



















OFFICIAL OPINIONS  
OF  
THE ATTORNEY-GENERAL

OF  
**The Commonwealth of Massachusetts**

PUBLISHED BY THE  
ATTORNEY-GENERAL

---

VOLUME VI  
1921-1922

---



---

---

THIS VOLUME CONTAINS  
THE OPINIONS OF ATTORNEY-GENERAL  
J. WESTON ALLEN, 1921-1922  
ALSO TABLES OF STATUTES AND CASES  
CITED, AND AN INDEX DIGEST

---

---



## PREFACE.

---

This volume is issued by the Attorney-General in pursuance of the authority contained in Resolves of 1926, chapter 46, which provides that the Attorney-General shall "collect and publish in a volume properly indexed and digested such of the official opinions heretofore published as an appendix to the annual report of the attorney general as he may deem of public interest or useful for reference."

This volume is in substantial uniformity with the preceding volumes. The work of preparation has been in charge of Mr. Louis H. Freese, Chief Clerk.

ARTHUR K. READING,  
*Attorney-General.*

Boston, January, 1928.



# TABLE OF STATUTES CITED OR REFERRED TO IN THIS VOLUME.

ACTS OF CONGRESS.		PAGE
1916, Aug. 29, c. 416, § 2 . . . . .		382
UNITED STATES STATUTES AT LARGE.		PAGE
39 Stat. 728 . . . . .		676
40 Stat. 550 . . . . .		673
40 Stat. 594, 595 . . . . .		673
41 Stat. 163, 224 . . . . .		673
UNITED STATES COMPILED STATUTES.		PAGE
§ 3809 . . . . .		382
UNITED STATES REVISED STATUTES.		PAGE
§ 1891 . . . . .		382
UNITED STATES CONSTITUTION.		PAGE
Art. I, §§ 2, 5 . . . . .		383
Art. I, § 10 . . . . .	59, 67, 68, 196, 291, 397, 454, 510, 567, 568	
Art. III, § 2 . . . . .		502
Fed. Reserve Act, 38 Stat., c. 6 . . . . .		97
CONSTITUTION OF THE COMMONWEALTH.		PAGE
Dec. of Rights, art. XXX . . . . .		69, 444
Const., pt. 1, art. XIV . . . . .		288, 295
—— pt. 2, art. IV . . . . .		352
—— c. I, § I, art. II . . . . .		182
—— § I, art. IV . . . . .	353, 355, 474, 484, 526, 585, 609, 681	
—— § II, art. III . . . . .		200
—— § II, art. IV . . . . .		322
—— § II, art. VII . . . . .		200
—— § III, art. X . . . . .	200, 215, 359, 470	
—— c. II, § I, art. IX . . . . .		371
—— § I, art. IV . . . . .	120, 321, 526	
—— § I, art. XI . . . . .	172, 273, 474, 637	
—— c. III, art. I . . . . .		522, 588
—— art. II . . . . .		438
—— art. III . . . . .		527, 589
—— c. V, § I, art. I . . . . .		327
—— c. VI, art. I . . . . .		482
—— art. II . . . . .		110
—— art. VI . . . . .		139

CONSTITUTION OF THE COMMONWEALTH — *Con.*

	PAGE
Amend'ts Const., art. VIII . . . . .	358, 588
— — — art. XI . . . . .	513
— — — art. XVII . . . . .	139
— — — art. XVIII . . . . .	651, 652
— — — art. XIX . . . . .	361
— — — arts. XXI, XXII . . . . .	345, 346, 347, 348, 349
— — — art. XXV . . . . .	377
— — — art. XXXVII . . . . .	527
— — — art. XLIV . . . . .	609
— — — art. XLVI . . . . .	120, 416, 448, 513, 648, 652, 665
— — — art. XLVI, § 2 . . . . .	20, 356, 566, 567
— — — art. XLVI, §§ 2, 3 . . . . .	651
— — — art. XLVII . . . . .	252, 587, 586, 585
— — — art. XLVIII, pt. III, § 2 . . . . .	199
— — — art. XLVIII, pt. III, §§ 1, 2 . . . . .	198
— — — art. XLVIII . . . . .	176, 435, 436
— — — art. XLVIII, pt. III, § 2 . . . . .	198, 199
— — — art. LIX . . . . .	60, 67
— — — art. LXII, § 1 . . . . .	653, 654
— — — art. LXIII, § 1 . . . . .	320, 637
— — — art. LXIV . . . . .	139, 199, 201

## STATUTES OF THE COMMONWEALTH.

	PAGE		PAGE
1793, c. 29 . . . . .	232	1889, c. 450, § 7 . . . . .	217
1802, c. 37 . . . . .	232	1893, c. 303 . . . . .	553
1816, c. 96 . . . . .	59	1894, c. 130 . . . . .	323
1825, c. 133 . . . . .	67	— — — c. 333, § 427 . . . . .	323
1826, c. 109, § 4 . . . . .	588	1895, c. 201 . . . . .	323
1830, c. 81 . . . . .	59, 60, 67	— — — c. 311, § 2 . . . . .	553
1834, c. 183, § 7 . . . . .	67	— — — c. 501, §§ 2, 6 . . . . .	349
1849, c. 56 . . . . .	352	1896, c. 99 . . . . .	60
1850, c. 88 . . . . .	644	— — — c. 506, § 1 . . . . .	370
1852, c. 154 . . . . .	135	— — — c. 517, §§ 2, 3, 6 . . . . .	350
1853, c. 312 . . . . .	205	— — — §§ 2, 3, 6, 23, 24 . . . . .	351
1861, c. 183, § 7 . . . . .	25, 26	1897, c. 197 . . . . .	46
1863, c. 220 . . . . .	107	— — — c. 445, § 2 . . . . .	667
1868, c. 75 . . . . .	267	— — — c. 467 . . . . .	668
1870, c. 226 . . . . .	80, 81	— — — c. 506, § 1 . . . . .	259, 260
— — — c. 370, § 2 . . . . .	244	1898, c. 548, § 1 . . . . .	252
1871, c. 382, §§ 1, 6 . . . . .	267	1899, c. 467 . . . . .	551
1876, c. 97 . . . . .	567	1900, c. 369 . . . . .	124
— — — c. 97, § 1 . . . . .	566, 568	1901, c. 176 . . . . .	252
1877, c. 224 . . . . .	83	— — — c. 360 . . . . .	125
1882, c. 139 . . . . .	136	1902, c. 227 . . . . .	32
1884, c. 329 . . . . .	153, 550	1903, c. 276 . . . . .	285
1887, c. 234, § 3 . . . . .	152, 153, 154	— — — c. 437 . . . . .	61
1888, c. 413, § 6 . . . . .	657	— — — § 2 . . . . .	60, 67
— — — c. 413, § 18 . . . . .	81	— — — § 40 . . . . .	241, 242



STATUTES CITED.

ix

STATUTES OF THE COMMONWEALTH — *Con.*

	PAGE		PAGE
1903, c. 438, § 1 . . . . .	26	1914, c. 714, § 1 . . . . .	56
1904, c. 385 . . . . .	89	— c. 721 . . . . .	106
— c. 409, § 4 . . . . .	3	— c. 724 . . . . .	29
— c. 458, § 1 . . . . .	532	1915 (Gen.) c. 16 . . . . .	7
1905, c. 150, § 1 . . . . .	680	— c. 151 . . . . .	656
— c. 428 . . . . .	42	— c. 176 . . . . .	372
1906, c. 163, pt. III, §§ 144, 145 . . . . .	148	— c. 227, §§ 1, 2, 3 . . . . .	268
— c. 345 . . . . .	577	— c. 267, § 32 . . . . .	56
— c. 385 . . . . .	644	1916 (Gen.) c. 37 . . . . .	158
— c. 436, § 1 . . . . .	370	— c. 268, § 1 . . . . .	160, 368
1907, c. 377 . . . . .	81	— c. 269 . . . . .	609
— c. 563, § 1 . . . . .	370	— § 5, cl. 10 . . . . .	16
1908, c. 498 . . . . .	324	— § 11 . . . . .	610
— c. 520, §§ 60, 61 . . . . .	658	— § 16 . . . . .	640
— c. 589, §§ 4-6 . . . . .	325, 624, 625	— c. 296 . . . . .	360
— c. 590, § 34 . . . . .	227	— (Spec.) c. 84, § 1 . . . . .	476, 477
— c. 597, §§ 3, 4 . . . . .	679, 680	— c. 116 . . . . .	175
1909, c. 490, pt. I, § 23, cl. 7 . . . . .	419	— c. 268 . . . . .	368, 371
— pt. III, §§ 39-41 . . . . .	94	1917 (Gen.) c. 327, § 40 . . . . .	374
— c. 504, § 18 . . . . .	132	— c. 342 . . . . .	63, 252, 583, 586
— c. 527, § 1 . . . . .	370	— § 6 . . . . .	584
— c. 531 . . . . .	125	— c. 344, pt. III . . . . .	268
— c. 534, § 1 . . . . .	7	— (Spec.) c. 289 . . . . .	175
1910, c. 281 . . . . .	563	1918 (Gen.) c. 49, § 1 . . . . .	103, 104
— c. 399, § 4 . . . . .	270	— c. 100 . . . . .	163
— c. 656 . . . . .	17	— c. 101 . . . . .	84
1911, c. 471, §§ 1-24 . . . . .	625	— c. 129 . . . . .	419, 422
— c. 576 . . . . .	30	— c. 228 . . . . .	602
— c. 655, § 10 . . . . .	364, 365	— c. 252 . . . . .	28
— c. 669 . . . . .	129	— c. 255, § 1 . . . . .	95
1912, c. 158, § 1 . . . . .	32	— §§ 4, 7 . . . . .	28
— c. 700 . . . . .	642	— c. 257, § 219 . . . . .	268
— c. 706, § 6 . . . . .	237	— c. 262 . . . . .	109
— §§ 14, 16 . . . . .	238	— § 5 . . . . .	107
1913, c. 266 . . . . .	129	— c. 266 . . . . .	644
— c. 530 . . . . .	548	— (Spec.) c. 159 . . . . .	149, 396, 397, 398, 401, 519, 520
— c. 577 . . . . .	331, 581, 582	— § 2 . . . . .	400
— § 1 . . . . .	37	— c. 168 . . . . .	60, 61
— § 3 . . . . .	38	— c. 188 . . . . .	147, 148, 149, 396, 397, 398
— c. 673, § 2 . . . . .	237	1919 (Gen.) c. 9 . . . . .	103, 104
— c. 832, § 3, cl. 3 . . . . .	325, 624	— c. 14 . . . . .	529
— § 6, cl. 4 . . . . .	325	— c. 101 . . . . .	17
— § 13 . . . . .	325, 326	— c. 105 . . . . .	433
1914, c. 119, §§ 1, 2 . . . . .	38	— c. 117 . . . . .	640
— c. 408 . . . . .	30	— c. 125 . . . . .	353, 354
— c. 494, §§ 1, 2 . . . . .	625, 626	— c. 146 . . . . .	29
— c. 504, § 2 . . . . .	241	— c. 150 . . . . .	602
— c. 643, § 6 . . . . .	83	— c. 271 . . . . .	605, 606
— c. 659 . . . . .	269		
— §§ 1-5 . . . . .	264, 265		

STATUTES OF THE COMMONWEALTH — *Con.*

		PAGE			PAGE
1919 (Gen.)	c. 283	171, 172	1921,	c. 203	280
— — —	c. 311	302, 304	— — —	§ 2	354
— — —	c. 320, § 1	108, 603	— — —	c. 222	633
— — —	c. 341	252	— — —	c. 296, § 1	395, 593, 596
— — —	c. 342, § 1	27, 28	— — —	c. 303	281, 404, 405
— — —	c. 350	121, 361	— — —	§ 10D	405
— — —	§ 17	470	— — —	§ 10E	406
— — —	§ 19	374	— — —	c. 325, § 2	251, 252
— — —	§ 126	602	— — —	c. 386, §§ 1, 5	410
— — —	c. 355	93, 95	— — —	c. 430	198, 199
— — —	§ 33	93	— — —	c. 449, § 3	249
— — —	pt. I, § 2	223	— — —	c. 456, § 2	593
— — —	c. 365	252, 253	— — —	c. 460	324, 326
— — —	(Spec.) c. 112, § 1	354	— — —	c. 461	472
— — —	c. 187	320, 321	— — —	c. 462	356
1920,	c. 219	529	— — —	c. 487, § 1	472, 473
— — —	c. 253	138	— — —	c. 499	245, 301
— — —	c. 335	324, 325, 326	— — —	§ 2, cl. (c), § 8	261-262
— — —	c. 396, § 1	458, 459	— — —	c. 502, § 3	209, 356
— — —	c. 420	84	1922,	c. 13	441, 442
— — —	c. 460	39	— — —	c. 161	435
— — —	c. 462	29	— — —	c. 177	632
— — —	c. 478	160	— — —	c. 316	581, 582
— — —	c. 545	376	— — —	c. 341	630
— — —	c. 550	93	— — —	§ 2	629, 630
— — —	c. 578, §§ 1, 2, 3	195, 197	— — —	c. 349	545, 546, 547
— — —	c. 591, § 17	283	— — —	c. 371, § 1	527, 528, 589
— — —	§ 20	577	— — —	c. 395, § 1	590
— — —	c. 610	63, 64	— — —	c. 403	655
— — —	c. 613	147, 149, 150, 397	— — —	c. 463	597, 600
— — —	§ 7	398	— — —	c. 544	582, 584, 585, 586
— — —	c. 621	354	— — —	c. 545	679, 682
— — —	c. 628	252	— — —	§ 1	640, 666
— — —	c. 629	9	— — —	§§ 1, 2, 29	661
1921,	c. 42	334, 337	— — —	§§ 1, 2, 3, 5	664, 665
— — —	c. 116	286	— — —	§ 27	640, 641, 680

## RESOLVES.

		PAGE			PAGE
1920,	c. 85	8	1922,	c. 33	648, 649
1921,	c. 54, c. 55	444			

## REVISED STATUTES.

		PAGE			PAGE
c. 7, § 10, cl. 7		421, 422	c. 44, § 23		60, 67
c. 20		67			

STATUTES CITED.

XI

GENERAL STATUTES.

	PAGE		PAGE
c. 42, § 3 . . . . .	307	c. 68, § 41 . . . . .	60, 67

PUBLIC STATUTES.

	PAGE		PAGE
c. 38, § 51 . . . . .	67	c. 74, § 4 . . . . .	307
c. 40, § 16 . . . . .	18	c. 77, § 8 . . . . .	322, 323
c. 51 . . . . .	267	c. 105, §§ 2, 3 . . . . .	60, 67
c. 65, § 17 . . . . .	124		

REVISED LAWS.

	PAGE		PAGE
c. 3, §§ 1-3 . . . . .	201	c. 96 . . . . .	86
c. 10, § 8 . . . . .	470	— § 17 . . . . .	89
c. 13, § 2 . . . . .	269	c. 106, §§ 23, 24 . . . . .	307
— § 35, . . . . .	266, 267	c. 108, §§ 32-35 . . . . .	152
c. 19, § 9 . . . . .	2	— §§ 36, 37 . . . . .	605, 606
— § 23 . . . . .	680, 681	c. 109, § 3 . . . . .	60, 67
c. 36, § 55 . . . . .	67	c. 115 . . . . .	554
c. 50, §§ 1, 15, 20 . . . . .	265, 266	— §§ 30, 40 . . . . .	339
— § 10 . . . . .	267	c. 116, § 5 . . . . .	158
c. 62, § 43 . . . . .	125	— § 30 . . . . .	270
c. 65, § 15 . . . . .	577	— § 33 . . . . .	158
c. 69, §§ 1, 2, 8 . . . . .	275	c. 141, § 19 . . . . .	656
c. 73, §§ 7, 8 . . . . .	51	c. 153, § 3 . . . . .	160
c. 75, §§ 9, 14, 15 . . . . .	281	c. 198, § 1 . . . . .	137
— § 14 . . . . .	282, 283	c. 225, § 91 . . . . .	244
— § 100 . . . . .	257	— § 112 . . . . .	433
c. 88, § 19 . . . . .	135	— § 121 . . . . .	32
c. 91, § 91 . . . . .	293, 294		

GENERAL LAWS.

	PAGE		PAGE
c. 3, §§ 1-3 . . . . .	200	c. 9, § 11 . . . . .	328
— § 9 . . . . .	220	c. 10, § 16 . . . . .	645
— § 17 . . . . .	469, 471	c. 11, § 7 . . . . .	164, 165, 166, 169
c. 4, § 7, cl. 18 . . . . .	323	c. 12 . . . . .	362
— § 7, cl. 26 . . . . .	548	— § 3 . . . . .	170, 312
— § 7, cl. 31 . . . . .	338	— § 27 . . . . .	361
— § 7, cl. 34 . . . . .	282	c. 14, § 2 . . . . .	131, 133
c. 5, § 2 . . . . .	525, 526	c. 15, §§ 1, 4, 19 . . . . .	165
c. 6, § 21 . . . . .	664, 665, 666	— § 19 . . . . .	107
c. 7 . . . . .	361	— §§ 20-23 . . . . .	166
c. 8, § 5, par. (11) . . . . .	203	c. 17, §§ 2, 8 . . . . .	166
— § 6 . . . . .	374	c. 18, §§ 2, 8, 10, 11, 12, 13 . . . . .	167
— § 12 . . . . .	470	c. 19, §§ 4, 5, 6 . . . . .	168
— § 17 . . . . .	362	— §§ 26-32 . . . . .	169
c. 9, § 10 . . . . .	220	c. 21, § 1 . . . . .	636

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 21, § 8 . . . . .	288, 295	c. 43, § 32 . . . . .	56
c. 22 . . . . .	230, 332	— § 44G . . . . .	462
c. 28, § 4 . . . . .	601, 602, 603	c. 44, § 7 . . . . .	516
c. 29, § 18 . . . . .	321	— § 31 . . . . .	573
— § 27 . . . . .	378	c. 45, §§ 3, 14, 19 . . . . .	638
— § 34 . . . . .	384, 385	c. 46, § 1 . . . . .	621
c. 30, §§ 4, 27, 43 . . . . .	67	— §§ 1, 3 . . . . .	208
— § 5 . . . . .	230, 490	— § 13 . . . . .	621
— § 17 . . . . .	3, 45	c. 48 . . . . .	332
— § 21 . . . . .	110, 220	— §§ 16, 20 . . . . .	464
— § 23 . . . . .	110	c. 54, § 141 . . . . .	214
— § 27 . . . . .	637	c. 55, § 1 . . . . .	242
— § 37 . . . . .	230, 231	c. 58, § 27 . . . . .	170, 224, 225, 386, 387
— § 38 . . . . .	360	c. 59, § 1 . . . . .	370
— § 39 . . . . .	75, 76, 211	— § 2 . . . . .	613
— §§ 40-50 . . . . .	602	— §§ 2, 5, 75 . . . . .	608
— § 41 . . . . .	164	— § 3 . . . . .	87
— § 45 . . . . .	602	— § 5 . . . . .	88
— §§ 45-50 . . . . .	5, 107, 337, 601, 603	— § 5, cl. 10 . . . . .	258
— § 46 . . . . .	108, 110	— § 5, cl. 27 . . . . .	609, 610, 613
c. 31, §§ 3, 5, 31, 43 . . . . .	336	— §§ 5, 11, 12, 14 . . . . .	679
— § 17 . . . . .	62	— § 18, cl. 3d . . . . .	419, 423
— § 23 . . . . .	598	— §§ 58, 71, 72 . . . . .	170
— § 26 . . . . .	680	— § 75 . . . . .	613, 617
— § 43 . . . . .	335	c. 62, § 5, cl. (c) . . . . .	43, 45, 136
— §§ 43, 44 . . . . .	218	— § 8, par. (e) . . . . .	258, 259
— § 48 . . . . .	476	— §§ 28, 30 . . . . .	233
— § 50 . . . . .	477, 478	— § 30 . . . . .	619
— § 51 . . . . .	62	— §§ 32, 35, 58 . . . . .	639
c. 32 . . . . .	630, 632	— § 33 . . . . .	543, 545
— § 2, cl. 3 . . . . .	473	— § 37 . . . . .	616
— §§ 6-19 . . . . .	624	— §§ 43-47 . . . . .	608
— § 7 . . . . .	624, 626	— §§ 49, 51 . . . . .	614
— § 15 . . . . .	625	— §§ 49-53 . . . . .	610, 613
— § 18 . . . . .	625	— § 50 . . . . .	613
— §§ 20, 22 . . . . .	380	— § 55 . . . . .	48
— § 48 . . . . .	572	c. 63, § 1 . . . . .	418
— § 68 . . . . .	472, 473	— §§ 1-10 . . . . .	418
c. 33 . . . . .	664	— § 11 . . . . .	311, 543
— §§ 39, 43, 45, 46 . . . . .	429	— § 12, par. (f) . . . . .	386
— § 42 . . . . .	428	— § 13 . . . . .	279, 387
— § 44 . . . . .	374	— §§ 13, 69 . . . . .	277
— § 45 . . . . .	561	— § 16 . . . . .	311
— § 52 . . . . .	72, 538	— § 32 . . . . .	311
c. 37, § 11 . . . . .	77	— § 51 . . . . .	387, 389
c. 38, § 17 . . . . .	318	— §§ 53, 55, 58 . . . . .	309
c. 40, § 5 . . . . .	18	— § 58 . . . . .	310, 311
— § 5, par. (19) . . . . .	573	— § 71 . . . . .	170
— § 9 . . . . .	114	— §§ 73, 75, 80 . . . . .	278
c. 41, §§ 91-95 . . . . .	607	c. 65, § 1 . . . . .	655

