIA, — ARMORIES, — FAIR FOR CHARITY.

Armories provided for the militia, under St. 1888, c. 384, may not be used by a regiment for the purpose of holding a fair for the benefit of a charitable society.

To the Adjutant General.
1897
December 6.

Your letter of the 3d requires my opinion upon the question whether troops located in armories provided under St. 1888, c. 384, may "use the armories for the benefit of outside charities." Your letter further states that in the specific case upon which the question arises it is proposed by a regiment of volunteer militia to hold a fair for the benefit of a charitable society, to wit, the Home for Consumptives.

St. 1895, c. 465, § 5, provides as follows: "Armories provided for the militia under the provisions of chapter three hundred and eighty-four of the acts of the year eighteen hundred and eighty-eight shall not be used except by the active militia of this Commonwealth, and they shall not be loaned or let to

* Affirmed in *Attorney-General* v. *Berkshire Health and Accident Association*, 171 Mass. 458.

any one except for a proper military purpose, and then only when the application is approved by the commander-in-chief and intermediate commanders."

The plain purpose of this statute is to forbid the use of armories provided for the militia excepting by the active militia, and for proper military purposes. Your question must be answered in the negative.

COUNTY ACCOUNTS, — EXPENSES OF JAILS, — APPROPRIATION, — COUNTY TREASURER.

Salaries of jailers, masters and assistants, and expenses incurred for the support of prisoners in jails and houses of correction, are expenditures "required by law," and the appropriation for them having been used before the end of the financial year, the county treasurer may pay them for the remainder of the year, under St. 1897, c. 153, § 10, out of any money in the county treasury.

To the Controller of County Accounts.
1897
December 20.

St. 1897, c. 153, § 10, is adapted to meet the difficulties suggested in your letter of December 6. The facts you state are that, in the county in question, the appropriations have proved not to be sufficient to pay the expenses incurred for "salaries of jailers, masters and assistants, and the support of prisoners in jails and houses of correction;" and that the amount, owing to unforeseen contingencies, was all expended in eleven months of the financial year.

The expenditures referred to are "required by law," and are therefore within the provisions of § 10, above referred to, which provides in terms that "Whenever the appropriation for any purpose is insufficient to meet any expenditure required by law the county treasurer may, on the order of the county commissioners, make payment for such legally required purpose out of any money in the county treasury." The salaries of the persons named are fixed by law, and the prisoners must be supported. It is not always possible to foresee the amount required for such purposes, particularly the support of prisoners. It was the obvious intention of the Legislature to provide for just such contingencies by the section referred to.

COUNTY ACCOUNTS, — CLERKS OF COURTS, — TENDER, — SURETY.

Moneys paid to clerks of municipal or district courts as "tender" and as "surety" in lieu of bond on appeal, in civil cases, are included in the provisions of St. 1887, c. 438, §§ 3, 4, and 6, and the Controller of County Accounts has the right to require an accounting of them.

The same moneys, if, for any reason, they remain in the hands of clerks, come within the provisions of St 1890, c. 215, and should be deposited in a national bank.

To the Controller of County Accounts.
1897
December 20.

Your letter of November 18 requires my opinion upon the following questions, to wit: —

1. Are moneys paid to the clerk of a municipal or district court as "tender," in civil cases, included in the funds or moneys described in and included in the provisions of St. 1887, c. 438, §§ 3, 4 and 6?

2. Are moneys paid into court as "surety," in lieu of bond on appeal in civil cases, so included?

3. Are the moneys above designated included in and covered by the provisions of St. 1890, c. 215?

The first two questions may be properly considered together.

St. 1887, c. 438, § 3, provides that the controller "shall visit . . . at least once a year . . . all . . . clerks of police, municipal or district courts . . . and at such times shall make an examination of the books, accounts and vouchers of the aforesaid officers, ascertaining in detail the various items of receipts and expenditures; and said controller shall ascertain the actual amount of cash or money on hand in any of the aforesaid departments or with any of said officers." Section 4 of the same chapter provides that it shall be "the duty of all such officers . . . to make returns and exhibits under oath to said controller in such form and at such time or times as he shall prescribe." Section 6 provides that the said officers shall "keep an accurate record of . . . all sums of money which have in any way been charged or received by them or to their use by reason or on account of their offices or in their official capacity."

By St. 1890, c. 216, § 2, it is further provided that the officers named in § 3 (above quoted) who "shall neglect or refuse

to record or cause to be recorded in the cash book prescribed by the controller of county accounts an accurate classification of all moneys received and expended or paid out by them in their official capacity, or by reason or on account of the same," shall be guilty of a misdemeanor.

I understand that it is claimed by some of the clerks of such courts that moneys paid as "tender" or "surety" are not within the provisions of the above statutes, and therefore are not included in the funds which the clerks are required to keep an account of, subject to the examination of the controller; and that consequently the controller cannot by right demand to see the accounts or statements of receipts and disbursements of money so derived, nor to see vouchers of payments so made, nor to know or verify the actual balance on hand belonging to either account. This contention is based upon the fact that moneys paid as "tender" and as "surety" are not public funds. They are moneys in which neither the county nor the municipality is interested, but only the parties to the suit. The controller, being a public officer, is not concerned, it is claimed, in such moneys, and consequently has no right to examine the accounts of them.

The difficulty with this contention lies in the fact that the language of the statute is explicit and comprehensive. Money paid as "tender" or as "surety," though not paid for the use of the public, is, nevertheless, paid to the clerk as a public officer, and received, held and paid out by him as such. The statute expressly includes "all moneys which have in any way been charged or received by them or to their use by reason or on account of their said offices or in their official capacity." I am of opinion that this language cannot be so limited as to exclude money received or paid for any purpose by clerks in their official capacity.

The purpose of the statute, moreover, clearly looks to an examination of all funds received by such officers, whether on public or on private account. If a clerk had money in his hands as clerk, which he was not required to keep and exhibit an account of to the controller, that officer would be unable to verify his accounts accurately, or to know with the certainty

which the statute intends, the actual state of his cash. Money not required to be kept in the accounts exhibited to the controller could be transferred to the moneys so required to be kept in such a way that the accounts would appear to be correct, even when there was in fact an actual deficit. The only way in which the controller can keep fully informed of the facts is by requiring accounts to be kept of all moneys received by clerks in their official capacity. If that is done, the controller can check up the items of receipts and payments, and ascertain if the cash on hand corresponds thereto.

St. 1888, c. 275, which, in reference to the duties of the controller, uses the expression "public funds," does not, in my opinion, affect the question. That statute provides that the controller shall in his annual report make such suggestions and recommendations to the General Court as, in his judgment, will tend to simple, uniform and economical method of accounting for public funds. Whatever that statute may mean, it relates to the duties of the controller, but does not modify the provisions of the statutes fixing the duties of clerks.

I am of opinion, therefore, that the first two questions must be answered in the affirmative.

The third question is, whether moneys paid to a clerk as "tender" or as "surety" are included in the provisions of St. 1890, c. 215. That statute provides that "clerks of police, district and municipal courts, having cash funds in their hands as such officers beyond what is required for immediate use, shall make deposit thereof as trustees in some national bank located in the county in which said officers serve."

I am of opinion that the reasons stated above, which require an affirmative answer to your first two questions, are as well applicable to the determination of this question. Both classes of funds referred to by your question are in the hands of the clerks as public officers, and are not required for immediate use. If they are deposited as required by this statute, the controller is enabled, as already stated, to check up and verify the accounts of the clerks.

It has been claimed that money paid as "tender" should be kept in *specie*, for the reason that it is said to be important for

the parties to know whether the tender to the defendant by the plaintiff was made in lawful money. But the fact that lawful money is paid to the clerk is not evidence that money of that character was originally tendered. Bad money might have been offered to the plaintiff, and good money brought into court.

It is of no consequence what sort of money is paid to the clerk, if he accepts it for the amount intended to be paid. Many technicalities surrounded the subject of tender under the common law; among them that only certain classes of money, to wit, gold and silver, or paper money declared by the government to be legal tender, should be used, thus excluding even bills of national banks. There could be no tender at common law after suit brought. This was cured by statute; and it is provided (Pub. Sts., c. 168, §§ 24, 25, 26) that a tender may be made, in certain cases, after action brought, and be availed of in defence if the amount tendered be paid into court. The words of the statute are, "bringing into court the amount so tendered for costs, as well as for the debt or damage." It is not the "money" tendered that must be delivered to the clerk, but the "amount." There is, therefore, no obligation on the part of the clerk to keep it separate. It follows that the amount so paid becomes funds in his hands as a public officer, and subject to the provisions of the statute referred to.

Money paid as "surety" stands upon the same principle. The statute makes it the duty of clerks of inferior courts receiving money in lieu of bond to "transmit the same with the papers to the clerk of the superior court to which the appeal is taken." If the money received is transmitted forthwith, there is of course no reason for depositing it in a national bank; but if for any reason it remains in the hands of the clerk, it comes within the provisions of the statute.

INSURANCE, — ASSESSMENT COMPANY, — MUTUAL RESERVE FUND LIFE ASSOCIATION, — INCREASE OF ASSESSMENTS, — DUTY OF INSURANCE COMMISSIONER.

The Mutual Reserve Fund Life Association is an assessment insurance company, and if it proposes to increase an assessment over the last prior assessment, St. 1896, c. 515, § 7, makes it the duty of the Insurance Commissioner to grant or withhold his approval thereof.

To the Insurance Commissioner.
1898
January 22.

The form of policy issued by the Mutual Reserve Fund Life Association which has been submitted to me provides that upon stated times during each year "there shall be payable to the association a mortuary premium for such an amount as the executive committee of the association may deem requisite, which amount shall be at such rates, according to the age of each member, as may be established by the board of directors." The amounts so collected, less twenty-five per cent. set apart for the reserve fund, go into the death fund to meet the current mortality of the association.

This stipulation brings the company clearly within the class of assessment companies; that is to say, companies whose contracts call for such assessments as are sufficient to meet the claims upon them from time to time, in distinction from level-premium companies, whose contracts call for the payment of a fixed sum.

St. 1896, c. 515, § 7, was an attempt to give supervision over increase of assessments upon those insured in that class of companies by providing that "No call in excess of the last prior call shall be made without the consent and approval in writing of the Insurance Commissioner." I understand that this company proposes to make such a call, and your approval thereof has been requested; and the question submitted by your letter of January 14 is, "whether, under the above-named provision of law, the Insurance Commissioner has any duty in this matter."

If I understand your question, I answer it by saying that it is your duty under the statute to consider whether the increase in the call is necessary, and whether the interests of the policy holders and the solvency of the company require that such in-

crease be made; and to grant or withhold your approval, in your discretion, upon consideration of all the circumstances affecting the question.

It does not appear to me to be necessary to consider whether the statute under discussion is unconstitutional, as being a law impairing the obligation of contracts. The duty of an executive officer, ordinarily, is to conform to the statutes enacted for the conduct of his department, not to discuss their constitutionality. I see no reason why this case should present an exception to the rule. Whether the law impairs the obligation of insurance contracts is a question which should be raised by the contracting parties.

MASSACHUSETTS HOSPITAL FOR EPILEPTICS, — INMATES, — CHARGES FOR SUPPORT.

Persons received into the hospital under St. 1895, c. 483, § 10, are "inmates" thereof, and charges for their support may be collected in the same manner as charges for the support of persons committed thereto by the courts.

To the Trustees of the Massachusetts Hospital for Epileptics. 1898 January 25.

Your letter of December 7 requests the opinion of the Attorney-General as to whether the charges for the support of patients received into the Massachusetts Hospital for Epileptics, under St. 1895, c. 483, § 10, "may be collected from the State or place of settlement as in the case of commitments by the courts."

Section 12 of the same chapter determines who shall be responsible for the support of inmates of the Massachusetts Hospital for Epileptics. That section provides that the charges for the support of such inmates of the hospital as are not of sufficient ability to pay for their own support, or have not persons or kindred bound by law to maintain them, shall be paid by their place of settlement if they have a legal settlement in this State; but if they have no legal settlement in this State, such charges shall be paid by the Commonwealth at the rate provided by law for the support of city, town and State patients in the State lunatic hospitals.

It makes no distinction between persons received into the hospital under § 10 and those committed thereto by an order

of court. Persons received under § 10 are "inmates" within the meaning of § 12, and the charges for their support may be collected in accordance with that section.

Convict, — Commutation of Punishment, — Governor and Council, — Sheriff, — Removal of Prisoner.

When the Governor and Council have commuted the punishment of a convict, and caused a warrant for the purpose to issue to an officer, their jurisdiction in the matter has ended, and the prisoner is thereafterwards to be held as though the sentence provided for by the order of commutation had been imposed by the court.

Their assent, therefore, to the removal of the prisoner from one jail to another would not give a sheriff any authority to remove her in addition to what he now has by Pub. Sts., c. 220, § 2.

To the Governor and Council.
1898
February 8.

The letter of Henry G. Cushing, sheriff of Middlesex County, which has been referred by your honorable body to this office, states that a woman was convicted of the crime of murder, and that her sentence was commuted by His Excellency the Governor and the Honorable Council to imprisonment for life in the Lowell jail. The letter further states that, for reasons stated therein, it is important that she be removed to the Cambridge jail, for the purpose of having a surgical operation performed, the facilities for such an operation at the latter jail being much superior to those where she is now confined. The letter further states that she consents to having the operation performed. The sheriff requests the assent of the Governor and Council to such removal.

Pub. Sts., c. 218, § 15, provides that "When a convict is pardoned or his punishment is commuted, the officer to whom the warrant for that purpose is issued shall, as soon as may be after executing the same, make return thereof under his hand, with his doings thereon, to the secretary's office; and he shall also file in the clerk's office of the court in which the offender was convicted an attested copy of the warrant and return, a brief abstract whereof the clerk shall subjoin to the record of the conviction and sentence."

The foregoing statute comprises the whole authority of the

Governor and Council in the matter. When the warrant provided thereby to be issued by the Governor and Council is delivered to the officer, their jurisdiction in the matter is ended, and the prisoner is thereafterwards to be held as though committed by the court, and as though the sentence provided for by the order of commutation of the Governor and Council had been imposed by the court.

This being so, the assent of the Governor and Council would give the sheriff no authority in addition to that which he now has by law; and the provisions of Pub. Sts., c. 220, § 2, to wit, that the sheriff may, at his discretion, remove prisoners from one jail to another for their health or safe keeping, apply to this case, notwithstanding the warrant of commutation issued by the Governor and Council.

Massachusetts School Fund, — Truancy.

The failure of a school committee of a town to prosecute a parent for not sending his child to school is not a failure on the part of the town to comply with the laws relating to truancy; and the commissioners of the Massachusetts School Fund have no authority to withhold from the town its share of said fund on that account.

To the Commissioners of the Massachusetts School Fund.
1898
February 18.

Pub. Sts., c. 43, relating to the Massachusetts School Fund, provides in § 5 that no apportionment of the school fund shall be made to a city or town which has not "complied with the laws relating to truancy."

Your letter of January 15 states the following case, which has arisen in one of the towns otherwise entitled to distribution of a portion of the school fund: —

"The parent of a child whose age is within the compulsory limits of eight and fourteen years declines to send him to school on the ground that the school-house is inconveniently distant, and that the school committee does not furnish transportation thereto for the child in question.

"The school committee claims that the school-house is conveniently located for said child, and that he ought to walk to and from it."

The question submitted by your letter is, whether the refusal or neglect of the school committee to enforce the attendance of the child in question, acting under the provisions of St. 1894, c. 498, § 1, constitutes such a failure to comply with the laws relating to truancy as to authorize your Board to withhold from the town its share of the school fund.

The case you state is not one of truancy. The refusal of the school committee to prosecute the parent for not sending his child to school is not a failure on the part of the town to comply with the laws relating to truancy.

STATE SCHOLARSHIPS, — NOT DIVISABLE.

The Board of Education has no authority to divide scholarships awarded by the Commonwealth into fractional parts, so that more than one student may receive benefit from a single scholarship.

To the Board of Education.
1898
February 19.

Your letter of December 3, 1897, requests my opinion upon the following question: —

"The Board of Education has at its disposal three scholarships in Amherst, three in Tufts and three in Williams colleges, under the provisions of St. 1859, c. 154, and forty-three scholarships in the Massachusetts Institute of Technology and forty in the Worcester Polytechnic Institute, in accordance with the laws printed upon the appended sheet. Are these scholarships divisible? That is, can they be divided into fractional parts, and more than one student receive benefit from a single scholarship?"

The word scholarship, as used in the statutes, undoubtedly signifies a grant of money to a student to assist him in obtaining an education. If a scholarship is divided, and given to two students, two scholarships are thus created, and the number of scholarships is doubled. But the statutes fix the number of scholarships. Your question must, therefore, be answered in the negative.

PAUPER, — SETTLEMENT, — PAYMENT OF TAXES.

Provided a person has resided in any place in this State five years together after he became twenty-one years of age, and did not receive aid as a pauper during that time, it is immaterial, on the question of whether he has a settlement in that place, whether he paid all taxes duly assessed upon his poll or estate for any three years within that time, during the five years or after the five years had elapsed. If he has paid them, he has a settlement.

To the Board of Lunacy and Charity. 1898 March 5.

Your letter of January 22 requests my opinion upon the following facts stated therein: —

Philip Shannahan, aged sixty-five, a native of Ireland, married, and a laborer, arrived at Boston in 1887 and went thence directly to Salem. He lived in Salem from 1887 until he was committed to the State Almshouse at Tewksbury in December, 1897. He was an inmate of the Salem almshouse from January 4 to January 23, 1896. Up to that time he had paid no taxes; but in October, 1896, his poll tax for 1891 and 1892 was paid, and in the following November his poll tax for 1893, thus making three years' taxes in five years' residence.

The question submitted for my consideration is whether, on the foregoing facts, he has a legal settlement in Salem.

Pub. Sts., c. 83, § 1, cl. 5, provides that "Any person of age of twenty-one years, who resides in any place within this state for five years together, and pays all state, county, city or town taxes, duly assessed on his poll or estate, for any three years within that time, shall thereby gain a settlement in such place." I do not understand that it is claimed that Shannahan gained a settlement in Salem, unless under the provisions of the foregoing statute.

I assume that his poll tax was duly assessed upon him, and was the only tax duly assessed upon him for the years 1891, 1892 and 1893; and that he has not reimbursed the city of Salem for his support in the Salem almshouse from January 4 to January 23, 1896.

The facts submitted bring the case within the express provisions of the statute above quoted, Shannahan being of the age of twenty-one years, having resided in Salem for five years together, and having paid all taxes assessed against him for

three years of that time. He is therefore settled in Salem, unless the fact that he received relief as a pauper after the expiration of the five years' period of residence and before the payment of his taxes for three years creates an exception to the provisions of the statute. Such a construction, however, makes it necessary to incorporate into the statute an additional requirement, and one which is not authorized upon consideration of the language itself.

The statutes of Massachusetts relating to the settlement of paupers are arbitrary regulations, founded upon considerations of general convenience, and have no necessary relation to principles of natural justice or contract rights. In construing their provisions, little assistance can be drawn from the consideration of general principles of equity. As was said by Mr. Justice Lord, in *Plymouth* v. *Wareham*, 126 Mass. 475, 477: "The liability of a town (for the support of paupers) is a strict statute liability, to be fixed by positive rule. The statutes upon the subject are in no sense remedial, and are not to be modified or enlarged by construction or by any apparent equities, and nothing is to be deemed to be within the spirit and meaning of the statutes which is not clearly expressed by their words." Applying this rule of construction to the present case, it is not difficult to reach the conclusion that Shannahan's settlement is in Salem.

Section 2 of the settlement statute (Pub. Sts., c. 83) does not in my opinion affect the question. That section provides that "Nothing in the preceding section shall be construed to give any person the right to acquire a settlement or to be in process of acquiring a settlement while receiving relief as a pauper." This section is merely declaratory of the rule previously laid down by the Supreme Judicial Court. It has been held by that court in many well-considered cases that a person cannot be said to be in process of acquiring a settlement by reason of a continued residence, if any part of such continuity is broken by reason of the fact that he received assistance as a pauper. The earliest case upon this subject was *East Sudbury* v. *Waltham*, 13 Mass. 460. The settlement in that case was claimed to be acquired under a statute requiring residence for

ten years and payment of taxes for five years. It appeared that the person claiming the settlement had received assistance as a pauper during the ten years, and it was held that he had not gained a settlement in the plaintiff town. This rule was followed in *East Sudbury* v. *Sudbury*, 12 Pick. 1. In *West Newbury* v. *Bradford*, 3 Met. 428, where similar facts appeared, Chief Justice Shaw stated the reasons for the rule as follows: "Whilst receiving relief as a pauper, he is not in a condition to perform those duties of a resident inhabitant and efficient member of the community, which the law contemplates as the ground of his right to a settlement from ten years' residence and payment of taxes for one-half of those years. The law supposes an ability to perform municipal duties which are inconsistent with the dependent condition of a pauper." It will thus be seen that § 2 of the settlement law institutes no new principles concerning settlement laws, but was in affirmation of the rule already adopted by the Supreme Judicial Court. It is to be interpreted, therefore, in the light of those decisions and of the reason of the rule, as above stated.

So considered, it is obvious that the words of the section "in process of acquiring a settlement" refer to the period of five years' residence. After the expiration of the five years and before the payment of the taxes, the individual cannot properly be said to be in process of acquiring a settlement. The word "process" implies continuity. The payment of taxes is an act that may be performed at any time, and cannot be said to be any part of the "process" referred to in the statute.

Moreover, if he is living in another town, he may even be in process of acquiring a settlement in the latter town. If, therefore, by having still the right at his election to fix his settlement in the former town, though not living there, by payment of his taxes there, he may be said to be "in process of acquiring a settlement" in the former town, it follows that he would therefore be in process of acquiring a settlement in two towns. This could not have been the intention of the Legislature. *Boston* v. *Wells*, 14 Mass. 384.

The case of *Boston* v. *Amesbury*, 4 Met. 278, supports this construction. Settlement in that case was claimed under a

statute which required a residence of ten years and the payment of taxes for five years, assessed during the ten years' residence. Taxes for the five years were paid, not only after the expiration of the period of ten years, but after he had received support by confinement in a penal institution. The question there raised was, whether the defendant town could be held liable for expenses incurred after the expiration of residence but before the payment of taxes. The precise point now under consideration, therefore, was not before the court; but it was conceded by counsel and assumed by the court that the payment of the taxes, even though relief as a pauper had been received between the years of residence and the time of such payment, fixed a settlement of the pauper, the provisions of the statute having been complied with.

I am of opinion, therefore, that upon the facts stated the settlement of the person in question is in Salem.*

COUNTY ACCOUNTS, — COPIES OF CRIMINAL RECORDS FOR DISTRICT ATTORNEYS, — FEES.

Clerks of courts are authorized to charge fees for copies of records furnished by them to district attorneys to be used in evidence in criminal cases, at the rate of twenty cents a page.

Except in cases where costs are paid by the defendant, however, the money may be charged to the county by the district attorneys, and in every case must be paid to the county by the clerks.

To the Controller of County Accounts. 1898 March 10.

Your letter of March 3 requests my opinion upon the following questions, to wit: —

"1. When copies of criminal records are ordered by district attorneys for use in criminal trials in the Superior Court, are either trial justices, justices of district courts without clerks, or clerks of district courts, furnishing copies of such records, entitled to receive from the county payment for such copies?"

"2. If so, how much for each copy?"

First. — Pub. Sts., c. 199, § 5, provides that all written copies furnished by clerks shall be charged for at the rate of twenty cents a page. This does not include copies which they are re-

* In consequence of this opinion St. 1898, c. 425, § 1, was enacted.

quired by law to make, such, for example, as the copies which are transmitted when a case goes from an inferior court to the Superior Court by appeal. There is no statute which requires clerks to furnish copies to district attorneys for use as evidence in criminal cases; and I know of no reason why district attorneys should be exempt from the provisions of § 5, above referred to, requiring copies to be paid for at the rate of twenty cents a page.

In practice, however, it is not usually important that the charge be made. The district attorney has the right to tax the costs of trials to the county. Moreover, all fees received by clerks must be paid to the treasury. It follows that the money withdrawn from the treasury upon the certificate of the district attorney is paid to the clerk, who, in turn, repays it to the treasury. In case the sentence of the court should include the payment of costs by the defendant, it would be otherwise; and in such cases the expenses of copies used at the trial could be properly charged to the defendant, and paid over to the clerk.

In courts without a clerk, the statutes relating to clerks are applicable to clerical work performed or required to be performed by the justices. Pub. Sts., c. 154, § 27.

Second. — The statute fixes the amount of the fee.

CONSTRUCTION OF STATUTES, — KILLING OF DEER.

Pub. Sts., c. 92, § 8, was amended by St. 1882, c. 199; and Pub. Sts., c. 92, was expressly repealed by St. 1886, c. 276; but St. 1882, c. 199, was not repealed thereby.

St. 1882, c. 199, prohibits the killing of deer at any time excepting Tuesdays, Wednesdays, Thursdays and Fridays in the month of November.

To the District Attorney of the North Western District.

1898 March 11.

Your letter of March 9 requests my opinion upon the question whether St. 1882, c. 199, has been repealed by St. 1886, c. 276. The latter statute expressly repeals Pub. Sts., c. 92; and St. 1882, c. 199, to which your inquiry relates, is an act amending one section of the repealed chapter.

Pub. Sts., c. 92, is an act relating to the preservation of certain birds and other animals. It contains twelve sections.

Section 8 prohibits the killing of deer between the first day of December and the first day of November in every year.

St. 1882, c. 199, provides that "Section eight of chapter ninety-two of the Public Statutes is amended so as to read as follows." Then follows a redraft of the section prohibiting the killing of deer at any time excepting Tuesdays, Wednesdays, Thursdays and Fridays in the month of November. Other provisions of the amended section, particularly those relating to the penalty to be imposed, differ materially from § 8 in the Public Statutes.

St. 1886, c. 276, is "An act for the better preservation of birds and game." By § 11, as before stated, c. 92 of the Public Statutes is expressly repealed. No section of the statute of 1886 relates to the preservation of deer, although most if not all the birds and game provided for in the Public Statutes are protected under it. If, therefore, the repeal of Pub. Sts., c. 92, carries with it the repeal of St. 1882, c. 199, it follows that the killing of deer in this Commonwealth is no longer unlawful at any time.

I do not think this was the intention of the Legislature, nor that the statute is to be so construed. This is particularly shown by the repealing clause of St. 1886, c. 276, which, in addition to repealing the game law in the Public Statutes, also repealed St. 1883, c. 36, which was an act amending § 6 of said c. 92. If the contention that the repeal of c. 92 carried with it the repeal of St. 1882, c. 199, amending § 8 of that chapter, then it would not have been necessary to have referred specifically to St. 1883, c. 36, amending another section of the Public Statutes. This is not to be presumed. On the contrary, it is rather to be presumed that, by specifying that one amendment should be repealed, it was intended that the other amendment should not be repealed.

This construction, moreover, concurs with the general rule for the construction of statutes. "Where an act or a portion of an act is amended so as to read in a prescribed way, it has been said that the section amended is entirely repealed and obliterated thereby." Endlich, Interpretation of Statutes, § 196.

The same rule is stated in *Commonwealth* v. *Kenneson*, 143 Mass. 418. This being so, Pub. Sts., c. 92, § 8, was repealed by St. 1882, c. 199, and the latter statute was substituted therefor and became an independent statute. It follows that the repeal of Pub. Sts., c. 92, did not operate to repeal St. 1882, c. 199.

TOWN BOUNDARIES, — PERAMBULATIONS OF SELECTMEN, — BOUND STONES.

Town boundaries can be fixed only by statute, but where statutes defining them are uncertain or ambiguous, resort may be had to other evidence, such as records of perambulations by selectmen, bound stones, and subsequent acts of the Legislature referring to parts of the original boundary line, to ascertain the true line intended by the Legislature.

To the Topographical Survey Commission. 1898 March 11.

Some general considerations relating to town boundaries will assist not only in answering the specific inquiries in your letter, but in the determination of cases as they may hereafter arise in your work.

Town boundaries can be fixed only by statute. No agreements between towns or their officers, by perambulation or otherwise, are effectual to alter or vary lines established by statute.

It often happens, however, that the statutes defining town boundaries, especially the older ones, are uncertain or ambiguous. It may also happen that the line is described in general terms, and that reference must be had to facts existing at the time of the enactment of the statute to ascertain the intention of the Legislature. The statute referred to in your letter illustrates this fact. The order in council passed March 12, 1712, setting off Lexington from Cambridge, describes a line which cannot be traced excepting by knowledge of extraneous facts. It recites that for more than twenty years the farmers, "dwelling on a certain tract of out-lands, . . . obtained leave from the General Court, with approbation of the town, to be a hamlet or separate precinct, and were set off by a line, to wit: — beginning at the first run of water or swampy place, over which is a kind of bridge in the way or road on the southerly side of

Francis Whitmore's house, towards the town of Cambridge aforesaid." Thence it runs "across the neck of land lying between Woburn line and that of Watertown side, upon a south-west and north-east course." This description contains scarcely more than a presumption that the boundary line which had been so set off by farmers twenty years before, and which was adopted in the division of the towns, is a straight line. It is probable that the line followed existing farm boundaries, and was therefore not a straight line. The words of the statute leave it at least uncertain whether a straight line was intended.

In such a case, and in all cases where the statute is ambiguous or uncertain, recourse may be had to other evidence for ascertaining the true line intended by the Legislature. The principal evidence so resorted to is that afforded by perambulations and bound stones or monuments. By St. 1785, c. 75, the Legislature provided: "That the bounds of all townships shall be, and remain as heretofore granted, settled and established. And to prevent an interference of jurisdiction, the lines between towns shall be run, and the marks renewed within three years from the last day of March instant, and once every five years forever after, by two or more of the selectmen of each town, or such other persons as they shall in writing appoint, to run and renew the same; and their proceedings, after every such renewal of boundaries, shall be recorded in the respective town books." Periodical perambulations of town lines by the selectmen of the adjacent towns have been required by successive acts since that time. St. 1827, c. 117, § 1, further provided for the erection by the selectmen of adjacent towns, at their joint expense, of permanent monuments to designate their respective boundaries at the angles; and such is the law to-day.

Neither these perambulations nor the bound stones so provided to be erected can control or alter the bounds between towns as fixed by statute. *Commonwealth* v. *Heffron*, 102 Mass. 148. But in cases where the true boundary is uncertain, or the words of the statute fixing the boundaries between towns is ambiguous, such perambulations and bound stones may be resorted to as evidence of the true boundary. As was said by Mr. Justice Morton, in *Freeman* v. *Kenney*, 15 Pick. 44, 46,

"When perambulations are duly made and recorded, they are not merely *prima facie*, but very high and strong evidence." It is also said by Mr. Justice Gray, in *Commonwealth* v. *Heffron*, 102 Mass. 148, 151, that "perambulations are competent and strong evidence of the location of the lines."

Perambulations and monuments, however, are not the only evidence. Subsequent acts of the Legislature referring to the same subject may be considered as declaratory of the intent contained in the original act, especially where the act itself was ambiguous or uncertain.

Applying these principles to the specific case stated in your letter, you will have, I think, little difficulty in coming to the conclusion that the course referred to by the council of 1712 was not a straight line, but was an adoption of the farmers' line run out to correspond with farm boundaries, twenty years before that time. All the perambulations in existence follow a line which departs materially from a straight course. The perambulations also all agree. All existing monuments correspond to such perambulations.

Moreover, in the incorporation of Winchester, which was bounded by a portion of the original line between Lexington and Arlington, the Legislature adopted the line fixed by the perambulations, which in that portion was very far from the straight line between the termini. St. 1850, c. 255. In the act incorporating the town of Belmont (St. 1859, c. 109), the line fixed between that town and Lexington, and which was also a portion of the old line, was a departure from what would have been the original line, assuming that it was straight.

The perambulations and monuments are all consistent, and are not inconsistent with the original act of 1712, unless that established a straight line. In view of this fact, and inasmuch as the Legislature has twice adopted the line of perambulations as the true line for a portion of the course, there remains no good reason for supposing that the remainder of the course, to wit, the portion of the original line which now bounds the towns of Arlington and Lexington, is a straight line, or that it follows a straight course between the original termini. On the contrary, all the evidence tends to show that the line

fixed by the perambulations should be adopted by you as the true line.