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 65, § 14 . . . . .	170	c. 94, § 81 . . . . .	275
c. 66, § 10 . . . . .	548	— §§ 119, 120 . . . . .	683
c. 69, § 1 . . . . .	303	— § 128 . . . . .	682, 683
— § 3 . . . . .	638, 643	— § 146 . . . . .	282
— § 7 . . . . .	511	— §§ 186-196 . . . . .	405
c. 70, § 1 . . . . .	390, 391	— §§ 190, 193, 194, 304 . . . . .	406
c. 71, § 4 . . . . .	448, 449, 450, 567, 568	— § 191 . . . . .	393
— §§ 8, 9 . . . . .	596	— § 192 . . . . .	391, 392
— § 21 . . . . .	302, 304	— § 215 . . . . .	414
— § 26 . . . . .	306	— §§ 270-277 . . . . .	255
— § 41 . . . . .	56	— § 304 . . . . .	291
— §§ 61, 63 . . . . .	453	c. 98, § 2 . . . . .	541
— § 68 . . . . .	597	— § 15 . . . . .	123
c. 73, § 1 . . . . .	512	c. 101, § 3 . . . . .	57
c. 74, §§ 1-24 . . . . .	624	— § 16 . . . . .	576
— § 42 . . . . .	166	— § 17 . . . . .	575
— §§ 49-51 . . . . .	166	— § 22 . . . . .	575
c. 75, §§ 1, 5 . . . . .	166	c. 103, § 11 . . . . .	219
— § 13 . . . . .	107, 108	c. 105, §§ 1, 3, 6 . . . . .	274, 443
c. 76, §§ 5, 6 . . . . .	394	c. 107, §§ 7, 8 . . . . .	50, 52
— § 5 . . . . .	597	— § 212 . . . . .	385
c. 79 . . . . .	24, 541	c. 109, § 1 . . . . .	615
— § 1 . . . . .	22, 23	c. 110, § 5 . . . . .	263
— § 3 . . . . .	452	c. 111 . . . . .	573
— § 5 . . . . .	561	— §§ 2-25 . . . . .	406
c. 80 . . . . .	268	— §§ 6, 32, 112, 116 . . . . .	434
c. 81, § 5 . . . . .	23	— §§ 26-32 . . . . .	281
— § 7 . . . . .	24	— § 31 . . . . .	280, 282
c. 82, §§ 2-9 . . . . .	431	— § 57 . . . . .	30
— § 11 . . . . .	431	— §§ 63-69 . . . . .	167
c. 85, § 8 . . . . .	376	— § 121 . . . . .	99
c. 90 . . . . .	62	— § 159 . . . . .	192
— § 7 . . . . .	177	— § 160 . . . . .	466, 469
— § 26 . . . . .	548	c. 112, § 2 . . . . .	642
— §§ 39, 40 . . . . .	191	— §§ 2-12 . . . . .	372
c. 91, § 6 . . . . .	210	— § 40 . . . . .	627, 628, 629
— § 13 . . . . .	192	— §§ 45-46 . . . . .	604
— § 18 . . . . .	647	— § 48 . . . . .	338, 339
— § 37 . . . . .	578, 579, 580	— § 68 . . . . .	641, 642
c. 92, §§ 85, 87 . . . . .	560	c. 114, § 37 . . . . .	282, 284
c. 93, §§ 1, 2, 14 . . . . .	485	— §§ 20, 21 . . . . .	638
— § 14A . . . . .	483	— § 37 . . . . .	282
— §§ 24-28 . . . . .	17	c. 115 . . . . .	635
— §§ 29-33 . . . . .	375	— §§ 17, 18 . . . . .	633
— §§ 35-39 . . . . .	590	c. 116, § 1 . . . . .	409, 437, 633
c. 94, § 10 . . . . .	281	— § 2 . . . . .	129
— §§ 30, 35, 60, 64, 111, 121, 122, 169, 189, 192, 217, 235, 248, 260, 290, 293 . . . . .	257	— § 4 . . . . .	129
— §§ 74-82 . . . . .	288	— §§ 1, 2, 4, 5 . . . . .	126
		— § 4 . . . . .	161, 162
		— § 5 . . . . .	161, 162, 228, 408

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 120, §§ 1-6 . . . . .	167	c. 148, §§ 31, 45 . . . . .	332
— § 13 . . . . .	163	— § 39 . . . . .	229
— § 15 . . . . .	161, 162	— § 40 . . . . .	229, 230, 231
— §§ 16, 17 . . . . .	162	c. 149, § 56 . . . . .	203, 306, 308
c. 121, §§ 28-37 . . . . .	167	— § 89 . . . . .	303
c. 122, §§ 1, 6 . . . . .	168	c. 151, §§ 1, 2, 3, 4, 11 . . . . .	237
c. 123, § 25 . . . . .	168	— § 13 . . . . .	238, 239
— § 32 . . . . .	167	c. 152 . . . . .	530, 629, 630, 632
c. 124, §§ 97-115 . . . . .	162	— § 9 . . . . .	442
c. 125, § 47 . . . . .	572	c. 155 . . . . .	67
c. 126, § 8 . . . . .	245	— § 3 . . . . .	60
c. 127, § 61 . . . . .	544	— § 50 . . . . .	240
— §§ 97-115 . . . . .	162	c. 156, §§ 15, 16 . . . . .	263
— § 105 . . . . .	243, 245	— §§ 42, 46 . . . . .	242
— § 127 . . . . .	432, 433	c. 158 . . . . .	547
— §§ 130, 141 . . . . .	114	— §§ 46-54 . . . . .	272
— § 141 . . . . .	32, 34	c. 164, §§ 14, 15 . . . . .	174
c. 128, §§ 46-50 . . . . .	205	c. 167 . . . . .	41
c. 129 . . . . .	683	— § 1 . . . . .	42
— § 15 . . . . .	683	— §§ 2, 5 . . . . .	174
— §§ 15-17 . . . . .	682	— § 12 . . . . .	40, 340, 341
— § 17 . . . . .	682	— § 16 . . . . .	455, 457, 559, 659
c. 130 . . . . .	288	— § 17 . . . . .	544
— § 6 . . . . .	294	— § 22 . . . . .	40, 240, 241, 570, 660
— § 17 . . . . .	193	— §§ 22, 23 . . . . .	241
— § 59 . . . . .	430	— §§ 22-36 . . . . .	221, 222, 313
c. 131 . . . . .	228	— § 37 . . . . .	35, 36
— § 3 . . . . .	296	c. 168, § 2 . . . . .	173, 174
— § 7 . . . . .	381	— § 23 . . . . .	227
— §§ 14, 84 . . . . .	341	— § 25 . . . . .	646, 659
c. 138, §§ 19, 43, 46 . . . . .	663	— § 31 . . . . .	543, 658
— §§ 11, 19 . . . . .	662	— § 33 . . . . .	455, 457, 559
c. 140, §§ 4, 9 . . . . .	206	— § 54 . . . . .	251
— §§ 2-21 . . . . .	206	— § 54, cl. 6 . . . . .	173, 174
— § 64 . . . . .	78	— § 54, cl. 11 . . . . .	562
— § 65 . . . . .	77, 78	c. 169 . . . . .	42
— § 172 . . . . .	19	— § 1 . . . . .	40
— §§ 181, 182 . . . . .	205, 206	— § 1, cl. 2 . . . . .	556
c. 142, § 11 . . . . .	548	— § 2 . . . . .	570
c. 147, § 2 . . . . .	432	— § 3 . . . . .	81, 130, 570
— §§ 22-30 . . . . .	606	c. 170, § 12 . . . . .	84
— §§ 32-51 . . . . .	111	— § 27 . . . . .	84
— § 40 . . . . .	21	— § 48 . . . . .	50, 51
c. 148, § 2 . . . . .	230	c. 171, §§ 5, 17 . . . . .	79
— § 4 . . . . .	31	c. 172 . . . . .	240, 241
— § 11 . . . . .	230	— §§ 1, 52 . . . . .	35
— § 13 . . . . .	480	— § 4 . . . . .	550, 552
— § 30 . . . . .	229, 331, 332	— §§ 6, 7, 8 . . . . .	241
— §§ 30, 31, 45 . . . . .	581	— § 18 . . . . .	158

GENERAL LAWS — *Con.*

	PAGE		PAGE
c. 172, § 19 . . . . .	221, 222	c. 197, § 24 . . . . .	656
— § 31 . . . . .	657, 658, 659	c. 206, § 5 . . . . .	656
— § 33 . . . . .	250	— § 21 . . . . .	656
— § 39 . . . . .	158	c. 207, § 38 . . . . .	248, 249
— § 40 . . . . .	250	c. 210, §§ 12-14 . . . . .	620
— § 44 . . . . .	242	c. 211, § 4 . . . . .	362
— § 45 . . . . .	659, 660	c. 217, § 12 . . . . .	4
— §§ 51, 61 . . . . .	251	— §§ 28, 29 . . . . .	336
— § 52 . . . . .	36	— § 35 . . . . .	5
— §§ 60, 70 . . . . .	543	c. 221, §§ 8-10 . . . . .	319
— §§ 65, 67, 68 . . . . .	544	— §§ 12, 32 . . . . .	5
— §§ 73-75 . . . . .	97	— § 53 . . . . .	588
— § 75 . . . . .	96	— § 55 . . . . .	588
c. 173, §§ 2, 4 . . . . .	251	— § 97 . . . . .	5
c. 174, . . . . .	298, 301	— § 100 . . . . .	319
— § 1 . . . . .	557	c. 222, §§ 1, 2 . . . . .	248
— §§ 1, 3 . . . . .	299	c. 235, §§ 36-45 . . . . .	77, 78
— § 8 . . . . .	558	— § 46 . . . . .	137
c. 175, § 2 . . . . .	14, 151	c. 252, § 1 . . . . .	514, 515, 545, 546
— § 47, cl. 10 . . . . .	13	— § 5 . . . . .	514
— § 81 . . . . .	46, 47	— § 7, cl. 5 . . . . .	426
— § 150 . . . . .	45	— §§ 13, 14 . . . . .	547
— § 151 . . . . .	45	c. 258, § 5 . . . . .	232
— § 151, cl. 2 (3) ( <i>d</i> ) . . . . .	146	c. 262, §§ 50, 53 . . . . .	315, 317
— § 173 . . . . .	614	c. 268, § 16 . . . . .	101
c. 178, § 13 . . . . .	455, 456, 457, 559, 560	c. 273, §§ 9, 11, 16 . . . . .	592
c. 180, § 4 . . . . .	205	— § 15 . . . . .	593
c. 182 . . . . .	461	c. 276, § 1 . . . . .	289
c. 186, § 1 . . . . .	137	— § 23 . . . . .	295, 432
c. 190, § 2 . . . . .	215	— §§ 83, 85, 89 . . . . .	319
— §§ 5, 6 . . . . .	216	c. 281, § 2 . . . . .	603
— § 7 . . . . .	620		

## TABLE OF CASES CITED IN THIS VOLUME.

	PAGE		PAGE
A. Blum, Jr.'s, Sons <i>v.</i> Whipple, 194 Mass. 253, 258 . . . . .	172	Attorney General <i>v.</i> Pelletier, 240 Mass. 264, 292 . . . . .	681
Abington <i>v.</i> Duxbury, 105 Mass. 287	208	— <i>v.</i> Pitcher, 183 Mass. 513 . . . . .	51
Ableman <i>v.</i> Booth, 21 How. 506, 519, 520 . . . . .	503	— <i>v.</i> Preferred Mercantile Co., 187 Mass. 516 . . . . .	52
Adams <i>v.</i> Pease, 2 Conn. 481 . . . . .	298	— <i>v.</i> Tillinghast, 203 Mass. 539	2, 295
— <i>v.</i> Yazoo & M. B. R. Co., 77 Miss. 194, 253 . . . . .	240	— <i>v.</i> Tufts, 239 Mass. 458 . . . . .	353, 362, 424, 681
Alexander's Executor <i>v.</i> City of Ver- sailles, 152 Ky. 357 . . . . .	422	— <i>v.</i> Williams, 140 Mass. 329 . . . . .	579
Allgeyer <i>v.</i> Louisiana, 165 U. S. 578, 589 . . . . .	488	Austin <i>v.</i> Shaw, 10 Allen, 552 . . . . .	92
American Academy <i>v.</i> Harvard College, 12 Gray, 582, 596 . . . . .	71	Auten <i>v.</i> U. S. Natl. Bank, 174 U. S. 125, 141 <i>et seq.</i> . . . . .	42
American School of Magnetic Healing <i>v.</i> McAnnulty, 187 U. S. 94 . . . . .	505, 506	Auto Acetylene Light Co. <i>v.</i> Prest-o- Lite Co., 276 Fed. 537 . . . . .	488
American Soda Fountain Co. <i>v.</i> Stol- zenbach, 75 N. J. L. 721, 726 . . . . .	246	Averill <i>v.</i> Chadwick, 153 Mass. 171 . . . . .	295
Amos <i>v.</i> United States, 255 U. S. 313	290	Bachrach <i>v.</i> Allen, 239 Mass. 272 . . . . .	272
Amy <i>v.</i> Watertown, 130 U. S. 301, 319	523	— <i>v.</i> Commissioner of Banks, 239 Mass. 272, 273, 274 . . . . .	544, 659
Angle <i>v.</i> Chicago, St. Paul & C. Ry., 151 U. S. 1, 17-19 . . . . .	523	Badger <i>v.</i> United States <i>ex rel.</i> Bolles, 93 U. S. 599 . . . . .	359
Ankeny <i>v.</i> Richardson, 187 Fed. 550 . . . . .	44	Balch <i>v.</i> Shaw, 174 Mass. 144 . . . . .	369
Atlantic Coast Line <i>v.</i> N. Car Corp. Com'n, 206 U. S. 1 . . . . .	149	Bank for Savings <i>v.</i> The Collector, 3 Wall. 495, 512 . . . . .	42
Atlas Bank <i>v.</i> Nahant Bank, 3 Met. 581, 585 . . . . .	280, 340	Bartlett, Petitioner, 163 Mass. 509, 514 . . . . .	118
Attorney General <i>v.</i> Apportionment Commiss., 224 Mass. 598, 601 . . . . .	345	Barto <i>v.</i> Himrod, 8 N. Y. 483 . . . . .	181, 185
— <i>v.</i> Boston & Albany R.R. Co., 233 Mass. 460 . . . . .	28, 93, 95, 265	Bates <i>v.</i> Loring, 239 Mass. 349 . . . . .	525
— <i>v.</i> Campbell, 191 Mass. 497, 501	214	Batt <i>v.</i> Treasurer & Receiver General, 209 Mass. 319, 320 . . . . .	369
— <i>v.</i> East Boston Co., 222 Mass. 450	29	Bay State Dredging & Contracting Co. <i>v.</i> W. H. Ellis & Son Co., 235 Mass. 263, 268 . . . . .	76, 212
— <i>v.</i> Gardiner, 117 Mass. 492 . . . . .	579	Beach <i>v.</i> Kent, 142 Mich. 347 . . . . .	517
— <i>v.</i> Jamaica Pond Aqueduct Corp., 133 Mass. 361, 364 . . . . .	192	Beals <i>v.</i> Brookline, 174 Mass. 1, 20 . . . . .	157
— <i>v.</i> Mass. Pipe Line Gas Co., 179 Mass. 15 . . . . .	94, 111, 311	Beard <i>v.</i> Seavey, 191 Mass. 503 . . . . .	295
— <i>v.</i> Methuen, 236 Mass. 564 . . . . .	175	Beedle <i>v.</i> Bennett, 122 U. S. 71 . . . . .	367
— <i>v.</i> Old Colony R.R., 160 Mass. 62, 92 . . . . .	182	Belknap <i>v.</i> Schild, 161 U. S. 10 . . . . .	366, 505
— <i>v.</i> Parker, 126 Mass. 217, 219 . . . . .	170	Benson <i>v.</i> United States, 146 U. S. 325	596
		Bent <i>v.</i> Emery, 173 Mass. 495, 498 . . . . .	541
		— <i>v.</i> Hubbardston, 138 Mass. 99 . . . . .	245
		Bergeron, Petitioner, 220 Mass. 472, 476 . . . . .	135, 551