Your letter contains some general inquiries touching your duties in ascertaining town boundaries, illustrating your difficulties by a statement of the questions involved in ascertaining the line between Arlington and Lexington. In answering the specific inquiry I have sufficiently stated the general rule governing the performance of your duty, so far that it appears to be unnecessary further to dwell in this communication upon the general questions contained in your letter.

Insane Criminals, — Transfer, — Board of Lunacy and Charity.

St. 1895, c. 390, authorizes the State Board of Lunacy and Charity to transfer insane criminals from the State lunatic hospitals to the State Asylum for Insane Criminals at Bridgewater.

It is immaterial that the mittimuses committing them to the lunatic hospitals recite that they are to be detained there until further order of the court or any justice thereof. After they have been received in a State lunatic hospital they come within the jurisdiction of the Board, and it may remove them at its pleasure from one hospital to another.

To the Inspector of Institutions. 1898 March 11.

Your letter of January 12 requires my opinion upon the question whether the State Board of Lunacy and Charity has authority to transfer from the State lunatic hospitals to the State Asylum for Insane Criminals at Bridgewater certain criminal insane patients. The letter states that there is some uncertainty as to the authority of the Board, because of the fact that criminal insane patients are in certain cases sent by order of the court to a specific lunatic hospital, to be detained there "until further order of said court or any of the justices thereof."

St. 1895, c. 390, provides, in § 5, that "The State Board of Lunacy and Charity is hereby authorized to transfer to and from the State lunatic hospitals and the Asylum for Insane Criminals any of the description of persons mentioned in this act, whenever, in its judgment, such transfer will insure a better classification of insane criminals." The persons mentioned in the act include insane male persons specified in Pub. Sts., c. 222, §§ 10, 12 and 14, and St. 1895, c. 320; also Pub. Sts., c. 214, §§ 16, 19 and 20, and c. 213, § 15. Both of the persons re-

ferred to in your letter come within the class referred to in Pub. Sts., c. 214, § 16, and may, therefore, under the authority of St. 1895, c. 390, be removed by the Board to the State Asylum for Insane Criminals.

The fact that the order of commitment specified a lunatic hospital does not take away or diminish the authority of the Board. Pub. Sts., c. 214, § 16, provides that the court may cause persons held on indictment who are found to be insane "to be removed to one of the State lunatic hospitals for such a term and under such limitations as it may direct." The mittimus to the sheriff must therefore specify a hospital to which the person may be taken and which must receive him. He then comes within the jurisdiction of the Board, and may be removed, notwithstanding the original order of commitment. The undoubted purpose of the statute is to place persons committed for insanity under the control of the Board, with authority to remove them at its pleasure from one asylum to another. Similar provisions apply to persons sentenced to the State Prison, reformatory or to a house of correction or jail. The mittimus must specify the institution to which the commitment is made, and then the authority of the Prison Commissioners to remove the prisoner from one institution to another is practically unlimited.

BOUNTY DEPOSITED WITH TREASURER UNDER ST. 1863, C. 254, — INTEREST.

St. 1863, c. 254, § 4, is to be construed liberally in favor of soldiers in considering questions relating to the payment of interest on bounty money left by them in the treasury; and if there is sufficient evidence of an assignment to the Treasurer, interest should be paid on the money from the time it became due.

Bounty money accruing to the widows or legal heirs of soldiers after their death could not be assigned by the soldiers; and, if it was not assigned to the Treasurer by the widows or heirs, it does not draw interest.

To the Auditor. 1898 April 7.

Your letter of March 17 requests my opinion as to the proper computation of interest on moneys deposited with the Treasurer of the Commonwealth under the provisions of St. 1863, c. 254, § 4. The section is as follows: "Any volunteer who is or

shall be entitled to the bounty or pay provided in this act, may assign to the treasurer and receiver-general the whole or any part of such bounty or pay, which shall be by him received, and distributed in the manner provided for in the sixty-second chapter of the acts of the year eighteen hundred and sixty-two, and said bounty shall be held subject to the order of the volunteer, and the sum remaining in the hands of the treasurer shall draw interest at the rate of five per cent. per annum."

It is impracticable to deal with all questions of interest arising upon this section, and I prefer to consider the specific case submitted by way of illustration. One Bartlett enlisted in November, 1863, and became entitled to bounty under the provisions of St. 1863, c. 254, to wit: to receive the sum of fifty dollars upon his enlistment, and twenty dollars monthly so long as he should remain in the service; and if he should die in the service, twenty dollars a month for six months after his death, to be paid to his widow, or, if he should leave no widow, to his lawful heirs. There is evidence from the records that he made an assignment of this bounty in some form to the Treasurer, and that under such assignment the sum of $223.99 was paid to the Treasurer, and stands in the treasury to the credit of the soldier of to-day. There was also due him at the time of his death the sum of $127, which had not been deposited with the Treasurer. He was taken prisoner by the Confederates, and died in prison. The said sum of $127 was the amount of bounty which accrued to him while in prison.

Your question relates to the three sums which are due, to wit: first, the sum of $223.99, which was under his assignment duly deposited in the treasury; second, the sum of $127, accruing to him while in prison; and, third, the sum of $120, being the amount of bounty for six months after his death.

At the time of the enactment of the statute in question the Commonwealth was raising large sums of money for the equipment of soldiers for the war of the rebellion. Section 7 of the same act authorized the Treasurer to borrow from individuals and institutions such sums of money, at a rate of interest not exceeding five per cent., as would be necessary to carry out the provisions of the act. Section 4 invited the soldiers them-

selves to whom bounty accrued to loan the amount of their bounty to the Commonwealth upon the same rate of interest. The provisions of this statute, so far as they apply to loans by soldiers, are, in my opinion, to be construed liberally, and when doubts arise they are, if consistent with the statute, to be resolved in favor of the soldier. The Commonwealth borrowed and used the money of the soldiers, and should pay the debt in full. No technical defence should be set up against their claim.

As to the sum of $223.99, which was unquestionably assigned by the soldier, I am clearly of the opinion that interest accrued on the money as soon as it was due the soldier. It was payable monthly, and when the monthly bounty was due, and remained in the hands of the Treasurer under the assignment, it at once began to draw interest, continued to draw interest, and still draws interest until it is paid. The words in the section, "the sum remaining in the hands of the treasurer shall draw interest at the rate of five per cent. per annum," are obviously to be interpreted as a sum of money due the soldier and loaned by him to the Commonwealth.

As to the sum of $127, the evidence of assignment is not so specific. It is not my duty to advise you whether, as matter of fact, the evidence of assignment is sufficient; but I may at least say that, as you stated the facts to me, I am of opinion that you are authorized, as matter of law, to find that this portion of his bounty was also assigned, and, being so assigned, was loaned to the Commonwealth; and, having since been held by the Commonwealth, is liable to interest for the same time as the sum of $223.99 above referred to.

As to the bounty accruing after his death, the case stands differently. He did not and could not assign the whole or any portion of the bounty accruing to his widow or legal heirs after his death. It was payable to her or to them, and not to his legal representatives, who alone could recognize or be bound by his contract. It is not pretended that any assignment was made either by his widow or his legal heirs. There was, therefore, no contract by which the Commonwealth became legally or morally bound to pay interest on this sum. It was payable

as it accrued, and would have been paid if demand therefor had been made. Unless the evidence should show an assignment by his widow, or, in case there was no widow, by his legal heirs, interest is not payable thereon. I do not understand that any such assignment was made.

This disposes of the specific case stated in your letter. It is quite likely that the considerations I have stated as applicable to the case may assist you in dealing with other cases as they arise.

TUBERCULOUS CATTLE, — CONDEMNATION AND KILLING, — COMPENSATION.

The language of St. 1895, c. 496, § 10, providing that when cattle condemned as afflicted with the disease of tuberculosis are killed, full value thereof at the time of condemnation, not exceeding the sum of sixty dollars for any one animal, shall be paid, is to be construed as meaning the full value of the animal for purposes of sale at the time of condemnation, considering the fact that it is diseased, provided that not more than sixty dollars shall be paid for any animal.

It is therefore unnecessary for the Cattle Commissioners to cause a post-mortem examination to be made upon each animal killed for the purpose of determining how much it is afflicted before agreeing upon the value of the animal for the purpose of payment.

To the Cattle Commissioners.
1895
April 7.

Your letter of February 7 states that some criticism has been made touching the method of procedure adopted by your Board in paying for cattle condemned and killed under the provisions of St. 1895, c. 496, § 10.

The language of the statute as amended is as follows: "When the board of cattle commissioners or any of its members, by an examination of a case of contagious disease among domestic animals, becomes satisfied that the public good requires it, such board or commissioner shall cause such animal or animals afflicted therewith to be securely isolated, or shall cause it or them to be killed without appraisal or payment. . . . If it shall subsequently appear, upon post-mortem examination or otherwise, that such animal was free from the disease for which it was condemned, a reasonable sum therefor shall be paid to the owner thereof by the Commonwealth: *provided, however*, that whenever any cattle condemned as afflicted with the disease

of tuberculosis are killed under the provisions of this section the full value thereof at the time of condemnation, not exceeding the sum of sixty dollars for any one animal, shall be paid to the owner thereof out of the treasury of the Commonwealth if such animal has been owned within the state six months continuously prior to its being killed." St. 1895, c. 496, § 11, provides the method of ascertaining the compensation to be paid to an owner who is entitled to compensation for an animal destroyed. Under its provisions the commissioners and the owner may agree. If they cannot agree, the question shall be determined by arbitrators. Further provisions give the right to the party aggrieved by the decision of the arbitrators to have his damages assessed by a jury.

Your letter states that, in carrying out the provisions of the statutes, it has been the practice of the commission to ascertain by agreement or appraisal, before causing the condemned animal to be killed, the amount to be paid to the owner; and that this method of procedure is criticised on the ground that the Board should not determine the value either by agreement or appraisal until after a post-mortem examination.

There is nothing in the statute which requires a post-mortem examination of an animal killed before agreeing upon its value or ascertaining the same by appraisal; and I do not think a fair interpretation of the law imposes such a requirement upon your Board. I am of opinion that the procedure adopted by you conforms to the spirit and intent of the law, and that the criticism which has been made cannot be sustained.

In construing the statute, it is to be remembered that it was enacted in the exercise of the so-called police powers of the Legislature. The Commonwealth, in the exercise of this power, has authority to destroy animals afflicted with contagious diseases without awarding any compensation whatever. As to all diseases, excepting tuberculosis, the statute makes no provision for compensation; but expressly provides that they are to be killed without appraisal or payment. *Miller* v. *Horton*, 152 Mass. 540.

In view, however, of the prevalence of tuberculosis, and the large number of cattle required to be killed on account of the

existence of that disease, the Legislature has seen fit by various successive statutes to award partial compensation in certain cases to the owners of cattle afflicted with tuberculosis and killed for that reason. The original statute (St. 1894, c. 491, § 45) provided for the payment to the owner of one-half of the value of the animal for food or milk purposes, and without taking into consideration the existence of the disease. The Legislature of 1895 proposed to amend this statute by providing for the payment of the full value instead of one-half the value for food or milk purposes, and also without taking into consideration the existence of the disease. In an opinion given to the Governor May 22, 1895,* the Attorney-General advised him that the proposed legislation would be unconstitutional. Thereupon the bill was re-drawn, and the present proviso substituted. The words "value for food or milk purposes" were stricken out, and also the words "without taking into consideration the existence of the disease." As the law now stands, a sum of money in the nature of compensation is to be paid to owners of cattle if the cattle have been owned continuously within the State for six months prior to the killing. The sum paid is to be the full value of the cow at the time of condemnation, but not to exceed the sum of sixty dollars.

This is not a proviso for full compensation, because the maximum amount to be paid is sixty dollars, which is less than the full value of some cattle. Nor can it be said to be a compensation representing the value of the animal for food or milk purposes. Other provisions of the same statute make it unlawful to sell the products or the carcass of an animal afflicted with tuberculosis. It therefore must be regarded as a sum of money representing the value of the animal for purposes of sale at the time of condemnation, considering the fact that it is diseased. It does not follow that, because scientific tests reveal the existence of tuberculosis, the animal has no market value. It may still be saleable, and the price which could be obtained for it would depend upon how far the disease had affected its general appearance and condition. It is plainly this market value which the Legislature has seen fit to award to the owner when the

* See page 234, *ante*.

animal killed has been owned by him within the State for more than six months.

It is obviously not necessary under the statute to await the results of a post-mortem examination before determining the question of the existence of tuberculosis. It is true that in another part of the same section provision is made for reasonable compensation to the owner of the animal in case a post-mortem examination should demonstrate that the animal killed was free from disease. This, however, is an independent provision, and is not to be considered in connection with the proviso in question, requiring payment of an arbitrary sum to certain owners of cattle condemned by the commission as diseased. This payment is to be made whenever cattle are "condemned as afflicted with the disease of tuberculosis." For the purposes of settlement under this proviso the judgment of the commission that the animal is diseased is to be taken as conclusive. A post-mortem examination would not add any essential fact to the determination of the amount to be paid to the owner. The extent to which the disease had progressed before killing is not of importance, excepting so far as it had affected the appearance and condition of the animal for the purpose of sale. If the post-mortem examination should settle that the commission were mistaken, the owner would have a right to compensation under other provisions of the statute, unless he had been settled with at the time of condemnation under the proviso in question.

In other words, the scheme contemplated by the statute calls for a determination by the commission of the existence of tuberculosis before condemnation. When that fact has been ascertained and declared, it becomes the duty of the commission to condemn and kill the animal. Upon such condemnation it is the duty of the commission to pay a sum of money which represents the market value of the animal killed to the owner, if the animal has been owned continuously for six months within the State. The amount to be paid is computed upon the assumption that the animal is diseased, and a post-mortem examination would determine nothing more. The only purpose of an autopsy is to ascertain if the commission

was mistaken in its opinion; in which case the owner is entitled to full and unlimited compensation, without regard to the length of ownership by him.

It is, therefore, unnecessary to wait for the results of an autopsy before agreeing, or ascertaining by appraisal, for the purpose of payment, upon the value of an animal which the commission has adjudged to be diseased and has ordered to be killed.

PAUPERS, — MONEY LEFT AT DECEASE, — PUBLIC ADMINISTRATOR.

It is the duty of superintendents of insane asylums having money left with them by patients dying in the hospital who were public charges, if there are no relatives to claim it, and it is not legally claimed under Pub. Sts., c. 85, § 32, to turn it over to a public administrator.

To the Superintendent of the Medfield Insane Asylum.
1898
April 7.

Your letter of March 18 states that small sums of money, less than twenty dollars in amount, have from time to time been left in your hands by patients dying in the hospital who were public charges, supported either by towns or by the State; that no near relatives have been found to claim the money; and you request my advice as to your proper course in relation to the same.

Pub. Sts., c. 131, § 18, provides that when the total property of an intestate which has come into the possession or control of a public administrator is of value less than twenty dollars, he shall reduce the property into money, not taking administration thereon, and shall deposit such money, first deducting his reasonable expenses and charges, with the Treasurer of the Commonwealth, who shall receive and hold it for the benefit of any persons who may have legal claims thereon.

This provision determines your duty in the premises. When there are no relatives to claim the money (and it is not claimed by the overseers of the poor of a town chargeable with the pauper's support, under Pub. Sts., c. 85, § 32), it is to be paid to a public administrator, to be by him disposed of in accordance with the provisions of § 18.

STATE HIGHWAY, — PETITION BY SELECTMEN, — WITHDRAWAL OF PETITION.

When the selectmen of a town have filed a petition with the Highway Commission, recommending that a road be laid out as a State highway, their jurisdiction is ended, and the matter is within the exclusive jurisdiction of the commission; and a new board of selectmen, even though acting under a vote of the town, has no right to withdraw the petition.

To the Highway Commission. 1898 April 15.

Your letter of April 1 requests my opinion on the following question: "If the board of selectmen, acting under St. 1894, c. 497, § 1, file a petition with the commission for a State highway, and no action was taken on the matter by the commission other than placing the petition on file, can a new board of selectmen, acting under a vote of the town, withdraw the petition?"

Section 1 of the statute referred to is as follows: "Whenever the county commissioners of a county, or the mayor and aldermen of a city, or the selectmen of a town, adjudge that the public necessity and convenience require that the Commonwealth take charge of a new or an existing road as a highway, in whole or in part, in that county, city or town, they may apply by a petition in writing to the Massachusetts Highway Commission, stating the road they recommend, together with a plan and profile of the same."

Section 2 of the statute, as amended by St. 1897, c. 355, § 1, provides that: "Said Highway Commission shall consider such petition and determine what the public necessity and convenience require in the premises, and, if they deem that the highway should be laid out or taken charge of by the Commonwealth, shall file a certified copy of a plan thereof in the office of the county commissioners of the county in which the petitioners reside, with the petition therefor and a certificate that they have laid out and taken charge of said highway in accordance with said plan."

The obvious construction to be given to these sections, taken together, is that when the selectmen of a town have once adjudged that the public necessity and convenience require the Commonwealth to take charge of a new or existing road as a

highway, and have filed a petition with the commission, their jurisdiction in the matter has ended. The matter is then within the exclusive jurisdiction of the Highway Commission. The selectmen of the town are the judges in the first instance; but, once having exercised their judgment, the question of public necessity and convenience devolves upon the Highway Commission, and neither the board of selectmen nor a subsequent board has any further voice in the matter.

I am of opinion, therefore, that a new board of selectmen, even though acting under a vote of the town, has no right to withdraw the petition filed by a former board.

SAVINGS BANK, — GUARANTY FUND, — EQUALIZING DIVIDENDS.

St. 1894, c. 317, § 25, requires a savings bank to reserve from its net profits for a guaranty fund until that fund amounts to five per cent. of the whole amount of its deposits; and if its guaranty fund does not amount to five per cent. of its deposits, it has no right to use any portion of that fund to meet losses, and thereby equalize dividends.

To the Commissioners of Savings Banks.
1898
April 15.

Your letter of January 28 requires the opinion of the Attorney-General upon the question whether a savings bank, whose guaranty fund does not amount to five per cent. of its deposits, may charge a loss to that fund before the full amount of five per cent. is reached.

The statute in question is St. 1894, c. 317, § 25, which is as follows: "Every such corporation shall, at the time of making each semi-annual dividend, reserve as a guaranty fund, from the net profits which have accumulated during the six months then next preceding, not less than one-eighth nor more than one-fourth of one per cent. of the whole amount of deposits, until such fund amounts to five per cent. of the whole amount of deposits, which fund shall be thereafter maintained and held to meet losses in its business from depreciation of its securities, or otherwise."

The obvious intent of the Legislature in this enactment is to require savings banks to reserve not less than one-eighth or more than one-fourth of one per cent. of the deposits semi-

annually until the amount of the reserve so set aside amounts to five per cent. of the whole amount of deposits. This is clearly shown by reference to §§ 26 and 27 of the same chapter. Section 26 provides, in substance, for a division at stated periods of the income of the corporation, "after a deduction of all reasonable expenses incurred in the management thereof, and the amounts reserved for the guaranty fund." Section 27 prohibits the making of a dividend unless the profits "over and above the sum to be added to the guaranty fund" amount to one and one-half per cent. of the deposits.

These sections plainly require a deduction, before making a division, of the amount required by law to be set aside for the guaranty fund. If the guaranty fund could be used for the payment of losses during the six months preceding, and thereby to increase the amount of the dividend, the result would be the same as though no reservation were made for the guaranty fund. The amount reserved would first be charged against the profits and then paid out to increase the profits. This would render the law nugatory.

The purpose of accumulating a guaranty fund is to insure the safety of depositors by keeping on hand, over and above the ordinary profits of the bank, five per cent. of the whole amount of deposits. In order that the burden may not fall too heavily upon depositors, the accumulation is to be made gradually. But the intention of the statute is that the accumulation be constant, and that no less than one-eighth of one per cent. be added for each six months until the whole sum of five per cent. is reached, which sum is to be maintained.

A recent statute (St. 1896, c. 231) assists and confirms this view of the intention of the Legislature. Until the latter statute was enacted the amount which banks were allowed to hold in addition to the guaranty fund could not exceed one per cent. of the deposits, and when the accumulated profits reached that percentage an extra dividend must be declared. St. 1894, c. 317, § 28. By the statute of 1896 savings banks may accumulate eleven per cent. of their deposits before making an extra dividend. This gives them an opportunity to hold five per cent. of the deposits in addition to the guaranty fund, for the

purpose of maintaining and equalizing their dividends, without resorting to the guaranty fund while the same is in process of accumulation.

I am of opinion, therefore, that a savings bank may not use, for the purpose of meeting losses, any portion of the guaranty fund that it is required to accumulate until such fund amounts to five per cent. of its deposits.

INSURANCE, — BOMBARDMENT.

Insurance companies authorized to do business in Massachusetts have no authority to insure against the destruction of property by bombardment.

To the Insurance Commissioner. 1898 April 18.

Your letter of April 4 requires my opinion upon the authority of insurance companies doing business in Massachusetts to insure against the destruction of property by bombardment, or other acts of the public enemy.

Insurance companies authorized to do business in Massachusetts are prohibited from making contracts of insurance against loss of property by acts of the public enemy. The Massachusetts standard policy is a form of contract authorized by St. 1894, c. 522, § 60, for insurance against loss by fire. It specifically excepts loss by fire originating from "invasion, foreign enemies, civil commotion, riots, or any military or usurped power whatever." Clause 7 of said section, however, authorizes a company to attach a rider to the standard policy, containing provisions "adding to or modifying those contained in the standard form." By such a rider an insurance company may waive the exception against loss by fire resulting from foreign enemies, etc. But even then the policy would not cover loss or damage by bombardment or other act of the public enemy, unless fire ensued: and then only such part of the loss as would be due to the fire.*

* In consequence of this opinion, St. 1898, c. 380, § 1, was enacted.

PAROLE LAWS, — UNITED STATES PRISONERS, — COMMISSIONERS OF PRISONS.

The Commissioners of Prisons have no such authority to release prisoners from the State Prison, sentenced there by the United States courts, as they have under the parole laws to release prisoners sentenced there by the State courts.

To the Commissioners of Prisons. 1898 April 18.

Your letter of April 7 requires my opinion upon the question whether your Board has the same authority to release prisoners from the State Prison, sentenced by the United States courts, as it has to release prisoners who have been sentenced by the courts of this Commonwealth. Your letter refers specifically to St. 1894, c. 440, St. 1895, c. 252, and St. 1897, c. 206.

The statutes referred to are what are called the "parole" laws. As finally amended, they provide that the Commissioners of Prisons, when they are satisfied that a person held in the State Prison upon his first sentence has reformed, may, under certain conditions, issue to him a permit to be at liberty during the remainder of his term, upon such terms and conditions as they deem best. This permit can be issued after two-thirds of the term of sentence has expired.

United States Rev. Sts., § 5539, is as follows: "Whenever any criminal, convicted of any offence against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such State or Territory."

From the earliest times statutes have existed in this State authorizing the reception of United States prisoners in our jails, houses of correction and in the State Prison. When prisoners are so committed by sentence from the federal courts they are, under the provisions of the section quoted, subject to the same discipline and treatment as prisoners sentenced by the courts of the State. I am of opinion, however, that this sec-

tion does not authorize the commissioners to discharge them before the expiration of the time for which they are sentenced. The words "discipline" and "treatment" do not refer to the term of sentence, but to the conduct and management of prisoners while in confinement.

Under the provisions of the United States Rev. Sts., § 5543 (first enacted in 1867), prisoners sentenced by United States courts are entitled to the deduction of one month in each year from the term of their sentence for good behavior. By § 5544 this provision for deduction does not apply to prisoners where credits for good behavior are allowed under State laws. In such cases United States prisoners "shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary." This statute thus authorizes an abridgement of the term of sentence of a prisoner sentenced by the federal courts.

It differs, however, essentially from the provisions of the parole law. The latter authorizes discharge in the discretion of the Commissioners of Prisons at any time after two-thirds of the sentence has expired, with authority in the commissioners to recommit the prisoner if he violates the terms of his parole. Under the credit system a fixed number of days is deducted for each month of actual good behavior. It cannot be said that indefinite release of a prisoner at the discretion of the Commissioners of Prisons is within the intention of the section of the United States statute above quoted, authorizing specific deductions to be made from the term of sentence for good behavior.

I am of opinion, therefore, that the statutes authorizing the Commissioners of Prisons to release prisoners on parole are not applicable to persons sentenced to the penal institutions of Massachusetts by the courts of the United States.

MEDFIELD INSANE ASYLUM, — AUTHORITY OF TRUSTEES TO PURCHASE LAND.

The trustees of the Medfield Insane Asylum have no authority to purchase land without a special act of the Legislature appropriating money for that purpose.

To Trustees of the Medfield Insane Asylum. 1898 May 10.

I have your letter of the 7th, inquiring whether the trustees of the Medfield Insane Asylum have authority to purchase real estate without a special act of the Legislature.

The asylum was established by St. 1892, c. 425, and appropriations for its completion have been made by St. 1894, c. 391, St. 1895, c. 399, Res. 1896, c. 41, and St. 1897, c. 205. These statutes relate only to the building of the asylum on land which had already been purchased by a special commission authorized by and acting under St. 1890, c. 445. Under that statute the Governor was "authorized to appoint three persons as commissioners, with full power to purchase or bond, subject to the approval of the governor and council, suitable real estate . . . as a site for an asylum for the chronic insane." St. 1892, c. 425, recites that land had been purchased by virtue of this statute.

In my opinion these statutes and proceedings exhaust the authority of the trustees to purchase land. If, therefore, it is desired to purchase other land, it will be necessary to obtain a special act of the Legislature, appropriating money for that purpose.

FIREARMS, — STUDENTS OF HARVARD UNIVERSITY, — PARADE.

The Governor of the Commonwealth is authorized by St. 1895, c. 465, § 6, to consent that the students of Harvard University drill and parade with firearms in public under the superintendence of their teachers.

Although military instruction is not compulsory in Harvard University, yet it is a designated course of study offered to all students, and may be counted toward a degree, and is, therefore, a "prescribed part of the course of instruction" within the meaning of the statute.

To the Governor. 1898 May 10.

Your Excellency has desired my opinion upon the construction of St. 1895, c. 465, § 6, which forbids bodies of men from associating themselves together for drill or parade with firearms within this Commonwealth, and contains the following proviso, to wit: "*provided, further*, that students in educational insti-

tutions where military science is a prescribed part of the course of instruction may, with the consent of the governor, drill and parade with firearms in public, under the superintendence of their teachers."

The president of Harvard University requests the Governor to consent that the students of Harvard University drill and parade with firearms in public under the superintendence of their teachers.

The question arises upon the words "is a prescribed part of the course of instruction." The president's letter states that military instruction is not a compulsory study for all students, although it is a regularly designated course of study offered to all students in arts and science, by whom it may be counted towards the degree.

I am of the opinion that the university is within the proviso. It could not have been the intention of the Legislature that the study of military science, particularly in institutions of learning, where the courses of study are largely elective, should be compulsory. If that study is one of the elective courses open to its students, some of which courses must be taken to entitle them to a degree, it is "a prescribed part of the course of instruction," within the meaning of the statute.

INSURANCE, — NATURE OF CONTRACT.

The essential element of insurance is that the insured receives indemnity from loss by reason of the happening of events without his control or the control of the insurer.

The contracts of "The Medical Alliance" and the "National Registry Company" are contracts of insurance.

The "Electrical Inspection and Maintenance Company" issues a contract by which for a consideration it agrees to make such repairs as are necessitated by the ordinary wear and tear of operating the machinery named in the contract. That is not a contract of insurance. The element of hazard is wanting.

If a physician contracts for his services for a fixed time for a fixed price, it is not insurance.

To the Insurance Commissioner. 1898 May 11.

I have received from you sundry requests, written and oral, for my opinion as to whether certain contracts referred to are contracts of insurance. The same general considerations apply

to all the questions, and I will consider them together, referring hereafter in detail to each form of contract.

The nature of an insurance contract, both at common law and under the statutes of this Commonwealth, has been discussed in sundry opinions of the Attorney-General. See Opinions of December 2, 1891, April 26, 1893, April 20, 1894, June 21, 1894, and June 15, 1896.* I beg to refer to these opinions for a full discussion of the nature of insurance contracts.

By St. 1897, c. 66, § 1, an insurance contract is defined to be "an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction, loss or injury of something in which the other party has an interest." It is doubtful whether this statutory definition is anything more than a declaration of the common law definition of insurance. Mr. Justice Gray, in *Commonwealth* v. *Wetherbee*, 105 Mass. 148, 160, defines insurance in very much the same terms. See also *Claflin* v. *United States Credit System Co.*, 165 Mass. 501. Mr. Justice Lawrence, in *Lucena* v. *Crauford*, 2 Bos. & P. (N. R.) 300, 301, after quoting from Grotius, Pothier and Blackstone, says: "These definitions by writers of different countries are in effect the same, and amount to this, that insurance is a contract by which one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things."

The essential element of insurance is that the insured receives

* See pages 33, 77, 153, 164 and 345, *ante*.

indemnity from loss by reason of the happening of events without his control or the control of the insurer.

Applying these principles to the specific cases submitted, I find no difficulty in determining whether they are or are not contracts of insurance.

First. An association calling itself "The Medical Alliance" has issued a certificate in which, in consideration of weekly payments, it promises, first, that should the member be killed, or die suddenly, or be drowned, it will endeavor immediately to identify him or her, to notify his or her friends, and to take entire charge until they arrive or assume responsibility, limiting the expenditure in case of death to the sum of one hundred dollars; and, second, should the holder of the certificate become insane or unconscious, or burned, paralyzed or falsely arrested, stricken by apoplexy or heart failure, overcome by heat or cold, or be unable to prove his or her identity under any circumstances, it will endeavor to furnish promptly the best medical or surgical aid, to identify him or her, notify his or her friends, and to take entire charge until they arrive or assume responsibility, and to continue to supply the holder of the certificate with medical aid and medicines until recovered or has been pronounced incurable; the limit of expenditure under its terms being five dollars a week for a term of five weeks. This is a contract of insurance.

Second. The "National Registry Company" receives applications for "registry and accident insurance." It then supplies the applicant with a policy of accident insurance issued by the Fidelity and Casualty Company of New York, and gives the applicant a pocketbook with a card bearing an identification number, in which the sum of twenty-five dollars is guaranteed in case of accident to be paid to the person holding the card for care, medical attendance, etc. Though not a written contract, it is no less a contract of insurance. Insurance contracts need not be in writing; they may be oral. Upon the consideration of the payment of a sum of money by the holder of the card, the Bureau undertakes to render certain services and to guarantee the payment of a certain sum of money, in case of accident occurring to said holder.

Third. The "Electrical Inspection and Maintenance Company" issues a contract purporting to bind the company, in consideration of a fixed sum, to inspect, repair and maintain the electrical machinery described in the application for contract, and to renew at its expense armatures, commutators, etc., and to keep the same in as good an operative condition as it is at the time the contract was made. It is specified that the contract applies only to repairs necessitated by the ordinary and usual operation of machinery, and does not apply to damage to property or person resulting from disarrangement or accident; and that the contract "shall in no way be considered as insurance of the machinery to be maintained."

This is not a contract of insurance. The element of hazard is wanting. It is an agreement to furnish such repairs as may be expected to be incidental to the operation of machinery. It is inevitable that electrical machinery will by the ordinary and usual wear and tear of operation require from time to time ordinary and necessary repairs. This contract is an agreement to furnish those repairs for a fixed sum. The only element of chance involved is the extent of the repairs which may be required. But in this, as in other matters, it is neither hazardous nor unusual to undertake continuing work, although somewhat indefinite in its amount, for a fixed sum. It does not differ from the ordinary contracts by which an attorney is annually retained by his client.

Fourth. "If a physician, either by himself or as a representative of a conclave of physicians, agrees to furnish for a consideration medical or surgical aid and medicines to individuals in sickness or accident, would the agreement to do so be considered a contract of insurance?" This question stands upon the same principles as the last stated. A contract by a physician to furnish medical services for a fixed time and for a fixed price is not insurance.

STATE HOUSE, — CONTRACTS IN WHICH COMMONWEALTH IS INTERESTED, — PROPOSALS, — ADVERTISING.

The State House Commissioners are not required to advertise for proposal for contracts under St. 1898, c. 395.

To the State House Commissioners. 1898 May 20.