	PAGE		PAGE
Birdsell <i>v.</i> Shaliol, 112 U. S. 485 . . . . .	367	Buck <i>v.</i> Beach, 206 U. S. 392 . . . . .	460
Blackstone <i>v.</i> Miller, 188 U. S. 189 . . . . .	460	Buell <i>v.</i> Chapin, 99 Mass. 594 . . . . .	172
Bliss <i>v.</i> Bliss, 221 Mass. 201, 211 . . . . .	184	Burnham <i>v.</i> Morrissey, 14 Gray, 226 . . . . .	471
Block <i>v.</i> Hirsh, 256 U. S. 135 . . . . .	196, 586	Butchers Slaughtering & c. Assn. <i>v.</i> Boston, 214 Mass. 254, 258 . . . . .	551
Bogni <i>v.</i> Perotti, 224 Mass. 152 . . . . .	196, 403	Butler <i>v.</i> Pennsylvania, 10 How. 402 . . . . .	681
Boston <i>v.</i> Chelsea, 212 Mass. 127 . . . . .	180,	Butterfield <i>v.</i> Stranahan, 192 U. S., 470, 496 . . . . .	186
— <i>v.</i> Doyle, 184 Mass. 373 . . . . .	188, 524	C. A. Weed & Co. <i>v.</i> Lockwood, 264 Fed. Rep. 453 . . . . .	254
— <i>v.</i> Schaffer, 9 Pick. 415 . . . . .	68	Calder <i>v.</i> Kurby, 51 Gray, 597 . . . . .	112
— <i>v.</i> Treasurer and Receiver Gen- eral, 237 Mass. 403 . . . . .	397, 474, 479, 519, 536	— <i>v.</i> Michigan, 218 U. S. 591, 598 . . . . .	523
— <i>v.</i> Warwick, 132 Mass. 519, 520 . . . . .	634	Camp <i>v.</i> Rogers, 44 Conn. 291 . . . . .	413
Boston & Lowell R.R. Corp. <i>v.</i> Salem & Lowell R.R. Co., 2 Gray, 1 . . . . .	68, 540, 541	Campbell <i>v.</i> Knights of Pythias, 168 Mass. 397, 400 . . . . .	172
Boston & Maine Railroad <i>v.</i> City of Cambridge, 8 Cush. 237 . . . . .	86	Canfield Oil Co. <i>v.</i> Federal Trade Commission, 274 Fed. 571 . . . . .	488
Boston, etc., R.R. Corp. <i>v.</i> Salem, etc., R.R. Corp., 2 Gray 1 . . . . .	59	Carpen <i>v.</i> Foster, 12 Pick. 485 . . . . .	345
Boston Fish Market Corp. <i>v.</i> Boston, 224 Mass. 31 . . . . .	89	Carr <i>v.</i> National Security Bank, 107 Mass. 45, 49 . . . . .	385
Boston Glass Mfg. Co. <i>v.</i> Langdon, 24 Pick. 49, 52 . . . . .	98, 240	Carter <i>v.</i> Hornback, 139 Mo. 238 . . . . .	295
Bowden <i>v.</i> Brown, 200 Mass. 269 . . . . .	69	Carthage <i>v.</i> Colligan, 216 N. Y. 217 . . . . .	284
Boyd <i>v.</i> United States, 116 U. S. 616, 622-630 . . . . .	284	Cary Library <i>v.</i> Bliss, 151 Mass. 364 68, 70, 92, 196, 511, 512, 540 . . . . .	68,
Boyden <i>v.</i> Hill, 198 Mass. 477, 487 . . . . .	43	Case <i>v.</i> Clark, 220 Mass. 344 . . . . .	656
Bradfield <i>v.</i> Roberts, 175 U. S. 291 . . . . .	505	Case of Joseph Downe, Jr., Mass. Election Cases, 1780-1852, p. 244 . . . . .	214
Bradlee <i>v.</i> Warren Savings Bank, 127 Mass. 107 . . . . .	455	Catheron <i>v.</i> County of Suffolk, 227 Mass. 598 . . . . .	319
Bradley <i>v.</i> Richmond, 227 U. S. 477 . . . . .	182	Central Pacific R.R. Co. <i>v.</i> California, 162 U. S. 91 . . . . .	673
Brazeo <i>v.</i> Michigan, 241 U. S. 340 . . . . .	447	Chable <i>v.</i> Nicaragua Canal Constr. Co., 59 Fed. Rep. 846 . . . . .	222
Brewer <i>v.</i> City of Springfield, 97 Mass. 152 . . . . .	203	Chapman <i>v.</i> Gray, 15 Mass. 439 . . . . .	137
Brimmer <i>v.</i> Boston, 102 Mass. 19 . . . . .	510	Chappell <i>v.</i> United States, 160 U. S. 499 596	596
Broadway National Bank <i>v.</i> Baker, 176 Mass. 294 . . . . .	272	Charlestown <i>v.</i> Groveland, 15 Gray, 15 129	129
Brodgbine <i>v.</i> Revere, 182 Mass. 598, 600 . . . . .	181, 182, 467	Chase <i>v.</i> Dickey, 212 Mass. 555 . . . . .	92
Brophy <i>v.</i> Apport. Commiss., 225 Mass. 124 . . . . .	346	Chelsea <i>v.</i> Treasurer and Receiver- General, 237 Mass. 422 . . . . .	643
Brougham <i>v.</i> Oceanic Steam Naviga- tion Co., 205 Fed. 857 . . . . .	623	Chicago <i>v.</i> Powers, 231 Ill. 560 . . . . .	446
Brown <i>v.</i> Boston & Maine R.R., 233 Mass. 502 . . . . .	183, 587	Chicago & Alton R.R. <i>v.</i> Tranbarger, 238 U. S. 67, 69, 77 . . . . .	484, 585
— <i>v.</i> Brown, 174 Mass. 197 . . . . .	160	Chicago, etc., R.R. Co. <i>v.</i> Nebraska, 170 U. S. 57, 74 . . . . .	510
— <i>v.</i> Nahant, 213 Mass. 271 . . . . .	663	Chicago, etc., R.R. Co. <i>v.</i> Chicago, 166 U. S. 226, 241 . . . . .	540
— <i>v.</i> Russell, 166 Mass. 14 . . . . .	350, 424, 599	Chicago Life Ins. Co. <i>v.</i> Needles, 113 U. S. 574 . . . . .	400
Brownell <i>v.</i> Old Colony R.R., 164 Mass. 29 . . . . .	149	Church <i>v.</i> Boylston & Woodbury Cafe Co., 218 Mass. 231 . . . . .	225
		Cincinnati <i>v.</i> Louisville & Nashville R.R., 223 U. S. 390, 400 . . . . .	510

	PAGE		PAGE
Cincinnati Gas Light & Coke Co. v. State, 18 Oh. St. 237 . . . . .	291	Commonwealth v. Chapin, 5 Pick. 109 . . . . .	194
Cincinnati, Wilmington, &c. R.R. v. Commiss., 1 Ohio St. 77, 78 . . . . .	587	— v. Coehituate Bank, 3 Allen, 42 . . . . .	413
City of Staunton v. Stout's Executor, 86 Va. 321 . . . . .	422	— v. Conn. Valley St. Ry. Co., 196 Mass. 309, 311 . . . . .	449
City of Blakely v. Hilton, 150 Ga. 27 . . . . .	422	— v. Crowninshield, 187 Mass. 221 . . . . .	575
Clark v. Blackington, 110 Mass. 369 . . . . .	656	— v. Dedham, 16 Mass. 141 . . . . .	449
— v. Brown, 3 Allen, 509, 511 . . . . .	386	— v. Dana, 2 Met. 329, 334-336 . . . . .	289
— v. Gaskarth, 8 Taunt. 431 . . . . .	253	— v. Ducey, 126 Mass. 269, 273 . . . . .	292
— v. Flagg, 11 Cush. 539, 540 . . . . .	386	— v. Essex Co., 13 Gray, 239 . . . . .	194
— v. New England Tel. & Tel. Co., 229 Mass. 1, 6 . . . . .	225	— v. Feeny, 221 Mass. 323, 325 . . . . .	430
— v. Treasurer and Rec. Gen., 218 Mass. 292 . . . . .	460	— v. Fox, 218 Mass. 498 . . . . .	182
Codman v. Crocker, 203 Mass. 146, 154 . . . . .	183	— v. Gee, 6 Cush. 174 . . . . .	206
Cogswell v. Chubb, 1 App. Div. (N.Y.), 93 . . . . .	296	— v. Hawkes, 123 Mass. 525 . . . . .	359
Cole v. Lagrange, 113 U. S. 1 . . . . .	474, 479, 486	— v. Henry, 229 Mass. 19 . . . . .	178
— v. Tucker, 164 Mass. 486 . . . . .	463	— v. Hilton, 174 Mass. 29 . . . . .	177
Collins v. Waltham, 151 Mass. 196 . . . . .	157	— v. Houtenbrink, 235 Mass. 320, 323 . . . . .	642
— v. Texas, 223 U. S. 288, 296 . . . . .	142, 143, 642	— v. Hyde, 230 Mass. 6 . . . . .	467
Collister v. Hayman, 183 N. Y. 250 . . . . .	446	— v. Intoxicating Liquors, 110 Mass. 172 . . . . .	353
Commissioner of Banks v. Jordan, Marsh Co., 241 Mass. 273 . . . . .	544	— v. Jewelle, 199 Mass. 558 . . . . .	373
Commissioner of Health v. Bunzel, 221 Mass. 31 . . . . .	257	— v. Kingsbury, 199 Mass. 542, 546 . . . . .	182, 467
Commissioners on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 451 . . . . .	61, 194	— v. Lancaster Savings Bank, 123 Mass. 493, 496 . . . . .	310
Commissioners of Union County v. Greene, 40 Oh. St. 318 . . . . .	546	— v. Libbey, 216 Mass. 356, 358 . . . . .	484, 585
Commonwealth v. Alden, 143 Mass. 113 . . . . .	257	— v. Lockwood, 109 Mass. 323, 339 . . . . .	651
— v. Alger, 7 Cush. 53 . . . . .	194, 198	— v. John T. Connor Co., 222 Mass. 299 . . . . .	308
— v. Beaman, 8 Gray, 497 . . . . .	361	— v. Kozlowsky, 238 Mass. 379, 387 . . . . .	328, 362, 603, 625
— v. Beaulieu, 213 Mass. 138, 141 . . . . .	585	— v. Maletsky, 203 Mass. 241, 246 . . . . .	183
— v. Bennett, 108 Mass. 27, 29 . . . . .	184	— v. Meckel, 221 Mass. 70, 72 . . . . .	206
— v. Berkshire Life Ins. Co., 98 Mass. 25, 29 . . . . .	145	— v. Nickerson, 236 Mass. 281 . . . . .	190
— v. Blackington, 24 Pick. 352 . . . . .	184	— v. Osborn Mill, 130 Mass. 33 . . . . .	308
— v. Boston & Maine R.R., 222 Mass. 206, 208 . . . . .	403, 488	— v. Packard, 185 Mass. 64 . . . . .	482
— v. Bow, 177 Mass. 347 . . . . .	206	— v. Parks, 155 Mass. 531 . . . . .	413
— v. Brennan, 103 Mass. 70 . . . . .	112	— v. Pear, 183 Mass. 242 . . . . .	100
— v. Carter, 132 Mass. 12, 14, 15 . . . . .	292	— v. Peebles, 134 Ky. 121 . . . . .	422
— v. Cary Improvement Co., 98 Mass. 19, 22 . . . . .	279	— v. Peoples Five Cents Savings Bank, 5 Allen, 428, 438 . . . . .	310
		— v. Peters, 2 Mass. 125 . . . . .	361
		— v. Phelps, 209 Mass. 396, 407, 408 . . . . .	290
		— v. Plaisted, 148 Mass. 375, 382 . . . . .	182, 467
		— v. Porn, 196 Mass. 326 . . . . .	142, 143, 326, 373, 642
		— v. Pratt, 137 Mass. 98, 104 . . . . .	42
		— v. Reading Savings Bank, 133 Mass. 16, 19 . . . . .	455

	PAGE		PAGE
Commonwealth <i>v.</i> Richardson,	142	Danforth <i>v.</i> Groton Water Co.,	178
Mass. 71, 74	328, 329	Mass. 472	412, 547
— <i>v.</i> Riley, 210 Mass.	387, 392;	Dartmouth College <i>v.</i> Woodward,	
S. C., 232 U. S.	671	4 Wheat. 518	59, 67, 68
— <i>v.</i> Sisson, 189 Mass.	247	Davies <i>v.</i> Burns, 5 Allen,	349
. . . . .	467, 468	. . . . .	317
— <i>v.</i> Slocum, 230 Mass.	180, 190	Davis <i>v.</i> Gray, 16 Wall.	203
. . . . .	182	— <i>v.</i> Inhabitants of Chilmark,	199
— <i>v.</i> Smith, 10 Allen,	448, 455, 456	Mass. 112	596
. . . . .	241	— <i>v.</i> Treasurer & Receiver General,	
— <i>v.</i> Smith, 141 Mass.	135, 138	208 Mass. 343, 345	369, 370
. . . . .	293	Daves <i>v.</i> Boylston, 9 Mass.	337, 352
— <i>v.</i> Stodder, 2 Cush.	562	. . . . .	656
. . . . .	574, 575	Dearborn <i>v.</i> Ames, 8 Gray,	1
— <i>v.</i> Strauss, 191 Mass.	545	. . . . .	353
. . . . .	446, 484,	Delafolle <i>v.</i> New Jersey, 54 N. J. L.	381
. . . . .	585	. . . . .	290
— <i>v.</i> Tiffany, 119 Mass.	300	Demmon <i>v.</i> Boylston Bank, 5 Cush.	
. . . . .	467	194	544
— <i>v.</i> Theberge, 231 Mass.	386, 389	Denny <i>v.</i> Mattoon, 2 Allen.	361, 378
. . . . .	182	. . . . .	481
— <i>v.</i> Tobin, 108 Mass.	426, 429	Dent <i>v.</i> West Virginia, 129 U. S.	114,
. . . . .	290	122	142, 143, 642
— <i>v.</i> Vincent, 108 Mass.	441	Denver <i>v.</i> Denver Union Water Co.,	
. . . . .	177, 467	246 U. S. 178	587
— <i>v.</i> White, 6 Cush.	181	Derby <i>v.</i> Blake (1799), 226 Mass.	
. . . . .	660	618	59, 522
— <i>v.</i> Zimmerman, 221 Mass.	184	Derinza's Case, 229 Mass.	435, 442
. . . . .	142,	. . . . .	602,
. . . . .	143, 373, 642	. . . . .	603
— <i>v.</i> Union Ins. Co., 5 Mass.	230,	Dewey <i>v.</i> Richardson, 206 Mass.	430,
232	240	433	182
Confiscation Cases, 7 Wall.	454, 458	Dexter <i>v.</i> Shepard, 117 Mass.	480
Conn. River R.R. Co. <i>v.</i> County Com-	missioners, 127 Mass. 50	. . . . .	203
. . . . .	541	Dickey <i>v.</i> Putnam Free School,	197
Cook <i>v.</i> Leland, 5 Pick.	236	Mass. 468	450
. . . . .	421	Dickinson <i>v.</i> Worcester, 7 Allen,	19, 22
Cooney Co. <i>v.</i> Arlington Hotel Co.,		. . . . .	157
11 Del. Ch. 286, 306	264	Dinan <i>v.</i> Swig, 223 Mass.	516
Coppage <i>v.</i> Kansas, 236 U. S.	1, 14	. . . . .	181, 215,
. . . . .	488	. . . . .	359, 384, 524
Corcoran <i>v.</i> Boston, 185 Mass.	325	District of Columbia <i>v.</i> Bailey,	171
. . . . .	88	U. S. 161, 176	170
Cornwall <i>v.</i> Todd, 38 Conn.	443	Dobbins <i>v.</i> Commissioners of Erie	
. . . . .	422	County, 16 Pet. 435, 448, 449	497
Costley <i>v.</i> Commonwealth, 118 Mass.		Dr. Miles Medical Co. <i>v.</i> John D. Park	
1, 36	348, 651	& Sons Co., 220 U. S. 373	485, 487
Cotton Plant, 10 Wall.	577	. . . . .	360
Coulombe <i>v.</i> Eastman, 76 N. H.	248	Donaldson <i>v.</i> Strong, 195 Mass.	429
. . . . .	265	. . . . .	44
County of Berkshire <i>v.</i> Cande,	222	Donovan <i>v.</i> Apportionment Commis.,	
Mass. 87, 90	587	225 Mass. 55	346
Coyle <i>v.</i> Taunton Safe Deposit & Trust		Door <i>v.</i> United States, 195 U. S.	138
Co., 216 Mass. 156, 158, 163	272	. . . . .	185,
Craig <i>v.</i> Warner, 216 Mass.	386, 393	. . . . .	382
. . . . .	246	Downes <i>v.</i> Bidwell, 182 U. S.	244, 251
Crawford <i>v.</i> Nies, 220 Mass.	61, 65	. . . . .	382
. . . . .	68, 69,	Doyle <i>v.</i> Continental Ins. Co., 94 U. S.	
. . . . .	92	535, 541	523
— <i>v.</i> Nies, 224 Mass.	474	Drury <i>v.</i> Natick, 10 Allen,	169, 183
. . . . .	69, 93	. . . . .	568
Crease <i>v.</i> Babcock, 23 Pick.	334	Dudley <i>v.</i> Sanborn, 159 Mass.	185
. . . . .	99	. . . . .	656
Crenshaw <i>v.</i> United States	134 U. S. 99	Duffy <i>v.</i> Bourneuf, 227 Mass.	513, 517
. . . . .	681	— <i>v.</i> Treasurer and Receiver Gen-	
Daley <i>v.</i> Watertown, 192 Mass.	116	eral, 227 Mass. 562	460
. . . . .	157	— <i>v.</i> Jackson, 256 U. S.	589
Dallinger <i>v.</i> Rapello, 14 Fed.	32	. . . . .	609
. . . . .	422		
Dalton <i>v.</i> Bernardston, 9 Mass.	201,		
203	128, 129, 228		
Dana <i>v.</i> Third National Bank,	13		
Allen, 445	385		
— <i>v.</i> Treasurer and Receiver Gen-			
eral, 227 Mass. 562	460		
— <i>v.</i> Jackson, 256 U. S.	589		

	PAGE		PAGE
Dunn v. Agricultural Society, 46 Ohio St. 93, 99, 100 . . . . .	205	Fitzgerald v. Lewis, 164 Mass. 495 . . . . .	546
— v. Lowe, 203 Mass. 516, 518 . . . . .	290, 294	Flagg v. Worcester, 13 Gray, 601 . . . . .	157
— v. State, 13 Ga. Ap. 314 . . . . .	42	Flanders v. Cross, 10 Cush. 514 . . . . .	87
Durfee v. Old Colony, etc., R.R. Co., 5 Allen, 230 . . . . .	400	Fletcher v. Peck, 6 Cranch, 87 . . . . .	520
Durgin v. Minot, 203 Mass. 26 . . . . .	198	Flint v. Stone Tracy Co., 220 U. S. 107, 145 . . . . .	95
Eastern Bridge & Structural Co. v. Worcester Auditorium Co., 216 Mass. 426, 430 . . . . .	588	Flynn v. Flynn, 183 Mass. 365 . . . . .	656
Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 153 . . . . .	43, 44	Folger v. Columbian Ins. Co., 99 Mass. 267, 276 . . . . .	98, 240
Edgar A. Levy Leasing Co. v. Siegal, 258 U. S. 242 . . . . .	446, 586	Ford v. Breen, 173 Mass. 52 . . . . .	290
Eidman v. Martinez, 184 U. S. 578 . . . . .	338	Forster v. Forster, 129 Mass. 559 . . . . .	196
Einstein v. Marshall, 58 Ala. 153 . . . . .	515	Fort Leavenworth R.R. Co., v. Lowe, 114 U. S. 525 . . . . .	595
Eklon v. Chelsea, 223 Mass. 213, 216 . . . . .	561	Franklin v. Fisk, 13 Allen, 211 . . . . .	157
Eliot v. Freeman, 220 U. S. 178 . . . . .	461	Franklin Savings Bank v. Framingham, 212 Mass. 92, 94 . . . . .	328, 329
— v. Trinity Church, 232 Mass. 517, 522 . . . . .	70, 509, 511, 540	Freedman v. Bloomberg, 225 Mass. 491 . . . . .	137, 138
Employers Liability Ins. Co. v. Insurance Commissioners, 64 Mich. 614 . . . . .	338	Freeland v. Hastings, 10 Allen, 570 . . . . .	474, 479, 536
Engel v. O'Malley, 219 U. S. 128, 136 . . . . .	43	Friend v. Childs Dining Hall Co., 231 Mass. 65, 72 . . . . .	206
Entick v. Carrington, 19 Howell's State Trials, 1029 . . . . .	289	Frost v. American Surety Co., 217 Mass. 294, 296 . . . . .	506, 607
Essex Co. v. Lawrence, 214 Mass. 79, 90 . . . . .	623	— v. Thompson, 219 Mass. 360, 365 . . . . .	460
Everett v. Foster, 223 Mass. 553 . . . . .	271	Frothingham v. March, 1 Mass. 247 . . . . .	203
<i>Ex parte</i> Jackson, 96 U. S. 727, 733 . . . . .	290	Gage v. Steinkrauss, 131 Mass. 222 . . . . .	467
— McCardle, 7 Wall. 506, 514 . . . . .	523	Gagnon's Case, 228 Mass. 334, 338 . . . . .	630
— Young, 209 U. S. 123, 149, 155, 156 . . . . .	506	Gannett v. Cambridge, 218 Mass. 60 . . . . .	613, 617
Fairchild v. Hughes, 258 U. S. 126 . . . . .	501	Garst v. Hall & Lyon Co., 179 Mass. 588 . . . . .	487
Farr Alpaca Co. v. Commonwealth, 212 Mass. 156, 162 . . . . .	310	Geer v. Conn., 161 U. S. 519 . . . . .	177, 431
Farrar v. Pillsbury, 217 Mass. 330, 335 . . . . .	240	Geo. H. Sampson Co. v. Commonwealth, 202 Mass. 326, 334 . . . . .	212
Fay v. Noble, 12 Cush. 1, 18 . . . . .	246	George G. Fox Co. v. Glynn, 191 Mass. 344 . . . . .	489
Fechteler v. Palm Bros. & Co., 133 Fed. Rep. 462, 469 . . . . .	262	Georgia v. Stanton, 6 Wall. 50 . . . . .	502, 505
Federal Trade Commission v. Beech-nut Packing Co., 257 U. S. 441 . . . . .	446, 485, 487, 542	— v. Tennessee Copper Co., 206 U. S. 230, 237 . . . . .	503
Fellows v. Miner, 119 Mass. 541 . . . . .	70, 92	German Alliance Ins. Co. v. Kansas, 233 U. S. 389 . . . . .	586
Field v. Clark, 143 U. S. 649 . . . . .	184, 185, 186, 587	Gibbons v. Ogden, 9 Wheat. 1, 203 . . . . .	291
First National Bank v. Fellows, Attorney Gen., 244 U. S. 416 . . . . .	36, 186	Gill v. Atty-Gen., 197 Mass. 232, 237 . . . . .	69
First Universalist Society v. Bradford, 185 Mass. 310 . . . . .	369	Ginn v. Almy, 212 Mass. 486, 497 . . . . .	160
Fisher v. McGirr, 1 Gray, 1, 27-31 . . . . .	289	Goldstein v. Conner, 212 Mass. 57, 59 . . . . .	183
Fitchburg Railroad Co. v. Grand Junction, etc., Co., 1 Allen, 552 . . . . .	359	Gonzales v. Williams, 192 U. S. 1 . . . . .	382
		Gordon v. United States, 117 U. S. 697, 700, 701, 705 . . . . .	503
		Gould v. United States, 255 U. S. 298 . . . . .	290
		Graham v. Roberts, 200 Mass. 152 . . . . .	182, 184, 424, 462