I am requested by a letter received from your architect to advise your Board whether it is necessary for the State House Commissioners to advertise for proposals for the work to be done under St. 1898, c. 395, being "An act to provide for illuminating the dome and lantern of the State House, and for improvements on the State House grounds." The architect's letter further states that the work will involve an expenditure in all of about $8,000, divided among four contractors.

There is no general statute requiring that proposals for contracts in which the Commonwealth is interested shall be advertised. Whenever the Legislature has seen fit to require proposals for such contracts to be advertised, it has been by special legislation. St. 1889, c. 394, providing for the building of the addition to the State House, required, in § 4, that proposals for work or material exceeding $1,000 in value should be advertised for. That act, however, applied exclusively to the State House addition, and its provisions do not include contracts made under the statute now under consideration.

I am of opinion that the commissioners are not required to advertise for contracts under the act in question.

CHARITABLE CORPORATION, — THE INDUSTRIAL AND LABOR UNION OF NEW BEDFORD, INCORPORATED, — EXPULSION OF MEMBER.

The Industrial and Labor Union of New Bedford, Incorporated, a charitable corporation organized under Pub Sts , c. 115, is not subject to St. 1888, c. 134, and there is no reason why it may not provide for the expulsion of a member without a vote of a majority of all the members.

To the Commissioner of Corporations. 1898 May 21.

My opinion is required upon the question whether "The Industrial and Labor Union of New Bedford, Incorporated," is amenable to the provisions of St. 1888, c. 134, entitled "An

act to authorize the incorporation of labor and trade organizations."

The agreement of association of the corporation in question states that the incorporators associate themselves together with the intention of constituting a corporation according to the provisions of Pub. Sts., c. 115. It further states that the purpose of the corporation is "to promote benevolence and charity, advance morality and social intercourse among its members, provide means for entertainment and instruction for its members, assist the sick and indigent, provide for the burial of the dead and the support of their families." Its by-laws provide certain qualifications for membership which are not important to the discussion of the question submitted. Section 4 of article 11 further provides that no person shall be admitted "who shall be engaged in any of the professions," or "who shall be engaged in commercial business on his own account: *provided, however*, that this article shall not apply to the corporation physician, or to persons engaged in industrial pursuits or labor." Although one of the purposes of the organization is to aid its sick and the families of its deceased members, yet under the provisions of its by-laws a member obtains no contract rights against the corporation for those purposes, but relies solely upon a vote of the directors authorizing such payments.

The articles of association of this corporation, as well as its by-laws, brings it clearly within the provisions of Pub. Sts., c. 115, relating to associations for charitable, educational and other purposes. The question submitted is whether it is also subject to the provisions of St. 1888, c. 134, authorizing the incorporation of labor or trade organizations; and especially to § 4 of said chapter, which provides that no member of a corporation organized under that statute shall be expelled by a vote of less than a majority of all the members thereof.

I am of opinion that the corporation in question is not subject to the provisions of the statute of 1888. There is much similarity between the two classes of corporations. Both look to the promotion of the welfare of their members and are charitable in their nature. But the statute of 1888 is specific, and

relates to a particular class of charitable associations, to wit, labor organizations. The purpose of corporations formed under this chapter is stated in § 1 to be that of "improving in any lawful manner the condition of any of the employees in any one or more lawful trades or occupations."

This cannot be said to be the specific purpose of the corporation in question. It is true that under its by-laws no person engaged in any one of the learned professions, or in commercial business on his own account, can be admitted as a member. This rule of exclusion, however, by no means limits membership to employees or persons engaged in manual labor. Persons engaged in any business or occupation are eligible to membership, as are common laborers who have learned no special trade. The organization of the corporation is broad enough to authorize the admission to its membership of any person, regardless of his business or occupation, excepting only professional men and merchants; and the purposes of its incorporation have no specific reference to "the improvement of the condition of employees in any one or more lawful trades or occupations."

I am of opinion, therefore, that the corporation is not subject to the provisions of St. 1888, c. 134, § 4, requiring a vote of a majority of all the members for the expulsion of a member.

GAS MANUFACTURED BY MUNICIPAL CORPORATIONS, — INSPECTION.

St. 1891, c. 370, § 17, imposes the same duty upon the Gas Inspector to inspect the gas manufactured and supplied by municipal corporations as Pub. Sts., c 61, § 14, as amended by St. 1892, c. 67, imposes upon him to inspect the gas of other corporations.

Although the penalty for supplying inferior gas is nugatory so far as municipal corporations are concerned, yet it is important that gas supplied by them should be inspected, so that the Gas Commissioners may be informed as to how far they comply with the law.

To the Gas Inspector.
1893
May 26.

Your letter of the 12th inst. requires my opinion upon the question whether it is your duty to inspect gas supplied by municipal corporations.

St. 1891, c. 370, enables cities and towns to manufacture

and distribute gas and electricity, and provides in § 17 as follows: "All general laws of the Commonwealth, and all ordinances and by-laws of any city or town availing itself of the provisions of this act, relative to the manufacture, use, generation or distribution of gas or electricity, or the quality thereof, or plant or the appliances therefor, shall apply to such city or town, so far as the same may be applicable and not inconsistent with this act, in the same manner as the same apply to persons and corporations engaged in making, generating or distributing gas or electricity therein."

I am of opinion that this section imposes upon you the same duty of inspection of gas manufactured by municipalities as is imposed upon you by existing laws relative to gas manufactured by other corporations. The inspection required of you by Pub. Sts., c. 61, § 14, as amended by St. 1892, c. 67, is for the purpose of testing the quality of the gas manufactured; and the section quoted provides specifically that the general laws relating to the quality of gas apply to gas manufactured by municipalities.

It is true that under § 14, providing for inspection by your office, the only penalty for producing gas below the standard fixed thereby is a fine of one hundred dollars, to be paid by the company to the city or town supplied by it. This penalty is nugatory so far as municipalities are concerned, for the town receiving the fine is also the town upon which the fine is imposed. But, although there is no effective penalty for producing gas of inferior quality which can be enforced against cities and towns, it does not follow that it is not your duty to make the inspection. The collection of the fine is not the only purpose of the inspection. It being your duty to report to the Gas Commissioners (St. 1885, c. 314, § 15), it is important that gas supplied by municipalities should be inspected, to the end that the Board having general jurisdiction of the whole subject shall be fully informed as to how far the provisions of law relating thereto are complied with by cities and towns.

SOLDIERS, — RIGHT TO VOTE WITHOUT LIMITS OF COMMONWEALTH, — CONSTITUTIONAL LAW.

Concerning the authority of General Court to enact legislation allowing soldiers to vote without the city, town or district in which they are entitled to vote under existing law or without the Commonwealth.

To the Governor. 1898 June 3.

Replying to your letter of inquiry of June 2, I am of opinion that the General Court is authorized to enact by legislation that inhabitants of this Commonwealth engaged in the military service of the United States, being otherwise qualified, may cast their votes without the limits of this Commonwealth, or in any town or district within this Commonwealth, for electors for president and vice-president of the United States, and for representatives to Congress; also for sheriffs, registers of probate, clerks of courts, district attorneys and all civil officers whose election is not otherwise provided for by the Constitution of the Commonwealth; also for municipal officers.

I am further of opinion that the General Court is not authorized, under the Constitution, to enact by legislation that inhabitants of this Commonwealth may cast their votes for governor, lieutenant-governor, councillor, senator, representative, treasurer and receiver-general, secretary, auditor or attorney-general in any other place, whether within or without this Commonwealth, than in the town, city or district in which under the provisions of the Constitution of the Commonwealth they are entitled to vote.

FIREARMS, — HIGHLAND CADETS OF MONTREAL, — PARADE, — UNITED STATES, — GOVERNOR, — CONSTITUTIONAL LAW.

The Highland Cadets of Montreal, Canada, a military organization, are prohibited from parading with firearms in this Commonwealth by St. 1895, c. 465, § 6.

The Governor has no authority to waive the provisions of that statute.

It is a matter of domestic regulation, and not within the jurisdiction of the United States or its authorities.

The statute is constitutional.

To the Adjutant-General. 1898 June 4.

Your letter of June 2 requires my opinion upon the question whether the Highland Cadets of Montreal, Canada, a military organization, may be authorized, either by the authorities of

the United States or by the governor of this Commonwealth, to parade with firearms in Massachusetts.

St. 1895, c. 465, § 6, provides that "No body of men whatsoever, other than the regularly organized corps of the militia, the troops of the United States and the Ancient and Honorable Artillery Company of Boston, shall maintain an armory or associate themselves together at any time as a company or organization, for drill or parade with firearms." Section 7 of the same chapter provides a penalty for violation of the provisions of the section quoted. There can be no question that the provisions of this statute extend to the case in question. It is not limited in its terms to citizens of the Commonwealth; and the purposes of its enactment apply as well to companies from foreign countries as to domestic organizations. The Legislature undoubtedly considered that it would not be conducive to the general welfare to permit armed bodies of men to assemble together or to parade through the public streets. Such a law is clearly within the so-called police power conferred upon the Legislature by the Constitution. It is moreover in conformity to the spirit of Art. 17 of the Declaration of Rights, which declares that "The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the Legislature, and the military power shall always be held in an exact subordination to the civil authority, and be governed by it."

In *Presser* v. *Illinois*, 116 U. S. 252, 267, a case in which a similar statute in Illinois was upheld as being constitutional, Mr. Justice Woods, in delivering the opinion of the court, said: "It cannot be successfully questioned that the State governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties and exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this

power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine." See also *Commonwealth* v. *Murphy*, 166 Mass. 171.

Military associations, whether foreign or domestic, being expressly prohibited by statute from parading with firearms, it is scarcely necessary to state that the Governor has no authority to waive its provisions.

Nor can authority be given by Federal officers or under Federal laws. It is a matter of domestic regulation, and not within the jurisdiction of the United States or its authorities.

CIVIL SERVICE, — DEPUTY CITY AUDITOR OF BOSTON.

The duties of the deputy city auditor of Boston, as defined by the auditor, involve the exercise of judgment, discretion, authority and responsibility, and his position does not come within the classification of civil service rule VI., schedule A.

To the Civil Service Commissioners.
1898
June 30.

Your letter of June 7 requires my opinion upon the question whether the deputy city auditor of Boston comes within the classification provided by schedule A in civil service rule VI. of the rules of the Civil Service Commissioners.

The duties of the office are defined in a letter from the city auditor, dated May 9, 1898, from which I quote the following: —

"All requisitions upon the Civil Service Commission for the certification of names and all communications from heads of departments and divisions to the civil service commissions will hereafter pass through your office and be made a matter of record there; and it is also desired, if such an arrangement can be made with the Civil Service Commission, that all certifications of names and other communications from the Civil Service Commission to heads of departments shall equally pass through your hands.

"Your office is also to serve as a bureau of information, both for the departments and for the public, as to all matters per-

taining to the civil service laws and rules and the application thereof; you will be expected to be thoroughly familiar with the laws and rules, with any decisions or opinions of the Attorney-General relative to the construction of the same, and with the practice and rulings of the Civil Service Commissioners. You will be expected to know just what positions are specifically classified, and to have such general knowledge as can be obtained at the office of the Civil Service Commission as to the condition of the eligible lists.

"If, in the performance of these duties, it becomes necessary or desirable for you to consult with the law department, you can hold such consultation at any time informally, or request a formal opinion upon any point through me.

"You will be expected to inspect, so far as possible, all the pay rolls of the city, and satisfy yourself that all persons now upon such pay rolls are legally employed, and to see that any new names appearing upon the pay rolls are properly there, either through comparison with the certifications of the Civil Service Commission or through satisfying yourself that the positions filled do not come under the civil service law or rules.

"You will be expected to prepare periodically such statistical information as to numbers of men employed in different capacities, discharges, new appointments, etc., as may be desired by the board of statistics. While your duties come in a general way under the auditing department, the work specially assigned to you is in large part work which this department has not heretofore undertaken to perform, and you will be given an office distinct from the regular office of this department."

Schedule A under civil service rule VI. includes the following positions, to wit: "Clerks, and other persons, under whatever designation, rendering services as copyists, recorders, bookkeepers, agents, or any clerical, recording or similar service;" also "inspectors, agents, almoners, and all persons, under whatever designation, whose duties may be in part clerical." In previous opinions given to your Board by this office I have stated that in my judgment the civil service act and the rules established thereunder should in general be so construed

as to distinguish between positions of mere routine, which ordinarily do not involve administrative or discretionary powers, on the one hand, and those, on the other hand, which involve the exercise of judgment, discretion, authority and responsibility; and that the general scheme of the act includes the former and does not include the latter class. Attorney-General's Opinions, October 12, 1892, and July 17, 1896.*

This definition seems to me to be conclusive of the present case. Assuming that the letter of instructions above quoted correctly defines the duties of the deputy city auditor, it is plain that the duties of his office, involving as they do the exercise of judgment, discretion, authority and responsibility, come within the latter class, and are not within the fair scope of the classification in the schedule referred to.

I am of opinion, therefore, that the duties of the deputy city auditor, as above stated, are not such as to bring the office within the classification established by your rules.

CATTLE COMMISSIONERS, — EXPENSES, — SALARIES, — APPROPRIATION.

The Legislature did not appropriate any money for the expenses of the Cattle Commissioners for 1898, but the law establishing the Board and fixing the compensation of its members is not repealed thereby. They are still the sworn officers of the Commonwealth, and are required to perform the duties prescribed for them by the statutes, except so far as those duties involve the expenditure of money.

They cannot receive their salaries now, but their claims therefor are just, and, like all other claims against the Commonwealth, depend for their payment upon the sense of justice of the Legislature.

To the Cattle Commissioners.
1898
July 2.

Your letter of the 25th ult. calls attention to the fact that no appropriation for the expenses of your commission has been made by the present Legislature, and requires the opinion of the Attorney-General upon the question "whether, in view of that fact, the commission should cease to perform its duties and lock up its office altogether; or whether it should remain organized, keep its office open and do what it can."

With one or two exceptions, not necessary now to consider,

---

* See pages 71 and 353, *ante*.

no money can be paid from the treasury of the Commonwealth to any person whatsoever without a specific appropriation therefor by the Legislature. The officers of government hold their positions in view of the general statutes relating thereto, which fix their duties and establish their salaries. Such general laws, however, do not of themselves authorize the payment of the salaries so established, or of the incidental and necessary expenses incurred in the discharge of the duties of such officers. For these an appropriation must annually be made by the Legislature. This principle extends throughout every department of State government. It is in recognition of the fundamental principle that the amount of expenditure for governmental purposes, and the consequent tax levy therefor, is, and in a republican form of government necessarily must be, within the immediate and direct control of the representatives of the people. Even judgments of the courts in civil proceedings against the Commonwealth cannot be paid without a special appropriation therefor. Pub. Sts., c. 195, § 4.

It is, moreover, expressly provided by Pub. Sts., c. 16, § 37, that "No public officer shall make purchases or incur liabilities in the name of the Commonwealth for a larger amount than that which has been appropriated by law for the service or object for which such purchases have been made or liabilities incurred; and the Commonwealth shall be subject to no responsibility for the acts of its servants and officers beyond the several amounts duly appropriated by law."

The Legislature having deliberately and repeatedly refused to make further appropriation for the conduct of the business of your commission, you are thereby relieved from the performance of such of the statutory duties devolved upon you which involve the incurring of liability to be paid by the Commonwealth. By the positive provisions of the statute above quoted, you have no right to do any acts whatsoever which call for the expenditure of the money of the Commonwealth. The general statutes applicable to your commission imposing duties upon your Board are to be construed in connection with and are limited by the statute I have quoted. For example, it is made your duty to cause horses afflicted with glanders to be

killed. In so far as this duty may require the expenditure of money, you have no right, in view of the action of the Legislature, to perform it; and the failure of the Legislature to furnish money for the purpose is to be regarded by you as abrogating any duty imposed upon you in that respect. Although by general laws you have been made the agents of the Commonwealth to do certain acts, your agency has been by implication revoked by the failure of the Legislature to furnish you with money for that purpose.

The foregoing considerations apply to such portion of your duties as involve the expenditure of money. The failure, however, to make an appropriation does not repeal the law establishing your Board and its duties, except as hereinbefore stated, nor that which fixes your compensation. You are still sworn officers of the Commonwealth, duly constituted, charged with the performance of the duties thereof, so far as the same can be performed without the expenditure of money or the incurring of liability on behalf of the Commonwealth, and entitled to the compensation fixed by law for your services. No appropriation having been made, you cannot at present receive your salary. Your claim, like all other claims against the Commonwealth, depends for its payment upon legislative appropriation, and you have no other security that it will be paid than your reliance upon the sense of justice of the General Court. As I have already intimated, no officer and no creditor of the Commonwealth stands upon a better title. With the exception of the Governor and the justices of the Supreme Judicial Court, no officer of the Commonwealth, however elected or appointed, can receive the compensation fixed by law for his office until the amount has been appropriated by the Legislature. Nor can any person having a claim against the Commonwealth, however, just, enforce its payment otherwise than by the grace of the General Court.

The failure of the Legislature to make appropriation for your work does not require you to abdicate your offices, nor to give up the performance of your duties, excepting in the cases where liability in behalf of the Commonwealth may be incurred. On the contrary, it is the duty of your commission to continue to

hold their offices, and to perform the duties thereof, so far as may be, with the expectation that at some future time the Legislature will authorize payment therefor. If you are not willing to continue in office under these conditions, it is your duty to resign.

BALLOT LAW COMMISSION, — APPOINTMENT, — DEMOCRATIC NATIONAL PARTY.

The Governor is not authorized to appoint a member of the Democratic National party upon the Ballot Law Commission in 1898.

To the Governor. 1898 July 18.

St. 1896, c. 383, prescribes the qualifications of the members of the Ballot Law Commission. It provides in § 1 that the commission shall be so selected that at least one of its members "shall be of the political party which at the annual State election next preceding their appointment, cast the largest vote for governor, and at least one of said members shall be of the political party which cast the next largest vote for governor." At the last State election, held in November, 1897, the largest number of votes was cast for the candidate of the Republican party; the next largest vote for governor was cast for George Fred Williams, nominated as a candidate by the Democratic party, at a convention duly called and held. The latter received 79,552 votes. William Everett, regularly nominated at a convention of the party called the Democratic National party, received 13,879 votes. Both the Democratic and the Democratic National party appear to have maintained regular and complete party organizations, and to have been entirely distinct and independent each from the other.

The political complexion of the Ballot Commission, so far as concerns the duty of the Executive in making appointments thereto, is determined by the annual State election next preceding the appointment. Your letter directs me to assume, for the purpose of the inquiry submitted, that no member of the Ballot Commission, as at present constituted, is a member of or affiliates with the party organization which nominated Mr. Williams for governor. Until there was occasion to make a new appointment to the commission, this fact was, under the

statute, of no consequence; but now that an appointment is to be made, I am clearly of the opinion that it is the duty of the Governor to select a member of that organization, and that it would not be a compliance with the law to appoint a member of the Democratic National party.

I am aware that in the case of *Jaquith* v. *Wellesley*, 171 Mass. 138, some of the language used by Mr. Justice Barker in delivering the opinion of the court may seem to be inconsistent with the views above stated. It is to be borne in mind, however, that the eligibility of the person in question in that case, which arose in the summer of 1897, was governed by his party affiliations in the State election of 1896. During that election, as Your Excellency will remember, the Democratic party was divided into two factions, each claiming to be regular, and disputing with the other the right to represent the Democratic party. Both factions held State conventions and nominated their candidates as Democrats. Until the election of November, 1896, was held it could not be determined with certainty which faction more truly represented the majority of the voters of the party; nor could it be said that one who affiliated with either of the factions contending in that election had thereby lost his right to membership in the party. The decision of the court determined nothing more than that the Democratic party, although divided into factions during the campaign and in the election of 1896, was, notwithstanding, one of the leading political parties of the nation, membership in which would not be lost in consequence of affiliation with either faction during that campaign and election.

The question which now arises, however, is to be determined with reference to the election of 1897, when a different condition of things prevailed. Both factions had perfected their party organization and machinery. The majority body retained the word "Democratic," and had become without doubt the representative in this Commonwealth of the regular national organization. The minority faction no longer claimed to be a part of the National Democratic party, as it then existed. The two organizations ceased to be factions of one party and became separate and distinct parties, differently denominated, each hold-

ing its own convention, adopting its own platform and nominating its own candidates. The difference between them was even more radical than that between them and the Republican party, and was scarcely less marked than that between the Republican party and the Prohibition party.

For these reasons the principles enunciated in *Jaquith* v. *Wellesley* are not in my opinion applicable to the situation as it exits to-day, and would not be so held by the court.

In that case, the incumbent had been regularly and lawfully appointed, and his removal was sought because of his alleged change of political faith. This issue was heard before the selectmen and decided in favor of the incumbent; and the court refused to issue a mandamus reversing the action of the selectmen in the matter, or compelling them to act otherwise. A very different question was presented from that which now confronts Your Excellency. A new appointment is to be made; and in making that appointment it is, in my opinion, the plain duty of the Executive, in view of the political situation as it existed in the election of 1897, to recognize the organization which cast the next to the largest number of votes at that election as entitled to representation upon the Ballot Law Commission.

LAND REGISTRATION ACT, — OFFICERS OF COURT, — APPOINTMENT.

The land registration act does not take effect in any respect till October 1, 1898, and no appointments can be make thereunder till then.

To the Governor. 1898 July 21.

The question submitted, whether appointees under the land registration act (St. 1898, c. 562) draw salary from the time of their appointment, or whether such salary does not begin until October 1, is apparently based on a misconstruction of the statute. The last section of the act provides that it "shall take effect upon the first day of October in the year 1898." So far as I have been able to discover, there is no provision, such as is often made in similar statutes, for having that portion of the act providing for appointments take effect at an earlier day than the date fixed for the full effect of the whole statute.

For example, St. 1897, c. 508, enacted that the term of office

of the bar examiners provided for by that act should commence on the first day of October, and that the act should take effect on the first day of January following. So, in the act establishing the Superior Court (St. 1859, c. 196), it was provided in the last section that the act should take effect, so far as the appointing, commissioning and qualifying the justices were concerned, on the tenth day of May, and that the act should take full effect on the first day of July following.

There are many reasons why the officers of the court should be appointed, the court established and the manner of procedure promulgated, so that its business could begin October 1, when the act takes effect. There is, however, no such provision in the act. It appears to be an oversight. In the absence of any such provision, I can find no authority authorizing the Executive to make appointments before the first day of October. Section 4, providing for the appointment of judges and a recorder, is not yet law, and will not be law until the first day of October, and an appointment made now or at any time before that date would be without authority of law.

INTERNAL REVENUE LAW, — CERTIFICATES, — ATTORNEY-GENERAL.

State officers have no right to the opinion of the Attorney-General upon questions which do not concern them in the performance of their official duties.

Persons other than State officers are not entitled to the opinion of the Attorney-General, and would not be bound by it if they had it.

If statutes of Massachusetts make it the duty of the Secretary of State to file or record any instrument, he should do so regardless of whether proper revenue stamps have been affixed to it or not.

A certificate is a statement written and signed (usually by some public officer), but not necessarily or usually sworn to, which is by law made evidence of the truth of the facts stated, for all or for certain purposes.

A certificate of nomination is a certificate within the meaning of the internal revenue law and requires a stamp to be affixed thereto.

A nomination paper is not a certificate.

To the Secretary. 1898 July 27.

Your letter of July 20 requests the opinion of the Attorney-General upon the question whether the following forms of certificates required by law to be filed in your office are subject

to the provisions of the United States revenue law requiring internal revenue stamps to be affixed thereto; to wit: —

(1) Statement of receipts and expenditures, under the corrupt practices act, so called.

(2) Statement of expenses, under the lobby act, so called.

(3) Certificate of condition of corporation, under Pub. Sts., c. 106.

(4) Certificate to accompany labels, etc., under the trademark act.

(5) Convention certificate of nomination.

(6) Nomination paper.

You have no occasion to seek the opinion of the Attorney-General upon the first four of the forms of certificates enumerated in your letter. If they are subject to the provisions of the federal law, the stamps required are to be affixed not by you, but by the persons filing the same. Whether they should affix stamps or not, is for them to determine. They are not entitled to the opinion of the Attorney-General upon the question, and would not be bound thereby.

The internal revenue law, it is true, provides, in § 15, that it shall not be lawful to record or register any instrument required to be stamped unless a stamp of the proper amount has been affixed thereto; but a similar provision of the internal revenue law of 1866 (U. S. Sts., 1866, c. 184, § 9), was held by the Supreme Judicial Court of Massachusetts not to prohibit the performance by the officers of the Commonwealth of the duties imposed upon them by its statutes, but that it was limited in interpretation and effect to records required or authorized by acts of Congress. *Moore* v. *Quirk*, 105 Mass. 49.

It being made your duty by the statutes of Massachusetts to file or to record the instruments in question, you should do so, regardless of the question whether proper revenue stamps have been affixed or not.

The same may be said of certificates of convention and nomination papers. In view, however, of the importance of uniformity in proceedings under the election laws of the Commonwealth, it has been the custom of this office to advise you upon questions relating to such matters, even though they may

not strictly concern the performance of your official duties. The questions now stated appear to be of that class.

Schedule A of the internal revenue law, enumerating instruments which must be stamped, provides as follows: "Certificate of any description required by law not otherwise specified in this act, ten cents."

The word "certificate" may be defined as a statement, written and signed (usually by some public officer), but not necessarily or usually sworn to, which is by law made evidence of the truth of the facts stated, for all or for certain purposes. Such are, for example, a certificate of discharge, issued by a bankruptcy court to show that a bankrupt has been duly released from his debts; a certificate of naturalization, issued by the proper court to show that the holder has been duly made a citizen; a certificate of registry, issued by a custom house collector to show that a vessel has complied with the navigation laws. Century Dictionary, title *Certificate*.

In Bouvier's Law Dictionary, under the title *Certificates*, it is stated that "certificates are either *required by law*, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned; or *voluntary*, which are given of the mere motion of the party giving them and are in no case evidence."

These definitions, though not wholly consistent, appear to be sufficient to indicate the meaning of the words "certificate of any description required by law," as used in the act of Congress. They are not limited, in my judgment, to statements which may by statute provision be received as evidence in judicial proceedings, but include all statements required by statute to be made as evidence for the use of any officer of the Commonwealth in the performance of his duty.

Applying these principles, it is not difficult to reach the conclusion that certificates of nomination are "certificates required by law," within the meaning of the internal revenue statute. A certificate of nomination is a certification by the presiding officers of a political convention of the candidates nominated at such convention to be voted for at the next annual election. It is required to be signed and sworn to. The Secretary of

State receives it as evidence of the proceedings of the convention, and it is his duty, if the certificate is in due form, to enter the names of the candidates so nominated upon the official ballot. Every requirement of a certificate, as that word is used in legal proceedings, is fulfilled in such a paper. I am of opinion that it is within the provisions of the internal revenue statute, and must be stamped.

It is otherwise with a nomination paper. This is merely a statement by certain voters that they desire to nominate a person as a candidate for office. It must be sworn to, but an affidavit is not a certificate. There must be affixed to the nomination paper the certificate of the registrars of voters of the town or district within which the nomination is made, that the names signed to the nomination paper are those of qualified voters. This is undoubtedly a certificate within the meaning of the law, but, being given in the performance of official duty, is within the proviso of § 17 of the internal revenue statute, which exempts from the stamp taxes imposed by the act State, county, town or other municipal corporations in the exercise of functions strictly belonging to them in their ordinary governmental, taxing or municipal capacity. Although this proviso is inserted in a section relating to other forms of instruments, I am of opinion that it was intended by Congress to be general in its applications, and to exempt all papers required of State or municipal officers by the provisions of our statutes.

I am of opinion, therefore, that nomination papers do not require to be stamped under the provisions of the United States revenue statute.

INTERNAL REVENUE LAW, — RETURNS OF GAS AND ELECTRIC LIGHT COMPANIES.

The Gas Commissioners are not required to affix internal revenue stamps upon returns required by law to be made to them, and it is immaterial to them whether such returns are stamped or not.

To the Gas and Electric Light Commissioners. 1898 July 28.

I have your letter of July 25, inquiring whether the provisions of the internal revenue statute, recently enacted, apply to the returns required by law to be made to your Board by

the several gas and electric lighting companies in the Commonwealth.

You have no occasion to seek the opinion of the Attorney-General upon this question. If such returns are subject to the provisions of the Federal law, the stamps required are not to be affixed by your Board, but by the persons or corporations filing the same. Whether they should affix stamps or not is for them to determine. They are not entitled to the opinion of the Attorney-General upon the question, and would not be bound thereby.

The internal revenue law, it is true, provides, in § 15, that it shall not be lawful to record or register any instrument required to be stamped, unless a stamp of the proper amount has been affixed thereto; but a similar provision in the internal revenue law of 1866 (U. S. Sts., 1866, c. 184, § 9) was held by the Supreme Judicial Court of Massachusetts not to prohibit the performance by the officers of the Commonwealth of the duties imposed upon them by its statutes, but that it was limited in interpretation and effect to records required or authorized by acts of Congress. *Moore* v. *Quirk*, 105 Mass. 49. This relieves your Board from any responsibility in the matter.

INTERNAL REVENUE LAW, — CERTIFICATES, — CLERKS OF COURTS, — CONGRESS.

Certificates issued by clerks of courts, except when issued for the benefit of the Commonwealth, should be stamped, and the stamps should be paid for by the persons for whose benefit they are issued.

Congress has no power to impose a tax in any form upon the States as sovereign bodies.

To the Controller of County Accounts.
1898
July 28.

There is little doubt that certificates issued by clerks of courts should be stamped, in accordance with the provisions of the war revenue law of 1898.

Your letter of July 21, assuming that stamps must so be affixed, inquires whether the person to whom the paper issues should be charged for the stamp in addition to the prescribed fee, or for the stamp alone, where no fee for the instrument is provided by law.

Section 6 of the internal revenue statute provides: "That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected and paid, for and in respect of the several bonds, debentures or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this act, or for or in respect of the vellum, parchment, or paper, upon which such instruments, matters, or things, or any of them shall be written or printed by any person or persons, or party who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

It thus appears that the stamp is to be paid for either by the person who issues the instrument, or by the person for whose benefit the same shall be issued.

It is obvious, not only from this but also from other sections of the revenue act, that, with certain exceptions, not necessary now to consider, Congress is indifferent as to who shall pay the tax. It is not a tax upon any class of individuals, but upon transactions. Congress has selected the transactions of frequent occurrence, and has imposed a stamp tax upon documents which are a part of such transactions. The essential requirement is that the stamp shall be affixed; and the person issuing the document is held to see to it that the stamp required by law is so affixed and duly cancelled.

It is well settled, however, that in the case of certificates issued by any officer of the Commonwealth, for the benefit or use of any person or corporation excepting the Commonwealth, only the person or corporation for whose use or benefit the certificate is issued can be compelled to pay the tax chargeable by law. Congress has no power to impose a tax in any form upon the States as sovereign bodies. *Collector* v. *Day*, 11 Wall. 113; Cooley's Constitutional Limitations, 6th ed., p. 592, and cases cited. The same is true as to municipal corporations. *United States* v. *Railroad Company*, 17 Wall. 322, 329.

This being so, it follows that the stamps required by the

revenue act are to be paid for by the persons for whose use or benefit the paper is issued. It being also the duty of the officer issuing the same to see to it that the document is duly stamped, he may lawfully require the person for whose benefit it is issued to pay for the necessary stamps to be affixed thereto.

CIVIL SERVICE, — TEMPORARY VACANCIES.

St. 1898, c. 447, does not authorize appointing officers to fill vacancies in their departments, caused by the enlistment of employees who hold positions classified under the civil service rules into the volunteer service of the United States, without making requisition upon the Civil Service Commissioners.

To the Civil Service Commissioners.
1898
July 28.

Your letter of June 24 requests the opinion of the Attorney-General upon the question whether, under St. 1898, c. 447, appointing officers have the right to fill, temporarily, vacancies in their departments in cases where the positions are classified under the civil service rules, without making a requisition upon the Civil Service Commissioners.

The statute in question is as follows: "Heads of departments, boards, commissions and superintendents of State institutions having in their employ men who desire to enlist under the call of the President of the United States for service in the war now existing between the United States and Spain are hereby authorized to grant leave of absence, without pay, to men mustered into the volunteer service of the United States, until they are honorably discharged therefrom; and said officials are hereby authorized to fill temporarily any vacancies occurring by reason of such mustering into the United States service."

The purpose of this statute is not to suspend or repeal the civil service laws and rules. It was to enable men holding positions in the civil service to enlist in the service of the United States without losing their positions. Men who muster into the volunteer service of the United States are, under the provisions of this statute, to be granted leave of absence without pay, and the appointments to the vacancies thus created are not permanent, but temporary.

The only authority for temporary appointments without requisition upon the Civil Service Commissioners is § 1 of rule XLI., which provides as follows: "Appointments . . . for temporary service shall be made in accordance with the civil service rules except in case of emergency, where the public business would suffer from delay in filling the position as herein provided. In no case shall such appointment or employment for an emergency continue for more than ten days, and no reappointment or employment of the same person, or of another to the same position at the end of such period, shall be allowed."

It is obvious that this rule would not authorize temporary appointments under the statute above quoted, without making requisition upon the Civil Service Commissioners. The appointment, though temporary, must be made under civil service rule XXVI., which provides that "Whenever there is a vacancy to be filled in the classified service, the appointing officer or power shall make requisition upon the commissioners for the names of eligible persons."

The statute does not repeal this rule.

SAVINGS BANK, — NATIONAL BANK, — VAULT.

St. 1898, c. 567, § 3, is nugatory in so far as it attempts to put the securities of a savings bank beyond the reach of the officers of a national bank when the treasurer of the savings bank is also cashier of the national bank.

To the Commissioners of Savings Banks.
1898
July 28.

Your letter of July 13 requests the opinion of the Attorney-General as to the proper construction to be given to St. 1898, c. 567, § 3.

The section, so far as material to the question raised, is as follows: "No savings bank or institution for savings shall . . . occupy in common the same safes or vaults with any bank, national banking association or trust company: *provided, however*, that nothing herein contained shall be construed to prohibit a savings bank or institution for savings from occupying within such vault a safe or compartment over which it has exclusive control."

The principal question stated in your letter refers to the con-

struction to be given to the section quoted when the same person holds the office of treasurer of a savings bank and cashier of a national bank, both using the same vault.

I am told that the section under consideration was submitted to your Board as the second section of a proposed bill, the first section of which provided that the offices in question should not be held by the same person. Taken in connection with that section, it would be effective, but in consequence of the refusal of the Legislature to enact the first section or to prohibit the holding of those offices by one person, the purpose of the second section (the one now under consideration) was for the most part frustrated.

As it stands, the only effect of the section in question is to require that when a vault of a national bank is used by a savings bank, a separate compartment be set apart for the use of the savings bank and for its exclusive occupation. In view of the fact that the holder of the two offices necessarily has access to the compartment set apart for the use of the savings bank, the section, in so far as it attempts to put the securities of the savings bank beyond the reach of officers of the national bank, is nugatory.

The section cannot, in my opinion, be construed as you suggest, to authorize your Board to direct that any other officer of the savings bank than the treasurer shall have exclusive control of or access to the portion of the vault set apart for the use of the savings bank. By the very nature of his office, no one but the treasurer has the right to the custody of the securities of the savings bank; much less would it be proper for such custody to be taken from him and given to another officer.

STREET RAILWAY COMPANIES, — FRANCHISE TAXES, — APPORTIONMENT, — SPECIAL LEGISLATION.

The Tax Commissioner cannot apportion the franchise tax assessed upon street railway companies for 1898 among cities and towns, since St. 1898, c. 578, provides that apportionment shall be made to them in proportion to the length of track operated by street railway companies, in them, but

does not provide that the companies shall return to the Tax Commissioner the length of track operated by them in cities and towns till May, 1899.

The tax for the current year cannot be distributed until the Legislature makes provision therefor.

To the Tax Commissioner. 1898 August 4.

Your letter of July 28 discloses an omission in St. 1898, c. 578, which can only be supplied by legislation.

Pub. Sts., c. 13, §§ 38 and 40, provide for a franchise tax upon the shares of certain Massachusetts corporations, including street railway companies, to be assessed by the tax commissioner, payable not earlier than the first day of November (§ 53). These provisions have not been repealed by St. 1898, c. 578, relating to street railways.

Under the provisions of Pub. Sts., c. 13, §§ 57 and 58, this tax was apportioned by the Tax Commissioner to the cities and towns substantially upon the basis of the number of shares of said corporations owned by residents of such cities and towns, respectively.

These sections have been expressly repealed by St. 1898, c. 578, § 26. The statute takes effect October 1 (§ 28). It follows that the tax for the current year cannot be distributed under the provisions of the Public Statutes.

St. 1898, c. 578, provides, in § 4, that "Prior to the first day of November in each year the Tax Commissioner shall apportion the amount of the tax for which each street railway company is liable under the provisions of chapter thirteen of the Public Statutes, and under the provisions of section three of this act, among the cities and towns in proportion to the length of tracks operated by said companies in said cities and towns, respectively."

The Tax Commissioner can only ascertain the length of tracks operated by street railway companies in the several cities and towns of this Commonwealth from the returns required to be made by such companies in May of each year. Pub. Sts., c. 13, § 38. Under that section the returns so required did not show the length of tracks operated by street railway companies in the several cities and towns in the Commonwealth. But by St. 1898, c. 578, § 2, that section is amended, so that hereafter the returns

made by street railway companies must show the length of tracks operated in each city and town.

The first return, however, under the amended law will not be made until May, 1899. It follows that the Tax Commissioner has no data upon which he can apportion the tax assessed and collected for the current year. No distribution, therefore, can be made of the tax for the current year until provision therefor is made by the Legislature.

INTERNAL REVENUE LAW, — CERTIFICATES.

Certificates given by the Civil Service Commission in the performance of their official duties do not require an internal revenue stamp, for the reason that the Commonwealth would have to pay for the stamp, and Congress has no power to tax the Commonwealth.

To the Civil Service Commissioners. 1898 August 11.

For reasons which are fully stated in an opinion submitted to the Secretary of the Commonwealth, dated July 27, 1898, I am of opinion that the internal revenue law of 1898 does not require stamps to be affixed to certificates, forms of which are submitted with your letter of August 2.

Briefly reviewing the reasons considered at length in the communication referred to, the certificates in question are given in the exercise of governmental functions. To compel either the Civil Service Commissioners, or the Board or officer that receives it, to pay a stamp tax upon it, would be to impose a tax either upon the State itself, or upon some municipal corporation within the State. Under a similar provision in the revenue statutes during the civil war, it was held that Congress has no power to tax either the States or any municipal corporation therein. *United States* v. *Railroad Co.*, 17 Wall. 329; *Collector* v. *Day*, 11 Wall. 113.

INSURANCE, — MARINE COMPANY, — CAPITAL AND SURPLUS.

The words "capital and surplus, wherever they may be," in St. 1898, c. 537, § 3, include the property and assets of a foreign marine insurance company both in the United States and in foreign countries.

To the Insurance Commissioner. 1898 August 12.

The Massachusetts insurance act of 1894, c. 522, provides in § 20 that: "No fire insurance company shall insure in a single hazard a larger sum than one-tenth of its net assets." The word "fire" was inserted inadvertently, as plainly appears by the context, and was stricken out by St. 1895, c. 59. This prohibition, together with the restrictions upon reinsurance enacted in the same statute, have proved burdensome, and have made it difficult readily to place large risks.

St. 1898, c. 537, was enacted upon the petition of numerous merchants and importers, who were affected by the stringency of these restrictive provisions. By the first section of this act reinsurance is permitted in companies not authorized to do business in this State, when evidence is furnished to the Insurance Commissioner that such insurance cannot be obtained in authorized companies; and in such cases the restrictive provisions of § 20, above quoted, as to the amount which may be insured in a single hazard, do not apply. Section 3 of the statute of 1898 repeals § 20, as to marine insurance companies, by providing that "Any insurance company authorized to do marine business in this Commonwealth may take any risk provided it reinsures the same, if necessary, so that it does not retain for itself of the risk an amount exceeding ten per cent. of its capital and surplus, wherever they may be."

Your letter of July 27 requests the opinion of the Attorney-General as to the construction of the words "ten per cent. of its capital and surplus, wherever they may be." You suggest in your letter "that there is an ambiguity, or seeming ambiguity, arising from the fact that the words 'capital and surplus' have a general significance from common use, but a special one under the Massachusetts statutes when applied to insurance companies of a foreign country." St. 1894, c. 522, § 79, after requiring a deposit either with the Treasurer of the Commonwealth or with the financial officer of some other State, pro-

vides that "such deposit shall be deemed for all purposes of the insurance laws the capital of the company making it." Section 81 of the same statute, authorizing a deposit of funds in trust by foreign insurance companies for the benefit of their policy holders and creditors in the United States, provides that such deposit, together with the deposit made under the provisions of § 79, shall, "constitute the assets of such company as regards its policy holders and creditors in the United States."

I appreciate the force of your suggestion, that "it is impracticable for the Insurance Commissioner to ascertain the 'capital and surplus' of a foreign insurance company if those words are taken in the widest signification; there being no method by which the department can call for a verification of the company's statements as to such foreign capital, or for an examination of its foreign assets." But I do not think this difficulty is sufficient to override the express provisions of the statute. The expression "capital and surplus, wherever they may be," cannot be construed intelligibly unless it is held to include the property and assets of a foreign insurance company, whether in the United States or at the home office of such company. When an expression is used, the meaning of which is beyond question, it cannot be interpreted as having a different meaning merely because the statute in which it occurs thereby becomes difficult of execution. It is to be presumed that the Legislature had the difficulties suggested in mind, and used the language referred to in view of and notwithstanding such difficulties.

The language of the statute of 1898 differs essentially from that of § 20 of the Massachusetts insurance statute. The prohibition in the latter was against insuring in a single hazard more than one-tenth of "its net assets." The word "assets" in that connection undoubtedly includes only the assets recognized as such in § 83 of the same statute above quoted. The substitution in the statute of 1898 of the expression "capital and surplus, wherever they may be," for the words "net assets," as used in the former statute, is significant, and in my judgment conclusive.

STATE AID, — SPANISH WAR, — SOLDIERS AND SAILORS.

The war between the United States and Spain began April 21, 1898, and soldiers and sailors who mustered into the military or naval service of the United States previous to that day are not entitled to State aid under St. 1898, c. 561.

To the Governor. 1898 August 16.

I beg to acknowledge the receipt of a communication from the city clerk of Gloucester, referred to me by Your Excellency, and which I herewith return.

St. 1898, c. 561, § 1, provides in substance that there shall be paid out of the treasury of the Commonwealth to each soldier or sailor "who has been or is hereafter mustered into the military or naval service of the United States during the present war as a part of the quota of or to the credit of this Commonwealth, and to members of the Massachusetts naval militia mustered into the service of the United States, also to residents of Massachusetts mustered into the regular army or navy or into the volunteer brigade of engineers of the United States during the present war, the sum of seven dollars per month."

It is beyond question that under these provisions the allowance of seven dollars per month can be paid only to soldiers or sailors who enlisted into the service of the United States during the present war. The language is explicit, and is not capable of any other reasonable construction.

This being so, it becomes necessary to determine the time of the beginning of the war. The word "war," as used in legislation, refers not to the actual, but to the official, relations between the United States and other nations. Acts of belligerency or violence do not of themselves constitute war. Declaration of war is the exclusive prerogative of the Congress of the United States (U. S. Const., Art. 1, § 8), and war exists only when it has been declared by act of Congress.

On the 25th of April of this year an act of Congress was approved, entitled, "An act declaring that war exists between the United States of America and the kingdom of Spain." The act declared that "war exists and has existed since the twenty-first day of April, A. D. 1898, including said day, between the United States of America and the kingdom of Spain." The

beginning of the war, therefore, must be taken to be the twenty-first day of April last. All persons who enlisted prior to that date, whether a longer or a shorter time before, are alike excluded from the benefits of the act.

No other reasonable construction can in my opinion be given to the act, and the cases of hardship suggested in the letter referred to me do not affect the question. I fully appreciate the apparent injustice arising from the fact that men enlisted into the regular service on April 21 are entitled to receive State aid, while those who enlisted on the 20th are not so entitled. But this consideration does not properly affect the question. It is the duty of the law officer to interpret the law as he finds it, not as he thinks it should be.

SCHOOL TEACHERS, — SALARIES, — SCHOOL FUND.

St. 1898, c. 496, § 1, raises the minimum school year from twenty-four to thirty-two weeks. If the aggregate sum paid teachers by a town for thirty-two weeks' work is the same as the aggregate sum previously paid them for twenty-four, the effect is that the town reduces their salaries, and the Board of Education has not the right to approve a payment from the income of the school fund to such town under St. 1896, c. 408.

To the Board of Education.
1898
August 23.

St. 1896, c. 408, provides that there may be paid from the income of the school fund to certain towns a sum not exceeding two dollars per week for the actual time of service of each teacher employed in the public schools of said town, which sum shall be added to the salary of such teacher: "*provided*, that the amount paid by the town toward the salary of such teacher shall not be less than the average salary paid by said town to teachers in the same grade of school for the three years next preceding."

When this statute was enacted, the minimum school year was twenty-four weeks; but by St. 1898, c. 496, § 1, the minimum is raised from twenty-four to thirty-two weeks. The question stated in your letter of August 18 is, in substance, whether, if the pay of a teacher for thirty-two weeks amounts in the aggregate to as much as the sum heretofore paid for twenty-four weeks' service, the average salary remains the same.

In the case supposed there is obviously a reduction of salary. The salaries of teachers in smaller towns are usually paid weekly. The statute under consideration (St. 1896, c. 408) provides for the addition of two dollars *per week* to the salary of a teacher. If a school teacher has been paid one hundred and forty-four dollars for twenty-four weeks' work, it is beyond question that the same aggregate sum for thirty-two weeks' work amounts to a reduction of salary.

This would be true, even if the teacher received an annual instead of a weekly salary. The contract in such a case would be for the performance of twenty-four weeks' work for one hundred and forty-four dollars. A contract for thirty-two weeks' work at the same annual salary is in effect a reduction.

I am of opinion, therefore, that the Board of Education has not the right to approve a payment from the income of a school fund to a town which pays its teachers no more for thirty-two weeks than it has previously paid for twenty-four weeks' work, but that such a change in the compensation of a teacher, although the aggregate amount remains the same, is in effect a reduction of salary.

SCHOOL YEAR, — SCHOOL FUND.

The word "year" in St. 1898, c. 496, § 1, requiring towns to maintain public schools for thirty-two weeks in each year, is to be construed as meaning the financial year of the town, — the year for which the annual appropriations are made.

To the Board of Education.
1898
August 24.

St. 1898, c. 496, provides in § 1 that every town and city shall maintain public schools for thirty-two weeks in each year. This is an increase of the minimum school year, which was formerly twenty-four weeks. Your letter of August 10 states that distribution of the school fund by the Board of Education is conditional upon compliance by towns and cities with the provisions of law relating to maintenance of public schools; and that it is important, therefore, to know when the year referred to in the statute begins, during which schools must be maintained for a period of thirty-two weeks.

The meaning of the word "year" as used in the statutes is to be determined from the context. It does not necessarily mean the

calendar year. *Howe* v. *Boston Carpet Co.*, 16 Gray, 493, 497. The act in question takes effect September 1, 1898. This is the approximate date of the beginning of the school year; and if there were no other controlling considerations, the word "year" might be taken to refer to the school year. The act, moreover, contains many other sections in addition to the one under consideration. It is in effect a codification of existing statutes relating to school attendance and truancy. Many of its provisions, such, for example, as those relating to compulsory attendance of children, truancy and truant officers, would naturally go into effect at the beginning of the school year, and the date fixed for the operation of the act undoubtedly has reference to such provisions.

But there are obvious difficulties in holding that the section under consideration refers either to the school year or to the calendar year. Under the scheme of town governments the appropriations for the year are made at the annual meeting, which by law must be held in February, March or April of each year. The amount to be expended upon public schools is then fixed, and the assessments and taxes for the year are based upon the amounts then appropriated. Although the school year usually begins in September, the financial arrangements for the continuance of public schools and the length of time which they must be kept open have been made at the annual meeting in the spring. If, therefore, the section under consideration be taken to be in force on the first day of September in the current year, it would be necessary for all towns which have heretofore maintained schools only for the period of twenty-four weeks, as previously required, to hold special town meetings for the purpose of making additional appropriations to comply with the law. I do not think the Legislature so intended; but, on the contrary, that when an obligation concerning the maintaining of public schools, which involves the expenditure of money, is imposed upon a town, such a statute is to be construed as being in force only from the beginning of the financial year, unless otherwise specially provided.

This construction derives much support from the consideration of other sections of the same statute. Section 8 provides that when a child belonging to a neighboring town resides in

another town for the sole purpose of attending school there, the latter town shall be paid a sum equal to the average expense of such school per pupil during the year next preceding. It is obvious that the year referred to in this section is the financial year. It would be difficult, if not impossible, to ascertain the average expense of a school per pupil during any other period than the financial year. Section 17 provides that the chairman of the school committee shall annually on or before the last day of April transmit to the State Board a certificate of the amount raised by the town for the support of public schools during the preceding year. Here, again, the word "year" obviously refers to the financial year. It may also be noted that § 16 provides for a census of all the illiterates to be taken on the first day of September annually, the first census to be taken in the year 1899. This provision, too, indicates that it was the intention of the Legislature that the statute, so far as it imposes upon towns the financial burden of a longer school year, should not become operative until the beginning of the financial year or some time in the year 1899.

Upon the whole, therefore, I am of the opinion that the year referred to in § 1, requiring schools to be kept for a period of thirty-two weeks in each year, is to be construed as meaning the financial year of the town; that is to say, the year for which the annual appropriations are made, and that no additional burden is laid upon towns during the present financial year.

INSURANCE, — FRATERNAL BENEFICIARY ASSOCIATION, — ANCIENT ORDER OF UNITED WORKMEN, — ALLEGIANCE TO FOREIGN CORPORATION.

The Grand Lodge of the Ancient Order of United Workmen, a fraternal beneficiary association incorporated in this Commonwealth, has no right to assess its members for the purpose of paying the proceeds over to the Supreme Lodge of the Ancient Order of United Workmen, a foreign corporation, to be disbursed by it to pay benefits to persons not members of the Massachusetts corporation.

To the Insurance Commissioner. 1898 August 28.

The Grand Lodge of the Ancient Order of United Workmen of Massachusetts is a fraternal beneficiary association, incorporated February 9, 1883, under the provisions of Pub.

Sts., c. 115. It is now subject to the provisions of St. 1898, c. 474, which is in substance a codification of the laws relating to fraternal beneficiary associations.

This corporation owes allegiance to the Supreme Lodge of the Ancient Order of United Workmen, a corporation organized under the laws of the State of Kentucky, and not admitted to do business in this Commonwealth. The allegiance of the Massachusetts corporation, however, to the Supreme Lodge must be subordinate to its obligations under the statutes of Massachusetts.

At the last session of the Supreme Lodge a law (so called) was enacted providing for a special war relief fund, from which shall be paid all losses which occur from injuries or disease contracted by its members while in the service of the United States. This fund is not disbursed by the Grand Lodge, the Massachusetts corporation, but is to be paid to the Supreme Lodge, to meet the death losses of this kind in all jurisdictions. In order to raise this fund, a special relief assessment of fifty cents has been levied upon each member of the order in good standing on the first day of August, 1898; and the officers of the Supreme Lodge have called upon the members of the Massachusetts corporation for the payment of the first assessment.

The question stated in your letter of August 15 is whether this assessment is legal. The statutes regulating fraternal beneficiary associations in this Commonwealth distinctly contemplate that the assessments levied upon the members of a corporation organized under their provisions and subject to them shall be expended only for the benefit of the members of such corporations. A corporation has no right to assess its members for the purpose of paying the proceeds to a foreign corporation, to be disbursed by such foreign corporation for the purpose of paying benefits to persons not members of a Massachusetts corporation.

The precise question submitted by your letter arose in *Lamphere* v. *Grand Lodge*, 47 Mich. 429; and it was held in that case that a member of the defendant corporation could not be required to pay such assessment, or be suspended from membership by reason of his refusal so to do.

The assessment is clearly illegal.

CORPORATION, — BOSTON ELEVATED RAILWAY COMPANY, — COMPUTATION TAX, — DISTRIBUTION.

Under St. 1897, c. 500, the Tax Commissioner has nothing to do with the assessing or distributing of the computation tax of the Boston Elevated Railway Company.

That statute makes it the duty of the company to pay its computation tax to the Treasurer of the Commonwealth, and the duty of the Treasurer to distribute the tax among the different cities and towns in proportion to the mileage of elevated and surface main tracks, reckoned as single track, which is owned, leased or operated by the company and located therein; but it does not provide any means of officially advising the Treasurer of the mileage of track owned, leased or operated by the company in the different cities and towns, and he cannot distribute the tax until special legislation is enacted providing means for so advising him.

To the Tax Commissioner. 1898 August 30.

Your letter of August 15 requests the opinion of the Attorney-General as to the duties of the Tax Commissioner in assessing and distributing the computation tax of the Boston Elevated Railway Company, under the provisions of St. 1897, c. 500, § 10.

The section in question provides that the corporation shall "be annually assessed and shall pay taxes now or hereafter imposed by general law in the same manner as though it were a street railway company, and shall, in addition, as compensation for the privileges herein granted, and for the use and occupation of the public streets, squares and places, by the lines of elevated and surface railroad owned, leased and operated by it, pay to the Commonwealth, on or before the last day of November in each year, during said period of twenty-five years, an annual sum, the amount of which shall, in each year ending the last day of September, be determined by the amount of the annual dividend paid in that year by said corporation." Then follow provisions for determining the amount. The section further provides that: "The above sum shall be paid into the treasury of the Commonwealth and distributed among the different cities and towns in proportion to the mileage of elevated and surface main tracks, reckoned as single track, which is owned, leased or operated by said corporation and located therein."

It is apparent that this statute does not make it any one's

duty to assess the franchise tax upon the company, nor is any provision made for advising the Treasurer of the Commonwealth of the mileage of elevated and surface main track of the company located in any city or town. The company is simply required to pay its franchise tax into the treasury of the Commonwealth, and presumably the Treasurer is to distribute it among the different cities and towns in proportion to the mileage of elevated and surface main track which the company controls in the different towns and cities; but he cannot do that until he is officially advised of the mileage of elevated and surface main track the company controls in the different cities and towns.

St. 1898, c. 578, § 28, provides that "the return by the Boston Elevated Railway Company to the Tax Commissioner under the provisions of section thirty-eight of chapter thirteen of the Public Statutes shall also contain a statement under the oath of the treasurer of said company giving the length of the track operated by it in each city and town in the Commonwealth on the thirtieth day of September next preceding the date of the return;" and it further provides that "prior to the first day of November in each year, the Tax Commissioner shall apportion the amount of the tax for which the Boston Elevated Railway Company and any other street railway company whose railways are now owned, leased or operated by it, are liable under the provisions of chapter thirteen of the Public Statutes, among the several cities and towns, in proportion to the length of tracks owned by said Boston Elevated Railway Company and by each of said other street railway companies in said cities and towns respectively." It also provides that "The Tax Commissioner shall notify the treasurers of every such city and town of the share of said tax so apportioned to each city and town, and he shall also certify to the Treasurer of the Commonwealth the shares thus apportioned."

But this statute applies only to the taxes assessed against the Boston Elevated Railway Company under the provisions of Pub. Sts., c. 13, § 38, and does not make any reference whatever to the computation tax assessed in accordance with St. 1897, c. 500, § 10.

It is apparent, therefore, that the Tax Commissioner has nothing to do with the assessing or distributing of the computation tax of the company. No assessment is provided for. The corporation is required to compute the amount of the tax and to pay it to the Treasurer of the Commonwealth. The Treasurer cannot distribute the tax until special legislation is enacted providing some means for officially advising him of the mileage of elevated and surface main track owned by the company in the different cities and towns.

MANUFACTURING, — FOREIGN CORPORATION, — CERTIFICATE OF CONDITION.

Barrett, Nephews & Co., a corporation organized under the laws of New York, "for the purpose of conducting and carrying on the business of dyeing cotton, silk, woollen and other fabrics and all the business pertinent thereto and connected therewith," having its factories in New York, and a usual place of business in this Commonwealth, is not a "manufacturing company," within the meaning of those words in St. 1891, c. 341, and is not exempt from filing its certificate of condition under that statute.

To the Commissioner of Corporations. 1898 September 1.

Your letter of May 16 requests the opinion of the Attorney-General upon the question whether Barrett, Nephews & Co., a corporation organized under the laws of the State of New York, and having a place of business in Massachusetts, is exempt from filing a certificate of its condition under St. 1891, c. 341.

Its claim of exemption is based upon the allegation that it is a manufacturing corporation, doing its manufacturing wholly without the Commonwealth. The exact question, therefore, is, whether it is a manufacturing corporation within the meaning of the statute referred to. The words of the statute are as follows: "All corporations chartered or organized under the laws of another State or country and having a usual place of business in this Commonwealth, shall annually in the month of March make and file in the office of the Secretary of the Commonwealth a certificate, signed and sworn to by its president, treasurer, and at least a majority of its directors, stating the amount of its capital stock as it then stands fixed by the corporation, the amount then paid up, and the assets and liabilities

of the corporation, in such form as the Commissioners of Corporations shall require or approve. This section shall not apply to railroad companies, nor to mining and manufacturing companies actually conducting their mining and manufacturing operations wholly without the Commonwealth."

It is to be observed that the statute above quoted, being a requirement in the nature of a condition imposed by the Commonwealth upon foreign corporations which by comity are allowed to do business within our jurisdiction, is to be construed as to its exceptions strictly in favor of the Commonwealth. The purpose of the statute is plain. It is to afford individuals doing business with foreign corporations the same opportunity to obtain authentic information as to their financial standing as, by other statutes, is afforded to them in the case of domestic corporations.

The Commonwealth may impose any requirement it sees fit as a condition precedent to the admission of a foreign corporation to do business in this State. *Attorney-General* v. *Bay State Mining Co.*, 99 Mass. 148, 153.

Unless the corporation seeking to be exempt from this general law brings itself clearly within the terms of the exemption, it must be held to be within the general provisions of the statute.

The declared purpose of the company in its charter is thus stated: "The objects for which the company is to be formed are for the purpose of conducting and carrying on the business of dyeing cotton, silk, woollen and other fabrics, and all the business pertinent thereto and connected therewith."

It is doubtful if the Commissioner of Corporations has the right to look beyond the words of the charter to ascertain the character of the corporation. If other sources of information are open for the purpose of ascertaining the true character of the business carried on by the corporation, I understand that I am to assume as a fact that the corporation in question, although the greater part of its business is the ordinary business of a dye house, is also engaged to a considerable extent in treating cotton cloth in such a way as to produce material for Holland shades. This process consists in taking the cotton cloth

from the loom, and, by bleaching, dyeing, sizing and otherwise finishing it, making it merchantable to retail trade. It is admitted, however, by the company, that this, though an important, is not the largest part of its business; and that the dyeing and cleansing of garments and other similar goods is still its principal industry.

The word "manufacture" has been the subject of numerous decisions in this Commonwealth and elsewhere. A corporation formed for the purpose of refining coal and coal oil and preparing them for use in trade as illuminants was held, in *Hawes* v. *Petroleum Company*, 101 Mass. 385, to be a manufacturing corporation. The business of manufacturing and distributing gas (*Commonwealth* v. *Lowell Gas Company*, 12 Allen, 75) and of producing and supplying electricity (*People* v. *Wemple*, 129 N. Y. 543) has also been declared to be manufacturing.

On the other hand, corporations engaged in the business of quarrying stone (*Wellington* v. *Belmont*, 164 Mass. 142), of cutting and distributing ice (*Hettinger* v. *Westford*, 135 Mass. 258), of slaughtering cattle (*People ex rel. New England Dressed Meat and Wool Co.* v. *Roberts*, 155 N. Y. 408), of mixing tea and grinding coffee (*People ex rel. Union Pacific Tea Co.* v. *Roberts*, 145 N. Y. 375), of constructing and using dry docks (*People* v. *The New York Floating Dry Dock Company*, 92 N. Y. 487), were held not to be manufacturing corporations.

Holmes, J., in *Ingram* v. *Cowles*, 150 Mass. 155, 157, says: "We hesitate to say that sawing logs into boards is a 'branch of manufactures,' and think it doubtful whether something more of a transformation of the raw material is not necessary to bring the employment within the clause." On the other hand, however, there can be little doubt that the manufacture of shingles, clap-boards, door frames and other like specific articles of commerce is manufacturing.

In several of the cases cited, manufacturing is defined to be a process for the production of some new article by the application of skill and labor to raw materials. It is obvious, however, that the term "raw materials" must be taken to be used relatively. The conversion of wool into yarn is manufacturing;

but the conversion of yarn into cloth, and of cloth into garments, is also manufacturing, although neither yarn nor cloth are, strictly speaking, raw materials.

I apprehend that the true definition of manufacturing, as that word is used, not only in commerce, but in legislative enactments, is the production, by the application of skill, labor and machinery, of an article of commerce different in its character and use from the material employed. When, on the other hand, no new article of commerce is produced, and the operation consists merely of work done upon an article to improve its usefulness or value, without changing its commercial character, such an operation is not manufacturing.

Applying these distinctions to the business of the corporation in question, as stated in its charter, I find no difficulty in reaching the conclusion that it is not a manufacturing corporation. The process of dyeing garments and other fabrics does not ordinarily change their essential character as articles of commerce. If, therefore, the question is to be determined by consideration of the declared purposes of the corporation, it is not a manufacturing corporation, and is not within the exemption of the statute.

I do not deem it necessary to determine whether you would be authorized in any case to receive evidence that the business of the corporation is more extensive than the purpose stated in its charter; for, upon the facts stated, I am of opinion that it has not brought itself within the meaning and spirit of the exception in the statute. Barrett, Nephews & Co. is a corporation organized for the purpose of carrying on the business of dyeing. As such, it is not exempt from making the returns required by the statute in question. The fact, if admissible, that, in addition to its dyeing business, it is engaged to some extent in the conversion of cotton cloth into Holland shades, does not change its essential character. It is not thereby brought within the class of manufacturing corporations.

While it may not be necessary to hold that a corporation should do a manufacturing business exclusively in order to make it a manufacturing corporation, and I do not so advise you, yet, if the principal business is not a manufacturing business, it is

not, in my judgment, a manufacturing corporation within the meaning of the statute, although, in addition to its regular business, it is incidentally or even largely engaged in processes that, considered by themselves, might be classed as manufacturing.

I am informed that the corporation relies upon the case of *Cambridge Water Works* v. *Somerville Dyeing Company*, 4 Allen, 239. This was a suit seeking to charge the directors of the defendant corporation for its debts, under a statute making directors of manufacturing corporations liable in certain cases for the debts of the corporation. Upon examination of the case, however, it will be found that the question whether the defendant was a manufacturing corporation was not considered nor determined by the court. The case went up on a demurrer which admitted the allegations to the bill, among them, that the corporation in question was a manufacturing corporation. No question as to the *status* of the corporation was, or could, under the pleadings, be considered by the court.

Without finally determining how far the carrying on of a manufacturing business may bring a corporation formed for other purposes within the exemption of the statute, it is sufficient in the present case to say that, upon the facts stated, I am of opinion that the corporation in question is not a manufacturing corporation.*

BOARD OF EDUCATION, — DUTIES, — SCHOOL COMMITTEES.

It is not the duty of the Board of Education to enquire whether members of the school committees of towns are duly elected and qualified, but to treat those persons who *de facto* hold the office of school committee as duly elected and qualified.

To the Board of Education. 1898 September 2.

Your letter of the 29th ult. submits certain questions relating to the legality of the election and qualification of members of the school committees of towns. The request is based upon the assumption that it is necessary for you, in the performance of your duties, to determine whether the persons who sign cer-

* See further, as to manufacturing, page 209, *ante*.

tificates "are legally qualified to serve as members of their respective committees."

If it were, as you suggest, necessary that you know absolutely who is entitled to hold the office of school committee in each of the towns within your jurisdiction, your question would be pertinent, and you would be entitled to the opinion of the Attorney-General. Such is not the case, however. It is your duty to deal with those persons who *de facto* hold the office of school committee, whether by election by the people or by the committee to fill vacancies existing or supposed to exist. Whoever is so elected and is actually in occupation of the office is to be regarded by you as the rightful officer, for the purpose of making the returns and transacting the business required to be done with the Board of Education.