	PAGE		PAGE
Great Northern R.R. Co. v. Minnesota, 238 U. S. 340 . . . . .	486, 488	Higginson v. Treasurer, etc., of Boston, 212 Mass. 583, 591 . . . . .	561
Greene v. Louisville & I. R.R. Co., 244 U. S. 499, 506, 507 . . . . .	506	Hittinger v. Eames, 121 Mass. 539, 546 . . . . .	467
— v. Mayor of Fitchburg, 219 Mass. 121 . . . . .	577	Holcombe v. Creamer, 231 Mass. 99, § 11 . . . . .	238
Greenfield Savings Bank v. Abercrombie, 211 Mass. 252 . . . . .	544	Hollander v. Central Metal Co., 109 Md. 131 . . . . .	44
— v. Commonwealth, 211 Mass. 207, 280, 310, 313, 570 . . . . .	570	Hollister v. Benedict & Burham Mfg. Co., 113 U. S. 59 . . . . .	366
Greenwood v. Union Freight Ry. Co., 105 U. S. 13 . . . . .	61, 67	Holmes v. Greene, 7 Gray, 299 . . . . .	408
Grover v. Grover, 24 Pick. 261 . . . . .	159	Holt v. Somerville, 127 Mass. 408 . . . . .	38
Gulf Colorado & Santa Fé Ry. v. Ellis, 165 U. S. 150, 155 . . . . .	142	Holyoke Water Power Co. v. Lyman, 15 Wall. 500 . . . . .	61, 67
Gurney v. Howe, 9 Gray, 404 . . . . .	172	Holy Trinity Church v. United States, 143 U. S. 457, 459, 472 . . . . .	551
Hagar v. Buck, 44 Va. 285 . . . . .	44	Hooper v. Bradford, 178 Mass. 95 . . . . .	371
Hairston v. Danville & Western Ry., 208 U. S. 598 . . . . .	486	— v. Shaw, 176 Mass. 190, 369, 370, 371 . . . . .	371
Hale v. Henkel, 201 U. S. 43, 76 . . . . .	291	Horan v. Watertown, 217 Mass. 185 . . . . .	482
Hall v. Wisconsin, 103 U. S. 5 . . . . .	454	Houston, etc., Ry. Co. v. United States, 234 U. S. 342 . . . . .	186
Hamilton Natl. Bank v. American L. & T. Co., 66 Neb. 67 . . . . .	42	Howard v. Fall River Iron Works Co., 203 Mass. 273, 276 . . . . .	547
Hammer v. Dagenhart, 247 U. S. 251, 495, 503, 506 . . . . .	495, 503, 506	Howes v. Maxwell, 157 Mass. 333 . . . . .	663
Hampshire County v. Franklin County, 16 Mass. 76 . . . . .	413	Howland v. Flood, 160 Mass. 509 . . . . .	239
Hanson v. South Scituate, 115 Mass. 336, 342 . . . . .	328, 329	Hubbard v. Worcester Art Museum, 194 Mass. 280, 289 . . . . .	60
Haraden v. Larrabee, 113 Mass. 430, 432 . . . . .	216	Hutchins v. State Bank, 12 Met. 421, 425 . . . . .	421, 656
Hardy v. Yarmouth, 6 Allen, 277 . . . . .	421	Hutclinson v. Danley, 88 Kan. 437 . . . . .	37
Harlan v. Kruschel, 164 Iowa, 667 . . . . .	178	<i>In re</i> Chapman, 166 U. S. 661 . . . . .	519
Hart v. Tax Commissioner, 240 Mass. 37 . . . . .	609	— Eastern Shore Shipbuilding Corp., 274 Fed. 893 . . . . .	677
Hartley v. Granville, 216 Mass. 38, 40, 317, 318 . . . . .	317, 318	— Gay, 5 Mass. 419 . . . . .	137
Harvard College v. Soc. for Promoting Theological Education, 3 Gray, 280, 68, 70, 92 . . . . .	68, 70, 92	— Hickory Tree Road, 43 Pa. St. 139 . . . . .	547
Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605 . . . . .	137	— Loney, 134 U. S. 372, 373 . . . . .	384
Hawkes v. New York, 170 U. S. 189, 195 . . . . .	142, 143	— Rahrer, 140 U. S. 545, 560, 185, 495 . . . . .	185, 495
Heard v. Talbot, 7 Gray, 113 . . . . .	98, 240	— Strawbridge & Mays, 39 Ala. 367, 375 . . . . .	286
Heim v. McCall, 239 U. S. 175 . . . . .	136	— Wm. S. Butler & Co. Inc., 207 Fed. Rep. 705, 713 . . . . .	216
Hellen v. Medford, 188 Mass. 42 . . . . .	364	International Harvester Co. v. Missouri, 234 U. S. 199 . . . . .	485
Hemmenway v. Towner, 1 Allen, 209, 208 . . . . .	209, 208	International Paper Co. v. Commonwealth, 232 Mass. 7 . . . . .	29
Henley v. Myers, 215 U. S. 373 . . . . .	413	International Postal Supply Co. v. Bruce, 194 U. S. 601, 607 . . . . .	336
Herbert v. Simson, 220 Mass. 480 . . . . .	159	International Text Book Co. v. Connelly, 206 N. Y. 188 . . . . .	254
Hewett v. Canton, 182 Mass. 220 . . . . .	157	Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 . . . . .	185, 186
— v. Charier, 16 Pick. 353 . . . . .	642		

	PAGE		PAGE
J. Doherty, 207 Fed. Rep. 997, 999, 1000 . . . . .	253	Kokomo Steel & Wire Co. <i>v.</i> Columbia Wire Co., 200 U. S. 621 . . . . .	367
J. S. Lang Engineering Co. <i>v.</i> Com- monwealth, 231 Mass. 367, 370 544, 658		Lafin, etc., Co. <i>v.</i> Steytler, 146 Pa. St. 434 . . . . .	208
Jackson <i>v.</i> Phillips, 14 Allen, 539, 556 71, 92, 118, 261	261	Lahr <i>v.</i> Metropolitan El. Ry. Co., 104 N. Y. 268 . . . . .	412
Jacobson <i>v.</i> Mass., 197 U. S. 11, 22 . . . . .	496	Lane <i>v.</i> Watts, 234 U. S. 525, 540 . . . . .	506
Jaquith <i>v.</i> Worden, 73 Wash. 349, 360 178		Large Oil Co. <i>v.</i> Howard, 163 Pac. Rep. 537 . . . . .	673
Jenkins <i>v.</i> Andover, 103 Mass. 94, 449 . . . . .	650	Lathrop <i>v.</i> Merrill, 207 Mass. 6, 10, 24; C. J. 204 . . . . .	421, 656
Johnson <i>v.</i> Maryland, 254 U. S. 51 . . . . .	664	Lawrence <i>v.</i> Smith, 201 Mass. 214 579, 580 — <i>v.</i> Board of Registration, 239 Mass. 424, 428 . . . . .	628 656
Johnston <i>v.</i> Belmar, 58 N. J. Eq. 354 . . . . .	284	— <i>v.</i> Wright, 23 Pick. 128 . . . . .	656
Jones <i>v.</i> Portland, 245 U. S. 217 . . . . .	586	Lee <i>v.</i> Lynn, 223 Mass. 109, 112 . . . . .	424
— <i>v.</i> Robbins, 8 Gray, 329 . . . . .	196	Legal Tender Case, 110 U. S. 421, 444 251	
Jordan Marsh Co. <i>v.</i> Natl. Shawmut Bank, 201 Mass. 397, 411 . . . . .	172	Lever Bros. Co. <i>v.</i> Commonwealth, 232 Mass. 22 . . . . .	29
Kansas <i>v.</i> Colorado, 185 U. S. 125; 206 U. S. 46, 83, 84, 99 . . . . .	503	Lewis <i>v.</i> Lynn Institution for Savings, 148 Mass. 235, 243 . . . . .	455
Keller <i>v.</i> United States, 213 U. S. 138 495		Lindsley <i>v.</i> National Carbonic Gas Co., 220 U. S. 61 . . . . .	431
Kelly <i>v.</i> Commissioner of Banks, 239 Mass. 298, 301 . . . . .	544	Liverpool, etc., Steamship Co. <i>v.</i> Com- missioners of Emigration, 113 U. S. 33, 39 . . . . .	501
Kennebec Co. <i>v.</i> Augusta Ins., etc., Co., 6 Gray, 204, 207 . . . . .	246	Loan Assoc. <i>v.</i> Topeka, 20 Wall. 655 474, 479, 486 . . . . .	478
Kennedy <i>v.</i> Commonwealth, 182 Mass. 480, 481 . . . . .	76, 212	Logan <i>v.</i> Mayor & Alderman of Law- rence, 201 Mass. 506, 511 . . . . .	478
— <i>v.</i> Hodges, 215 Mass. 112 . . . . .	460	Long Island Water Supply Co. <i>v.</i> Brooklyn, 166 U. S. 685 . . . . .	510
Kennison <i>v.</i> Beverly, 146 Mass. 467 . . . . .	157	Loring <i>v.</i> Young, 239 Mass. 349 524, 525	
Kessler <i>v.</i> Kedzie, 106 Ill. App. 1 . . . . .	396	Loughborough <i>v.</i> Blake, 5 Wheat. 317, 318 . . . . .	497
Kiggins <i>v.</i> Munday, 19 Wash. 233 . . . . .	42	Louisiana <i>v.</i> Texas, 176 U. S. 1, 19 . . . . .	502
Kilgour <i>v.</i> Gratto, 224 Mass. 78 . . . . .	413	Louisville & Nashville R.R. Co. <i>v.</i> Central Stock Yards Co., 212 U. S. 132 . . . . .	486, 488
King <i>v.</i> Dedham Bank, 15 Mass. 447 . . . . .	59	Lowell <i>v.</i> Archambault, 189 Mass. 70, 73 . . . . .	284
King County, Wash. <i>v.</i> United States Shipping Board E. F. Corp., 282 Fed. 950 . . . . .	677	— <i>v.</i> Boston, 111 Mass. 454 . . . . .	53, 119, 474, 479, 480, 482, 483, 531, 536, 537, 653, 654
Kingman <i>v.</i> Brocton, 153 Mass. 255 113, 114, 119, 474, 479, 486, 536		— <i>v.</i> County Commissioners, 152 Mass. 372 . . . . .	623
Kinneen <i>v.</i> Wells, 144 Mass. 497 345, 527		Lunt <i>v.</i> Post Printing Co., 48 Colo. 316, 321 . . . . .	515
Kinney <i>v.</i> Treasurer and Receiver- General, 207 Mass. 368, 369 . . . . .	460	Luther <i>v.</i> Borden, 7 How. 1 . . . . .	502
Knapp <i>v.</i> Railroad Co., 20 Wall. 117, 122, 123 . . . . .	68	Lynn <i>v.</i> County Commissioners, 148 Mass. 148, 151 . . . . .	184
Knickerbocker Ice Co. <i>v.</i> Stewart, 253 U. S. 149, 164 . . . . .	185, 186	— <i>v.</i> Polk, 8 Lea (Tenn.) 121 . . . . .	524
Knights <i>v.</i> Treasurer & Receiver General, 236 Mass. 336, 341 . . . . .	225		
— <i>v.</i> Treasurer and Rec. General, 237 Mass. 493, 496 . . . . .	355, 540, 654		
Knowlton <i>v.</i> Moore, 178 U. S. 41 . . . . .	504		
Koffman <i>v.</i> Koffman, 193 Mass. 593 . . . . .	208		
Kohl <i>v.</i> United States, 91 U. S. 367, 371 . . . . .	510		

	PAGE
MacLaren <i>v.</i> State, 141 Wis.	577 . 42
Madisonville Traction Co. <i>v.</i> St. Bernard Traction Co., 196 U. S.	239, 251 . 486
Maguire <i>v.</i> Tax Commissioner, Mass. 503, 506	. 609
Mahoning Valley R. Co. <i>v.</i> Santoro, Ohio St. 53	. 199
Main <i>v.</i> County of Plymouth, Mass. 66, 69	. 269
Mallinckrodt Chemical Works <i>v.</i> Missouri, 238 U. S. 41	. 485
Marbury <i>v.</i> Madison, 1 Cranch, 137	. 501
Marcus Brown Holding Co., Inc., <i>v.</i> Feldman, 256 U. S. 170	. 196, 446, 586
Marsh <i>v.</i> Woodbury, 1 Met. 436	. 137
Marshall <i>v.</i> Jaquith, 134 Mass. 138	. 160
Martin <i>v.</i> Witherspoon, 135 Mass. 175, 178	. 183, 587
Martin L. Hall Co. <i>v.</i> Commonwealth, 215 Mass. 326, 329	. 600, 634
Mass. Agricultural College <i>v.</i> Marden, 156 Mass. 150, 156	. 106
Mass. Election Cases, 1780-1852	. 215
Mass. Inst. of Tech. <i>v.</i> Boston Society of Natural History, 218 Mass. 189	. 26, 27, 28
Matter of Heff, 197 U. S. 488, 505	. 503
— Heilmance, 71 N. Y. 481, 486, 487	. 253
— of Samuel Carver, 224 Mass. 169, 172	. 135
Maynard <i>v.</i> Hill, 125 U. S. 190	. 185
Mayne <i>v.</i> Huntington County, Ind. 132	. 547
Mayor, etc., of Worcester <i>v.</i> Norwich & Worcester R.R. Co., 109 Mass. 103	. 149
McClurg <i>v.</i> Brenton, 123 Ia. 368	. 290
McCoach <i>v.</i> Minehill & Schuylkill Haven R.R., 228 U. S. 295	. 95
McCormick Harvesting Machine Co. <i>v.</i> Aultman Co., 169 U. S. 606	. 336
McCready <i>v.</i> Virginia, 94 U. S. 391	. 177
McCulloch <i>v.</i> Maryland, 4 Wheat. 316, 400, 401, 436	. 495, 501, 673
McGlue <i>v.</i> County Commissioners, Mass. 59	. 346
McGratti <i>v.</i> Boston, 103 Mass. 369	. 510
McKeon <i>v.</i> New England R.R. Co., 199 Mass. 292, 295	. 412
McLennon <i>v.</i> Richardson, 15 Gray, 74, 77	. 290

	PAGE
McMahon <i>v.</i> Holyoke, 226 Mass. 450	. 157
McNamara <i>v.</i> Boston & Maine R.R., 216 Mass. 506	. 129
McQuesten <i>v.</i> Atty.-Gen., 187 Mass. 185	. 139, 170
McRae <i>v.</i> Auditor General, 146 Mich. 594	. 232
Mead <i>v.</i> Aeton, 139 Mass. 341	. 474, 479, 536
Meade <i>v.</i> United States, 2 Ct. Cl. 224	. 510
Medford <i>v.</i> Learned, 16 Mass. 215	. 413
Memphis, etc., R.R. Co. <i>v.</i> Railroad Commissioners, 112 U. S. 609, 619-623	. 241
Merrick <i>v.</i> Amherst, 12 Allen. 500	. 649
Milford <i>v.</i> County Commis., Mass. 162, 165	. 369
Millard <i>v.</i> Roberts, 202 U. S. 429, 438	. 505
Milligan <i>v.</i> Drury, 130 Mass. 428	. 87
Millsaps <i>v.</i> City of Jackson, 78 Miss. 537	. 422
Minnesota Rates Cases, 230 U. S. 352	. 587
Minot <i>v.</i> Baker, 147 Mass. 348, 351	. 71
— <i>v.</i> Winthrop, 162 Mass. 113	. 369
Mississippi <i>v.</i> Johnson, 4 Wall. 475	. 505
Missouri Pacific Ry. Co. <i>v.</i> Nebraska, 164 U. S. 403; 217 U. S. 196	. 486, 488, 511
Missouri <i>v.</i> Illinois & Sanitary District of Chicago, 180 U. S. 208, 241	. 503
Moeckel <i>v.</i> Cross & Co., 190 Mass. 280	. 482
Monongahela Bridge Co. <i>v.</i> United States, 216 U. S. 177	. 186
Monongahela Nav. Co. <i>v.</i> United States, 148 U. S. 312	. 541
Moore <i>v.</i> Stoddard, 206 Mass. 395, 399	. 209, 551
Moran <i>v.</i> Sones, 154 Mass. 200	. 211
Morgan <i>v.</i> Richardson, 13 Allen. 410	. 172
Motion Picture Co. <i>v.</i> Universal Film Co., 243 U. S. 502	. 485, 487
Mount Hermon Boys' School <i>v.</i> Gill, 145 Mass. 139, 146	. 644
Munn <i>v.</i> Illinois, 94 U. S. 113	. 586
Murphy <i>v.</i> Metropolitan Natl. Bank, 191 Mass. 159, 165	. 172
Muskrat <i>v.</i> United States, 219 U. S. 346, 361	. 501
Mutual Film Corp'n. <i>v.</i> Industrial Commission of Ohio, 236 U. S. 230	. 183, 446, 447
Nash <i>v.</i> Brown, 165 Mass. 384	. 42
— <i>v.</i> Commonwealth, 174 Mass. 335	. 75