It, therefore, is not important for you to know whether the members of the school committee hold their offices *de jure*, or whether they must be sworn to the performance of their duties, or whether a vacancy declared by the school committee to exist and filled by the election of a new member in fact exists or not. Those are contentions which must be settled by the parties. In your relations with the school committees it is your right and duty to deal with those who are *de facto* holding the office.

METROPOLITAN PARK COMMISSION, — SELECTMEN, — PARKWAYS, — STREET RAILWAYS, — LOCATIONS.

When highways are taken by the Metropolitan Park Commission for parkways, they acquire the same control over them as over the lands of private persons taken for the same purpose.

Neither the Metropolitan Park Commission nor the selectmen of towns have any authority to grant locations to street railway companies on parkways or over the public parks.

To the Metropolitan Park Commission.
1898
September 15.

Your letter of August 19 requires the opinion of the Attorney-General upon the question whether the Metropolitan Park Commission is authorized to grant street railway locations in parkways and public reservations under the care of the Board. Your letter of August 25 states that a request has been received from the Boston, Milton & Brockton Street Railway Company

for the approval by the Metropolitan Park Commission of certain locations granted that company by the selectmen of Milton on the Blue Hills parkway; and requires the opinion of the Attorney-General upon the question whether the selectmen of Milton have the power to grant street railway locations on the Blue Hills parkway, either the parts thereof which were formerly highways, or the portions which were taken from private owners. Both the questions submitted involve the same general considerations, and may be discussed together.

The authority to grant the use of public ways for street railways belongs primarily to the Commonwealth. Highways and townways, though to some extent under the control of municipal authorities, who for the most part are required to keep them in repair, yet belong, not to the municipalities, but to the public. No person or corporation may have or acquire special rights or easements in such ways excepting by authority of the Legislature or of some tribunal to whom authority has been committed by the Legislature. City and town authorities have no power to grant rights in public ways except so far as authorized by statute, and then only in the manner and upon the conditions prescribed by the statute. *Beekman* v. *Third Avenue Ry. Co.*, 153 N. Y. 144. The Legislature without consulting a town may grant a location to a street railway. *Central Ry. & Electric Co.'s Appeal*, 67 Conn. 197. The Legislature may act thus directly, or it may exercise this function of location through such agents as it sees fit. As a matter of convenience, the statutes of the Commonwealth have delegated this authority in towns to the selectmen, who, however, act not as officers of the town, but as a body of men upon whom the public duty has by law devolved. *Cambridge* v. *Cambridge R.R. Co.*, 10 Allen, 50, 57; Pub. Sts., c. 113, § 7; St. 1898, c. 578, § 13.

The authority thus conferred upon the selectmen is, however, limited to highways and townways. It does not extend to parkways constructed by the Metropolitan Park Commission. These are not highways, in the sense in which that term is usually employed. They are constructed under the authority of St. 1894, c. 288, § 1, which provides that "The board of metro-

politan park commissioners . . . is hereby authorized to connect any road, park, way or other public open space with any part of the cities or towns of the metropolitan parks district . . . by a suitable roadway or boulevard . . . and also to take or acquire in fee or otherwise . . . any lands or rights or easements or interest in land within said district, although the land so taken or any part thereof be already a street or way, and to construct . . . a suitable roadway or boulevard." When a public way is taken under this act, it ceases to be a public way and becomes a parkway.

I am informed that the Blue Hills parkway was constructed by the Metropolitan Park Commission by taking for that purpose the public highways known as Mattapan Street and Blue Hill Avenue, and, in addition, lands of private persons on both sides thereof. When those highways were so taken for the purposes of a parkway, the Park Commission acquired the same right or control over them as over the private lands also taken for the same purpose. Their right to control the parkway is the same over the part taken from the public as over the part taken from individuals. All rights and powers before vested in towns and town officers were taken away, and the entire control of the parkway was vested in the Park Commission. St. 1894, c. 288, § 3, provides that the Board "shall have the same rights and powers over and in regard to the roadways or boulevards taken and constructed hereunder as are or may be vested in them in regard to other open spaces, and shall also have such rights and powers in regard to the same as, in general, counties, cities and towns have over other public ways under their control." This statute must be construed to take away all rights over such parkways which formerly belonged to towns or to town officers, and to vest the same exclusively in the Metropolitan Park Commission. The selectmen of Milton, therefore, have no longer the right to grant locations therein, either in the portion which was taken from private owners or in the part which was a public way.

It by no means follows, however, that such power has been given to the Metropolitan Park Commission; or that it was the intention of the Legislature to authorize the commission to grant

locations for street railways either over the public parks or upon the boulevards under their care.

The statute above quoted, giving them the rights and powers in regard to the same as counties, cities and towns have over other public ways, does not expressly or by implication confer the power to grant street railway locations. As I have already stated, this power never vested in counties, cities or towns, but was devolved upon municipal boards, not as agents of the cities and towns, but as public officers acting by authority of the Legislature. It is not to be presumed that the authority to grant such locations, although taken away from the municipal boards, was conferred upon the Metropolitan Park Commission, unless there is some statute directly conferring such power. Street railway locations are in the nature of grants to private corporations carrying on business for the profit of their stockholders. They are authorized to use public property because they serve the public. Such authority, however, can come only by express grant of the Legislature, or by the grant of some body or tribunal to whom the power of granting locations has been expressly delegated.

I find no such authority delegated to the Metropolitan Park Commission. On the contrary, the powers and duties of that Board have been carefully guarded in such a way as to prevent them from authorizing the use of such reservations in any way inconsistent with the purposes for which they were created. Those purposes are clearly stated by the Legislature. St. 1893, c. 407, § 4, authorizes the Board to acquire, maintain and make available open spaces for exercise and recreation. It is clear that the granting of a street railway location would be inconsistent with this purpose. By St. 1894, c. 288, § 1, the Board is authorized to connect these open spaces with any part of the cities or towns of the metropolitan districts by suitable roadways or boulevards, and to have (§ 3) the same rights and powers over such boulevards as are vested in them in regard to other open spaces by previous statutes. Boulevards are thus made connecting parkways open to the use of the public, to be maintained and kept open for the use of the public in connection with the parkways under the control of the Board.

They do not become public highways, with the incidents attaching thereto, but remain parkways, acquired and constructed solely for the use of the public, as parkways. It would be, in my opinion, inconsistent with such use to grant street railway locations in them or in the open spaces.

It may be claimed that the language of St. 1895, c. 450, § 1, is intended to delegate such authority to the commission. I quote the section: "The metropolitan park commission may, for all purposes not inconsistent with the purposes specified in the act establishing said commission, and acts in amendment thereof and in addition thereto, erect, maintain and care for buildings, and, by deed executed, acknowledged and recorded according to the laws of the Commonwealth, grant or accept and assent to any deed containing reservations of easements, rights of way and privileges in life estates, estates for the life of another and estates for years, including leases in, upon, under and over any portion of the lands now or hereafter taken or acquired by it, all for such considerations and rentals and upon such terms, restrictions, provisions or agreements as said commission may deem best."

The word "easements," as used in the statute quoted, may be broad enough to include a grant to a street railway of the right to lay its tracks upon parkways and parks. But the whole clause is to be construed together. The easements which the Park Commission are authorized to grant or accept are "reservations of easements, rights of way and privileges in life estates, estates for the life of another, and estates for years" over any portion of the lands now or hereafter taken or acquired by it. It is plain that the easements intended are those granted or reserved to those who deed their land to the Board, and not peculiar special rights in behalf of corporations generally. The easements referred to are mentioned in the same clause with life estates and estates for years. The whole sentence is to be construed together. So construed, it is clear that the Legislature did not intend by such indirection of language to delegate to the commission the right to grant the use of parkways committed to its care for street railway corporations. Such a use would be "inconsistent with the pur-

poses specified" in the acts creating the parks and parkways and defining their duties.

A further question arises in the case of parkways upon the construction of St. 1896, c. 465, § 1, which is as follows: "Whenever by reason of a taking by the Commonwealth through its metropolitan park commission . . . an existing public street is so affected that the public rights therein might otherwise be abridged, either by being wholly or in part included within the taking, any and all exceptions and reservations made in said taking in favor of any municipality within which said street or any part thereof may lie, and of the public, and of any corporations or individuals, shall be valid, effectual and binding; and in order to insure to the parties from time to time concerned the full and perfect enjoyment of the uses thereby reserved said board is hereby authorized and empowered from time to time to make grants or conveyances of easements, to enter into agreements, to issue licenses, and generally to conclude arrangements to that end." This section obviously refers to the rights and easements existing at the time of the taking of a public way. The right of travelling on such a way is an easement enjoyed by the public. The right of maintaining tracks thereon for the purpose of public travel is an extension of such easement. So, too, water pipes, gas pipes and sewers are easements within the meaning of that word as used in the statutes. The intention of the Legislature, therefore, was to authorize the Park Commission in taking an existing way for park purposes, to make such arrangements as in their discretion seems proper to continue and insure to the parties, whether the public, or private persons and corporations, the easements reserved to them in such taking. If, therefore, the Board acquires an existing way in which the public generally have the right of travel, and municipal and other corporations have easements therein, such as rights to maintain street railway tracks, gas pipes, sewers and other things for which easements have heretofore been granted, the Board may under this statute continue and insure [assure] the right to the further use of such easements, private and public. It does not, however, and in my opinion was not intended to,

authorize the granting of new easements inconsistent with the purposes of the creation of such parkways. Public and private easements existing when the parkway is acquired may be respected by the commission in its discretion, but this power is very far from authorizing the Board to grant new locations.

In the absence of any express authority, I am of opinion that the Metropolitan Park Commission will perform its duty and carry out the intention of the Legislature by refusing to grant locations for street railways upon public lands and parkways under its care.

COUNTY ACCOUNTS, — CONSTABLES, — FEES, — OFFICIAL SERVICES.

A constable cannot receive a salary for a part of his official services and fees for the rest.

Testifying as a witness in a criminal case is no part of his official duty, and he may receive witness fees therefor, unless he is in attendance upon court during the time he is on duty as an officer.

To the Controller of County Accounts.
1898
September 15.

St. 1890, c. 440, § 1, provides that no constable who receives a salary shall be paid any fee or extra compensation whatever for any official service rendered in a criminal case. The question stated in your letter of August 2 is, whether a constable may be designated by the justices of the district court to attend the sessions thereof at a fixed salary, "with the understanding that he should serve mittimuses and receive fees therefor, the salary fixed being only for attendance upon the court, and preserving order therein."

The statute quoted is explicit in its terms. No constable who receives a salary shall be paid any fee for official services in any criminal case. It was the obvious intention of the law to prohibit salaried officers from being interested in fees. The arrangement suggested would therefore be unlawful.

The last clause of the section, a portion of which is quoted above, prohibits a constable from receiving fees "for testifying as a witness in any such criminal case during the time for which he receives such salary or allowance." The words "during the time for which he receives such salary or allowance" refer only to the clause quoted. There are, for example, many constables

and police officers who are employed and paid for night work. If such officers were called into court during the day, it was the intention of the Legislature that they should be paid their fees for travel and attendance as witnesses, such service being no part of their official duties, and not being performed during the time of their employment.

The statute expressly prohibits officers from receiving fees for any official service whatever in criminal cases. Testifying in court as a witness is not an official service. The statute however, prohibits them from receiving fees, if during the time of such attendance they are on duty as officers; otherwise, they may be paid their witness fees.

METROPOLITAN PARKS, — FINES, — ATTORNEY-GENERAL.

It is not the duty of the Attorney-General to advise clerks of courts, and those officers are not bound by his opinion. The language of St. 1897, c. 121, § 2, providing that "all fines recovered for violations of law within the limits of the lands, roadways or boulevards" under the care of the Metropolitan Park Commission "shall be accounted for and paid to the Treasurer and Receiver-General of the Commonwealth," is to be construed as including only such fines as are recovered for violation of the rules and regulations made by the Park Commission under authority of St. 1893, c. 407, § 4.

To the Metropolitan Park Commission.
1898
September 15.

Your letter of August 3 requests the opinion of the Attorney-General upon the interpretation to be given to St. 1897, c. 121, § 2, which provides, among other things, that "all fines recovered for violations of law within the limits of the lands, roadways or boulevards" under the care of the Metropolitan Park Commission "shall be accounted for and paid to the Treasurer and Receiver-General of the Commonwealth," and be added to the funds provided for meeting the expenses of the commission. It is not the duty of the Attorney-General to advise clerks of courts in the discharge of their duty, and those officers are not bound by his opinion. The conclusion I have reached, however, upon the question submitted is in accord with what I understand to be the contention of the clerk of the district court of Chelsea. I presume, therefore, he will accept and act upon it.

The language of the act is broad enough to include all crimes which are committed within the limits of public reservations under the care of the Board. Assault and battery, illegal sales of intoxicating liquor and larceny would, under such a construction of the law, be included. I am of opinion, however, that the law is not so to be construed; but that it was intended to include only such acts as become violations of law by reason of the fact that they are done upon parks and boulevards, and not acts which would be criminal whether committed there or elsewhere within the Commonwealth. For example, a person travelling in a carriage on a boulevard, who, on meeting another person, attempts to drive to the left instead of to the right, violates the provisions of Pub. Sts., c. 93, and is liable to be fined therefor. Such a violation of law might be committed upon a reservation under the care of your Board, but it would also be an offence if committed upon any public highway within the Commonwealth. The fact that it was done upon a boulevard is not of the essence of the offence. It would be otherwise with violations of regulations made by your Board under the authority of St. 1893, c. 407, § 4. Acts done in violation of such regulations are offences because committed upon public reservations, and fines accruing therefrom would be properly payable to the Treasurer of the Commonwealth, to be added to the funds at the disposal of the Park Commission.

The rules of criminal pleadings illustrate this distinction. The ordinary complaint or indictment, whether for a local or transitory offence, does not describe the locality further than to allege the offence to have been committed in a certain town. There is nothing in the record to inform the clerk that the offence was committed upon a public reservation, and he could only ascertain the fact by hearsay. I do not think it was the intention of the Legislature to put upon clerks the duty of examining into the circumstances of offences prosecuted in their courts to that extent. If, however, the offence is a violation of some regulation of the Board, the record discloses the fact, and his duty is clear.

Upon the whole, therefore, I am clearly of the opinion that the act in question applies only to violations of the law which

become so only by reason of the fact that they are committed upon public reservations in the care of the Metropolitan Park Commission.

COUNTY ACCOUNTS, — SPECIAL POLICE OFFICERS, — FEES, — CONSTABLES, —INQUESTS.

St. 1892, c. 200, regulates the fees of officers only in cases where they make arrests for drunkenness, and the person arrested is discharged without being brought before a court.

If a person arrested by a special police officer for drunkenness in a city or town where regular officers receive salaries is brought before a court, other provisions of law regulate the fees of the officer, and St. 1892, c. 200, has no application.

If the person arrested is discharged without being brought before a court the officer cannot be paid fees, even if a warrant is afterwards issued.

A special police officer is not a constable by virtue of being a police officer. If a special police officer is authorized to serve criminal process, he may be appointed to assist at an inquest under St. 1898, c. 204, § 2.

To the Controller of County Accounts.

1898

September 15.

Your letter of August 1 submits a number of questions concerning the construction of St. 1892, c. 200. For convenience, I quote the statute: —

"SECTION 1. When an officer whose sole compensation for services in criminal proceedings is derived from taxable fees, makes an arrest for drunkenness, and the person arrested is discharged without being brought into court or before a trial justice, the officer making such arrest shall be entitled to the same fees therefor as in cases where persons arrested are taken into court or before a trial justice, and complained against. If the arrest be made without a warrant, the officer making the same shall make a sworn statement in writing of his fees, in the nature of a return upon a precept, which statement he shall send to the court or trial justice having jurisdiction of the offence.

"SECTION 2. Special police officers making arrests for drunkenness in cities and towns in which the police officers or constables receive salaries shall not be entitled to fees under this act."

Your questions are as follows: —

1. "In a city or town in which the police officers receive salaries, when a special police officer has made an arrest for

drunkenness without a warrant does the issuing of a warrant after such arrest, and the making of a return thereon, with statement of fees, by such officer, entitle him to receive such fees?

2. "In the event of such an arrest, in such a city or town, when the person arrested is brought into court or before a trial justice, is the special police officer entitled to receive fees therefor either with or without making returns upon a warrant issued after arrest?

3. "In such a city or town, if a special police officer makes an arrest for drunkenness, with a warrant, is he entitled to receive fees therefor, whether the person arrested is or is not discharged without being brought into court or before a trial justice?"

Officers who receive regular salaries are not entitled to fees in criminal cases. Unsalaried officers whose compensation comes from fees are required to return their warrants to the court, where, at the conclusion of the case, their fees are taxed and allowed. It often happens, however, that persons are arrested for drunkenness, and discharged without being brought before the court. St. 1892, c. 200, above quoted, was enacted to enable unsalaried officers to obtain their fees in such cases. The Legislature, however, saw fit to provide in § 2 that in cities and towns where regular officers receive salaries, special police officers making an arrest for drunkenness should not be entitled when the person arrested is discharged without being brought into court. If in such city or town the person arrested is brought before the court, other provisions of law regulate the fees of the special police officer making the arrest, and the statute of 1892 has no application to such case. If, however, the person arrested is discharged without being brought before a court, the special officer cannot be paid fees, even if a warrant is afterwards issued.

4. "Does 'special police officer' in § 2 include constables?"

The term "police officer" is used in the statutes to describe a class of officers who are not constables. *Commonwealth* v. *Smith*, 111 Mass. 407, 408. Police officers are not constables in fact or in name. They hold their offices, not annually, but at

the pleasure of the mayor and aldermen or police commissioners. The provisions of § 2, therefore, do not apply to constables.

5. "Is a special police officer eligible for appointment under the provisions of St. 1898, c. 204, § 2?"

St. 1898, c. 204, § 2, provides that when an inquest is to be held by any district, police or municipal court, the justice may appoint any officer authorized by law to serve criminal process, to investigate the case and examine the witnesses, and may allow the officer so appointed such additional compensation therefor as said justice may deem proper, the same to be paid in the same manner as the fees and expenses of such officers are paid.

The answer to this question depends upon the powers of the particular special police officer in question. By Pub. Sts., c. 27, § 85, police officers may be appointed with all or any of the powers of constables, excepting the power of serving and executing civil process. While ordinarily special police officers would be given the power of serving criminal process, they might, nevertheless, be appointed without that power. *Commonwealth* v. *Doherty*, 103 Mass. 443, 444. If the special police officer is authorized to serve criminal process, he is eligible under the statute in question.

If a special police officer be appointed for this duty, he must be one who has received his authority to serve criminal process from the city or town in which the case arises.

AUSTRALIAN BALLOT LAW, — SUPERVISORS OF REGISTRATION, — APPOINTMENT.

St. 1898, c. 548, requires the Governor to appoint one supervisor of registration from each of the two leading political parties for each ward in Boston, one for each voting precinct in towns divided into voting precincts, two for towns not so divided, and one for cities where apparently the Legislature did not intend to require registrars to hold sessions, except in some central locality.

One from each party should be appointed for the city of Newton.

To the Governor. 1898 October 16.

I have examined St. 1898, c. 548, § 60, with reference to the appointment by the Governor of supervisors of registration. The language of the section is not free from doubt. It requires

the appointment of two supervisors "for each place of registration therein." If the language quoted is intended to include every place where registrars see fit to hold sessions, there is practically no limit to the number of registrars whom the Governor may be required to appoint, for the reason that there is no limit to the number of places where registrars may hold sessions for the purpose of registration.

The statute provides (§ 36) that every city or town "shall provide the registrars of voters with suitable rooms in which to hold their official sessions." It further provides that they shall hold such sessions as the town by a by-law, or the city by an ordinance, shall prescribe, and such other sessions as they deem necessary.

The statute further provides (§ 37, par. 4) that they shall hold sessions at suitable places within the limits of each voting precinct, and in towns not divided into voting precincts they shall hold sessions in two or more suitable places. It is further provided that, upon the petition of ten or more voters in any town, residing in a village two or more miles from the usual place of registration, the registrars shall hold sessions at a place convenient for such petitioners.

There are also provisions special to the city of Boston, under which it is required that sessions shall be held during the month of September in one or more places in each ward (§ 74).

The law, therefore, requires in all towns and cities at least one suitable place to be furnished as an office of registration. In towns provided with voting precincts there must be places of registration in each precinct. In towns not divided into voting precincts there must be at least two places of registration, and ten voters residing at a remote locality may require an additional place of registration in such towns. There appears to be no provision requiring more than one place of registration in cities, excepting in Boston, where there must be one in each ward.

I am of opinion that it is not a reasonable interpretation of § 60 to hold that it requires the Governor to follow the registrars from place to place and to appoint supervisors in each locality, where they may choose voluntarily to hold meetings

for the purpose of registration. There is no way in which the Governor may surely know where the registrars will hold their sessions. A sensible construction of the statute, in my judgment, requires only that the Governor shall appoint two supervisors for each locality where, under the statute, the registrars are required to hold sessions for registration. Thus it would be necessary to appoint one set for each ward in Boston, one for each voting precinct in towns divided into voting precincts and two in towns not so divided; but in cities where it was apparently the intention of the Legislature not to require the registrars to hold sessions, except in some central locality, the Governor is not called upon to appoint more than one set of supervisors.

This being so, I am of opinion that you will discharge the duty imposed upon you under the section by appointing one supervisor from each party for the city of Newton. I am informed that no ordinance of the city has been passed requiring additional places of registration, and that all the sessions (most of which, in fact, have been already held) other than those in the offices designated for the use of the registrars by the city are voluntary, and not in pursuance of any requirement of law.

TRADE-MARK, — MUSIC, — ORCHESTRA.

It is the duty of the Secretary of the Commonwealth to receive all certificates which are in the form required under St. 1895, c. 462, upon payment of the fee prescribed therefor, and to deliver a duly attested copy of the record of the same to the person filing the certificate. He is not called upon to determine whether the person filing the certificate will receive any protection thereby.

Music as played by an orchestra is not merchandise.

To the Secretary. 1898 October 27.

I am of the opinion that "music, as played by an orchestra," is not and cannot be considered as merchandise. If, therefore, the benefits of the provisions of St. 1895, c. 462, are limited to manufacturers, the filing of a form of advertisement as authorized by that act will not protect publishers of sheet music.

But there is nothing in the act itself which prohibits any

person from availing himself of its provisions. It provides, in § 1, that: "Any person . . . may adopt a label, trade-mark, stamp or form of advertisement, not previously owned or adopted by any other person . . . , and may file the same for record in the office of the Secretary of the Commonwealth." The title of the act, however, is "An Act to protect manufacturers," etc., and the section quoted provides further on that the certificate to be filed shall state "the class of merchandise and the particular description of goods comprised in such class to which it has been or is intended to be appropriated."

Your letter states that you have been asked to file the name of an orchestra under this law as a form of advertisement. I do not deem it necessary to consider how far such filing will protect the name of the orchestra, or whether the person filing the same can prevent others from using the same name; for, in my opinion, it is the duty of the Secretary of the Commonwealth to receive the certificates which are in apparent conformity to the provisions of the statute on payment of the fee prescribed therefor, and to deliver to the person a duly attested copy of the record of the same. The Secretary is not called upon under the act to determine the effect of such filing, or whether the person filing such certificate will receive any protection thereby. The broad and comprehensive provisions of the act, providing in terms that "any person may file such certificate," are, in my opinion, sufficient for your guidance, and authorize you to receive a certificate which is in proper form.

Voting Machine, — Constitutional Law.

A voting machine provided with knobs which when pressed register numbers may not lawfully be used in the election of representatives to Congress or representatives to the General Court.

A "written vote" or "a written or printed ballot" must be used.

To the Secretary.
1898
October 27.

I understand that my opinion is desired upon the question whether it is lawful to vote for representatives to Congress and for representatives to the General Court by means of voting machines.

I am informed that the voting machine in question is provided with knobs or buttons, one for each candidate to be voted for, so arranged and connected that when a knob or button is pressed, a number is registered next higher than the number registered by the previous pressing of the same knob or button. The voter expresses his preference by pressing the knob appropriated to the candidate he desires to vote for. The machine thereupon registers the number of his vote, duly credited to the candidate whose knob or button he has pressed.

The Constitution of Massachusetts (c. 1, § 3, art. 3) provides that "Every member of the House of Representatives shall be chosen by written votes." United States Revised Statutes, § 27, provides that "All votes for representatives in Congress must be by written or printed ballot; and all votes received or recorded contrary to this section shall be of no effect." Without attempting to define exhaustively what may or may not be included within the words "written vote," as used in the Constitution of Massachusetts, or "written or printed ballot," as used in the United States Revised Statutes, I am of opinion that the method of voting provided by the machine in question cannot properly be said to be within the meaning of those expressions, or either of them, and that the pressing of a knob for the purpose of registering a number is not the casting of a "written vote" or a "written or printed ballot."

I am of opinion, therefore, that such voting machines cannot lawfully be used in the election of representatives to Congress or in the election of representatives to the General Court.

County Accounts, — Unlicensed Dogs, — Unlawful Pedling, — Penalty, — Salaried Officers, — Official Service, — Attorney-General.

The Attorney-General, as a representative of the executive department, is not authorized and would not be justified in advising the judicial department in the performance of its duty.

Under St. 1891, c. 416, the duty of apportioning penalties recovered for keeping unlicensed dogs and for unlawful pedling devolves upon the court before whom the complaint is tried.

The making of a complaint is no part of the official duty of an officer, unless it is made so by some statute.

The officers enumerated in St. 1890, c. 440, § 1, are entitled, as complainants, to the proportion of the penalty imposed, payable by law to complainants, unless some statute makes it their duty to make complaint.

To the Controller of County Accounts.
1898
December 3.

I have your letter of the 15th ult., asking me to give further consideration to the question whether any of the officers enumerated in St. 1890, c. 440, § 1, may receive any portion of the penalty imposed in complaints for keeping unlicensed dogs and for unlawful pedling.

In a former letter to you I stated it as my opinion that under the provisions of St. 1891, c. 416, § 1, the duty of apportionment devolves upon the court. I see no reason to modify the conclusions then reached. The matter is within the jurisdiction of the court before whom the complaint is tried. The Attorney-General, as a representative of the executive department, is not authorized and would not be justified in advising the judicial department in the performance of its duty.

In view, however, of your statement that there is much diversity of opinion and practice in the matter, I am willing to state my views for what they are worth.

St. 1890, c. 440, § 1, provides as follows: "Except as specially provided in this act, no officer in attendance on any court, and no sheriff, deputy sheriff, jailer, constable, city marshal, or other police officer who receives a salary or an allowance by the day or hour from the Commonwealth, or from any county, city or town for his official services, shall be paid any fee or extra compensation whatever for any official services rendered or performed by him in any criminal case in which the Commonwealth or any county, city or town, is a party interested; nor for aid or assistance rendered to another officer; nor for testifying as a witness in any such criminal case, during the time for which he receives such salary or allowance."

The question submitted is, whether any officer named in the section quoted is entitled to receive a portion of the fine imposed for the keeping of a dog contrary to the provisions of law, under the statutes (Pub. Sts., c. 102, § 87) providing that one-third

of the amount shall be paid to the complainant. A similar question arises upon the statute relating to the prosecution of hawkers and pedlers, Pub. Sts., c. 68, § 19, providing that one-half of the forfeiture which may be recovered in such prosecutions shall be paid to the complainant.

I am of opinion that, excepting in cases when the law imposes it upon an officer as a duty, the making of a complaint is not an official service within the meaning of that term as used in St. 1890, c. 440, § 1, above quoted. When a public officer is authorized and required to do an act because of his official position, the doing of the act by him is the performance of an official service; but whenever he does an act which he is not required by law to do and which any one else might also do, though not a public officer, it is not an official service. An illustration of this distinction is to be found in the section itself, which, after prohibiting the officers named from receiving fees for the performance of official service, further prohibits them from receiving fees as witnesses in criminal cases. The statute thus recognizes the distinction between service as a witness and official services. Although the facts to which he testifies may have come to his knowledge because he is an officer, he is, nevertheless, not testifying as an officer, nor does he appear upon the witness stand in an official capacity. The official services referred to in the section undoubtedly are the services which they are by law required to perform, and which they perform as officers and by virtue of their offices. Such, for example, are the service of writs, warrants and subpœnas. The making of a complaint, on the other hand, ordinarily is no part of the official duty of an officer. He appears before the magistrate, not as an officer, but as a witness, making affidavit to facts which have come to his knowledge. This is no more an official service than testifying in court as a witness.

It follows, therefore, that an officer, although within the terms of the prohibition of St. 1890, c. 440, § 1, is ordinarily entitled as a complainant to the proportion of the fine imposed payable by law to the complainant.

In some cases, however, it is made by statute the duty of the

officer to enter complaints for violations of the statutes relating to dogs and of the statutes relating to hawkers and pedlers. Pub. Sts., c. 102, § 90, provides that the mayor of each city and the chairman of the selectmen of each town shall annually in July issue a warrant to one or more police officers or constables, directing them to kill or cause to be killed all unlicensed dogs, "and to enter complaint against the owners or keepers thereof." It is thus made the official duty of the police officer or constable to whom such warrant is directed to enter complaints against the owners of unlicensed dogs. Such complaints are entered in the performance of the official duty of the officer holding the warrant, and he is therefore not entitled to any portion of the fine recovered upon complaints so made by him.

The statute relating to hawkers and pedlers (Pub. Sts., c. 68) provides, in § 19, that constables and police officers shall within their respective towns and cities arrest and prosecute every person whom they may have reason to believe to be guilty of violating the provisions of this chapter. I am of opinion that the fair construction of this statute makes it the duty of such constables and police officers to enter complaints, and that consequently they are not entitled to receive any part of the fines recovered upon such complaints.

COMMONWEALTH'S LAND, — TAXATION, —EXEMPTION.

Under St. 1892, c. 418, the Commonwealth's land cannot be assessed by the street commissioners for any portion of the cost of laying out and constructing B Street, South Boston.

To the Harbor and Land Commissioners.

1898 December 19.

St. 1892, c. 418, § 8, provides that a portion of the cost of building streets in Boston may be assessed upon the several parcels abutting thereon, in accordance with the proportion in which the board of street commissioners shall determine that the parcels are increased in value thereby.

Your letter of November 11 requires the opinion of the

Attorney-General upon the question whether the Commonwealth's land at South Boston is liable for any proportion of the cost of laying out and constructing B Street by the street commissioners. I understand that the proposed lay-out is upon land belonging to the Commonwealth, and that the Commonwealth owns the land abutting upon the street on one side.

I do not deem it necessary to consider whether the provisions of Pub. Sts., c. 11, § 5, that the property of the Commonwealth shall be exempt from taxation, refer only to the annual general taxes assessed under the provisions of the chapter which contains the exemption, or whether it includes all special assessments levied upon real estate. The section exempts certain classes of property from taxation; among them are the property of the Commonwealth and that of certain charitable institutions. The case of *Boston Seamen's Friend Society* v. *Boston*, 116 Mass. 181, holds that the exemption of charitable institutions, in the section referred to, does not extend to special taxes for local improvements; and the reasoning of the opinion of Mr. Justice Devens would include all classes enumerated in the section, including the property of the Commonwealth. There is a strong ground for the contention, however, that the exemption of the property of the Commonwealth is based upon considerations not applicable to the exemption of public charitable institutions; and that it was the intention of the Legislature, upon grounds of public policy, to exempt such property in all cases.

Nor do I deem it necessary to determine whether the lands of the Commonwealth in South Boston have been appropriated to public uses, so as to bring them within the doctrine of the cases, which hold that property so appropriated is exempt from taxation. *Worcester* v. *Western Railroad*, 4 Met. 564.

It is sufficient for the purpose of the question proposed to say that other provisions of the statute under consideration make it clear that it was not the intention of the Legislature to subject the property of the Commonwealth to the assessment provided for in § 8, above quoted. Thus, § 9 of the chapter

provides that a portion of such assessment with interest shall be included in the annual tax bills on the parcels in question for a period of ten successive years. This and other provisions, unnecessary to recite, show clearly that the property intended to be assessed is such property as is assessed for general taxation. It is not to be presumed that the drastic provisions for assessing and collecting the assessments should be applicable to the Commonwealth.

I am of opinion, therefore, that the land of the Commonwealth is exempt from the provisions of the statute in question.