	PAGE		PAGE
National Mahaiwe Bank <i>v.</i> Peck, 127 Mass. 298 . . . . .	544	Opinion of the Justices, 122 Mass. 600 . . . . .	158, 273, 345, 438
National Prohibition Cases, 253 U. S. 350 . . . . .	506	— 136 N. E. 157 . . . . .	135, 653, 654
National Surety Co. <i>v.</i> Architectural Co., 226 U. S. 276 . . . . .	413, 547	— 138 Mass. 601, 603 . . . . .	183
Nelson <i>v.</i> State Board of Health, 186 Mass. 330 . . . . .	468	— 142 Mass. 601, 604 . . . . .	346
Newcomb <i>v.</i> Inhabitants of Rockport, 183 Mass. 74 . . . . .	596	— 145 Mass. 587, 590 . . . . .	337
New England Trust Co. <i>v.</i> Abbott, 205 Mass. 279, 282 . . . . .	160	— 150 Mass. 586 . . . . .	248
New Orleans <i>v.</i> Warner, 175 U. S. 120, 145 . . . . .	523	— 157 Mass. 594 . . . . .	346, 347
New York <i>v.</i> Milln., 11 Pet. 102, 139 . . . . .	495	— 160 Mass. 586 . . . . .	181, 184, 185, 188
— <i>v.</i> New Jersey, 256 U. S. 296, 301, 302 . . . . .	503	— 165 Mass. 599 . . . . .	248, 527
New York & Oswego Midland R.R. Co. <i>v.</i> Van Horn, 57 N. Y. 473 . . . . .	413	— 166 Mass. 589 . . . . .	350, 599
New York Trust Co. <i>v.</i> Eisner, 256 U. S. 345 . . . . .	504	— 175 Mass. 599 . . . . .	531
Noble <i>v.</i> Union River Logging R.R. Co., 147 U. S. 165, 171, 172 . . . . .	505	— 186 Mass. 603 . . . . .	474, 479, 492, 532, 537
Noble State Bank <i>v.</i> Haskell, 219 U. S. 104, 112 . . . . .	485	— 190 Mass. 611 . . . . .	132, 134, 533
Northampton <i>v.</i> County Commis- sioners, 145 Mass. 108 . . . . .	609	— 193 Mass. 608 . . . . .	484, 485
Northwestern Laundry <i>v.</i> Des Moines, 239 U. S. 486 . . . . .	54	— 207 Mass. 601 . . . . .	198
Norton <i>v.</i> Lilly, 210 Mass. 214, 217 . . . . .	656	— 208 Mass. 619, 622 . . . . .	53, 182, 412, 484
Oakes <i>v.</i> Hill, 14 Pick. 442, 448 . . . . .	328	— 210 Mass. 609 . . . . .	132, 134
Offield <i>v.</i> New York, N. H. & H. R.R. Co., 203 U. S. 372 . . . . .	510	— 211 Mass. 608 . . . . .	132, 134, 474, 475, 479, 482, 484, 534, 537
Ohio Oil Co. <i>v.</i> Indiana, 177 U. S. 190 . . . . .	431	— 214 Mass. 602, 606 . . . . .	348, 649
Old Colony Trust Co. <i>v.</i> Common- wealth, 220 Mass. 409, 413 . . . . .	280	— 216 Mass. 605, 606 . . . . .	353, 681
— <i>v.</i> Medfield & Medway St. Ry. Co., 215 Mass. 156 . . . . .	647	— 220 Mass. 608 . . . . .	347, 484, 488
— <i>v.</i> Wallace, 212 Mass. 335 . . . . .	36	— 226 Mass. 607 . . . . .	68, 345
Old Corner Book Store <i>v.</i> Upham, 194 Mass. 101 . . . . .	489	— 229 Mass. 601 . . . . .	175
Old South Society <i>v.</i> Crocker, 119 Mass. 1, 26 . . . . .	71	— 234 Mass. 597, 608 . . . . .	54, 182
Olds <i>v.</i> City Trust, etc., Co. of Phila., 185 Mass. 500, 505 . . . . .	240	— 237 Mass. 619, 623 . . . . .	158, 249, 273, 383, 481, 591
Oliverieri <i>v.</i> Atkinson, 168 Mass. 28 . . . . .	408	— 239 Mass. 606 . . . . .	391
Ollila <i>v.</i> Huikau, 237 Mass. 54 . . . . .	269	— 240 Mass. 601 . . . . .	528, 601
Opinion of the Justices, 13 Allen, 593, 172, 273, 638 . . . . .	345	Oregon Nav. Co. <i>v.</i> Winsor, 20 Wall. 64 . . . . .	489
— 10 Gray, 613, 615 . . . . .	345	Osborn <i>v.</i> Bank of United States, 9 Wheat. 738, 867 . . . . .	673
— 107 Mass. 604 . . . . .	248, 527, 528	— <i>v.</i> United States Bank, 9 Wheat. 738, 846, 857 . . . . .	506
— 117 Mass. 603 . . . . .	353, 681	Osgood <i>v.</i> Tax Commissioner, 235 Mass. 88 . . . . .	16
		Oulighan <i>v.</i> Butler, 189 Mass. 287 . . . . .	482
		Oulton <i>v.</i> Savings Institution, 17 Wall. 109, 118, 119 . . . . .	42
		Pacific States Teleph. & Teleg. Co. <i>v.</i> Oregon, 223 U. S. 118 . . . . .	502
		Packard <i>v.</i> Old Colony Railroad, 168 Mass. 92, 99 . . . . .	240
		Paine <i>v.</i> Woods, 108 Mass. 160, 169 . . . . .	467
		Pahner <i>v.</i> Barrett, 162 U. S. 399 . . . . .	596
		— <i>v.</i> Hampden, 182 Mass. 511 . . . . .	408
		Parker <i>v.</i> May, 5 Cush. 336, 339-340 . . . . .	139, 170, 361, 362
		— <i>v.</i> Marchant, 1 Younge & C. Ch. 290, 300 . . . . .	42



	PAGE		PAGE
Parkersburg v. Brown, 106 U. S. 487	474, 479	Portland Bank v. Apthorp, 12 Mass. 252, 256	253
Parkhurst v. Treasurer and Receiver General, 228 Mass. 196	369	— v. Maine Bank, 11 Mass. 204	386
Parkman v. McCarthy, 149 Mass. 502	216	Powelson v. Tennessee Eastern Electric Co., 220 Mass. 380	221
Patsone v. Penn., 232 U. S. 138	142, 177, 431	Priestly v. Treasurer and Receiver General, 230 Mass. 452	460
Patten v. Deshon, 1 Gray, 325, 329	44	Pritchard v. Norwood, 155 Mass. 539	656
Payne v. Gardiner, 29 N. Y. 146, 167	250	Prout v. Roby, 15 Wall. 471	44
Peabody v. Treasurer and Receiver General, 215 Mass. 129, 130	460	Quinn v. Hayden, 219 Mass. 343, 346	262
Peace v. Wilson, 186 N. Y. 403	199	Railroad Co. v. Peniston, 18 Wall. 5, 36, 37	673
Pennoyer v. McConnaughey, 140 U. S. 1, 10	506	Ransom v. Boston, 192 Mass. 290, 304	350
Pennsylvania College Cases, 13 Wall. 190	400	Rathke v. Gardner, 134 Mass. 14	157
Penn. Hospital v. Philadelphia, 245 U. S. 20	28, 510	Red "C" Oil Mfg. Co. v. North Carolina Board of Agriculture, 222 U. S. 380	183
People v. Allcutt, 189 N. Y. 517	373	Reed v. People, 125, Ill., 592	42
— v. Aurora, 78 Ill. 218	199	— v. Tarbell, 4 Met. 93, 101	253
— v. Black, 122 Calif. 73	338	Reetz v. Michigan, 188 U. S. 504, 510	142, 143
— v. Coler, 173 N. Y. 103; 12 C. J. 806	681	Re Kollock, 165 U. S. 526	186
— v. Compagnie Gén. Transatlantique, 107 U. S. 59, 62	291	Re McIntosh, 211 N. Y. 265	440
— v. Ericson, 263 Ill. 368	441	Renick v. Boyd, 99 Pa. St. 555	253
— v. Fire Assoc., 92 N. Y. 311	184	Revere v. Boston Copper Co., 15 Pick. 351	240
— v. Flynn, 189 N. Y. 180	446	Rex v. Clark, R. & R. C. C. 358	208
— v. Gordon, 194 Ill. 560	373	— v. Smith, 6 C. & P. 151	208
— v. Harper, 91 Ill. 357, 367	291	Rhines v. Wentworth, 209 Mass. 585	656
— v. N. Y., etc., Ry. Co., 84 N. Y. 565, 568, 569	253	Rhode Island v. Mass., 12 Pet. 657, 736-738	502
— v. Steele, 231 Ill. 340	446	Rice v. Bradford, 180 Mass. 545	369
— v. Tax and Assessment Commissioner, 11 Hun, 505, 507	20	— v. Nat'l Bank of the Comm., 126 Mass. 300, 304	240
People ex rel. Daily Credit Service Corp. v. May, 162 App. Div. (N. Y.) 215	14	— v. The Governor, 207 Mass. 577	122
Perkins v. Westwood, 226 Mass. 268, 271	482, 609	Richardson v. Essex Institute, 208 Mass. 311	118
Peters v. Stone, 193 Mass. 179, 186	43, 44	Ripley v. Brown, 218 Mass. 33	92
Phelon v. Granville, 140 Mass. 386	360	Riverbank Improvement Co. v. Bancroft, 209 Mass. 217	580
Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620	506	— v. Chadwick, 228 Mass. 242, 486, 488, 511, 540	511, 540
Phillips v. Allen, 2 Allen, 453	208	Rixey's Executors v. Commonwealth, 125 Va. 337	422
— v. Metropolitan Park Commis., 215 Mass. 502, 506	350	Robbins v. Townsend, 20 Pick. 345, 350	328
Pierce v. Drew, 136 Mass. 75, 79	348	Robinson v. Brown, 126 Fed. Rep. 429	272
— v. Stevens, 205 Mass. 219, 369, 370, 371	371	— v. Richardson, 13 Gray. 454	289
Plumley v. Mass., 155 U. S. 461	431	Robinson's Case, 131 Mass. 376, 379	135, 136
Pool v. Boston, 5 Cush. 219	317	Rockport v. Webster, 174 Mass. 385, 392	467
Porter v. United States, 106 U. S. 607, 611	296	Rohan v. Sawin, 5 Cush. 281, 284	295

	PAGE		PAGE
Round <i>v.</i> Police Commissioner, 197 Mass. 218 . . . . .	548	Soon Hing <i>v.</i> Crowley, 113 U. S. 703, 710 . . . . .	523
Rubber Co. <i>v.</i> Goodyear, 9 Wall. 788, 804 . . . . .	262	South Carolina <i>v.</i> United States, 199 U. S. 437, 448 . . . . .	503
Russell <i>v.</i> Howe, 12 Gray, 147 . . . . .	681	Sprague <i>v.</i> Dorr, 185 Mass. 10 . . . . .	467
— <i>v.</i> M'Lellan, 14 Pick. 63 . . . . .	240	— <i>v.</i> Minon, 195 Mass. 581, 583 . . . . .	467
Russo <i>v.</i> Chapin, 197 Mass. 64 . . . . .	570	S. S. White Dental Mfg. Co. <i>v.</i> Com- monwealth, 212 Mass. 35, 38 . . . . .	253
Sackett <i>v.</i> Sanborn, 205 Mass. 110, 112	316	Standard Fashion Co. <i>v.</i> Magrane Houston Co., 258 U. S. 346 . . . . .	485
Salisbury Land & Improvement Co. <i>v.</i> Commonwealth, 215 Mass. 371, 373 . . . . .	587	Standard Oil Co. <i>v.</i> Federal Trade Commission, 273 Fed. 478 . . . . .	488
Sanborn <i>v.</i> Carleton, 15 Gray, 399, 403	355	— <i>v.</i> United States, 221 U. S. 1 . . . . .	485
Sanders <i>v.</i> Partridge, 108 Mass. 556, 558 . . . . .	137	Staniels <i>v.</i> Raymond, 4 Cush. 314, 316 . . . . .	263, 551
Sanford <i>v.</i> Hampden Paint & Chemical Co., 179 Mass. 10 . . . . .	46	Stanley <i>v.</i> Colt, 5 Wall. 119, 169 . . . . .	71
San Francisco <i>v.</i> Lux, 64 Cal. 481 . . . . .	422	State <i>v.</i> Beardsley, 77 Fla. 803 . . . . .	422
Sargent <i>v.</i> Stetson, 181 Mass. 371 . . . . .	272	— <i>v.</i> Leland, 91 Minn. 321 . . . . .	42
Sawyer <i>v.</i> Davis, 136 Mass. 239 . . . . .	198	— <i>v.</i> McGough, 118 Ala. 159, 167 . . . . .	291
— <i>v.</i> State Board of Health, 125 Mass. 182, 192 . . . . .	406	— <i>v.</i> Ralston, 182 Ind. 150 . . . . .	232
Schaghticoke Powder Co. <i>v.</i> Greenwich & Johnsonville R.R., 183 N. Y. 306	212	— <i>v.</i> Sherman, 22 Ohio St. 411, 428	241
Schultz <i>v.</i> C. H. Quereau Co., 210 N. Y. 257 . . . . .	213	— <i>v.</i> Terra Haute, etc., R.R., 166 Ind. 580 . . . . .	524
Scott <i>v.</i> Willson, 3 N. H. 321, 325 . . . . .	298	State of Colorado <i>v.</i> Harbeck, 232 N.Y. 71 . . . . .	396
Shaw <i>v.</i> Ansaldi Co., Inc., 178 App. [N. Y.] Div. 589 . . . . .	264	State St. Trust Co. <i>v.</i> Treasurer & Re- ceiver General, 209 Mass. 373-378 . . . . .	160
Shea <i>v.</i> Mass. Benefit Assn., 160 Mass. 289, 295 . . . . .	172	Stephens <i>v.</i> Mayor of Booneville, 34 Mo. 323 . . . . .	422
— <i>v.</i> Parker, 234 Mass. 592 . . . . .	221	Stevens <i>v.</i> Episcopal Church History Co., 140 App. Div. [N. Y.] 570 . . . . .	264
Sheehan's Case, 122 Mass. 445 . . . . .	359	Stimson <i>v.</i> Brookline, 197 Mass. 568	157
Shrewsbury <i>v.</i> Boylston, 1 Pick. 105 . . . . .	210	Stone <i>v.</i> Street Commissioners, 192 Mass. 297 . . . . .	269
Silz <i>v.</i> Hesterberg, 211 U. S. 31 . . . . .	431	— <i>v.</i> Charlestown, 114 Mass. 214 . . . . .	184
Sinclair Refining Co. <i>v.</i> Federal Trade Commission, 276 Fed. 686 . . . . .	488	Storer <i>v.</i> Downey, 215 Mass. 273 . . . . .	440
Sklaroff <i>v.</i> Commonwealth, 236 Mass. 87 . . . . .	86	Story <i>v.</i> New York El. R. Co., 90 N. Y. 122 . . . . .	412
Sloan Shipyards Corp. <i>v.</i> United States Shipping Board Emergency Fleet Corp., 258 U. S. 546 . . . . .	676	Stoughton <i>v.</i> Baker, 4 Mass. 522, 530, 531 . . . . .	194, 355
Smith <i>v.</i> Higgins, 16 Gray, 251 . . . . .	239	Stoutenburgh <i>v.</i> Hennick, 129 U. S. 141 . . . . .	182, 185
— <i>v.</i> Northampton Bank, 4 Cush. 1, 12 . . . . .	422	Stroud <i>v.</i> Water Commissioners, 90 Conn. 412 . . . . .	178
Smyth <i>v.</i> Ames, 169 U. S. 466, 518, 519	506	Strout <i>v.</i> United Shoe Machinery Co., 215 Mass. 116, 119 . . . . .	225
Snook's Petition, 2 Hilt. (N. Y.) 566, 569 . . . . .	208	Studley <i>v.</i> Ballard, 169 Mass. 295, 296	318
Sohier <i>v.</i> Trinity Church, 109 Mass. 1, 17 . . . . .	71	Sullivan <i>v.</i> Kelly, 3 Allen, 148 . . . . .	208
Somerville <i>v.</i> Commonwealth, 225 Mass. 589, 592 . . . . .	129	Taber <i>v.</i> New Bedford, 177 Mass. 197	663
— <i>v.</i> Walker, 168 Mass. 388 . . . . .	482	Taft <i>v.</i> Adams, 3 Gray, 126, 130 424, 681	681
		Taunton & South Boston Turnpike Corp. <i>v.</i> Whiting, 10 Mass. 326, 336	386

	PAGE		PAGE
Tax Commissioner <i>v.</i> Putnam, 227		United States <i>v.</i> Jordan, 113 U. S.	
Mass. 522, 525 . . . . .	609	418 . . . . .	481
Taylor <i>v.</i> Beckham, 178 U. S. 548 . . . . .	681	— <i>v.</i> Lee, 106 U. S. 196, 204-208 . . . . .	505
Teele <i>v.</i> Bishop of Derry, 168 Mass.		— <i>v.</i> Mathews, 173 U. S. 381 . . . . .	318
341 . . . . .	69	— <i>v.</i> North Carolina, 132 U. S. 211,	
Texas <i>v.</i> Interstate Commerce Com-		220 . . . . .	232
mission, 258 U. S. 158 . . . . .	506	— <i>v.</i> Old Settlers, 148 U. S. 427, 463	523
Thacher <i>v.</i> Weston, 197 Mass. 143 . . . . .	43	— <i>v.</i> Palmer, 128 U. S. 262 . . . . .	366
Thomas <i>v.</i> Commonwealth, 215 Mass.		— <i>v.</i> Realty Co., 163 U. S. 427,	
369 . . . . .	212	440 . . . . . 233, 236, 481, 499	
— <i>v.</i> O'Sullivan, 6 Allen, 303 . . . . .	160	— <i>v.</i> Rykowski, 267 Fed. Rep. 866,	
— <i>v.</i> West Jersey R.R. Co., 101		871 . . . . .	290
U. S. 71 . . . . .	136	— <i>v.</i> Saunders, 120 U. S. 126 . . . . .	319
Thomson <i>v.</i> Pacific R.R., 9 Wall. 579,		— <i>v.</i> Standard Brewery, Inc., 251	
590 . . . . .	673	U. S. 210, 220 . . . . .	183
Thornton <i>v.</i> Marginal Freight Ry.,		— <i>v.</i> Strang, 254 U. S. 491 . . . . .	676
123 Mass. 32, 34 . . . . .	68	— <i>v.</i> United Verde Copper Co., 196	
Tile Guaranty & Surety Co. <i>v.</i> Idaho,		U. S. 207, 215 . . . . .	184, 188
240 U. S. 136 . . . . .	313	United States Housing Corp. <i>v.</i> Water-	
Torrey <i>v.</i> Millbury, 21 Pick. 64, 67 . . . . .	617	town, 113 Misc. Rep. (N. Y.) 679 . . . . .	677
Transportation Co. <i>v.</i> Chicago, 99 U. S.		Upshur <i>v.</i> Baltimore City, 94 Md. 743,	
635, 640 . . . . .	413	749 . . . . .	218
Treasurer and Receiver-General <i>v.</i>		Vanhorne's Lessee <i>v.</i> Dorrance, 2 Dall.	
City of Boston, 229 Mass. 83 228, 437		304, 308, 309 . . . . .	501
Trowbridge <i>v.</i> Schmidt, 82 Miss. 475 . . . . .	232,	Vaughan <i>v.</i> Street Commissioners, 154	
	233	Mass. 143, 145 . . . . .	422
Truax <i>v.</i> Raich, 239 U. S. 33, 37 . . . . .	142,	Veeder <i>v.</i> United States, 252 Fed. Rep.	
	143, 506	414, 418 . . . . .	284
Tucker <i>v.</i> Boston, 223 Mass. 478 . . . . .	477	Vicksburg <i>v.</i> Vicksburg Water Works	
Turner <i>v.</i> Dartmouth, 13 Allen, 291 . . . . .	157	Co., 202 U. S. 453 . . . . .	68
— <i>v.</i> Maryland, 107 U. S. 38 . . . . .	291	Vinton <i>v.</i> Welsh, 9 Pick. 87 . . . . .	194
United Shoe Machinery Corp. <i>v.</i>		Virginia <i>v.</i> West Virginia, 11 Wall. 39	502
United States, 258 U. S. 451 . . . . .	485	— <i>v.</i> West Virginia, 220 U. S. 1, 27	503
United States <i>v.</i> American Woolen		Waite <i>v.</i> Macy, 246 U. S. 606 . . . . .	183, 188
Co., 265 Fed. Rep. 401 . . . . .	254	Wales <i>v.</i> Belcher, 3 Pick. 508, 509,	
— <i>v.</i> A. Schrader's Son, Inc., 252		510 . . . . .	184, 353
U. S. 85 . . . . .	485, 487, 542	Walker <i>v.</i> Treasurer and Receiver Gen-	
— <i>v.</i> Beebe, 180 U. S. 343 . . . . .	170, 365	eral, 221 Mass. 600, 602 . . . . .	396, 460
— <i>v.</i> Boyer, 85 Fed. 425 . . . . .	498	Walls <i>v.</i> Midland Carbon Co., 254	
— <i>v.</i> Burns, 12 Wall. 246 . . . . .	366	U. S. 300 . . . . .	431
— <i>v.</i> Clallam County, Wash., 283		Ward <i>v.</i> Maryland, 12 Wall. 418, 428	497
Fed. 645 . . . . .	677	Ware <i>v.</i> Fitchburg, 200 Mass. 61 70, 119	
— <i>v.</i> Coghlan, 261 Fed. 425 . . . . .	677	Warren <i>v.</i> Pim, 66 N. J. Eq. 353 . . . . .	338
— <i>v.</i> Cruikshank, 92 U. S. 542, 549-		— <i>v.</i> Shook, 91 U. S. 704, 710 . . . . .	42
551 . . . . .	495	Washington <i>v.</i> Fairchild, 224 U. S. 510	486
— <i>v.</i> Des Moines Nav. & R. Co., 142		Watuppa Reservoir Co. <i>v.</i> Fall River,	
U. S. 510, 545 . . . . .	523	147 Mass. 548, 557, 564, 567 . . . . .	467
— <i>v.</i> Emery, Bird, Thayer Realty		Way <i>v.</i> Butterworth, 106 Mass. 75;	
Co., 237 U. S. 28 . . . . .	95	108 Mass. 509, 513 . . . . .	42
— <i>v.</i> George, 228 U. S. 14, 20 . . . . .	183,	Wayland <i>v.</i> Ware, 109 Mass. 248, 250	328
	184, 188	Wayman <i>v.</i> Southard, 10 Wheat. 1, 42	185
— <i>v.</i> Grimaud, 220 U. S. 506 . . . . .	186	Weeks <i>v.</i> Gibbs, 9 Mass. 74, 75, 76 . . . . .	421

	PAGE		PAGE
Weeks <i>v.</i> United States, 232 U. S. 383, 389-392 . . . . .	290	Willis <i>v.</i> Melvin, 53 N. C. 62 . . . . .	295
Welch <i>v.</i> Boston, 221 Mass. 155 . . . . .	460	— <i>v.</i> Standard Oil Co., 50 Minn. 290 . . . . .	291
— <i>v.</i> Swasey, 193 Mass. 364 . . . . .	440	Wilson <i>v.</i> Head, 184 Mass. 515, 518 . . . . .	239, 547
— <i>v.</i> Treasurer and Receiver Gen- eral, 223 Mass. 87, 92 . . . . .	460	— <i>v.</i> Mass. Inst. of Tech., 188 Mass. 565 . . . . .	26
West River B. Co. <i>v.</i> Dix, 6 How. 507 . . . . .	510	— <i>v.</i> New, 243 U. S. 332, 384 . . . . .	149, 506
Western Banking Co. <i>v.</i> Murray, 6 Ariz. 215 . . . . .	42	Wingate <i>v.</i> Orchard, 75 Fed. Rep. 241 . . . . .	272
Western Union Telegraph Co. <i>v.</i> Andrews, 216 U. S. 165 . . . . .	506	Winnisimmet Trust Inc. <i>v.</i> Libby, 232 Mass. 491, 492 . . . . .	44
Wheatland <i>v.</i> Boston, 202 Mass. 258 . . . . .	29	Winsor <i>v.</i> Mills, 157 Mass. 362 . . . . .	43
Wheeler <i>v.</i> New York, 233 U. S. 434 . . . . .	460	Winthrop <i>v.</i> Atty. Gen., 128 Mass. 258 . . . . .	68, 70, 92
Wheelwright <i>v.</i> Tax Commissioner, 235 Mass. 584, 586 . . . . .	369, 613	Wisconsin <i>v.</i> Pelican Ins. Co., 127 U. S. 265 . . . . .	396
White <i>v.</i> Chapin, 12 Allen, 516 . . . . .	157	Woodall <i>v.</i> Clifton, 1905, 2 Ch. 257 . . . . .	44
— <i>v.</i> Franklin Bank, 22 Pick. 181 . . . . .	340	Woodward <i>v.</i> Central Vermont Ry. Co., 180 Mass. 599 . . . . .	482, 483, 486
Whitney <i>v.</i> Hudson, 69 Mich. 189 . . . . .	517	— <i>v.</i> Worcester, 15 Gray, 19 <i>n</i> . . . . .	129
Whittaker <i>v.</i> Salem, 216 Mass. 483 . . . . .	474, 479, 482, 483, 486, 535, 537, 579, 653, 654	Worthing Corp. <i>v.</i> Heather, 1906, 2 Ch. 532 . . . . .	44
Whittenton Mills <i>v.</i> Upton, 10 Gray, 582, 585 . . . . .	240	Worthington <i>v.</i> London Guarantee, etc., Co., 164 N. Y. 81 . . . . .	199
Wilbraham <i>v.</i> Ludlow, 99 Mass. 587 . . . . .	408	Wright <i>v.</i> Dressel, 140 Mass. 147, 149 . . . . .	603
Wilgus <i>v.</i> Commonwealth, 9 Bush. (Ky.) 556 . . . . .	137	— <i>v.</i> Lyons, 224 Mass. 167 . . . . .	482
William Cramp & Sons Co. <i>v.</i> United States, 216 U. S. 494 . . . . .	170, 365	Wyeth <i>v.</i> Cambridge Board of Health, 200 Mass. 474, 481 . . . . .	181, 183, 188, 198, 447, 484
William Gilligan Co. <i>v.</i> Casey, 205 Mass. 26, 31 . . . . .	620	Wyoming <i>ex rel.</i> Wyoming Agricul- tural College <i>v.</i> Irvine, 206 U. S. 278 . . . . .	106
Williams <i>v.</i> Acton, 219 Mass. 520, 524 . . . . .	421	Young <i>v.</i> Duncan, 218 Mass. 346, 351 . . . . .	536
— <i>v.</i> Milton, 215 Mass. 1 . . . . .	460	— <i>v.</i> Jewell, 201 Mass. 385 . . . . .	620
— <i>v.</i> Talladega, U. S. 404, 419 . . . . .	673	Zonne <i>v.</i> Minneapolis Syndicate, 220 U. S. 187 . . . . .	95
— <i>v.</i> Rose, 218 Fed. Rep. 898 . . . . .	272		

# OPINIONS

OF

J. WESTON ALLEN, ATTORNEY-GENERAL.

---

## CIVIL SERVICE — SUPERVISOR AND ASSISTANT SUPERVISOR OF ACCOUNTS — OFFICERS — APPROVAL OF GOVERNOR AND COUNCIL.

The supervisor and assistant supervisor of accounts are officers, within the meaning of R. L., c. 19, § 9, since their duties are public and not merely clerical, and involve in their performance the exercise of some portion of the sovereign power.

They are also officers whose appointment is subject to confirmation by the Executive Council, within the meaning of R. L., c. 19, § 9, and therefore they may be appointed without compliance with the civil service law and rules.

You ask whether, in view of my opinion of December 20, in relation to certain employees in the office of the Commissioner of State Aid and Pensions, the supervisor and assistant supervisor of accounts are officers whose appointment is subject to confirmation by the Executive Council, within the meaning of R. L., c. 19, § 9, and therefore may be appointed without compliance with the civil service law and rules.

To the Com-  
missioner of  
Civil Service.  
1921  
January 3.

The offices of supervisor and assistant supervisor of accounts were created by St. 1908, c. 597, § 3, as amended by Gen. St. 1919, c. 210, which provides as follows: —

The auditor, with the consent of the governor and council, shall appoint a supervisor, and an assistant supervisor of accounts, whose salaries shall be fixed by him, with the approval of the governor and council.

The duties of the supervisor of accounts are defined by St. 1908, c. 597, § 4, as follows: —

Under the direction of the auditor, the supervisor of accounts shall direct and control all the accounts in all departments, and shall have full authority to prescribe, regulate and make changes in the methods of

keeping and rendering accounts, and shall see that they are properly maintained, and that all items are correctly allocated between capital receipts and disbursements and operating revenue and expense. He shall establish in each department a proper system of accounts, which shall be uniform so far as is practicable. He shall establish a proper system of accounting for stores, supplies and materials, and may provide, where he deems it necessary, for a continuing inventory thereof. He may inquire into the methods of purchasing and handling such stores, supplies and materials by the departments, reporting to the auditor such changes as may in his judgment be deemed wise. He shall provide such safeguards and systems of checking as will insure, so far as is possible, the proper collection of all revenue due the commonwealth; and, where he deems it necessary, shall provide that forms and receipts shall be numbered consecutively, making the departments responsible for their use or cancellation.

The duties of the assistant supervisor of accounts are not defined by statute. The word "assistant," however, implies that his duties are to assist the supervisor of accounts, and, in the absence of the supervisor, or during a vacancy in that office, temporarily to discharge those duties.

It is my opinion that the supervisor and assistant supervisor of accounts are "officers," within the meaning of that word as used in R. L., c. 19, § 9; that is, that they are officers whose duties are in their nature public and not merely clerical, involving in their performance the exercise of some portion of the sovereign authority of the State. *Attorney-General v. Tillinghast*, 203 Mass. 539. Their duties, as established by the statute quoted above, give them a large measure of responsibility. The fact that those duties are performed under the direction of the Auditor does not change their character.

In *Attorney-General v. Tillinghast*, *supra*, p. 544, it was said: —

The fact that the authority of one officer is subordinate to that of another does not prevent him from being an officer. A subordinate or inferior officer is none the less an officer.

There is a further question whether these officers are "officers . . . whose appointment is subject to confirmation by the executive council," within the language of R. L., c. 19, § 9.

A former Attorney-General held, with respect to St. 1904, c. 409, § 4, by which the State Forester was "empowered, subject to the approval of the governor and council, to hire such assistants as he may need in the performance of his duties, and to fix their salaries," that the approval required by the statute was rather an approval of a scheme for proposed appointments and expenditures than a confirmation of the particular appointment to be made. III Op. Atty.-Gen. 129. But in the present instance the offices are created and the duties defined by statute. It is my opinion that the statute creates these offices, and that the required consent and approval of the Governor and Council relate to the individuals appointed by the Auditor and the salaries fixed by him.

I therefore advise you that said supervisor and assistant supervisor of accounts may be appointed without compliance with the civil service law and rules.

---

#### BONDS — REGISTERS OF PROBATE — PREMIUMS.

Registers of probate, being charged with the duty of receiving money which they are required to pay over to the Treasurer and Receiver-General, by G. L., c. 217, §§ 18 and 20, are officials charged with the duty of receiving and disbursing money, under G. L., c. 30, § 17, and are therefore entitled to be reimbursed for amounts paid by them for premiums on their official bonds, required by G. L., c. 217, § 12.

The Commonwealth is under obligation to reimburse registers of probate for payments of premiums on their official bonds, although no appropriation has been made and no money is available therefor.

You ask my opinion whether registers of probate are entitled to have the premiums on their official bonds paid by the Commonwealth.

To the  
Auditor.  
1921  
January 4.

G. L., c. 30, § 17, provides as follows: —

If an official having custody of property of the commonwealth, or charged with the duty of receiving or disbursing money, is required to give bond to the commonwealth for the faithful discharge of his duty, the commonwealth shall reimburse him for the amount paid by him to a surety company for becoming surety on his official bond. Premiums on all surety bonds paid by the commonwealth shall be paid out of the appropriations for expenses of the several officers and departments.

Each register of probate is required to give bond to the Treasurer and Receiver-General for the faithful performance of his official duties. The statute (G. L., c. 217, § 12) is as follows:—

Each register shall give bond to the state treasurer for the faithful performance of his official duties, in a sum not less than one thousand nor more than ten thousand dollars, as ordered by the judge, with one or more sureties approved by him.

It is therefore necessary to determine whether a register of probate is “an official having custody of property of the commonwealth, or charged with the duty of receiving or disbursing money.”

The duties of the register are defined in said G. L., c. 217. Among those duties are the following:—

SECTION 15. The register shall have the care and custody of all books, documents and papers pertaining to his court, or deposited with the records of insolvency or filed in the registry of probate, and shall carefully preserve them and deliver them to his successor.

SECTION 18. The register shall furnish copies of records or other papers in his custody and shall collect the legal fees therefor.

SECTION 20. The register shall annually, on the first Mondays of January, April, July and October, account for and pay over to the state treasurer all fees and compensation which have been received by him otherwise than by salary.

While it may be questioned whether, under section 15, registers are given custody of property of the Commonwealth, it is clear that under sections 18 and 20 they are charged with the duty of receiving money which they are required to pay over directly to the Treasurer and Receiver-General. Registers are therefore such officials as are described in G. L., c. 30, § 17. Accordingly, they are entitled to be reimbursed for amounts paid by them for premiums on their official bonds.

It should be noted that the situation with respect to clerks of county courts is entirely different. Their bonds are given and accounting made to the treasurers of the respective counties



(G. L., c. 221, §§ 12, 32). Their salaries also are paid by the counties (G. L., c. 221, § 97), while the salaries of registers are paid by the Commonwealth (G. L., c. 217, § 35).

G. L., c. 30, § 17, also provides that "premiums on all surety bonds paid by the commonwealth shall be paid out of the appropriations for expenses of the several officers and departments;" and you inform me that no appropriation for the expenses of registers of probate is made, and therefore no money will be available for paying the premiums. It is my opinion that these facts would not relieve the Commonwealth of its obligation to the registers, declared by section 17, and that the Legislature should make an appropriation for the purpose of paying such premiums.

---

SALARIES OF OFFICERS AND EMPLOYEES OF THE COMMONWEALTH  
— INCREASES — EMPLOYEES IN MASSACHUSETTS NAUTICAL  
SCHOOL.

G. L., c. 30, § 47, prohibits any increase in the salaries of officers and employees classified under G. L., c. 30, §§ 45-50, and exceeding or to exceed \$1,000, authorized thereunder between December 1 and May 31 in any year, from taking effect until June 1 following.

It follows that no increase can be made which will be retroactive.

You ask me to advise you whether or not the Board of Commissioners of the Massachusetts Nautical School may increase the salaries of ship's steward and ship's cook at the present time, and also whether, if such increases can be made, they may be retroactive.

G. L., c. 30, §§ 45-50 (Gen. St. 1918, c. 228; Gen. St. 1919, c. 320), provide for the classification of certain State offices and positions.

Section 45 defines the offices and positions subject to the statute as "all appointive offices and positions in the government of the commonwealth, except those in the judicial branch and those in the legislative branch other than the additional clerical and other assistance in the sergeant-at-arms' office."

Section 47 is as follows: —

To the Executive Council.  
1921  
January 4.

Recommendations for increases in the salaries of officers and employees whose salaries are required by the preceding section to be fixed in accordance with such classification and specifications, shall be submitted in the first instance to the supervisor, and if approved by him shall take effect upon notice by the supervisor to the commissioner of civil service and the state auditor. If the supervisor does not approve a proposed increase in salary, he shall report the recommendation of the department or institution with his own recommendation to the governor and council whose decision shall be final, except that the governor and council shall not grant an increase in salary greater than that recommended by the department or institution. Increases in salaries granted under this section shall conform to such standard rates as may be established by rule or regulation in accordance with the preceding section. No increase in salary shall be granted under this section unless an appropriation sufficient to cover such increase has been granted by the general court in accordance with estimates for the budget filed as required by law. No increase in a salary exceeding or to exceed one thousand dollars, authorized under this section between December first and May thirty-first, both inclusive, in any year shall take effect until June first following or such later date as may be fixed by the department or institution recommending such increase, with the approval of the supervisor or the governor and council.

The plain language of the last sentence in section 47 prohibits any increase in salary exceeding or to exceed \$1,000, authorized between December 1 and May 31 in any year, from taking effect until June 1 following.

It appears from the papers you enclosed that the salaries about which you ask, if increased as proposed, would each exceed \$1,000. It is clear, therefore, that by virtue of the express prohibition in section 47 such increase may not take effect until June 1, 1921.

MOTOR VEHICLES — CHAUFFEURS.

- A person operating his own motor vehicle who receives compensation for any work or services in connection therewith is a chauffeur, within the meaning of Gen. St. 1915, c. 16.
- A person operating his own motor vehicle who transports stock or materials in any way directly connected with his business, and who does not receive compensation for such transportation, is not a chauffeur.
- A salesman working for the owner of a motor vehicle, who uses it in connection with the business of his employer, may be a chauffeur if he receives a portion of his pay for services in driving the motor vehicle.
- Such salesman may, at the discretion of the commission, be exempted from the definition of chauffeur and be designated as an operator, if his principal occupation is that of salesman and if his employer is a manufacturer or dealer.

The following questions have been submitted to this department for answer: —

To the  
Commissioner  
of Public  
Works,  
1921  
January 7.

1. Does the owner of a motor vehicle, who operates the same in connection with his business, transporting stock or materials or tools or finished products in any way directly connected with his business, require a chauffeur's license?

2. Does a salesman working for the owner of a motor vehicle, who uses the said motor vehicle for purposes of transportation of goods from place to place, or for the purpose of carrying samples, or for any other use in connection with the business of the owner of the motor vehicle, require a chauffeur's license?

The word "chauffeur" was defined in St. 1909, c. 534, § 1, as follows: —

"Chauffeur" shall mean any person who operates a motor vehicle *other than his own* and who directly or indirectly receives pay or any compensation whatsoever for any work or services in connection with motor vehicles, except only manufacturers, agents, proprietors of garages and dealers, who do not operate for hire. An employee of a manufacturer or a dealer whose principal occupation is that of a salesman may at the discretion of the commission be exempted from this definition and be designated as an operator.

This statute was amended by Gen. St. 1915, c. 16, by striking out the words "other than his own."

The purpose of the amendment apparently was to include within the definition of "chauffeur" persons operating their

own motor vehicles who receive compensation for any work or services in connection with motor vehicles, with the exceptions stated in the act. For example, a taxicab driver owning his own vehicle would not be a chauffeur, within the terms of the original act, but would be a chauffeur according to the act as amended. But one who operates his own motor vehicle in connection with his business, transporting stock or materials or tools or finished products in any way directly connected with his business, unless he receives compensation for such transportation, is not, in my opinion, a chauffeur, within the amended definition. Therefore, with the qualification stated, I answer your first question in the negative.

A salesman working for the owner of a motor vehicle, who uses it for purposes of transportation of goods from place to place, or for the purpose of carrying samples, or for any other use in connection with the business of his employer, may be a chauffeur if he receives a portion of his pay for his services in driving the motor vehicle. But if his principal occupation is that of a salesman, and if his employer is a manufacturer or a dealer, he may, by the terms of the statute, at the discretion of the commission, be exempted from the definition of chauffeur and be designated as an operator.

---

#### COMMISSION APPOINTED BY THE GENERAL COURT — EXPENDITURES — REPORT.

Where the General Court has appointed a commission to investigate and to report on a fixed date, the General Court may extend the time for filing or may receive the report after the date fixed.

Expenditures from money appropriated for expenses incurred in the preparation of the report may be authorized, although the expenses are incurred after the time fixed for filing, if they are incurred before the report is actually received.