OPINIONS UPON APPLICATIONS FOR LEAVE TO FILE INFORMATIONS IN THE NAME OF THE ATTORNEY-GENERAL.

Attorney-General *ex rel.* Charles C. Sanderson & others *v.* George W. Wells & others.

Corporation, — Election of Directors, — Quo Warranto, — Attorney-General.

Two towns became associated in the original agreement of association and subscribed for shares of the capital stock of a railroad corporation, and paid twenty-five per cent. of their respective subscriptions. The railroad failed to expend ten per cent. of its capital stock in the construction of its road within twelve months from the votes of the towns authorizing the subscriptions, as required by Pub. Sts., c. 112, § 49. It was conteuded that, because of such failure on the part of the railroad company, the subscriptions had become void, and that the chairmen of the selectmen of the towns had no right to cast the votes of the towns for directors of the corporation.

Held, that the subscriptions were not void, but only voidable at the option of the towns; that the selectmen of the towns had legally authorized their respective chairmen to cast the votes of the towns, and that, as the chairmen had cast the votes for the respondents, those votes were properly counted and the respondents legally elected directors of the corporation.

The Attorney-General will not sign an information to oust the directors of a railroad corporation from office, when he is of opinion that they were elected legally, especially if there is no allegation that injustice is being done or will result from their continuance in office.

1894 June 25.

This was an application by Charles C. Sanderson and others to the Attorney-General for the filing of an information by him at their relation against the respondents.

As is customary in such cases, notice of the application was issued to the respondents, and the parties were heard on the fifth day of June, 1894. At that hearing the following facts appeared and were practically undisputed: —

The Southbridge, Sturbridge and Brookfield Railroad Company was duly organized and chartered as a railroad corporation on the third day of May, 1892, with a capital stock of $130,000. The towns of Southbridge and Sturbridge became associates in the original agreement under the provisions of Pub. Sts., c. 112, § 34, and in said articles of association subscribed for shares of the stock of said railroad company, — the town of Sturbridge for one hundred and thirty shares, and the town of Southbridge for one hundred and eighty-five shares. The said towns have paid into the treasury of the railroad corporation twenty-five per cent. of their several subscriptions.

The construction of the railroad was begun within one year after the vote of the towns authorizing the above action, but less than ten per cent. of the capital stock was actually expended by said railroad within said time in the construction of its road.

The annual meeting of the stockholders of said corporation for the election of officers was duly held at Southbridge, May 16, 1894. Two tickets were voted for by the stockholders; one containing the names of the relators and the other those of the respondents. A. H. Edgerton, chairman of the selectmen of the town of Sturbridge, having been previously so instructed by vote of the selectmen of that town, cast the vote of the shares of said town for the respondents. Calvin Claflin, chairman of the selectmen of Southbridge, being also so instructed by vote of the selectmen of his town, cast the vote of the shares of the town of Southbridge for the respondents. No objection was made at the time of the casting of said ballot by said chairmen respectively against their authority so to vote. Before the taking of the vote certain stockholders protested in writing against the right of said towns to vote at said meeting, and challenged the counting of said votes by the committee appointed to count the votes, for the reason that said subscriptions were, as they allege, void, for the reason hereinafter stated.

A majority of the committee appointed to count the votes decided to count the votes of the two towns, and so reported. Including the votes of the towns, the respondents were duly elected directors of said company. If the votes of said towns were excluded, the relators would be so elected directors. One

of the committee to count the votes submitted a minority report, protesting against the counting of the votes of the towns, for the additional reason that they were cast by one of the selectmen alone.

The report of the majority of the committee was accepted, and the respondents were declared directors of said company, and are now acting as such directors.

The information which it is desired that the Attorney-General shall bring seeks to oust the respondents from their offices as such directors for the following reasons (it being apparent that without the voters of the towns the relators, not the respondents, were elected) : —

First. Because the subscriptions of said towns to the stock of said company had become void, by reason of the fact that ten per cent. of the capital stock had not been actually expended in the construction of the railroad within twelve months from the date of the vote of said towns authorizing said subscription.

Second. Because the votes of the towns for the respondents were not cast by the selectmen, but by one of said selectmen only; and no written authority to the person so casting said vote was exhibited at the time of said election.

There is no doubt that an information may properly be brought by the Attorney-General to try the title of persons assuming to act as directors of a railroad company organized under the laws of this Commonwealth. This form of remedy, it is true, is more usually employed to try the title of persons holding public offices. But it is no less the duty of the Attorney-General, when, in his opinion, the interests of the public require it, to inquire into the validity of the title of officers of corporations organized under its laws. This is especially true of railroad corporations, in the maintenance of which the public generally are interested. 2 Spelling's Extraordinary Relief, § 1831, and cases cited.

In the present case, however, I do not think the petitioners have stated a case which entitles them to the intervention of this office.

As to the first cause alleged : I do not agree with the contention of the respondents, to wit, that the towns having become

associates, under the provisions of Pub. Sts., c. 112, § 34, and in becoming associates having subscribed to the stock of the company, their subscription is not within the provisions of § 49 of the same chapter. It is true that § 48 refers in terms to a subscription authorized by vote under § 46; and it is claimed, therefore, by the respondents, that this section only refers to the case of a town subscribing to the stock of a railroad corporation, and not to the case of a town becoming an associate, under the provisions of § 34. I do not think the distinction is sound. Although under § 47 authority is given to towns to become associates under the provisions of § 34, yet such authority would be of no avail, and would not authorize action unless it were accompanied by a vote of the town authorizing a subscription to the stock; for whoever becomes associated under the provisions of § 34 must, in his subscription, set forth the number of shares to which he subscribes. See § 35. Unless this is done, the person signing the articles of association does not become an associate. Therefore, if a town, under the provisions of § 47, votes to become an associate in a railroad company, this is not in substitution for the subscription to the stock in the company, as authorized by § 46, but in addition thereto. There must still be a subscription, under the provisions of § 46, in addition to becoming an associate under the provisions of § 47.

While, therefore, it appears that both towns became associates, yet in so becoming associates they subscribed for shares of the stock by votes passed in accordance with the provisions of § 46; and such subscriptions became conditioned upon the provisions of § 49. This section provides that a town subscription shall be void "unless actually made by the person authorized, within twelve months from said vote; and unless, within the said period, a part thereof is actually paid, or some proceeding is commenced by the corporation to enforce payment thereof, and at least twenty per cent. of the capital stock of the corporation is actually paid in cash, and at least ten per cent. of the capital stock is actually expended by it in the construction of its road."

It is practically conceded that the last condition set forth in this section was not complied with, and that the railroad did not actually expend in cash ten per cent. of its capital stock in the construction of said railroad within the one year from the time of the vote authorizing said subscription. It was stated that certain contracts were made, and certain land and land rights donated, which, if included, would bring the value of the results accomplished up to and beyond said limit of ten per cent.; but there can be no doubt that the statute is not complied with unless ten per cent. is actually expended *in cash*, in accordance with the terms of the section quoted.

The vital question is, whether the failure to comply with this requirement renders the subscriptions of the towns void, or only voidable. The relators contend that it thereby becomes void and of no effect, and cannot be revived by any act or waiver whatever. The respondents, on the other hand, contend that the failure of performance of this condition only renders the subscription voidable, presumably upon action to that end by the town itself.

It is not claimed that the failure to expend the necessary ten per cent. in cash was due to any fault or omission on the part of the towns. On the other hand, it is not disputed that both towns have duly paid in all the assessments required by the corporation, amounting in all to twenty-five per cent. of their subscriptions; and that they have appropriated the money necessary to complete their subscriptions, and stand ready and are anxious to go on with the enterprise, and to pay the balance of their subscriptions whenever the same shall be called for. The contention of the relators, therefore, must be that, although the town has complied with every act necessary to be done by it in becoming a stockholder in the corporation, and is ready to go on with its subscription, yet it must be deprived of its rights as a subscriber because of the non-performance of duty by the other party to said contract of subscription, — to wit, the railroad company.

It would be, to say the least, exceedingly inequitable to hold that a contract, made for the benefit of both the contracting

parties, should become void to the injury of one of the parties upon a failure of the other party in respect thereto. I cannot believe that such injustice was the intent of the Legislature. The only reasonable construction to put upon the clause of the statute under discussion is, that it was intended to give the towns the right, at their option, to be relieved of their contract of subscription in case the railroad company was not diligent in going on with the work of construction to such an extent that it failed to expend ten per cent. of the capital for that purpose within twelve months from the time the contract was authorized.

The ingenious suggestion is made, however, by the relators, that some of the conditions set forth in said section are of such character that the non-performance of them would plainly avoid the subscriptions. For example, the first condition is, that if the subscription is not made by the persons authorized to make it within twelve months from the vote of the town, then the subscription is void. This, being a condition precedent to the subscription itself, ought to go to the validity of the subscription; and, if not made within the time limited by the statute, it may well be that such a subscription would be void and not merely voidable. The relators, therefore, contend that if it is conceded that some of the conditions set forth in said § 49 are such as render the subscription void and not voidable, the same is and must be true of all said conditions; and that it cannot be said that the statute is to be construed as setting forth four conditions, the non-performance of some of which render the subscription void, while failure as to others renders it only voidable.

I see no difficulty, however, upon consideration, in so construing the statute that, as to some of the conditions set forth, the non-performance of them renders the subscriptions void, and as to others only voidable. It is true that the word "void" is used but once; but this is only for conciseness of expression. The legal effect of the section is not thereby changed. It is to be construed, notwithstanding that all the conditions are appended grammatically to the single word "void," as though the section read "if the subscription is not

made by the persons authorized within one year from the time of the vote it shall be void. And if ten per cent. of the capital stock is not actually expended," etc., "it shall be void."

In other words, the question whether the word "void" is to be construed as meaning void or voidable, is to be determined not by rhetorical or grammatical construction of the sentence containing it, but rather upon the consideration of the intent of the Legislature in enacting the conditions. I cannot believe that it was the purpose of the Legislature to put it within the power of a railroad corporation to receive the subscription of a town, take its money, which may well be the whole of the subscription, perhaps misspend it (although no such claim is made in this case), neglect to construct the road, so far that not even ten per cent. is expended therefor within a year; and that thereupon, the town having complied with its part of the contract in full, and the railroad having been remiss in its duty, to declare the contract is to become void to the injury and loss of the town. It would require me to hold that the Legislature intended to punish one party to a contract for the sin of the other party.

We now come to the second point contended for by the relators. As has already been stated, it appeared at the hearing before me that the selectmen of each town, before the annual meeting of the corporation, authorized their chairman to cast the vote of the towns for the respondents as directors. This vote was in writing, but no copy was produced at the meeting. It further appeared that no objection was made at the time the vote was cast by the chairman to his so voting in behalf of his associates; and the objection to the manner of the vote was first taken by one of the committee to count the votes, on inspection of the ballot itself.

This objection is purely technical. It may be a sufficient answer to it to say that it should have been taken *in limine;* for, if it had then been taken, the irregularity might easily have been cured by producing the authority of the selectmen, or by having the selectmen themselves actually present. Such objections are not to be encouraged, and the analogy of proceedings at law do not favor them.

But I see no reason to hold that the vote was irregular. It is suggested by the relators that the language of § 50 is to be construed as requiring the personal presence of the board of selectmen. That section provides that "the selectmen of towns, and such persons as may be authorized by the city council of cities, may represent their respective municipalities at all meetings of corporations in which stock or securities are held, and vote upon all shares of stock owned by them respectively." It is claimed that, inasmuch as this section authorizes the employment of an agent or proxy by city councils only, it must be held to intend that selectmen can only act in a body. It must be remembered, however, that city councils are parliamentary legislative bodies, incapable of acting excepting as legislative bodies, and under parliamentary organization, and that in the nature of things whatever is done by them must be done by an agent. This is not so as to selectmen, who are composed of a smaller number of men, and can and often do act in *pais*, and not as a parliamentary body.

It would be, in my opinion, unreasonable to hold that the entire board should be present to do a formal act, like the casting of a ballot; and that when one of the selectmen is present, and no more, and he assumes to act for the others, it is to be presumed that he is acting as selectman, and as the representative of the board of which he is a member; and that at least, if objection is made that he is not authorized to do so, it should be made before he votes. He does not act as the agent of the selectmen, or as proxy, in the sense in which that word is used in corporation meetings, but rather as selectman, and as the representative of the board; and it would be, in my opinion, a strained construction of the statutes to require the physical presence of all the members of the board to do an act which can only in fact be done by one.

Upon the whole, therefore, I am clearly of opinion that the relators have not stated such a case in law as entitles them to the relief applied for.

If, however, the interests of the public might be affected injuriously by the continuance of the respondents in office, and it appeared that injustice were being done or even might pos-

sibly result thereby, I should hesitate to assume the function of determining the questions of law raised by the relators. It might in such a case, notwithstanding my personal views of the law, be my duty, if it were seriously claimed, as in this case, that the law were the other way, to give the relators the opportunity of having their rights determined by the court.

But this is not such a case. It has no merits. It is an effort to oust from the benefits of their contracts two towns which have performed all that has been required of them under their subscriptions, and stand ready to fulfil their obligations in full. Without considering the many matters alleged and disputed on either side of the hearing, none of which, it appears to me, are strictly material to the question now before me, I am clearly of the opinion, upon the facts not in dispute, that in the sound exercise of the discretion of this office, which I am called upon to exercise in the interests of the public, I should not sign this information for the purpose of trying out the question stated. It is my duty, therefore, to refuse the use of my name to the information, and to leave the parties to such remedies, if any, as they have the right to institute on their own behalf, if they desire to have the question determined.

Simon W. Hathaway, for the relators.
John M. Cochran, for the respondents.

ATTORNEY-GENERAL *ex rel.* ELISHA GREENHOOD *v.* ERASTUS WORTHINGTON, JR., & OTHERS.

Town Officers, — Park Commissioners, — Election, — Quo Warranto, — Attorney-General.

The town of Dedham, having adopted the Australian ballot law, voted to elect park commissioners "by a ballot in the form of the Australian ballot," and at a special town meeting, duly called, chose the respondents by ballot as commissioners.

Held, that they were legally elected, although the formalities of the Australian ballot law were not observed.

The town had the right to elect the respondents to serve the remaining portion of the year until the next annual town meeting.

There being no allegation that the rights of the public will be jeopardized by the continuance of the respondents in office, and the Attorney-General being of opinion that they were legally elected, he will not sign an information in the nature of *quo warranto* to try their title to office.

1894
September 21.

This was a proceeding in the nature of *quo warranto* against the defendants, setting forth that they were illegally elected as park commissioners of Dedham, and asking for judgment of ouster. A hearing was had upon the question of whether the name of the Attorney-General should be used in bringing said information, at which both parties were represented.

The bill sets forth substantially the following facts: —

The town of Dedham, at a meeting held December 30, 1890, duly accepted St. 1890, c. 386, commonly called the Australian ballot act.

At the annual town meeting, held March 5, 1894, the town accepted St. 1882, c. 154, commonly called the park act. In the warrant for said town meeting, at which the park act was accepted, were articles as follows: "To see if the town will elect three competent persons to constitute a board of park commissioners, and determine the manner of their election and prescribe their terms of office." "To see if the town will vote that hereafter the park commissioners shall be elected by ballot at the annual election of town officers, and fix their terms of office."

Under these two articles the town voted to elect by ballot at the next annual meeting (March, 1895), and thereafter each year at the annual meeting, three park commissioners; and that the term of office should be one year each.

A special town meeting was held on Monday, July 30, 1894, the warrant for which contained an article as follows: "To see if the town will rescind the whole action taken at the last annual meeting under articles 29 and 30 (the articles above quoted) of the warrant of said meeting relating to park commissioners." Also articles similar in form to those above quoted in the warrant for the annual meeting.

At this meeting the town passed the following vote: "*Voted*, To rescind the whole action taken at the last annual meeting under articles 29 and 30 of the warrant of the last meeting

relating to park commissioners." The meeting then voted: "To elect by a ballot in form of the Australian ballot at an adjournment of this meeting, to be held August 6, 1894, at which meeting the polls shall be open from 12 noon until 9 P.M., three park commissioners, to hold office until the annual March meeting of 1895; and that hereafter three commissioners shall be annually elected by ballot for the term of one year at the regular March meeting of the town in the same manner as other town officers are elected." And further: "*Voted*, That a caucus of the citizens be held in the town hall, August 2, 1894, at 7.30 o'clock P.M., for the purpose of nominating at least six candidates for the office of park commissioners for the above term; at which caucus the check list shall be used and the nominations made by marking; the time allowed for said marking to be one hour at least. *Voted*, That the town clerk be instructed to call said caucus."

The special town meeting thereupon adjourned until August 6, 1894, at 12 o'clock noon.

The caucus provided for by this vote was held in accordance with the terms of the vote. The call was issued by the town clerk, who called the caucus to order. A marking list was opened, but no name was permitted to go upon the list until it was accepted by a majority of those present. Fifteen names were in that manner placed upon the marking list, and each voter was permitted to nominate six candidates for the three places of park commissioners. The respondents in this petition were three of those so chosen. Another one of those so chosen subsequently declined to have his name used as a candidate.

At the adjourned town meeting, on Monday, August 6, 1894, two persons acting as "ballot clerks" were present with ballots which had been furnished to them by the town clerk. The ballots were folded, and on one of the inside pages were printed the five names chosen at the caucus, with directions at the head of the list to vote for three. The voters expressed their choice by crossing the names of such persons as they favored. Inquiry was made of the moderator whether he would receive ballots containing the names of three candidates

for park commissioners independent of those furnished by the clerk. He did not decline to receive them, but said they would be put in a separate box, and if the number of them affected the legality of the election their validity would be hereafter considered. Under this form of election the respondents were chosen to the office of park commissioners.

The relator claims that the election was illegal, and bases his claim upon the following grounds, none of which, in my opinion, are tenable: —

First. It is claimed that the St. 1882, c. 154, provided that the park commissioners should be elected by ballot; and, even if this were not so, that the special town meeting had voted that they should be chosen by ballot; and that this being so, the provisions respecting the election of town officers under the Australian form of voting must be observed. It is conceded by the respondents that none of the provisions of St. 1893, c. 417 (the Australian ballot act), were observed, excepting that the balloting was done in the manner above indicated. And it is further conceded that, if the law required these officers to be elected under the provisions of St. 1893, c. 417, the Australian ballot law, their election was illegal.

The park act, St. 1882, c. 154, provides only that any town which accepts the provisions of the act may "elect" three competent persons as park commissioners. It can scarcely be claimed that the word "elect" is to be construed as meaning "elect by ballot." Pub. Sts., c. 27, § 78, provides for the choosing of town officers. Section 80 provides that certain officers therein named shall be elected "by written ballots, and the election of all other town officers" shall be "in such mode as the meeting determines." These sections of the Public Statutes were repealed by St. 1893, c. 417; but § 274 of the last-named act contains substantially similar provisions. It cannot be said, therefore, that the "election" of town officers necessarily implies "election by ballot;" for the statutes have plainly prescribed that certain town officers shall be elected by ballot, and that all others may be elected in such manner as the town may determine.

It is claimed, however, that St. 1893, c. 417, § 293, has

changed the law in this respect, inasmuch as that section provides that in "towns which have accepted the provisions of chapter 386 of the Acts of the year 1890 . . . nominations of town officers to be elected by ballot shall be made . . . and elections of all such officers shall be conducted in accordance with the provisions" of this act; to wit, the Australian system of voting. It is claimed that under this section all officers which the town may be called upon to elect, if the voters determine that those officers shall be elected by ballot, must be voted for under the provisions of the Australian ballot act; and that, inasmuch as the town meeting at Dedham voted to elect the park commissioners by ballot, it must necessarily be by the Australian form of voting.

But the section under consideration is obviously to be read in connection with the other sections of the same act. Section 274, as above quoted, provides that certain officers shall be elected by ballot, and that other officers may be elected in such manner as the town may determine. The section under consideration following this must, therefore, be taken to mean that all town officers, whose election is required to be by ballot, shall be under the provisions of the Australian ballot act. There is nothing in any provision of law, nor in any previous vote of the town, requiring the park commissioners to be elected by ballot. They, therefore, could be elected by the town in such manner as it determined.

It is to be observed that the vote of the town was not to elect the officers by the Australian manner of voting, or simply by balloting, either of which features might have required the use of the system of voting required by St. 1893, c. 417. The vote of the town was to elect them "by a ballot in the form of the Australian ballot." The town had a right to choose them by a *viva voce* vote, by a marking list, by nomination and motion, or by what may be called the old-fashioned system of voting. None of these were prohibited under any provision of law. It was voted to adopt a system in which some features of the Australian method of voting were incorporated; but it did not and could not be deemed by its vote to have decided upon the Australian method of voting with all its provisions.

It cannot be said, as was urged by the relator, that freedom of choice was interfered with by the method established, whatever irregularities may have existed in the caucus, if any. That was a voluntary affair, and bound no voter. It does not appear, and in fact no such contention was made, that under the system adopted every voter did not have a right to vote for whom he pleased, by writing the name of his candidate in the ballot, and putting a cross against the same; nor even that any prohibition against the use of ballots not furnished by the town clerk was attempted by the authorities in charge of the meeting. The voters were, it is true, called upon to vote in a particular way. This, however, is true of every form of election. It cannot be said that a ballot is not a fair one because the voter is required to express his preference in any particular way, if his right of expressing his preference is unlimited.

Upon the whole, therefore, I cannot agree with the contention of the relator that the manner of electing the park commissioners was in violation of any of the statutes of the Commonwealth.

Second. It is further claimed that when the town voted at the annual meeting to elect park commissioners for the first time at the next annual meeting, to wit, in March, 1895, it exhausted its powers, and could not rescind its vote in that respect. It would be, in my opinion, an extraordinary proposition to deny to a town the right to alter or rescind its action from time to time according to the will of the voters, provided always that due notice of the proposed action were given in the warrant. I know of no rule of law which forbids a town to rescind a vote once passed by it, especially when the vote relates to a method of procedure, and the rescission precedes the execution of the method previously determined upon.

Third. It is also claimed that the action of the town in electing the respondents for the term of seven months, or until the next annual election, accompanied by a vote that thereafterwards commissioners should be elected for the term of one year at the annual town meeting, was *ultra vires*, for the reason that the town had no right to fix a period of service for the commissioners of less than one year, or a different period of service for one board from that to be fixed for a succeeding board.

If this claim were well founded, inasmuch as the town had the right to accept the park act at any meeting, regular or special, it would follow that, if the town proceeded to elect commissioners under the park act, it would be obliged to elect them for a year from the time of the special election, thus making it necessary to hold special elections every year, in order that the period of a year should be complete; or to wait until the next annual election after the acceptance before electing commissioners, and thus lose the benefits of the act for the greater part of a year.

It seems to me that sound sense requires me to hold that, when the town had settled upon its scheme relating to the time of election and term of office of its commissioners, it must be taken to have the right to proceed thereupon to elect commissioners to hold office until the time for the regular election fixed by the scheme. This is the practice in every corporation, which provides by its by-laws for the time of electing its officers and the term of their office. It gives, it is true, to the first board a shorter term; but inasmuch as that shorter term is only for the purpose of establishing the scheme as arranged by the town meeting, and gives the town the benefits of the act as soon as it is accepted by the town, I do not think the election of these respondents should be disturbed by this consideration.

Fourth. When the special town meeting met by an adjournment for the purpose of electing park commissioners, a motion was made to adjourn the meeting. The moderator refused to entertain the motion, and ruled it out of order. It is claimed that the meeting was illegally held, for the reason that the moderator erred in refusing to entertain the motion. Nothing, however, is better settled than that courts will not disturb the results of deliberative bodies, otherwise regular, by reason of misinterpretation of parliamentary law by the presiding officers.

Upon the whole, therefore, I am of opinion that the relators have not stated a case which entitles them to relief. If rights were seriously to be jeopardized by the continuance of the respondents in office, and irregularity of proceedings imperilled, it might be my duty, notwithstanding my own opinion, to give the relator the opportunity of having the regularity of the elec-

tion settled by the courts; but it is well settled that the validity of the acts of the respondents cannot be collaterally called in question, they having been chosen by the town at a meeting called for that purpose, and being at least *de facto* officers of the town.

Elisha Greenhood, *pro se*, as relator.
Frederick D. Ely, for the respondents.

ATTORNEY-GENERAL *ex rel.* LUCY M. GREEN *v.* BOSTON CHILDREN'S AID SOCIETY.

Corporation, — Forfeiture of Charter, — Attorney-General.

The Attorney-General will not sign an information to annul the charter of a corporation for an abuse of its corporate powers when the allegations as to the abuse have been examined previously by a justice of the Supreme Judicial Court in another proceeding and held unsupported by the facts.

To the Governor and Council.
1894
November 16.

I have the honor to acknowledge the receipt of the petition of Lucy M. Green to the Governor, which by vote of your honorable body was referred to this office.

I notified the parties in the matter of the petition to attend for a hearing upon the same, and have heard such witnesses and examined such documents as the parties submitted for my consideration. Upon consideration of the whole evidence submitted I have determined, in the exercise of the discretion imposed upon me, to refuse the use of the name of the Attorney-General to an information against the Boston Children's Aid Society to annul its charter, as prayed for in said petition; and it seems proper that I should submit to your honorable body my reasons therefor, with some suggestions that have occurred to me in my examination of the matter.

The Boston Children's Aid Society, against which the petition asks for an information, was chartered by St. 1865, c. 97. By the terms of that chapter the corporation was authorized to provide temporary homes for vagrant, destitute and exposed children of tender years in the city of Boston and its vicinity, and to provide for them such other and further relief as might

be deemed advisable. By § 4 of said chapter the directors were authorized in their discretion "to accept a surrender in writing by the father, or where there is no father having his legal domicile within the Commonwealth, by the mother . . . of any child or children to the care and direction of said institution." By § 5 of the same chapter the directors have authority "to consent to the adoption of any child which shall have been surrendered to the institution as aforesaid." Provisions are made in the same section relating to the manner of such adoption.

It appeared that the petitioner, Lucy M. Green of Worcester, a widow, was the mother of two children, Paul Revere Green and Cora May Green, aged respectively seven and ten years at the time of the surrender hereinafter set forth; that on the twenty-sixth day of June, 1889, by paper writings, a copy of one of which is herewith submitted, the said Lucy M. Green purported to surrender said children to said society. The society thereupon received said children into its care, and, as I am informed, acting under the authority given to said society by its charter, caused them to be adopted in families, the names and residence of which were not disclosed. Soon after the execution of said agreements the petitioner, Mrs. Green, claimed that she was induced to sign said agreements under a misunderstanding as to the legal effect of the instrument, and by reason of misrepresentations made to her by the agent of the society as to its purpose in taking them into its custody, and asked the society to return the children to her. The society refused to return the children, and has refused since then, and still refuses, to disclose the residence of the children, or to permit the mother to see them, excepting upon certain conditions and limitations, as hereinafter stated.

Since the filing of the petition submitted to me, Mrs. Green has succeeded in ascertaining the residence of the son, and has recovered possession of him and now has him with her at her home in Worcester. The residence of the daughter is still unknown to her.

Various legal proceedings have been instituted by Mrs. Green, among which was an action of tort for damages against the so-

ciety for abduction of her children, which is still pending. In the course of negotiations entered into for the purpose of settling the suit, the society proposed to Mrs. Green that if she would in some formal manner approve and ratify her surrender of the children, and assent to the adoption proceedings already entered into by the society, it would permit her to see the children at intervals, in the presence of some officer of the society, — she bearing a portion of the expense of travel of the children to the place of interview. This proposition was declined by Mrs. Green, and no other opportunity to see the children has been offered by the society. In 1892 Mrs. Green filed a petition for a writ of *habeas corpus* against the society in the Supreme Judicial Court for the county of Suffolk, claiming that the detention of said children was unlawful, alleging as reasons therefor that at the date of signing the release above referred to she was misled and deceived by the false and fraudulent statements made to her in regard to the purpose of the society, and that she signed it under a mistake of the facts as to its contents. This petition was duly heard before Mr. Justice Lathrop of the Supreme Judicial Court on the tenth day of November, 1892, and after hearing the parties fully and their evidence he refused the petition, and filed in the case a memorandum as follows: —

"I find in this case that the petitioner surrendered her children to the respondent, and to its care and direction, until each should respectively attain the age of twenty-one years, by instruments in writing, duly signed by her and with full knowledge of the contents of said instruments, and that no false or fraudulent representations were used to induce her to sign said instruments. I further find that said children are not improperly restrained of their liberty, and that their welfare does not require that the prayer of the petition should be granted."

The next step taken by the petitioner, so far as I am informed, was the filing of the petition with the Governor, which has been referred to me. In that petition she asks that the Attorney-General be requested to file in the Supreme Judicial Court an information against said society, praying that its charter, hereinbefore granted, be annulled, and assigning as

reasons therefor the abuse of the corporate rights granted to it under the statute above set forth. The specifications of the alleged abuses of corporate powers were substantially the same as the reasons assigned in her petition for *habeas corpus* for the alleged unlawful detention of the children by said society; and the further allegation that the society has refused her permission to see her children, or to furnish her knowledge of their whereabouts.

Conceding for the purpose of the hearing that the allegations in the petition, if proved, would be sufficient to authorize proceedings for the annulling of the charter of the society, I am yet of opinion that the exercise of the discretion imposed upon me in the matter of signing informations should not be exercised in favor of Mrs. Green.

It is true the finding of Mr. Justice Lathrop, above quoted, was no part of the judgment of the court, and that in a proceeding between the Commonwealth and the society it would not be conclusive, nor a bar to an information for annulling the charter, for the reason that it is *res inter alios*. The question of signing an information, however, is one addressed to the discretion of the Attorney-General; and it seems clear to me that, after the exact question at issue has been fully heard and passed upon on its merits by a justice of the Supreme Judicial Court, that fact should determine the question of the exercise of the discretion entrusted to me. It would be asking the court to re-try a question fully heard and substantially determined upon its merits. Some additional evidence, which it is said was not produced before the court, was submitted to me, but in my opinion it was not sufficient to disturb the finding of the court, and if produced before the court would in no way have affected its decision.

Therefore, assuming, as I think I should, that the finding of the court should govern the exercise of my discretionary powers, and, as to me it is practically conclusive upon the allegations of fraud or mistake upon the part of the petitioner, I am unable to find upon the evidence any violation or abuse of its charter by the society. It had, under the terms of the statute above quoted, the right to receive the surrender of the children and

to cause their adoption elsewhere. The legal effect of such surrender was to give the entire control of the children to the society, and to take away any rights the mother had to see them or to know of their whereabouts. By her instrument of surrender she renounced any such rights she might have had absolutely and forever. Her position after her surrender was no better than that of any other person not bound by natural ties to the children. Whatever may be said as to the expediency or justice of depriving her of any knowledge of or communication with them, it is clear that the acts of the society are within the terms of its charter, and such deprivation affords no ground whatever for annulling its corporate existence. *Dumain* v. *Guynne*, 10 Allen, 270.

I may be permitted, however, to submit one or two suggestions for the consideration of the council: —

First. I am much impressed with the fact that no formalities or safeguards of any kind are required in connection with the execution of the instruments of surrender by the parent of the child surrendered. Nothing seems to be required under the law as it stands but the signature of the parent. Inasmuch as it is an act of far-reaching and vital importance in its consequences, and one which absolutely sunders the natural tie between the parent and the child, and, moreover, is an act usually done under circumstances of great mental strain on the part of the parent, it seems to me but just to require that there should at least be as much formality in the execution of such an instrument as is now required in the transaction of real estate. It is not my province to make specific recommendations, but I regard it as a matter worthy of the consideration of the council.

Second. Whether there should not be a provision in the laws of the Commonwealth, when children are surrendered by their parents to a charitable institution, providing for some opportunity of communication between the children and their parents after the surrender, is a question upon which much may be said upon both sides, and which I beg to submit for the consideration of your honorable body. This society is not the only institution which is authorized to receive the surrender of children by their parents. I am informed that similar authority

is conferred upon some of the State charitable boards, and perhaps on the officers of some cities. It is urged upon the one hand that it would be dangerous, and even subversive, to the welfare of the children, if in all cases the parent surrendering had the right thereafterwards to be in communication with the children so surrendered. But there is much weight in the suggestion, which was forcibly made before me, that to deny the parent all right of knowledge of or communication with the child which he or she had been obliged by stress of circumstances to surrender the possession of, is cruel and unnatural. Without expressing any opinion upon the merits of the controversy, I beg to submit the matter for the consideration of your honorable body.

It should be understood that as to both of these suggestions there is no remedy but legislation.

John F. Blanchard, for the petitioner.
Henry G. Pickering, for the respondent.

ATTORNEY-GENERAL *ex rel.* WILLIAM F. NYE & others *v.* STEPHEN C. BURGESS & others.

Park,— Dedication to Public,— Nuisance,— Information to Abate,— Attorney-General.

A corporation which owned a large tract of land filed a plan of it in the registry of deeds, showing the tract divided into lots, avenues and open spaces. The open spaces on the plan were colored green, and marked "Camp Ground," "Bay View Grove," etc., and the one in question was divided into lots which were numbered. Numerous copies of the plan were printed and distributed, but it did not appear that the corporation had ever formally dedicated the land to the public. It afterwards sold the lots in question, and after several conveyances they became the property of the respondents. The relators requested the Attorney-General to sign an information to restrain the respondents from using them, on the ground that they had been dedicated to the public.

Held, that there was no evidence of a dedication to the public by the corporation, and the Attorney-General refused to sign the information.

1895 October 23.

This was a petition by the relators requesting the Attorney-General to sign an information against the respondents, restraining them from encroaching upon or using for private purposes a

tract of land in Onset Bay Village, in the town of Wareham, which it was claimed by the relators had been dedicated by the owners thereof as a public park.

At the hearing the following facts appeared: the Onset Bay Grove Association was incorporated by St. 1877, c. 98. The purpose of the association, as stated in the charter, was "holding personal property and real estate, where a wharf, hotel or other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages." In pursuance of the purpose of the corporation, a tract of land in Wareham, now known as Onset, was purchased, divided into convenient lots, and plans thereof prepared. On the first plan adopted by the corporation, and filed in the Registry of Deeds in 1877, the tract in question was divided into lots, and there was nothing on the plan to distinguish it from other lots of the association intended for sale. Very soon, however, another and more elaborate plan was adopted and filed in the office of the Registry of Deeds. This was in the year 1878. The copy of this plan produced at the hearing showed the property of the corporation divided into lots, avenues and open spaces. The lots were colored white, the avenues yellow and the open spaces green. These open spaces included a number of tracts described as and called parks; also a tract called "Bay View Grove;" another, "Camp Ground;" another, "Proposed Hotel;" and another large tract was called "Grove for Hitching Horses." On the tract in question, which was about one hundred and twenty feet long by one hundred feet wide, were inscribed the words "Offices of O. B. G. Asso." It was colored green, like the other open spaces, and in the centre of it was delineated a building, with two paths from the adjoining avenue leading to the building. The tract marked "Proposed Hotel" also contained the design of a building in the shape of a hotel. The space now in question was divided on the plan into three lots about the size of the other lots, and numbered consecutively with them, 53, 54 and 55. None of the other open spaces were so divided into lots or numbered. The open space marked "Proposed Hotel" was afterwards sold to private persons, who

have erected a hotel thereon. The space marked "Grove for Hitching Horses" has also been sold to private parties. None of the other open spaces have been sold, excepting the tract in question. This was sold in October, 1888, by a warranty deed, to one Sidney Dean. The deed described the tract as "lots numbered 53, 54, 55, on a plan of lands of Onset Bay Grove Association, recorded in Registry of Deeds for Plymouth County," etc. Shortly afterwards, and during the same month, Dean resold the tract to E. Y. Johnson and Cyrus Peabody. These grantees in 1892 sold lot numbered 54 to the respondent Stephen C. Burgess, a portion of another lot to another respondent named in the information, and the remainder to other persons. The land since said sale by the association has been occupied by the grantees or their tenants for private purposes, and buildings have been erected thereon by them.

To support the contention that the park in question had been dedicated to the public, testimony of the relators and other witnesses, including the first president of the corporation, was introduced. It appeared from their testimony that a great many copies of the plan last adopted had been printed and extensively circulated. During the years from 1878 to 1888 numerous inquiries were made to know if the lots could be sold. The officers of the corporation said the lots were not for sale, but were reserved. It does not appear that any representation or declaration was made by any officer that they were dedicated to the public; and it was obvious from the testimony of the witnesses, taken in connection with the plant itself, that the purpose of the association was to reserve the tract in question for the erection of a corporation office, and perhaps other buildings for the convenience of the public, like a post-office, an express office, etc. This plan, however, was not carried out, and a company office has long since been erected in another part of the grounds. It was not clear from the testimony of the witnesses whether the tract in question had been fenced by the association; but it appeared that in the early days of the enterprise seats were placed upon the lots for the accommodation of the public, and were so used. The tract in question

was very nearly in the centre of the whole territory, and was the point at which most of the passengers by the street railway, which connected with the steam railway, disembarked.

The petitioners relied upon the foregoing facts, which are stated in the most favorable way for them, to show dedication by the owners of the land prior to 1888, and acceptance thereof by the public. It is plain, however, that the purpose of the corporation was not to dedicate the tract in question to the public, but to reserve it for its own use.

Dedication of land to the public for the purpose of a park, or for public use, is the giving up of the land to the control and beneficial ownership of the public. It is not necessary that a dedication should be made by deed, and it may be, and usually is, shown by acts of the grantors indicating an intention to surrender the beneficial control of the land to the public. The mere recording of a plan, showing a space marked as a park, or colored differently from the rest of the plan, is not of itself sufficient evidence of dedication, although such a fact may be considered in connection with other acts and declarations of the grantors indicating a purpose to convey the land for public uses. Inasmuch as it is proved by acts and declarations, and not by record as land is ordinarily conveyed, the intent of the owner should be clearly proved, and the acts of the owner which are relied upon to show dedication should be unequivocal in their nature. *Attorney-General* v. *Whitney*, 137 Mass. 450; *Attorney-General* v. *Abbott*, 154 Mass. 323.

In the case here presented the facts are not only consistent with an intention to reserve rather than to dedicate the land in dispute, but they plainly indicate that the purpose of the corporation was to reserve the land for its own use. The erection of a corporation office, a post-office, an express office and other like buildings is not a public use of a tract of land, in the sense that it thereby becomes the property of the public. Such a use of the land, while for the convenience of the public, is still private in its nature. It would undoubtedly be for the convenience of persons visiting or residing at Onset to have the office of the association, the post-office, the express office and other like buildings in a central and convenient place, and the corporation

might well reserve a convenient tract of land for that purpose; but the public would not thereby acquire any title to the tract, or any right to have the buildings so erected. The title to the tract would still remain in the corporation for all purposes. The sale of the tract indicates that the corporation changed its purpose in relation to its use of the lots. As the use originally proposed was for the corporation, for its own purpose, the public would not have the right to intervene, even though the people residing in or visiting the place were inconvenienced thereby.

I have been unable to find, therefore, in the petitioners' case, any evidence that the corporation intended to dedicate the tract in question to the public. That being so, it is my duty to refuse the name of the Attorney-General to the information.

Thomas E. Grover, for the petitioners.

Attorney-General *ex rel.* Stephen C. Brownell & others *v.* David L. Parker.

Public Officer, — Quo Warranto, — Attorney-General.

The Attorney-General will not sign an information in the nature of *quo warranto* to oust a public officer from office when it appears certain that the officer's term will expire before the case can be heard by the court.

1895
November 5.

This was an application to the Attorney-General to file an information against the respondent, David L. Parker, to have him ousted from the office of mayor of the city of New Bedford. The information alleged that his election was procured by "bribery and corrupt practices of the respondent and his agents and representatives."

The election called in question by these proceedings was held on the fourth day of December, 1894. The respondent took his seat as mayor on the first Monday of January, 1895. His term of office expires on the first Monday of January, 1896. This application was made to the Attorney-General June 4, 1895. In accordance with the practice of the office, notice was given to the respondent, and a hearing was appointed for June 12, 1895,

which by consent of the parties was adjourned until June 22, 1895. On the last-named day the parties appeared, and the relators offered evidence of witnesses and affidavits in support of the allegations in their information. At the close of the hearing the relators stated that they had further evidence to offer, and the hearing was thereupon adjourned until the first day of July following. Meanwhile, criminal proceedings were had against certain parties who it was claimed had been implicated in the alleged corrupt practices, and by request of the relators the hearing which was to have been had on the first day of July was continued to a day to be afterwards determined. No further action was taken in the matter until October 26, 1895, when upon application of the relators a further hearing was had, at which time the evidence of the relators was concluded.

At the last hearing, to wit, on October 26, 1895, the relators' evidence being concluded, the respondent through his counsel made the suggestion that the information should not then be signed and filed by the Attorney-General, for the reason that, as was claimed, it could not be heard and determined during the term of office of the respondent. Deeming the suggestion of the respondent an important one, I heard the parties fully upon it, and reserved the matter for consideration without hearing the respondent's evidence upon the principal issue.

The first question arising upon the respondent's suggestion is whether in point of fact there is a reasonable prospect of the case being heard and determined before the first Monday of January, 1896. By the provisions of Pub. Sts., c. 186, §§ 17, 19 and 20, petitions of this character are to be filed in the county where the respondent lives, but the court may take order for summary hearing of the parties. The usual rules governing time for appearance and answer are not held to apply to such proceedings; and it is the practice of the court in such cases to direct the parties to appear and answer speedily, to the end that the determination of the questions may not be delayed. It cannot be said conclusively, therefore, that there is not in fact time for hearing the case by a single justice before the expiration of the term of office of the respondent.

Nor do I attach much importance to the claim of the respondent that the determination of the case will be delayed by reason of the fact that he will demand trial by jury. In *Attorney-General* v. *Sullivan*, 163 Mass. 446, cited by the respondent, the right of the parties to jury trial in cases of this character was denied; and it is doubtful if the court would in its discretion order issues to be framed for a jury, especially if such a proceeding would so far delay the result that the judgment would thereby become nugatory.

The necessary steps in proceedings of this character are as follows: The filing of the information; notice within such time as the court may order to the respondent; filing answer by the respondent within such further time as may be ordered by the court; and a hearing of the case by a single justice. In view of the many and grave questions of law which the case of the relators undoubtedly raises, there is little doubt that the case would be reported by a single justice, or, at all events, that an appeal would be taken to the full bench; in which case, of course, final judgment would be still further delayed. This being so, even assuming that due diligence be used by the parties, I see no prospect that final judgment can be entered by the full bench before the first Monday of January, 1896. It is scarcely to be expected even that the issues of fact could be determined at a single hearing. The same issues, I am informed, when tried before a magistrate in New Bedford, occupied several days. Furthermore, the making up of a record for the full bench, the preparation of an argument and the consideration of the question by the court necessarily consume considerable time. It would be, I think, without precedent if questions involving so much testimony, and raising so many important issues of law as those presented by this information, should be begun, tried by a single justice, heard on appeal, and determined by rescript of the full bench of the Supreme Judicial Court within a period of sixty days. The time required to determine the case of *Attorney-General* v. *Sullivan*, above referred to, which was an information to try the title of the respondent to the office of president of the common council to which he claimed to have been elected, is instructive upon this question. In that case

it was recognized by the court as of the utmost importance to the interests of the city that the question be speedily determined. Counsel upon both sides were diligent; and the court gave every possible assistance, by way of special and early assignments, to have the matter speedily determined. Yet in that case the information was signed by the Attorney-General March 11, 1895, and the rescript of the full bench was not sent down until May 21. It is not to be expected that more diligence will be shown by counsel in the present case; and, on the other hand, it is doubtful whether, even if the court were disposed to advance the case for speedy determination, notwithstanding the apparent *laches* of the relators in procuring it to be signed, it would be possible to give it immediate attention, either by a single justice or in the appellate court. The full bench of the Supreme Judicial Court will be in session beginning on the second Tuesday of November almost continuously until the first Monday of January, 1896.

An information was filed in the county of Bristol in April last, in which the relators in the present proceedings were plaintiffs, seeking the same relief sought for in the present petition. It was suggested by these relators that the Attorney-General might, in the exercise of his discretion, intervene in that proceeding and appear as plaintiff, if it became apparent that the present proceedings could not be brought to a determination in season to be effective. To adopt this suggestion, however, would not help the matter. The same questions, and perhaps some others, are involved, and the same proceedings must be had: and a final determination could not be arrived at in that case sooner than in the information now before me.

It being apparent, therefore, that final judgment could not be had before the expiration of the term of office of the respondent, it becomes necessary to consider what standing the case would have in court in view of the fact that its action would be nugatory. It may be laid down as a general rule that an extraordinary remedy, like a writ of *quo warranto*, will not be granted where it would be without beneficial results. The only remedy to which the relators are entitled is judgment of ouster. An information in the nature of *quo warranto*, like the present,

is held by the Supreme Judicial Court to be, in Massachusetts at least, purely a civil proceeding. *Attorney-General* v. *Sullivan*, 163 Mass. 446. Although under the English common law it was sometimes brought for the recovery of a fine as well as to oust the respondent, the practice of levying a fine has never prevailed in Massachusetts; and in *Attorney-General* v. *Sullivan*, above quoted, it is clearly held that the Supreme Judicial Court in this State will not inpose a penalty in addition to the judgment of ouster.

In *Commonwealth* v. *Athearn*, 3 Mass. 285, which was an information against the respondent, claiming that he was unlawfully holding the office of town clerk, the court went so far as to hold that no proceeding of this character could be maintained against a town officer who was chosen for a year, for the reason that it would not be possible to enter judgment during the term of office in question. This, however, was before the court had the right under the statute to proceed summarily, as is now authorized by Pub. Sts., c. 186, § 19; and it is hardly to be supposed that the strict rule of that case would be followed. Indeed, there have been many cases, since the statutes have given summary jurisdiction, in which the title of an annual officer has been heard and determined by the court. The principle, however, laid down in *Commonwealth* v. *Athearn*, has never been overruled; to wit, that when no judgment of ouster can be entered until after the term of office expires, the court will, in the exercise of its discretion, refuse to hear the case.

I am clearly of the opinion that the present case cannot be heard and finally determined before the first Monday of January, 1896; and that upon this fact appearing to the court it is not to be expected that the petition would be entertained or heard. This being so, it is my duty to decline to sign the information. I do not agree with the contention of the relators that the only question to be determined by me is whether the petitioners have made out a case such as to entitle them to go forward in the courts. The granting of an information in the nature of *quo warranto* is addressed to the discretion of the Attorney-General. If for any reason he is of the opinion that

the proceeding will be nugatory, it is his duty, regardless of the merits of the case, to decline to allow the use of his name.

In view, therefore, of all the circumstances of the present case, and without considering the interesting questions of law raised by the petition and the evidence, and without expressing any opinion upon the evidence presented (not having heard the evidence of the respondent), I deem it my duty, for the reasons above stated, to decline to sign the information.

Edward Avery & Thomas F. Desmond, for the relators.
Albert E. Pillsbury & Lemuel Le B. Holmes, for the respondent.

Attorney-General *ex rel.* Joseph Lundy *v.* West End Street Railway Company.

Corporation, — Mandamus, — Attorney-General.

The Attorney-General will not institute proceedings at the relation of private individuals to compel a corporation to comply with an order of a State board, when the Legislature has clearly conferred upon the State board the responsibility of supervision over it and made it the duty of the State board to report violations of law by it to the Attorney-General.

1896
March 6.

This was a petition alleging that the West End Street Railway Company has failed to comply with the orders of the Board of Railroad Commissioners with respect to the use of fenders upon its cars, and requesting the Attorney-General to proceed by an information in the nature of a writ of mandamus, or by such other process as he may deem efficacious, to enforce such compliance.

St. 1895, c. 378, provides that "Street railway companies operating cars propelled by any motive power other than horse power shall equip their cars, when in use, with such fenders and wheel guards as may be required by the board of railroad commissioners, and said board shall have power from time to time to modify its requirements." Section 2 of the same act provides that "It shall be the duty of said board, within three months after the passage of this act, to notify street railway companies doing business in this Commonwealth of its require-

ments under the preceding section." The act further provides a penalty of fifty dollars a day for neglect to comply with the requirements of the board.

After the passage of this act, to wit, August 14, 1895, the Board of Railroad Commissioners issued an order containing certain requirements and regulations with regard to the use of fenders by street railway companies.

In December, 1895, the present petitioner petitioned the Board of Railroad Commissioners, setting forth the above act and order, and praying that the West End Street Railway Company be compelled to show whether or not they had complied with the orders; and, if not, why it should not be compelled to comply with the requirements of the orders of the Railroad Commissioners as above, and why penalties should not be collected. A hearing was appointed on this petition for February 5, 1896.

The board, after hearing the parties, declined to grant the petition or to act in the premises. The present petition claims that the proceedings of the board were not conducted in good faith, and requests the Attorney-General to proceed against the company, as above stated.

It is plain that the collection of the penalty prescribed by St. 1895, c. 378, is no part of the duty of this office. Pub. Sts., c. 217, §§ 1 and 2, provide that all penalties for neglect of any duty imposed by statute, where no provision is made by law, shall be paid to the respective counties; and that when the penalty exceeds one hundred dollars it shall, unless otherwise specially provided by law, be prosecuted and recovered by indictment in the Superior Court. Such a proceeding belongs to the district attorney in the district where the offence is committed.

The petitioner asserts that the Attorney-General may proceed under Pub. Sts., c. 17, § 4, which provides that the Attorney-General may, "when in his judgment the interests of the Commonwealth require it, file and prosecute informations or other processes against persons who intrude on the lands, rights or property of the Commonwealth, or commit or erect any nuisance thereon." This provision, which first appeared in 1849, when

the office of the Attorney-General was re-established, and which has been continued until the present time in substantially the same form, confers no new jurisdiction upon this office, but is rather a statutory declaration of powers which were already inherent in the office. There is no occasion to consider the power of this office to proceed upon the section referred to, for it is well settled that the Attorney-General can proceed by an information in the nature of a writ of mandamus against any corporation which fails in the performance of a duty owed by the corporation to the public. *Attorney-General* v. *Boston*, 123 Mass. 460, 479; *Attorney-General* v. *Old Colony Railroad Company*, 160 Mass. 62, 80. The true question which arises upon the petition is whether it was the intention of the Legislature to impose upon the Attorney-General any duty of action in this case until requested so to do by the Railroad Commissioners. The statutes which give jurisdiction to the Railroad Commissioners in relation to railroads are broad and comprehensive. Pub. Sts., c. 112, § 14, provides that "The board [of railroad commissioners] shall have the general supervision of all railroads and railways, and shall examine the same; and the commissioners shall keep themselves informed as to the condition of railroads and railways and the manner in which they are operated with reference to the security and accommodation of the public, and as to the compliance of the several corporations with their charters and the laws of the Commonwealth." Section 15 of the same chapter provides that "The board, whenever in its judgment any such corporation has violated a law, or neglects in any respect to comply . . . with the provisions of any law of the Commonwealth, shall give notice thereof in writing to such corporation; and, if the violation or neglect is continued after such notice, shall forthwith present the facts to the Attorney-General, who shall take such proceedings thereon as he may deem expedient."

By St. 1895, c. 378, therefore, the Board of Railroad Commissioners is authorized to regulate the fenders to be used by street railways. By the section of the Public Statutes above quoted it is further required to keep itself informed as to the manner in which the law is obeyed, and to that end may sum-

mon witnesses, administer oaths and take testimony (Pub. Sts., c. 112, § 25); and if, in its judgment, the company has violated any law, it may present the facts to the Attorney-General, who shall thereupon take such proceedings as he may deem expedient.

I am of opinion that the intention of the Legislature in the statutes quoted was to charge the Railroad Commissioners with the responsibility of supervision over railroads and railways, including street railways, and that no duty in the premises is imposed upon the Attorney-General until complaint has been made to him by the board. It is not to be supposed that two departments of government are charged with concurrent duty over the same subject matter; and, as the whole subject matter is, in express terms, placed in the hands of the Railroad Commissioners, the necessary inference is that the Attorney-General is to that extent relieved.

Nor do I think that it was intended that there should be any jurisdiction in the nature of an appeal from the acts of the Railroad Commissioners to the Attorney-General. The duties of that board are performed by its members, under the general authority, direction and control of the executive department; and if they fail in the performance of their statutory duty, the remedy of the citizen is by appeal to the appointing power. While it is the duty of the Attorney-General to see that the laws of the Commonwealth are enforced and its interests protected, yet, when that duty as to any specific matter is clearly conferred upon another department of government, his responsibility must be taken to be to that extent transferred to that department.

I deem it my duty, therefore, not to entertain the petition. This conclusion is reached without forming or expressing any opinion upon the question whether the petitioner is, as he alleges, justly aggrieved at the action of the Railroad Commissioners.

James M. Hall & Thomas I. Hogan, for the petitioner.

Attorney-General *ex rel.* William F. Nye *v.* Onset Bay Grove Association.

Corporation, — Forfeiture of Charter, — Attorney-General.

The Attorney-General will not apply for the forfeiture of the charter of a corporation organized for religious purposes because it has leased a portion of its property.

1896
July 13.

This was an application to the Attorney-General for the filing of a bill in equity by him against the Onset Bay Grove Association for the forfeiture of its charter, upon the ground that it has exceeded its authority by using the funds of the corporation for the carrying on of business not authorized by its act of incorporation.

The following facts appeared at the hearing. The Onset Bay Grove Association was incorporated by St. 1877, c. 98. By the provisions of this act the persons named therein were made a corporation "for the purpose of holding personal property and real estate, where a wharf, hotel and other public buildings may be erected, and building lots sold or leased for the erection of private residences or cottages." The petitioner in this case is William F. Nye, who was one of the persons named in the act of incorporation. He is and has been for many years one of the officers of the corporation, and has been largely interested in its affairs.

All of the incorporators were of the religious sect called Spiritualists, and obtained their act of incorporation in order that they might establish at Onset Bay a religious camp meeting and a summer resort for those desiring to attend such meetings. In pursuance of this purpose, after obtaining their act of incorporation, they purchased a large tract of land desirably situated on the shores of Onset Bay, and proceeded to lay it out into streets, avenues, squares and building lots. Some of the land was reserved in the original lay-out for the purpose of erecting thereon a tabernacle in which to carry on religious meetings. A speaker's stand was erected upon one of these lots, and seats and other fixtures provided for the purpose. The lots were sold in large numbers, at first principally to Spiritualists,

and afterwards, to some extent, to others. Hotels, stores and other buildings adapted to the wants of a summer population have been erected. A large summer settlement has been built up, composed of people drawn thither partly by the beauty of the location, but largely on account of the religious services held there during the summer months. These services differ somewhat from those of other denominations, and attract, and, perhaps, are intended to attract, many people to them who are not interested or believers in the denomination under whose auspices they are carried on. A brass band is engaged to furnish sacred and popular music, and speakers of reputation are procured to deliver addresses. These meetings are largely attended, both by those owning or occupying cottages in the settlement and by others who come to the place for that purpose, and they constitute a principal feature of the resort.

Meetings of this character have been held since the organization of the company, and have been carried on by the corporation and paid for out of the income received by it from rentals of its property. The present petitioner was active in establishing and carrying on these meetings from the beginning, for many years, and until some time in the spring of 1895. But on the twenty-seventh day of May, 1895, the petitioner, having been advised that it was doubtful whether under its charter the corporation had the right to carry on these meetings and appropriate its funds therefor, notified his fellow directors in writing to that effect, and requested them to take proper action to discontinue such use of the funds of the corporation.

Thereupon, to wit, on the sixth day of July, 1895, a meeting of the directors was held, at which Mr. Nye, although notified, was not present, and a vote was passed by which a large part of the property of the corporation was leased to a number of persons, being, in fact, all of the directors except Mr. Nye. The lessees were described in the lease as co-partners, doing business under the name of the Onset Bay Grove Camp Meeting Association. The term of the lease was seven years, and the rental was "one-half of the net profits that might accrue or come to them from the use of said property."

On the twenty-second day of May thereafter a special meet-

ing of the stockholders was held, upon due notice, to see if the stockholders would vote to ratify and confirm said lease; and it was voted at said meeting that the lease be ratified, fifty-seven votes being cast in favor of the ratification and forty-one against it.

Thereupon the lessees took possession of the property so leased, collected the rentals, and, after paying over one-half thereof to the treasurer of the corporation, have used the other one-half thereof in conducting meetings substantially as they had been previously conducted. It was admitted by the petitioner at the hearing that no pecuniary profit resulted to the lessees from the execution of the lease; and he did not charge that the lease was void as being made for their profit, advantage or benefit, or to defraud the stockholders, nor did he dispute that the association had authority under its charter to execute a lease of its real estate.

He claims, however, that the lease was executed for the purpose of evading the provisions of the charter of the association, and is merely a device for the diversion of the property of the association to a use not authorized by its charter. It is upon this ground that he asks that the charter be annulled.

Upon these facts I am of the opinion that a case is not stated which requires or justifies the exercise of the discretion of the Attorney-General to institute a proceeding of this character. Even if it be conceded that the lease is a mere device to evade the restrictions of the charter, it does not seem to me to be such an abuse of corporate powers as calls for its revocation. No harm to the community or to any individual can be said to result therefrom. On the contrary, the principal purpose for which the charter was sought by those who were named as incorporators, including this petitioner himself, to wit, that of carrying on religious meetings after the manner of Spiritualists, is thereby accomplished. Petitions of this character are addressed to the sound discretion of the Attorney-General, and he should not lend his name to the revocation of a charter unless it appears that the misuse of corporate powers is unlawful or mischievous, or is in fraud of the rights of the stockholders, or is against public policy. I do not think that the Common-

wealth is called upon to revoke the charter of a corporation organized for religious purposes, whose only abuse of its charter is the carrying on of such meetings, and when the abuse of chartered powers is at most technical merely, and not harmful.

The petitioner certainly has no just cause for complaint upon this ground. He himself, as officer and director of the corporation, has long been instrumental and active in establishing and promoting such meetings, and upon the faith of the continuance of the policy of the company, which he himself helped to establish, many permanent residents have undoubtedly been induced to purchase land and build and occupy summer houses. So far as he is concerned, his good faith is pledged rather to sustain such meetings than to have them discontinued.

But I do not think that even a technical abuse of corporate powers has been committed by the corporation. The only act which has been complained of is that it has leased a portion of its property. This it had a clear right to do. No complaint is made that the lease is improvident, or made for purposes of private gain. The terms and conditions of the lease are within the clear authority of the charter. The mere fact that it was made so that the lessees could carry on a business which was forbidden to the corporation itself is not, in my opinion, sufficient to invalidate the lease, or render the act of the corporation *ultra vires*. The transaction does not come within the principles of law which invalidate acts colorably done for purposes of fraud or evasion. The lease executed by the corporation was within its authority. It does not become illegal as a corporate act, because the purpose of the lease was to enable the lessees to do what the incorporators could not do.

William B. French, for the petitioner.
Thomas E. Grover, for the respondent.

Attorney-General *v.* Selectmen of Wellesley.

Mandamus, — Attorney-General.

An information for a writ of mandamus will not be signed by the Attorney-General when upon the facts shown it is clear that the duty for the neglect of which mandamus is sought will be performed by the respondents before the case can be heard by the court.

1897
October 29.

This was an application by the Democratic committee of the town of Wellesley for an information against the selectmen of that town.

The information set forth that John H. Sheridan and Charles M. Eaton, who were appointed upon the board of registrars of said town of Wellesley as Democrats, had ceased to act with the Democratic party, and were not entitled to serve as the Democratic members of the board of registration; that the town committee had notified the selectmen that Sheridan and Eaton had so ceased to act with the Democratic party; and that on the eleventh day of October they filed with the selectmen a written complaint setting forth the facts, and requesting the removal of Sheridan and Eaton.

The prayer of the information was for a writ of mandamus to the selectmen, commanding them to remove the said Sheridan and Eaton from their offices as registrars of voters, and to appoint members of the Democratic party in their places.

St. 1893, c. 417, after providing for a board of registration, which shall represent the two leading political parties, further provides, in § 29, that "Whenever, upon written complaint . . . to the selectmen of a town, and after notice and hearing, it shall appear that a registrar of voters, other than the . . . town clerk, has ceased to act with the political party which he was appointed to represent, the . . . selectmen . . . shall remove such registrar from office." Under this statute the jurisdiction of determining whether a registrar "has ceased to act with the political party which he was appointed to represent" is given to the selectmen. It is the duty of that board, when complaint is made, to give notice to the party complained against, and to hear and determine the question. If they refuse to give such a hearing, mandamus lies to compel them so

to do. If, therefore, there were no other facts than those stated in the petition, I should deem it my duty to sign the information, to the end that the complaint of the Democratic town committee might be duly heard and determined.

But it appeared at the hearing before me that about the time the information was presented in this office the selectmen had ordered a hearing upon the complaint of the Democratic committee, to be had November 16. The only result, therefore, which could come from the filing of this petition, would be a writ of mandamus to compel the board to perform a duty which will have been performed before the case can be heard by the court. Under these circumstances, I am of opinion that the use of the name of the Attorney-General should not be granted to the information.

It was strenuously urged at the hearing that by reason of the neglect of the selectmen the party which the petitioners represent has lost the right of being represented in the registration for the pending election. Whether this is so or not it is not necessary to determine, for, even if it be so, mandamus will not remedy the wrong. If through any neglect or failure of duty on the part of the selectmen the petitioners have lost rights, their remedy is by indictment. Mandamus does not lie to punish violations of the criminal law.

Henry J. Jaquith, for the petitioners.
Homer Albers, for the respondents.

Attorney-General *ex rel.* George T. Woodward *v.* Richard Bray.

Quo Warranto, — Local Officer, — Attorney-General, — Mandamus

An information in the nature of *quo warranto* will not be signed by the Attorney-General excepting in cases where the question of the construction of a law affecting the Commonwealth generally is involved, or when the Commonwealth as such is for any reason interested in the doctrine of the question, or where no other remedy is open to the relator. When the question involved is purely local, and one in which the Commonwealth has no interest, mandamus is the more proper remedy.

1897 December 20.

This was an application to the Attorney-General for the filing of an information in the nature of *quo warranto* against the re-

spondent to try his title to the office of superintendent of public buildings in Lowell. At the hearing it appeared that the respondent was holding the office lawfully, unless he had been removed therefrom by the election of the relator. The relator had been elected to the office by the common council, and the question upon concurring in the election came before the board of aldermen in due course. A dispute occurred between the mayor, who presided at the meeting of the board of aldermen, and one of the board, as to the proper disposition of certain alleged dilatory motions. Finally one of the aldermen assumed charge of the meeting, entertained and put certain motions, which resulted in the election of the relator. The mayor and a minority of the board denied the right of the alderman in question so to do. The sole question raised by the information is whether the proceedings in the board of aldermen, by which it is alleged that the relator was elected to the office, were legally conducted.

There is no question of the power of the Attorney-General to file an information in the nature of *quo warranto* against a person intruding upon a public office. This proceeding is a proper remedy to try the title between rival claimants to such office. 1 Spelling's Extraordinary Relief, § 620; 2 Spelling's Extraordinary Relief, § 1374. If, therefore, the position of superintendent of public buildings in Lowell is a public office, the Attorney-General may bring an information against the person usurping the office.

I do not deem it necessary, however, to determine the question whether the office of superintendent of public buildings is a public office, being of the opinion, upon other grounds, that it is my duty to refuse to sign the information.

The case in question presents no question of the consideration of a law of the Commonwealth. If a public office, it is not one which is of importance to the citizens of the Commonwealth generally. It has no connection with any department of the Commonwealth, nor with the expenditure of its money. It is a purely local question. While, technically, assuming it to be a public office, it is one the wrongful holding of which may be inquired into upon information by the Attorney-General

representing the public, it is obviously not one of the class of cases for which the remedy of *quo warranto* was principally designed.

If an information by the Attorney-General were the only remedy open to the relator, the case might stand differently; but the Supreme Judicial Court has declared, in express terms, in a case similar in all respects to this, that a writ of mandamus "affords the speediest and best method of settling the dispute of rival claimants to a municipal office." *Keough* v. *Holyoke*, 156 Mass. 403. See also *Russell* v. *Wellington*, 157 Mass. 100, 106. This remedy, which has thus been approved by the judgment of the Supreme Judicial Court, is open to the relator.