By Resolves of 1920, chapter 85, an unpaid special commission was created "to investigate the question of prenatal and postnatal aid and care for mothers and their children." That resolve contains the following provision: —

Said commission shall report its recommendations to the special session of the general court not later than November fifteenth, nineteen hundred and twenty, with drafts of such legislation, if any, as is recommended, with an estimate of the expense of carrying out its recommendations and may expend for the purposes of said investigation and report such sums as the general court shall appropriate.

By St. 1920, c. 629, item 27*k*, a sum not exceeding \$8,000 was appropriated for expenses of said commission.

I am informed by you that the commission proceeded with the investigation, but that it did not "report its recommendations to the special session of the general court not later than November fifteenth, nineteen hundred and twenty," as directed; and that you have received bills for personal services of employees covering the period from December 1 to December 11, inclusive.

You ask my opinion as to the propriety of passing bills incurred after November 15, in this case, or after the date on which the commissions are required to report, in other cases.

The term of office of the commission to which your inquiry is specifically directed and its authority to investigate the questions stated are expressly limited by the resolve to a period of time expiring on Nov. 15, 1920.

By the established custom in the General Court, if a committee or commission is not ready to make its report within the time directed, application may be made to the General Court for an extension of time within which the General Court will receive such report; but the General Court may receive the report after the date fixed by act or resolve creating the commission when no application has been made and no order passed extending the time.

In the present instance, application could not be made to the special session to extend the time fixed for filing the report beyond November 15, because the special session of the Legislature did not convene until after that date. The report was filed on December 7, which was the day when the special session convened, and the report was received and acted upon on that date.

While the report could have been filed with the clerk of either branch of the General Court, if the commission had been prepared to report, on November 15 or any prior date, the report was in fact filed on the earliest day upon which any action could be taken upon it.

I understand you raise the question generally whether a commission appointed to investigate and report to the General Court on a fixed day may expend money thereafter without authorization so to do by an act or resolve of the General Court. The expenditure of public money, except for certain special purposes, cannot be authorized upon an order, but only by act or resolve which receives the signature of the Governor. It is to be observed, however, that your inquiry relates only to the payment of money the expenditure of which has already been authorized and the money appropriated. The authority of the Legislature to receive a report after the date upon which it was ordered to be filed cannot be questioned. If, therefore, the Legislature by an order extends the time during which it will receive the report, I am of the opinion that any proper expenses incurred in the preparation of the report must be held to have the sanction of the Legislature, and to be legally incurred, if they are within the amount appropriated. This necessarily follows from the fact that the reason for extending the time, in the ordinary case, is because the report is unfinished and further work remains to be done by the commission. The same rule would generally apply in a case where the General Court receives the report after the date fixed for filing, without having extended the time, although this might not be true in all cases.

It is not necessary to determine whether a commission, after the date originally fixed for filing its report, could expend money already appropriated to conduct further investigations or for other purposes not incidental to the preparation of its report. A case might arise where further investigation was necessary, owing to new conditions arising after the investigation had been concluded and when the report was about to be filed. The need of further investigation might be the reason for extending the

time for receiving the report. I leave this question to be determined if occasion may arise.

A further question is presented by reason of the fact that the special commission in the present case filed its report on the seventh day of December, and you state that you have received "bills for personal services of employees covering the period from December 1 to December 11, inclusive." The filing of its report terminated the life of the commission, and it could not thereafter authorize any expenditures. If, however, prior to the filing of the report any proper expenditure was authorized for services which could not be completed at the time of filing, such as the return of papers and documents used by the commission, such an expenditure would be properly incurred, and should be paid.

---

INSURANCE — AGREEMENT BY COMPANY GUARANTEEING CREDIT  
REPORT AS TRUE STATEMENT OF FACTS SET FORTH — RE-  
SPONSIBILITY FOR ACCURACY OF OWN WORK — CONTRACT  
OF INSURANCE.

An agreement by a company guaranteeing that a credit report, at the date of such report, is a true statement of the facts which it sets forth, and limiting the responsibility of the company to any error of statement, advice or recommendation which misleads or causes loss to the subscriber, and further stipulating that payment shall be for the actual net loss caused by such error, is not a contract of insurance.

You have requested my opinion as to whether any features contained in a form of agreement of The Credit Clearing House involve insurance. The agreement reads as follows: —

To the Com-  
missioner of  
Insurance.  
1921  
January 10.

THE CREDIT CLEARING HOUSE.

—————, *President.*  
*Subscription for* ———

GUARANTEED CREDIT SERVICE.

In consideration of \$ ———, paid in advance, the subscriber hereto employs The Credit Clearing House with the use of its system of credit clearances and its guaranteed credit service to furnish the subscriber

with warranted recommendations, reports, or expert advice concerning transactions and accounts of an aggregate amount not exceeding \$———, upon which inquiries shall be made during the period ending ————, 192 , upon the conditions and warranties set forth hereinafter.

#### CORRECT INFORMATION.

The subscriber agrees that at the time he makes inquiries he will give correct information as to the amount of order, amount owing, terms and manner of payment. The subscriber agrees to file with The Credit Clearing House a list of his active accounts, to report all orders received, to answer all requests made by The Credit Clearing House for information within forty-eight hours from the time when the requests are received, to file on the 15th of each month a list of all past due accounts, and to notify said The Credit Clearing House immediately of any unfavorable changes in accounts advised upon. The subscriber further agrees to substantiate the information which he contributes, and to treat as confidential all recommendations or information received from the said The Credit Clearing House and to use same exclusively for his own use and benefit.

#### GUARANTEED SERVICE.

The Credit Clearing House warrants the accuracy and reliability of its service, and agrees to accept full responsibility for any error of statement, advice or recommendation made in writing by itself or any agent negligently or otherwise which misleads and causes loss to the subscriber; *provided, however, that in each transaction the following conditions are fulfilled:—*

1. The subscriber relied fully on said recommendation and acted without change in any detail or condition as directed therein, and was misled thereby, and suffered loss as a consequence.

2. The subscriber in case of claim of loss returns said original written recommendation given by The Credit Clearing House with the forms for oath and conditions for proof of loss printed thereon filled out and sworn to and mailed by registered post to said The Credit Clearing House, four-forty Fourth Avenue, New York City, within thirty days after the account becomes due or payable, or when requested by The Credit Clearing House.

3. There is no dispute, counterclaim, set-off, or defense whatsoever to said account or debt; and

4. The account or debt is assigned without reservation and delivered to The Credit Clearing House within thirty days after becoming due or payable, and in case of unfavorable change of said account, and when requested by The Credit Clearing House.



It is also agreed that this warranty be construed as a representation of accurate services and a promise to assume liability for net losses to the subscriber caused by error in misleading recommendations, reports or advice of The Credit Clearing House or its agents.

#### PAYMENT OF LOSSES.

It is agreed that The Credit Clearing House shall pay to the subscriber upon the terms and conditions herein set forth the actual net loss to the subscriber caused by error, advice or recommendation made in writing by itself or any agent negligently or otherwise which misleads and causes loss to the subscriber as hereinafter described and determined. The method of determining the amounts, if any, to be paid by the Company to the subscriber shall be as follows:—

1. All discounts, and credits of any nature, whether running from the debtor to the subscriber or to The Credit Clearing House, plus ——— per cent for collection fees and profits shall be deducted from the loss claimed.

2. The subscriber shall be paid said actual net loss less ——— per cent within ——— days after the loss is finally determined by The Credit Clearing House.

3. The subscriber will prove that he filed his claim of loss and assignment of the debt to The Credit Clearing House by producing written acknowledgment on the part of The Credit Clearing House or its agents of receipts of said claim and assignment.

In order to make recovery for loss simple and direct, it is understood that the sworn proof of loss and the assignment shall be deemed *prima facie* evidence of error or mistake on the part of The Credit Clearing House or its agents. The Credit Clearing House is hereby permitted to reserve to itself, in case the subscriber fails to fully co-operate the right to terminate the subscription at any time on the repayment of the amount for the unexpired portion of this contract.

G. L., c. 175, § 47, cl. 10, provides that a company may be incorporated —

To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts, or otherwise to insure against loss or damage from the failure of persons indebted to the insured to meet their liabilities.

The statute defines insurance to be “an agreement by which one party for a consideration promises to pay money or its

equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest." G. L., c. 175, § 2.

The essential element of insurance is that the insured receives indemnity from destruction, loss or injury by reason of the happening of events without his control or the control of the insurer. 1 Op. Atty.-Gen. 545.

The agreement set forth in full above cannot be considered insurance, since it involves no risk or hazard which is insured against, nor, employing the words of the statutory definition, the destruction, loss or injury of something in which the member has an interest. By the terms of the agreement The Credit Clearing House merely guarantees that the report which it makes is, at the date of such report, a true statement of the facts which it sets forth, and limits its responsibility to any error of statement, advice or recommendation which misleads or causes loss to the subscriber, and stipulates that payment shall be for the actual net loss caused by such error of such statement, advice or recommendation.

Your attention is called to the case of *People, ex rel. Daily Credit Service Corporation v. May*, 162 App. Div. [N. Y.], 215. In that case the facts were that a business corporation assumed a responsibility to its clients for the accuracy of its reports, and provided the measure of damages in case they proved to be inaccurate, and not otherwise, the damages not to exceed in any event the amount of credit extended by the client of the corporation to the customer on whom the corporation reported, and not to exceed the amount of loss actually sustained by the client. The court held in that case that such a corporation was not carrying on an insurance business. In discussing the case the court says:—

This is not insurance; it is merely permitting the corporation to charge for and receive the value of its services in their relation to the responsibility assumed. It does not guarantee the solvency of any one; it merely guarantees that the report which it makes is, at the date of such report, a true statement of the facts which it sets forth, and limits its responsibility to such report, stipulating that in no event shall the damages exceed

the amount of the credit which may be extended upon the basis of such report. This does not assume to pay any damages where the report is truthful and accurate; it does not assume any liability whatever for the credit extended, unless the credit was extended upon the basis of a report which was in fact inaccurate and false in material respects, and then it merely seeks to have the amount of the damages fixed by contract rather than by actions at law. It is one thing to guarantee the accuracy of one's own work, and quite another to assume the risk of future insolvency.

The court, in summing up, points out that the corporation gives to its customers a guaranteed basis of fact: —

It says, in a given case, John Smith on the 1st day of January, 1914, had \$10,000 in a certain bank; he had a stock of goods inventoried at \$15,000 on which there was a chattel mortgage for \$5,000; he owned a store building of the value of \$5,000, on which there was a lien of \$2,500, and had bills receivable of \$3,000, and bills payable of \$2,700. On this basis the merchant determines whether he wants to accept the risk of giving credit, and with this the corporation has no relation whatever. If the facts are as stated the corporation has performed its contract and has no further responsibility in the premises; the risk — the insurance of the credit — is either carried by the merchant or by some corporation having a charter to carry on an insurance business.

This line of reasoning, in my opinion, is sound, and applies with equal force to the agreement which you have submitted to me. Accordingly, I am of the opinion that the agreement in question will not, if executed, be a contract of insurance.

---

#### TAXATION — INCOME TAX — DISTRIBUTION OF CAPITAL OF DOMESTIC CORPORATION IN LIQUIDATION.

Where a domestic corporation transfers all its assets to another, receiving in exchange cash and securities which it distributes among its stockholders in liquidating its affairs, the stockholders receive no income which is taxable under either Gen. St. 1916, c. 269, § 2, or § 5, cl. (c), now G. L., c. 62, § 1, and § 5, cl. (c), respectively.

A Massachusetts corporation transferred all its assets to a newly organized Massachusetts corporation, receiving in exchange therefor cash and securities of the new corporation. The old corporation liquidated and wound up its affairs by a distribu-

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
January 11.

tion of the proceeds of the exchange among the stockholders. You ask whether the stockholders should be taxed on account of that transaction at 3 per cent, under Gen. St. 1916, c. 269, § 5, cl. (c), or whether the transaction comes within the terms of section 2 of the act.

Section 2 provides as follows: —

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax shall be taxed at the rate of six per cent per annum:

(b) Dividends on shares in all corporations and joint stock companies organized under the laws of any state or nation other than this commonwealth, . . .

No distribution of capital, whether in liquidation or otherwise, shall be taxable as income under this section; but accumulated profits shall not be regarded as capital under this provision.

Section 5 provides: —

Income of the following classes received by any inhabitant of this commonwealth during the calendar year prior to the assessment of the tax, shall be taxed as follows:

(c) The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not the said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum; . . .

It is my opinion that the transaction does not result in income to the stockholders, taxable under section 5, clause (c). The stockholders have not bought, sold or exchanged their stock. They have merely received a distribution in liquidation of their proportionate shares of the assets of the old corporation. The form of the transaction distinguishes this case from *Osgood v. Tax Commissioner*, 235 Mass. 88. There the plaintiff stockholder exchanged shares of one corporation for shares of another, organized for the purpose of succeeding to the business of the former. In the present instance the stock of the old corporation

was not exchanged, but its assets, in the form of cash and securities of the new corporation, were distributed among its stockholders in dissolution.

Moreover, there seems to be no provision in section 2 authorizing the taxation of this distribution to the stockholders. Clause (b) provides for taxation of dividends on shares of foreign corporations, but neither dividends nor other distributions of profits of a domestic corporation are taxable under that section.

---

#### COLLECTION AGENCY — BRANCH OFFICE — ADDITIONAL BOND.

A person who conducts a collection agency and who has filed with the Treasurer and Receiver-General a bond in compliance with G. L., c. 93, § 24, is not required, upon opening a branch office, to file an additional bond.

You request my opinion on the following facts: —

A person doing business under the name and style of "Pilgrim Service," of Springfield, Mass., filed a collection agency bond for \$5,000, under the provisions of St. 1910, c. 656, as amended by Gen. St. 1919, c. 101 (now G. L., c. 93, §§ 24-28). He now desires to open a branch office in the city of Worcester, and has requested a duplicate of the certificate of acceptance of this bond, as issued by the Treasury Department, so that he may have proof of compliance with the law. Your specific question is whether or not the statute permits a person or persons to open a branch office to do a collection agency business without furnishing a bond for each branch.

To the  
Treasurer and  
Receiver  
General.  
1921  
January 12.

The statutory provisions relative to the giving of a bond by persons conducting collection agencies are now found in G. L., c. 93, §§ 24-28, inclusive. Section 24 of said chapter provides, so far as is pertinent to your question, that no person shall conduct a collection agency, collection bureau or collection office, or engage in the Commonwealth solely in the business of collecting or receiving payment for others of any account, bill or other indebtedness, or engage in the Commonwealth solely in soliciting the right to collect or receive payment for another of any account, bill or other indebtedness, or advertise for or solicit in print the right to

collect or receive payment for another of any account, bill or indebtedness, unless such person, or the person, partnership, association or corporation for whom he may be acting as agent, has on file with the State Treasurer a good and sufficient bond.

Section 27 provides: —

The state treasurer shall keep a record, open to public inspection, of the bonds filed with him under the preceding section, with the names, places of residence, places of business of the principals and sureties, and the name of the officer before whom the bond was executed or acknowledged.

It is my opinion that a person conducting a collection agency, and who has filed with your office a bond in compliance with the law, is not required, upon opening a branch, to file with you an additional bond.

---

#### TOWNS — PUBLIC LIBRARY — SUPPORT.

A library in a town, to which the inhabitants have free access and of which they have the use, although it is not a town library owned and controlled by the town, is a public library for the maintenance of which a town may appropriate money under G. L., c. 40, § 5, cl. (18), and c. 140, § 172.

Mass. Const. Amend. XLVI, § 2, does not prohibit the use of public money for a library primarily intended for the use of the public, and to which the public is freely admitted.

To the Director  
of Public  
Libraries.  
1921  
January 24.

The Worthington Library was organized as a corporation on June 28, 1900, under P. S., c. 40, § 16, “to establish and maintain a public library, with reading rooms communicating therewith,” in the town of Worthington. It is not a town library owned and controlled by the town, but is, however, a library to which the inhabitants have free access and of which they have the use. You ask whether it is a library for the maintenance of which a town may appropriate money.

G. L., c. 40, § 5, provides as follows: —

A town may at any town meeting appropriate money for the following purposes:

(18) For the establishment, maintenance or increase of a public library therein, and for the erection or provision of suitable buildings or

rooms therefor, or for maintaining a library therein to which the inhabitants have free access and of which they have the use, and for establishing and maintaining a public reading room in connection with and under the control of the managers of such library.

G. L., c. 140, § 172, provides as follows: —

Money received by a county treasurer under the preceding sections relating to dogs, and not paid out for damages, shall, in January, be paid back to the treasurers of the towns in proportion to the amounts received from such towns, and the money so refunded shall be expended for the support of public libraries or schools. In Suffolk county, money so received by the town treasurer and not so paid out shall be expended by the school committee for the support of public schools.

Similar provisions of the Revised Laws were considered in an opinion of a former Attorney-General (II Op. Atty.-Gen. 316). That opinion reads as follows: —

Your letter of January 16 requests the opinion of the Attorney-General upon the question whether a town may lawfully appropriate money received from dog licenses to the support and maintenance of any library to which the inhabitants have free access and of which they have the use, although such library is not owned and controlled by the town.

R. L., c. 102, § 163, provides that money received under the provisions relating to dogs shall be paid back to the treasurers of the cities and towns, "and the money so refunded shall be expended for the support of public libraries or schools;" R. L., c. 25, § 15, provides that a town may appropriate money for the following purposes, among others: "For the establishment, maintenance or increase of a public library therein, and for the erection or provision of suitable buildings or rooms therefor;" and "For maintaining a library therein, to which the inhabitants have free access and of which they have the use, and for establishing and maintaining a public reading room in connection with and under the control of the managers of such library."

The question is, whether a library not owned and controlled by the town, yet open to the free access and use of the inhabitants of the town, is a public library within the meaning of c. 102, § 163. The apparent argument against including such a library within the phrase "public library" is that in c. 25, § 15, above quoted, the Legislature seems to make a distinction between such library and a public library, by providing, in separate paragraphs, for their maintenance.

I am of opinion, however, that no such distinction was intended, and that, whether a library is owned by the town or not, dog license money

may be appropriated to it so long as the inhabitants of the town have free access to it.

The situation has changed since this opinion was rendered only by the passage of Mass. Const. Amend. XLVI, § 2, providing, in part, that —

No grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town.

In the debates in the Constitutional Convention, vol. I, pp. 144-146, the question of the meaning of the words "free public libraries" was discussed. It was stated that the words were intended to designate libraries founded and primarily intended for the public, which are open to the public and in which the public has a beneficial interest; that the object of the exception was to allow appropriations of public money to libraries wholly or in part under private control.

The words "public library" are not technical and are not generally limited to designate merely a library under public control, but are generally used as descriptive of any library to which the general public has free access. *People v. Tax and Assessment Commissioner*, 11 Hun, 505, 507; 32 Cyc. 1248.

I am of opinion that the words "free public libraries," as used in this amendment, are used in the sense as defined in the opinion hereinbefore quoted and the other authorities cited above, and that they include all libraries which, as in the case of the Worthington Library, are primarily intended for the use of the public and to which the public is freely admitted.



BOXING EXHIBITIONS — PAYMENT TO THE COMMONWEALTH.

The words "total gross receipts" in G. L., c. 147, § 40, mean the total amount actually received and retained, and in determining that amount sums refunded on account of the illness of a boxer should be deducted.

A social and athletic club gave a boxing exhibition at which there was taken in from the sale of tickets or from admission fees the sum of \$6,184. Because of the illness of the boxer who was to take part in the main bout, the principal feature of the exhibition was not given. You state that the licensees claim that they have refunded a greater portion of the fees collected to the persons attending such exhibition, and that they also issued tickets to others good for the next exhibition. You ask me to advise you whether or not the 5 per cent due the Commonwealth on the total gross receipts of this entertainment, under G. L., c. 147, § 40, should be computed on the sum taken in at the exhibition.

To the Commissioner of Public Safety.  
1921  
January 25.