The practice of this office in respect to the filing of informations in the nature of *quo warranto* has not been uniform, even during the administration of the present incumbent. In view, however, of the increasing frequency of such applications, in cases where only minor or purely municipal officers are involved, I am of opinion that a definite rule should be adopted in the matter, and that the use of the name of the Attorney-General should be invoked only in cases of the character I have indicated. When a question of the construction of a law affecting the Commonwealth generally is involved, or when the Commonwealth, as such, is, for any reason, interested in the determination of the question, the information may, with propriety, be filed by the Attorney-General, regardless of the importance of the office. But when the question is purely local, and one in which the Commonwealth is in no way interested, excepting so far as the issue involved is technically, only, a public one, I am of opinion that the parties should be relegated to the use of the writ of mandamus, if that remedy be open to them.

For the foregoing reasons I decline to sign the information.

George F. Richardson, for the relator.
John J. Hogan & William A. Hogan, for the respondent.

Attorney-General *v.* Eastern Cold Storage Company.

Corporation, — Nuisance, — Abatement, — Attorney-General.

The Attorney-General, in the exercise of the sound discretion intrusted to him, will not allow the use of his name in proceedings to abate a nuisance where the nuisance complained of is only technical, does not involve any serious danger to the rights of the public, and is sought for the purpose of enabling private parties to litigate their differences.

1898
April 15.

This is an application to the Attorney-General for the filing of a bill in equity against the Eastern Cold Storage Company, to restrain it from entering upon, opening and digging up certain streets in the city of Boston for the purpose of laying pipes therein. The information was asked for by the representatives of the Quincy Market Cold Storage Company, a corporation engaged in the same business as the Eastern Cold Storage Company.

Upon hearing the parties the following facts appeared. The Quincy Market Cold Storage Company, the representatives of which asked for the signing of the information, is a corporation organized under the laws of Massachusetts, and established for the purpose of furnishing refrigerating fluid for cold-storage purposes to shops and markets. Under a license from the aldermen of the city of Boston, granted some years ago, it laid pipes in a number of the streets in the market district of the city of Boston, and has since used the pipes for the purposes of its business. Some question having been made as to its right to maintain its pipes in the streets, an act of the Legislature was passed (St. 1898, c. 128) confirming and legalizing its doings.

The Eastern Cold Storage Company, on the 28th of December, 1897, obtained a license from the board of aldermen to lay and maintain underground conduits for the transportation of refrigerating fluid in certain streets in the city of Boston, some of them, at least, being streets already occupied by the Quincy Market Cold Storage Company. In the exercise of this license the Eastern Cold Storage Company, under the

direction of the superintendent of streets, caused certain streets to be opened and its pipes to be laid therein; and it proposes to extend its pipes and business under the terms of the license granted to it by the board of aldermen.

The signing of the information by the Attorney-General is asked for on the ground that the acts of the defendant company constitute a public nuisance; it being claimed that the board of aldermen had no authority, without the express sanction of the Legislature, to give to the defendant company a license to dig up the streets.

If the only question raised by the information were the jurisdiction of the aldermen to grant a license to the Eastern Cold Storage Company to dig up the streets for the purposes of their business, I should have no difficulty in reaching the conclusion that I ought to sign the information. Whether the officers of a municipality may authorize the laying of pipes below the surface of a public way, by private persons or corporations, for purposes not directly sanctioned by the Legislature, is at least a question of such doubt that I should not feel at liberty to pass upon it adversely, but should deem it my duty to bring it before the court for determination. I do not, however, find it necessary to consider this question, for I am of opinion, upon other grounds, that I should not sign the information.

There is no doubt of the authority of the Attorney-General to maintain an information in equity to restrain a corporation or an individual from the doing of acts which may create a nuisance, or injuriously affect or endanger the public interests. *Attorney-General* v. *Jamaica Pond Aqueduct Corporation*, 133 Mass. 361. But this authority should only be exercised as to those public nuisances which affect or endanger the public safety or convenience, and require immediate interposition. *Attorney-General* v. *Tudor Ice Company*, 104 Mass. 239. The injury to public rights must be of a substantial character, and not a mere theoretical wrong. *Attorney-General* v. *Metropolitan Railroad*, 125 Mass. 515. When the nuisance complained of is an obstruction of a public way, and consists of acts which, even if unauthorized or illegal, will not create any serious or

continued hindrance or obstruction to public travel therein, the discretion of the Attorney-General should not be exercised. *District Attorney* v. *Lynn & Boston Railroad Company*, 16 Gray, 242. He should not intervene unless there is danger of actual, serious and permanent obstruction to the rights of the public.

Practically, the only interest the public has in highways is that they be kept open and unobstructed for travel. If, for example, it were proposed to erect a permanent structure, like a building, upon a public way, so as to interfere with the use of the streets by persons having occasion to travel thereon, it would be such a nuisance as the Attorney-General would be called upon to cause to be enjoined by proceedings in equity. It is otherwise with mere temporary disturbances of the surface, which are constantly occurring and which do not involve any permanent interference with public travel. Such matters may well be left to the control of the local authorities. It is to be presumed that those officers will perform their legal duty, and will not consent to or permit any act to be done which will seriously interrupt or interfere with persons having occasion to use the way in question. *District Attorney* v. *Lynn & Boston Railroad Company*, *ubi supra*.

Applying these distinctions, which are well settled, to the case presented, I am unable to discover any sound reason for the exercise of the discretion of the Attorney-General. The only possible interference with the rights of the public in their use of the streets is that occasioned by the digging up of the same for the purpose of laying pipes. Such an obstruction is temporary in its nature, and is one which is more properly within the control of the municipal body. It cannot be said to be a substantial and continued interference with public rights. The mere existence of pipes below the surface of the street, whether they are there lawfully or unlawfully, does not constitute an interference with the rights of the public to use the street, and is, therefore, not such a nuisance as calls for the action of the law officer of the Commonwealth.

The filing of an information like the one under consideration

is a representation to the court by the Attorney-General, appearing in behalf of the public, that the rights of the public are so far interfered with as to require action by him for its protection. In practice such informations may be, and often are, conducted by counsel representing private interests; but this fact does not change the essential nature of the proceedings. The use of the name of the Attorney-General is not a mere fiction, employed to give private parties a standing, but is an assurance to the court that the law officer believes that there is a substantial interference with the rights of the public. His discretion, therefore, should only be exercised in favor of such an information when, upon the facts presented to him, he is satisfied that such actual nuisance exists.

This is plainly not the present case. A company which has, after many years of use of the streets, finally obtained legislative sanction for its acts, seeks by the use of the name of the Attorney-General to enjoin a rival company from a similar use. No one has seen fit during these years to bring the matter to the attention of the law officer, and it is to be presumed that there has been no serious interference with public rights growing out of the acts of the petitioning corporation. I see no reason to suppose that any permanent danger to the public or any substantial interference with the use of the streets will result from the exercise of the license granted to the defendant corporation by the board of aldermen. The license itself appears to be carefully guarded, so as to cause only slight interruption to travel during the laying out of the pipes. Nothing appears tending to show that the privilege granted to the defendant company will be abused, or that any more serious interference with travel is liable to occur than is constantly arising from digging up the soil of the streets to lay pipes therein.

It is the duty of the Attorney-General to file informations for the abatement of nuisances which threaten the safety or convenience of the public. It is, on the other hand, no less his duty to exercise his discretion to withhold the use of his name in cases where the nuisance is only technical, does not involve any serious danger to the right of the public, and is sought for

the purpose, in fact, of enabling private parties to litigate their differences. For these reasons I deem it my duty, in the exercise of the sound discretion entrusted to me, to refuse the use of my name to the information.

George Putnam, for the petitioner.
James A. Bailey, Jr., for the respondent.

ATTORNEY-GENERAL *ex rel.* JAMES H. CONWAY & ANOTHER *v.* DANIEL F. MURPHY & ANOTHER.

Quo Warranto, — Local Officer, — Attorney-General, — Mandamus.

The Attorney-General will not sign an information in the nature of *quo warranto* to try the title to an office which is local in its nature, when the petitioners have a clear remedy by mandamus.

1898
June 21.

This was an application to the Attorney-General for the filing of an information in the nature of *quo warranto* against the respondents, to try their title to the office of members of the board of health of Woburn.

There is nothing in this application which distinguishes it from the case of *Attorney-General ex rel.* v. *Richard Bray.** The office of member of the board of health is local in its nature, and the questions in issue do not concern the citizens generally. The case does not present a question of the construction of any public statute. It involves merely a consideration of the charter of the city of Woburn — St. 1897, c. 172. There is no good reason why the law officer of the Commonwealth should intervene to procure a construction of a city charter, upon a question local in its nature. The petitioners have a clear remedy by mandamus, and do not need the intervention of this office.

For the foregoing reasons I decline to sign the information.

John W. Johnson, for the relator.
Frank P. Curran, for the respondent.

---

* See page 647, *ante*.

Attorney-General *v.* Norfolk Western Street Railway Company.

Quo Warranto, — Invasion of Public Rights, — Attorney-General.

Where no substantial invasion of the rights of the public is threatened by a corporation, the Attorney-General will not grant the use of his name to an information in the nature of *quo warranto* against it which in his opinion does not state a case. If the rights of the public were seriously threatened, he might deem it his duty, there being no other remedy for the parties directly interested, to submit the question to the court.

1898 November 6.

This was an application for the use of the name of the Attorney-General to an information in the nature of *quo warranto* against the Norfolk Western Street Railway Company. The information was applied for by persons owning estates abutting on the street through which it is proposed to locate the railway in question. No relators were named.

Upon hearing the parties the following facts appeared: The corporation was organized under the provisions of Pub. Sts., c. 113. Its articles of association described the railway as commencing "at a point on the westerly side of Washington Street near the junction of Washington and High streets in the town of Dedham and county of Norfolk, and to extend through the said Washington Street to School Street, thence through School Street to Court Street, thence through Court Street to Village Avenue, thence by Village Avenue to High Street, thence upon and through High Street to the town of Westwood in the said county." The remainder of the route described was through the towns of Westwood and Medfield to a point near the post-office in Medfield. After due publication of the articles of association, as required by Pub. Sts., c. 113, § 6, the directors petitioned for a location in the town of Dedham, in the streets named in the articles of association. After notice and hearing, the location was refused.

Thereupon the directors petitioned for a location beginning at the same point, but proceeding directly through High Street instead of going from High Street through School Street, Court Street and Village Avenue to High Street by the route specified

in the articles of association. The remainder of the location prayed for was the same as that described in the articles of association. This location through High Street was, after due notice and hearing, granted by the selectmen. Locations have also been duly obtained in the towns of Westwood and Medfield. After obtaining this location as aforesaid, and complying with the provisions of the statute, the Secretary of the Commonwealth issued to the corporation a certificate substantially in the form prescribed by Pub. Sts., c. 112, § 44. In this certificate the description of the road was the same as that set forth in the articles of association.

The petitioners allege that the selectmen of Dedham had no authority to grant the location in High Street, because the articles of association restricted the proposed railway to other streets; and that the construction of a street railway in High Street would be *ultra vires* for the same reason. The principal question, therefore, raised by the information is whether the description of a particular route in the articles of association limits the company to the route thus described.

The statute requires that the articles of association shall state the termini of the proposed road, and the length as near as may be. But the particular route by which the termini are to be connected is a matter for subsequent consideration by the selectmen. It is expressly provided in § 6 that the directors shall cause the articles of association to be published once a week for three weeks before proceeding to fix the route of the road. The route, therefore, cannot be fixed in the articles of association; and the enumeration of particular streets in them is surplusage, unless rights of others are thereby affected.

It is claimed, however, that the enumeration of specific streets in the articles of association cannot properly be treated as surplusage, because, by the publication of the articles containing the enumeration, the public, and particularly abutters, are misled. This contention, in my opinion, rests upon a misconception of the object of requiring publication of the articles of association. It is not for the purpose of giving notice to abutters. That is expressly provided for later, when the location is sought for. The publication of the articles of association is

to advertise the fact that the formation of a street railway corporation is proposed, with the names of the incorporators, and the amount of their interest in it, to the end that the public and persons liable to be affected may judge of the good faith, character and financial standing of the promoters of the enterprise.

The public cannot be misled by the designation of route in the articles of association, for its rights are fully protected by the jurisdiction delegated to the municipal body to pass upon the question of location. The rights of abutters, also, are amply secured by the statutes. No location can be granted until a petition has been filed with the municipal board, setting forth the streets upon which it is sought to locate tracks, and until due notice has been given of such petition, and opportunity given to abutters to object and to be heard upon their objection.

In this case the articles of association fully complied with the provisions of the statutes in stating the termini and the probable length of the proposed road. Further and more specific designation of the streets connecting the termini was unnecessary, had no business in the articles, and could not affect the rights of the public or of individuals. They are, therefore, of no effect, and may properly be regarded as surplusage.

The certificate of incorporation issued by the Secretary of the Commonwealth recited the description of the route as set forth in the articles of association. This was required by Pub. Sts., c. 112, § 44. It is contended, however, that this enumeration in the certificate amounts to a limitation in the charter of the corporation, confining it to the streets named. But the certificate of the Secretary is not its charter. The charter of a corporation formed under the general law is not the certificate of the Secretary of the Commonwealth, but consists of the statute or statutes under which it is formed, and which define its powers, together with the instruments required by such statute or statutes to be executed and filed by the corporation. 7 Am. & Eng. Encyl. of Law (2d ed.), p. 646. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 286. *Grangers' Life and Health Ins. Co.* v. *Kamper*, 73 Ala. 325, 341. The cer-

tificate of the Secretary of State is merely evidence that the incorporators have complied with the provisions of the general law, and are entitled to become and be a corporation. They derive their power and authority from, and are subject only to, the limitations of the statutes under which they are formed. The certificate of the Secretary cannot diminish or enlarge those rights.

I am clearly of the opinion, therefore, that the petitioners are not entitled to a writ of *quo warranto*. If great danger to the public were threatened, I might deem it my duty, however, in view of the suggestion that there is no other remedy, to sign the information. But no such danger exists. The Legislature has delegated the protection of the interests of the public to the municipal board. That board in this case has determined that public convenience and necessity require the location in question, and its determination must be accepted as conclusive.

No substantial invasion of public rights being threatened, I am of opinion that the Attorney-General is not called upon to grant the use of his name, particularly to an information which in his opinion does not state a case.

The application, therefore, is refused.

Moorfield Storey, for the petitioner.
George S. Forbush & Joseph J. Feeley, for the respondent.

MEMORANDUM.

In re Massachusetts Pipe Line Gas Company.

Corporation, — Massachusetts Pipe Line Gas Company, — Capital Stock, — Unauthorized issue, — Gas and Electric Light Commissioners, — Approval.

Before St. 1894, c. 450, was enacted, a gas company subject to general laws could not commence business till the whole amount of its capital stock, as fixed by the incorporators, had been paid in. That statute requires all gas companies to obtain the approval of the Gas and Electric Light Commissioners before issuing either original or increase issues of stock; so that now only so much of the capital stock of a gas company as the corporation is authorized by the Gas and Electric Light Commissioners to issue is required to be paid in.

The Massachusetts Pipe Line Gas Company, incorporated by St. 1896, c. 537, was made subject to general laws, and the amount of its capital stock fixed thereby at one million dollars; but it is subject to St. 1894, c 450, relative to the issuing of its stock, and must obtain the approval of the Gas and Electric Light Commissioners before its issue of the whole amount thereof will be legal.

1898 March 1.

The Board of Gas and Electric Light Commissioners, having determined that the Massachusetts Pipe Line Gas Company has violated the provisions of St. 1894, c. 450, by issuing capital stock without the authority of the Board, has referred the matter to the Attorney-General, under the provisions of St. 1885, c. 314, § 12. This section provides that the Attorney-General shall "take such proceedings thereon as he may deem expedient." I interpret this section as authorizing, if not requiring, the Attorney-General to determine whether, upon the facts stated by the Board, there has been a violation of law by the corporation reported. Acting, therefore upon this interpretation, I have duly considered the question presented and have heard counsel thereon.

I understand the facts to be as follows: The Massachusetts Pipe Line Gas Company, incorporated by St. 1896, c. 537, having voted at its first meeting to fix the capital of the corporation at one million dollars, has issued the whole amount of such capital stock without having previously obtained the authority of the Board. It is claimed by the Board that in so doing it has violated the provisions of St. 1894, c. 450, entitled "An Act relative to the issue of stocks and bonds by gas and electric light companies."

The charter of the company, in the first section, provides that the corporation shall be "subject to all the duties, restrictions and liabilities, and all general laws which now are or may hereafter be in force applicable to gas companies, except as hereinafter expressly provided."

There can be no question that the Massachusetts Pipe Line Gas Company is a gas company. Its charter authorizes the formation of the corporation "for the purpose of manufacturing, buying, selling, dealing in, conveying, transporting and distributing gas for illuminating, heating, cooking, chemical, mechanical and power purposes." It was claimed at the hearing before me that this corporation is to be distinguished from ordinary gas companies, because it proposes to deal in coke; and that the latter is the principal purpose for which the corporation was formed. However that may be in fact, no such distinction appears in the act of incorporation. It is impossible in the charter of the company to establish any difference between this and what in the statutes are specifically entitled "gas companies."

It is necessary to determine, first, what general laws were and are in force applicable to gas companies; and, second, whether this company is expressly exempted from any of such general laws.

Pub. Sts., c. 106, § 11, authorizes ten or more persons to associate themselves by an agreement in writing, with a capital not less than five thousand nor more than five hundred thousand dollars, for the forming of a gas company. The same chapter further provides in § 16 that the agreement for such organization shall set forth the fact that the subscribers thereto

"associate themselves together with the intention of forming a corporation, the corporate name assumed, the purpose for which it is formed, the town or city . . . in which it is established or located, the amount of its capital stock, and the par value and number of its shares." Sections 47 and 48 require the capital stock to be paid in, either in cash or by a conveyance of property, at a valuation approved by the Commissioner of Corporations. By § 46 it is provided that no corporation organized under c. 106 shall "commence the transaction of the business for which it was organized or chartered until the whole amount of its capital stock has been paid in." Sections 34 and 39, as amended by St. 1894, c. 472, provide that, in case of increase of capital stock of a gas company, the new shares shall be disposed of at their actual value for the benefit of the corporation. All the foregoing provisions are applicable to gas companies formed under general laws.

In 1894 the Legislature enacted what are commonly called the anti-stock-watering acts; c. 450 relating to gas companies, c. 452 to telegraph and telephone companies and c. 462 to steam and street railway companies. These three acts are similar in their provisions. They were intended to effect a radical change in the incorporation and conduct of the business of public-service corporations. Their obvious purpose was to prevent the issuing of stock or bonds not reasonably necessary for the prosecution of the business for which such corporations were organized; to the end that the public should not be required to contribute to the payment of dividends upon the stock or bonds, the proceeds of which were not reasonably necessary for the business of the corporation. The first section of the act relating to gas companies provides that "Gas companies and electric light companies, whether such companies are organized under general laws or under special charters, and however authorized to issue capital stock and bonds, shall hereafter issue only such amounts of stocks and bonds, as may from time to time, upon investigation by the Board of Gas and Electric Light Commissioners, be deemed and be voted by them to be reasonably requisite for the purposes for which such issue of stock or bonds has been authorized."

There is but little doubt that the provisions of the section just quoted were intended by the Legislature to apply and do apply, not only to increase of capital stock but to original issues of stock authorized upon the forming of the corporation. No distinction between original and increased stock is hinted at in the section, and the reasons which would apply to increase of capital stock are no less applicable to stock first issued. This being so, we are met with the fact that there is an inconsistency between the statute last quoted and the provisions of the general corporation law above set forth. Those required the capital stock to be fixed and limited by the articles of association, and that the corporation should not commence the transaction of business until the whole amount of capital stock so fixed should be paid in. If Pub. Sts., c. 106, § 46, is still applicable to gas companies, notwithstanding St. 1894, c. 450, it is obvious that in case the Gas Commissioners should decline to authorize the issue of the whole amount of capital stock fixed by the corporation, the company would not be authorized to commence business, the whole of the capital stock fixed by the corporation not having been paid in.

There is no express repeal of the provisions of § 46 in the statute of 1894; but at the end of the first section of the latter statute it is provided that "Nothing contained in this act shall be construed as impairing any existing requirements of law in relation to the issue of capital stock or bonds by such companies, provided such requirements are not inconsistent herewith." This by implication is a repeal or modification of such provisions of existing laws as are inconsistent herewith. I am of opinion that the provisions of the general law, requiring the paying of the entire capital stock, must be taken to be modified so as to require only the payment of such of the capital stock as the corporation has been authorized by the Board to issue.

But it is not necessary to hold that the statute of 1894 repeals that part of the existing law which provides for the fixing of the capital stock by the incorporators in forming the corporation under its provisions. The statute of 1894 has nothing to do with the fixing of the capital stock. It relates only to the

issue thereof. There is a plain distinction between fixing the capital stock of a corporation and the issuing of shares. In some States it is not necessary that the whole of the capital stock be issued; and it is notorious that many corporations are formed under the laws of such States for the reason, among other things, that they are not obliged under their charters to issue the whole amount of stock fixed thereby. Section 46 of the general corporation law, forbidding corporations to transact business until the whole amount of their capital stock is paid in, was first enacted by St. 1870, c. 224 § 32. Prior to that time there was no prohibition against a corporation carrying on business without the payment of its capital stock. Gen. Sts., c. 60, § 17, provided that the members of every company should be jointly and severally liable for the debts and contracts of the company "until the whole amount of the capital stock fixed and limited by the company" was paid in. But this did not make it unlawful for the company to carry on business before its stock was paid in, in whole or in part. The fixing of the capital stock by a charter, by articles of association or by vote of the corporation is merely the establishment of a limit. It does not at common law make it necessary to the existence of the corporation that shares shall be issued to the full amount of the capital fixed; nor did it under the statutes until St. 1870, c. 224, now § 46 of the general corporation law, was passed.

If this distinction between the fixing of the capital stock and the issuing of the shares thereof be kept in mind, there is no difficulty in reconciling the apparent inconsistency between the anti-stock-watering acts and the general corporation laws. It is still necessary, since the passage of the statute of 1894, that those associating themselves to form a gas corporation shall fix the amount of their capital stock by their articles, which amount shall only be increased in the manner provided under the law, by vote of the corporation. Unlike other private corporations, however, it is necessary, under the provisions of the statute of 1894, that before issuing any shares of the capital stock so fixed, the corporation shall go before the Board with a statement of the purposes for which it is desired that

stock should be issued. After hearing the corporation, the Board is authorized to determine what proportion of shares of the capital stock shall be issued for the purposes of the corporation as stated in its petition. The amount decreed by the Board is thereupon the actual authorized capital, and the provisions of § 46 are therefore modified so far as to require only the payment of the proportion of the whole of the capital stock which the Board has authorized the corporation to issue. It cannot be said that the public or creditors of the corporation are misled, for the provisions of law are presumed to be known to all persons, the proceedings of the Board are public; and the number of shares authorized to be issued, and which, therefore, stand for the capital stock of the company, are known or can be ascertained by any person interested.

It follows, therefore, that, unless subsequent sections of the charter of the Massachusetts Pipe Line Gas Company have expressly modified the provisions of the general law, it is subject to the provisions above set forth, and is authorized to issue only the number of shares that after hearing the Board from time to time authorize as necessary for the purposes of the corporation; and that, if the value of the shares so authorized to be issued is paid in the manner prescribed by general laws, the corporation has complied with the provisions of Pub. Sts., c. 106, § 46, and is authorized to do business without personal liability of directors or stockholders on that account.

It is claimed, however, that the company has been expressly exempted by its charter from the provisions of law above referred to. It is plain that such an intent on the part of the Legislature must be clearly indicated. The statutes of 1894, relating to public service corporations, were remedial in their nature, and for the benefit of the public. The Massachusetts Pipe Line Gas Company is a gas company, and all the reasons which led to the enactment of that statute are applicable to the corporation in question. They must be held to operate upon it, unless the contrary intention is rendered necessary by the express terms of its charter.

Section 3 of the charter provides that the capital stock of the corporation shall be "one million dollars, divided into ten

thousand shares at the par value of one hundred dollars each." In the light of the interpretation that I have heretofore given to the various general statutes applicable to gas companies, it cannot be said that this sentence, considered by itself, is, either expressly or by implication, an exemption of the corporation from the provisions of the statute of 1894. It has no greater significance than the fixing of the capital of a gas corporation organized under the general law, which provides that the articles of association shall state the amount of the capital stock. That provision is not, as has been suggested, to be regarded merely as opportunity for the associates to express their opinion in relation to the amount of capital needed, subject to the revision of their judgment by the Board. It means more. It is a direct command to the incorporators to fix the capital stock of the corporation they are proposing to form. That having been done, the amount of the capital stock is absolutely fixed and limited, and is not made subject to the revision of the Board of Gas and Electric Light Commissioners. Their jurisdiction under the statute of 1894 is in terms limited to a supervision over the *issuing* of the shares. They do not fix the capital at a different amount from that fixed by the articles of incorporation; they only regulate the amount to be issued.

The same considerations apply to that provision of the charter in question which fixes the capital of the corporation at one million dollars. There would be no occasion for such a provision, but for the fact that the amount fixed is greater than that permitted by the general law. In this respect the provisions of those laws are to be taken as having been expressly modified. The modification, however, is only as to the amount at which the capital stock may be fixed. The issuance of the stock is still subject to the salutary provisions imposed upon all gas companies, and which it was the clear intent of the Legislature of 1894 to impose upon all gas companies, however formed and whatever their capital.

Under the charter of the Massachusetts Pipe Line Gas Company, therefore, its capital stock is fixed or must be fixed by the corporation at one million dollars. Only such portion of this capital, however, may be from time to time issued as the

Board may reasonably determine to be necessary for the purposes of the corporation, as set forth in its petitions to the Board.

In view of this conclusion, it becomes unnecessary to consider whether the word "shall," which fixes the capital stock in the charter, is to be considered as imperative or to be equivalent to "may," a question which was discussed exhaustively at the hearing. Whether the corporation may fix its capital stock at a less amount than one million dollars (which is, at least, doubtful) is not of importance. The question submitted to me concerns only the issuing of shares of stock under the provisions of the statute of 1894. It appears that the corporation has fixed its stock at the sum named in the charter, and no question thereupon arises.

I am unable to appreciate the force of the argument, strenuously pressed before me, that the language of § 3, by which it is provided that the capital of the corporation shall be one million dollars, is to be regarded as a requirement that the corporation should actually pay in that amount of money before commencing business. The range of business permitted to the corporation under its charter is extraordinarily large. It may, on the one hand, content itself with the establishment of a single pipe line, connecting two towns or companies, an enterprise which would require far less capital than the amount fixed by the charter; or, on the other hand, it may lease many companies, and carry on a business for which the sum of one million dollars would be entirely inadequate. It would be unreasonable to suppose that the Legislature intended the corporation to have a capital of one million dollars if the business actually engaged in did not require one-tenth of that amount.

It is contended, in view of the magnitude of the enterprise authorized by the charter, that the Legislature deemed it necessary to require as a guaranty of good faith the payment of a capital of a million dollars. If there were any duty upon the company to go into any business which required a capital of a million dollars, there might be some force in this argument; but there is no such requirement. In view of the fact that the company has entire freedom of action as to the extent of the

business which it may do under its charter, it is reasonable to suppose that the Legislature intended, as indeed was expressly provided in § 1, that the corporation should be subject to the provisions applicable to other gas companies, which substantially make it the duty of the Board to keep the stock and bonds at a parity with the business of the corporation, and neither above nor below it.

So far I have considered only the first sentence of § 3 of the company's charter. It is strenuously claimed, however, that the succeeding sentence of the section is to be taken as changing the construction, which, as I have shown, would otherwise be put upon the first sentence. The sentence in question is as follows: "The company may from time to time, but in compliance with the provisions and requirements of the general laws of the Commonwealth applicable to the issue of capital stock, increase its capital stock to an amount not exceeding five million dollars." The contention of the company is that, in view of the express provision in this sentence, expressly requiring that an increase of capital stock must be in accordance with the provisions of general laws, the Legislature must have intended by implication that the fixing of the original capital stock should not be in accordance with the general laws relating to such capital stock.

But it is provided in § 1 that the provisions of the general laws shall be applicable to this corporation, "unless otherwise *expressly* provided." In view of the remedial and salutary character of the legislation of 1894, it would certainly be strange if the Legislature, after having provided that this corporation should be subject to such laws and all other general laws upon the subject, except where it should expressly provide otherwise, should indicate its intention of relieving this corporation therefrom by implication only. The words "otherwise expressly provided" are not to be lightly regarded. Intent to exempt the company is not to be inferred; it must distinctly, if not expressly, appear. To read into that part of the statute fixing the capital stock an intention to repeal the existing provisions of law applicable thereto, by inference from language found in a succeeding and independent sentence, is

very far from the "express" provision contemplated by the first section.

It cannot be denied that, under the interpretation which I have given to § 3, it contains superfluous and redundant language. I do not quite agree, however, as contended by counsel, that the whole purpose of the Legislature could have been expressed by using the expression "the capital stock shall not exceed five million dollars." Such a contention loses sight of the clear distinction made in the Public Statutes between original and increased stock. It has been the custom, in both general laws and in special charters, to fix the amount of the original stock and the limit of permissible increase; but in the case of gas companies there is a still more marked distinction between original and increased stock. The original shares are distributed to and paid for by the incorporators. Increased stock under the Public Statutes must be sold at public auction, and under St. 1894, c. 472, must be offered to the stockholders at a value to be fixed by the Board of Gas and Electric Light Commissioners, and not necessarily at par.

This distinction between original stock and increased stock of gas companies sufficiently explains the express requirement in the charter of the company in question that its stock shall only be increased under the provisions of the general law. Having fixed the original capital at one million dollars and the limit of increase at five million dollars, and having made the corporation subject to all the provisions of general law applicable to gas companies, the Legislature did not, as contended, merely fix the capital at not exceeding five million dollars, and use redundant words therefor. It fixed the original capital at a limit of one million dollars, to be issued from time to time as authorized by the Gas Commissioners, to be subscribed and paid for at par by the incorporators. After the limit of the original capital should be reached, increased capital could only be issued after authority obtained from the Gas Commission in the manner provided for the increase of capital stock of gas companies formed under the general laws, — to wit, at the actual market value thereof, not less than par.

It is true that, even under this interpretation, the clause "but

in compliance with the requirements and provisions of the general laws of the Commonwealth," etc., are redundant, for the reason that under § 1 the corporation had already been made subject to all the provisions of the general laws, unless otherwise expressly provided in the act. In view of the fact, however, that the provisions relating to original stock and increased stock are radically different, the redundant clause, in my opinion, is to be taken not as creating by implication an exemption in respect to its original stock from the anti-stock-watering acts, but rather as inserted *ex majore cautela;* having in view the importance of providing for the issuing of increased stock at the true value thereof, under the law applicable to all public-service corporations.

Richard Olney, L. S. Dabney & Wm. M. Butler, for the Massachusetts Pipe Line Gas Company.

Homer Albers, for certain consumers of gas.

Wm. B. French, for certain consumers of gas.

W. E. L. Dillaway, for holders of first and second series of Boston United Gas bonds.

INDEX-DIGEST.

REPRESENTATIVE DISTRICTS.
The division of the Commonwealth into districts containing as nearly as practicable an equal number of inhabitants, in accordance with U. S. Rev. Sts., § 23, should be made with reference to the number of inhabitants as ascertained by the United States census 331

SAVINGS BANKS — *Authorized Investments — Railroad Bonds.*
Bonds executed jointly and severally by two railroad companies and secured by a first mortgage on one of the roads, when the mortgaged road, although leased to the other, has paid dividends on its entire issue of capital stock out of the rentals received from the lease, are legal investments for savings banks under the provisions of Pub. Sts., c. 116, § 20, cl. 3, as amended by St. 1889, c. 305 149

2. —— *Authorized Investments — Municipal Notes.*
An instrument with a seal attached, but in other respects bearing all the attributes of a note, and issued by a city under a resolution authorizing the issue of promissory notes in anticipation of certain assessments, is not a bond within the meaning of a statute authorizing savings banks to purchase legally authorized bonds . . 190

3. —— *Guaranty Fund.*
Savings banks have no right to maintain and hold as a guaranty fund more than five per cent. of the total amount of their deposits . . 303

4. —— *Bank Building.*
The provisions of St. 1894, c. 317, § 21, par. 8, authorizing a savings bank to invest five per cent. of its deposits, but not exceeding $200,000, in a suitable site and building for the transaction of its business, limit the amount which such a bank may spend for such purpose, but do not prohibit it from providing for stores, halls, business offices, etc., in the structure which it is then authorized to erect 420