G. L., c. 147, § 40, provides, in part, as follows: —

Every licensee holding or conducting any such boxing or sparring match or exhibition shall, within seventy-two hours after its conclusion, pay to the state treasurer a sum equal to five per cent of the total gross receipts from the sale of tickets or from admission fees; . . .

I cannot pass on the question of fact whether a portion of the receipts was refunded to persons attending the exhibition, and whether tickets were issued to others good for the next exhibition. Assuming, however, that such was the case, I advise you that the words "total gross receipts," as used in G. L., c. 147, § 40, mean the total amount actually received and retained; that in determining that amount any sums returned to persons in attendance should be deducted; and that the 5 per cent should be calculated on the balance. It is obvious that where the admission was not returned, but tickets were issued for the next exhibition, the tax on the admission paid is due, but there will be no further tax on these tickets, as they will be used without any further payment for admission.

STATE HIGHWAYS — CERTIFICATE OF LAYOUT — ORDER OF  
TAKING — LAND OUTSIDE EXISTING PUBLIC WAY — STATU-  
TORY NOTICE — INDEMNIFICATION OF THE COMMONWEALTH.

The preliminary requirements referred to in G. L., c. 79, § 1, in the case of the laying out of State highways, are found in G. L., c. 81, § 5.

There is no objection to incorporating the order of taking in the certificate required in laying out a State highway, if it is necessary to take land for the purposes of a State highway outside the limits of an existing public way.

In cases where it is necessary to take land outside the limits of an existing public way, notice should be given in compliance with G. L., c. 79, § 8; in such cases, also, the provisions as to the indemnification of the Commonwealth are found in G. L., c. 81, § 7.

You request my opinion upon several questions arising out of the interpretation of the provisions in the General Laws concerning the taking of land by eminent domain for the purposes of State highways.

*First.* — You call attention to G. L., c. 79, § 1, which provides, in part, that —

A board of officers upon whom authority to take real estate by eminent domain on behalf of any body politic or corporate has been conferred by law, having first complied with all the preliminary requirements prescribed by law, may adopt an order of taking.

You state that in the laying out of municipal or county ways there are various provisions as to certain preliminary requirements which are to be complied with before adopting an order of taking. In the case of State highways, however, you state that there seem to be no provisions of law which prescribe any arrangements preliminary to the order of taking for a State highway. Therefore, you ask as to what bearing the words "having first complied with the preliminary requirements prescribed by law" have upon any orders of taking which may be adopted by the Department of Public Works.

To this question I reply that section 1, above quoted, contains the general provisions as to the taking of real estate by eminent domain on behalf of any body politic or corporate, and the words "having first complied with all the preliminary re-

quirements prescribed by law" are general, and apply to those boards of officers as to whom preliminary requirements are prescribed by the statutes. The preliminary requirements in the case of the laying out of State highways are found in G. L., c. 81, § 5.

*Second.* — You ask whether your department should include an order of taking of any land in your layout with the order that the department signs making the layout; in other words, if the certified papers required in laying out a State highway under the provisions of G. L., c. 81, § 5, can be included in the order of taking prescribed by G. L., c. 79, § 1, or whether there should be two separate documents.

G. L., c. 81, § 5, provides that —

If the division [of highways] determines that public necessity and convenience require that such way should be laid out or be taken charge of by the commonwealth, it shall file in the office of the county commissioners for the county where the way is situated a certified copy of a plan thereof, a copy of the petition therefor, and a certified copy of a certificate that it has laid out and taken charge of said way in accordance with said plan, and shall file in the office of the clerk of each town a copy of the plan showing the location of the portion lying in each town and a copy of the certificate that it has laid out and taken charge of said highway in accordance with said plan, and thereafter said way shall be a state highway.

Section 7 provides, in part: —

If it is necessary to acquire land for the purposes of a state highway outside the limits of an existing public way, the division may take the same by eminent domain on behalf of the commonwealth under chapter seventy-nine.

Section 1 of said chapter 79 provides, in part, that —

A board of officers upon whom authority to take real estate by eminent domain on behalf of any body politic or corporate has been conferred by law, having first complied with all the preliminary requirements prescribed by law, may adopt an order of taking, which shall contain a description of the land taken sufficiently accurate for identification, and shall state the interest therein taken.

In my opinion, there is no objection to the incorporating in the certificates required in the laying out of a State highway under the provisions of section 5 of chapter 81, the order of taking prescribed by section 1 of chapter 79, if it is necessary in a given case to take land for the purposes of a State highway outside the limits of an existing public way.

*Third.* — You state that, under chapter 79 read in connection with chapter 81, it is difficult to see how the owner will receive any notification of the taking of his land until after the taking has been made and damages awarded.

In reply to this question I would state that, as has been pointed out before, in case it is necessary to take land outside the limits of an existing public way, the Division of Highways is to take the same by eminent domain under the provisions of G. L., c. 79, which is the chapter containing the general provisions relative to eminent domain. Section 8 of said chapter contains the provisions relative to notice. Compliance by the Division of Highways with the requirements set forth in that section will give the proper legal notification to the owner of property taken.

*Fourth.* — You ask if, in making a layout for a State highway, it is necessary to acquire land privately owned, it is sufficient to have the county, city or town indemnify the State, they in turn assuming all responsibility for land damages by that indemnification, or, in case of a taking involving such property, must the Commonwealth proceed under eminent domain and take the land itself, and, under section 7 of chapter 81, be indemnified by the county, city or town which guarantees reimbursement.

In reply to this question, I would state that the provisions as to the indemnification of the Commonwealth in cases where it is necessary to take land outside the limits of an existing public way are found in G. L., c. 81, § 7, which reads as follows: —

The mayor, if so authorized by the aldermen, or the selectmen, if so authorized by the town, may stipulate in writing, in behalf of the city or town to indemnify and save harmless the commonwealth against all claims and demands for damages which may be sustained by any persons whose property has been taken for, or has been injured by the laying out or alteration of, any highway which the division proposes to lay

out and construct or alter as a state highway, and thereupon such city or town shall be liable ultimately for the amount of any verdict against the commonwealth for such damages, and for costs, and the amount thereof may be recovered by the commonwealth in contract.

---

COMMONWEALTH — LAND OF MASSACHUSETTS INSTITUTE OF  
TECHNOLOGY — EMINENT DOMAIN.

The Massachusetts Institute of Technology may sell to the Commonwealth the bare legal title to land conveyed to it by St. 1861, c. 183, but the land when so conveyed would be subject to the equitable easements arising from the restrictions contained in that act.

The erection of a memorial column or a statue would not be inconsistent with the maintenance of a square "as an open space."

St. 1861, c. 183, does not limit or infringe upon the right of the Commonwealth to exercise the power of eminent domain.

You request my opinion upon the following questions: —

To the Soldiers  
and Sailors  
Memorial  
Commission.  
1921  
January 28.

1. Has the Massachusetts Institute of Technology the right to convey to the Commonwealth the "westerly two-thirds of the square between Newbury, Boylston, Berkeley and Clarendon Streets on the Back Bay in the city of Boston," to be used as a site for a memorial to Massachusetts soldiers and sailors who have served the nation in time of war?

2. Has the Commonwealth the right to take said property for the said purpose by eminent domain?

I shall discuss these questions in the order in which I have just stated them.

1. The land in question was conveyed to the Massachusetts Institute of Technology (hereinafter called the institute) by St. 1861, c. 183. Section 3 of said act contained a description of the square on which the buildings of the institute and of the Boston Society of Natural History were subsequently erected, and provided that it should be "reserved from sale forever, and kept as an open space, or for the use of such educational institutions of science and art as are hereinafter provided for", — *i.e.*, the institute and the Boston Society of Natural History. The act contained certain other restrictions, among them one to the effect that the institutions named should not erect buildings covering more than one-third of the area granted to them, re-

spectively (§ 7), and provided that, under certain circumstances, the Commonwealth might re-enter.

By St. 1903, c. 438, § 1, the rights remaining in the Commonwealth with reference to the westerly two-thirds of the square above described, which is the parcel under discussion, were released to the institute in the following language:—

All the proprietary right, title and interest by way of reversion, right of re-entry or otherwise, remaining to the Commonwealth in that tract of land, being the westerly two-thirds of the square between Newbury, Boylston, Berkeley and Clarendon streets on the Back Bay in the city of Boston, which the Massachusetts Institute of Technology is authorized by chapter one hundred and eighty-three of the acts of the year eighteen hundred and sixty-one to hold and improve, is hereby released to the said Massachusetts Institute of Technology, its successors and assigns.

By section 2 the restriction contained in St. 1861, c. 183, § 7, was cancelled or discharged “subject to the rights, if any, of other parties and to the restrictions hereinafter set forth.”

In 1904 the question arose whether the act of 1903 operated to permit the institute to cover with its buildings more than two-thirds of the area previously granted to it. The court held that it did not, because third persons had bought lots facing the said square in reliance upon the said restriction remaining in force, and the restriction therefore constituted an equitable easement appurtenant to said lots. *Wilson v. Mass. Inst. of Technology*, 188 Mass. 565; see also *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242.

In *Mass. Inst. of Technology v. Boston Society of Natural History*, 218 Mass. 189, it was held that the words “shall be reserved from sale forever, and kept as an open space, or for the use of such educational institutions” created a similar equitable easement. Construing the words quoted, the court said that they did not prevent a sale of the “bare legal title,” but they did prevent a sale of the land that would defeat the purpose of the quoted words, which purpose was that the land should either be used by the educational institutions named in the act of 1861, or should be left as “an open space.”

The circumstances of the neighborhood may have changed considerably since these restrictions were created. If so, that fact might prevent a specific enforcement of the restrictions, but they would still remain in existence and would be the subject of pecuniary compensation. *Mass. Inst. of Technology v. Boston Society of Natural History, supra*, 196.

It follows from what has been said that the institute may reconvey to the Commonwealth the "bare legal title" to this land, but when so reconveyed, the land would be subject to the equitable easements arising from the restrictions contained in the act of 1861. That is to say, the land would no longer be used by the institute, and therefore the Commonwealth would be required to maintain it "as an open space"; or, if the restrictions should be held not to be specifically enforceable on account of changes in the neighborhood, and the Commonwealth should erect buildings upon the land, then the Commonwealth would be obliged to compensate the owners of the equitable easements created by the various restrictions.

Your letter does not state what type of memorial is proposed. I am of the opinion that the erection of a memorial column or statue would not be inconsistent with the maintenance of the square "as an open space." However, that statement raises a question not susceptible of being definitively answered without all the details of the proposed memorial before me.

I answer your first question affirmatively, but with the proviso that a reconveyance to the Commonwealth would, nevertheless, leave the land subject to all restrictions contained in the act of 1861.

2. "The act (of 1861) did not attempt to bargain away or infringe upon the future exercise of any sovereign rights, and the cases which deal with such a state of facts have no application here." *Mass. Inst. of Technology v. Boston Society of Natural History, supra*, 191. That is to say, the Legislature did not intend, by enacting the statute of 1861, to limit or infringe the right of the Commonwealth to exercise later the power of eminent domain in respect to this property. If the act had been intended to have the effect suggested, it would probably have been unconstitutional

in that respect. *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20.

Your second question, therefore, should be answered in the affirmative. But it should be added that if the land in question should be taken by eminent domain for a purpose which, when carried into effect, would violate the restrictions contained in the act of 1861, it would be necessary to compensate all owners of equitable easements in the land taken. These owners are "owners of the lots abutting on Boylston, Clarendon and Newbury streets and facing the square in question. They [the restrictions] were not intended for the benefit of the lots fronting on Berkeley Street, which had been sold before the passage of the act." *Mass. Inst. of Technology v. Boston Society of Natural History*, *supra*, 196.

---

#### TAXES — ABATEMENT — STATUTORY REMEDY EXCLUSIVE.

An application for abatement of taxes claimed to have been illegally assessed, made more than six months after payment, cannot be granted.

The remedies provided by statute for the correction of a tax illegally assessed are exclusive, and no relief can be had unless the method prescribed is followed.

To the  
Treasurer and  
Receiver Gen-  
eral.  
1921  
January 31.

As chairman of the Board of Appeal, application has been made to you for an abatement of taxes assessed upon the West End Street Railway under Gen. St. 1918, c. 252, and Gen. St. 1919, c. 342, upon the ground that in view of the decision in *Attorney-General v. Boston & Albany R.R. Co.*, 233 Mass. 460, the company was not a corporation doing business for profit, and the assessment was consequently illegal. This application was not made until Jan. 13, 1921, which was more than six months after the payment of both said taxes. You ask my opinion whether, assuming that the taxes were improperly assessed, the Board of Appeal may properly grant the application.

The remedies provided by Gen. St. 1918, c. 255, are an application within ten days to the Board of Appeal for a correction of the tax (§ 4), and a petition within six months to the Supreme Judicial Court for an abatement (§ 7). This latter section provides that "said petition shall be the exclusive remedy."



By Gen. St. 1919, c. 342, § 1, the statute of the previous year was revived and re-enacted, and thereby the same remedies were provided for a correction or abatement of a tax assessed for that year.

Another remedy for abatement of an illegal tax is provided by Gen. St. 1919, c. 146 (G. L., c. 58, § 27), which is as follows:—

If it shall appear that a legacy and succession tax or a tax or excise upon a corporation, foreign or domestic, which has been paid to the commonwealth, was in whole or in part illegally exacted, the commissioner may, with the approval of the attorney general, issue a certificate that the party aggrieved by such exaction is entitled to an abatement, stating the amount thereof. The treasurer shall pay the amount thus certified to have been illegally exacted, with interest, without any appropriation therefor by the general court. No certificate for the abatement of any tax shall be issued under this section unless application therefor is made to the commissioner within the time prescribed by law for beginning legal proceedings to obtain a repayment of the tax. This section shall be in addition to and not in modification of any other remedies.

The Supreme Judicial Court has held in a number of cases that where a tax is illegally assessed, and even if the tax is unconstitutional and wholly void, the remedy provided by statute is exclusive, and the taxpayer can have no relief unless he follows the method prescribed. *Wheatland v. Boston*, 202 Mass. 258; *Attorney-General v. East Boston Co.*, 222 Mass. 450; *International Paper Co. v. Commonwealth*, 232 Mass. 7; *Lecer Bros. Co. v. Commonwealth*, 232 Mass. 22.

By St. 1920, c. 462, the Legislature provided for an abatement of excise taxes levied upon foreign corporations under St. 1914, c. 724, which subsequently was held by the Supreme Court of the United States to be unconstitutional.

It is my opinion that the Board of Appeal has no authority to allow an abatement of the taxes in question, and that the only remedy which the company has is by application to the Legislature for relief.

## PUBLIC HEALTH — DISPENSARY — LAST NATIONAL CENSUS.

G. L., c. 111, § 57, requiring cities and towns having a population of 10,000 or more as determined by the last national census, to establish and maintain a dispensary, applies whenever by a national census a town has a population of 10,000 inhabitants.

To the Com-  
missioner of  
Public Health,  
1921  
January 31.

You have asked if a town whose population according to the 1920 census is more than 10,000, but which was below that number in the previous census, is subject to the provisions of St. 1911, c. 576, as amended by St. 1914, c. 408.

The present law is to be found in G. L., c. 111, § 57, and reads, in part, as follows:—

Every city, and every town having a population of ten thousand or more, as determined by the last national census, shall establish and maintain within its limits a dispensary for the discovery, treatment and supervision of needy persons resident within its limits and afflicted with tuberculosis.

In the act of 1914 instead of the words “last national census” were the words “latest United States census.” It does not appear that any substantive change was made in the law by the general revision, and the words “last” and “latest” are presumed to be synonymous. There is nothing to indicate that a particular census enumeration was intended to determine the duties of towns. If such had been the case the language of the statute would have been such as to make it clear. The reasonable interpretation is that the Legislature intended to exempt towns of less than 10,000 inhabitants from the operation of the law, but when the growth of a town reached that figure, the statute would automatically operate.

It is my opinion that the law applies whenever by a national census a town has a population of more than 10,000 inhabitants.

CIVIL SERVICE — ASSIGNMENT TO SPECIAL DUTY — NECESSITY  
FOR EXAMINATION.

A person designated by the Commissioner of Public Safety to investigate into the causes of fires, pursuant to G. L., c. 148, § 4, need not take a civil service examination, since such designation is an assignment to special duty rather than an appointment or promotion.

You inquire whether the person designated by the commissioner pursuant to G. L., c. 148, § 4, must take a competitive civil service examination as the condition of such designation. You state that with the concurrence of the Supervisor of Administration you allow to the person so designated \$300 a year to make up for the traveling and meal expenses received by fire-prevention inspectors upon active duty, in which the person designated does not participate because his work confines him to the office.

To the Commissioner of  
Public Safety.  
1921  
January 31.

The material part of G. L., c. 148, § 4, provides as follows: —

The marshal shall investigate or cause to be investigated the cause and circumstances of all fires of which he has notice, as provided in the preceding section, by which property has been damaged, or destroyed, especially to ascertain whether the fire was caused by carelessness or design. For these purposes the marshal or some person designated by the commissioner may summon and examine on oath any person supposed to know or have means of knowing any material facts touching the subject of investigation. . . .

It casts upon the marshal a duty to investigate or cause to be investigated the cause and circumstances of certain fires. If the marshal himself makes the investigation, there is, of course, no need for designating some other person to make it. Thus the duty to be performed by the person designated, if a designation be made, is both special and temporary. Even though a standing designation be made, which I infer is your intention, there appears to be nothing in the act which prevents alteration thereof at your pleasure. Under these circumstances, such designation appears to be an assignment to perform a special duty rather than an appointment to a position or a promotion. I am therefore of opinion that such designation is not subject to the rules of the civil service, and does not require a civil service examination.

PRISONER — SUCCESSIVE SENTENCES — PAROLE — EXPIRATION  
OF SENTENCE.

A prisoner in a jail or house of correction, whose sentence for another offence to the same institution is to begin "from and after expiration of" the first sentence, is eligible to parole upon the first sentence when not more than six months of it remain unexpired.

The successive sentences must be considered separately.

A parole upon the first sentence does not cause that sentence to expire.

Where a prisoner is paroled upon the first sentence, he cannot be committed to the institution upon the second sentence until the first has expired.

To the Com-  
missioner of  
Correction.  
1921  
February 1.

You state the following facts:—

A person was committed to the Suffolk County House of Correction on Dec. 28, 1919, for a term of twelve months. Within a few days thereafter he was sentenced to two months in the house of correction "from and after expiration of" the first sentence. You do not state by what courts these sentences were imposed.

Upon these facts you ask my opinion whether the penal institutions commissioner of the city of Boston has power, with the permission of the probation officer and the district attorney, to parole said prisoner from the first sentence.

The statute governing the matter was formerly R. L., c. 225, § 121, as amended by St. 1902, c. 227, and by St. 1912, c. 158, § 1. It is now G. L., c. 127, § 141, which provides:—

A probation officer may, with the consent of the county commissioners, or, in Suffolk county, of the penal institutions commissioner of Boston, investigate the case of any person imprisoned in a jail or house of correction upon a sentence of not more than six months, or upon a longer sentence of which not more than six months remain unexpired, or for failure to pay a fine, for the purpose of ascertaining the probability of his reformation if released from imprisonment. If after such investigation he recommends the release of the prisoner, and the court which imposed the sentence, or, if the sentence was imposed by the superior court, the district attorney, certifies a concurrence in such recommendation, the county commissioners or the penal institutions commissioner may, if they consider it expedient, release him on parole, upon such terms and conditions as they may prescribe, and may require a bond for their fulfilment. The surety upon any such bond may at any time take and surrender his principal, and the county commissioners or the penal institu-

tions commissioner may at any time order any prisoner released by them to return to the prison from which he was released. This section shall not apply to persons held upon sentences of the courts of the United States.

The meaning of the quoted language is clear where the prisoner is confined under one sentence only. The question raised, however, is whether, or how, the section applies to the case of a prisoner confined under one sentence and later sentenced for another offence to further confinement in the same institution "from and after expiration of" the first sentence.

The first possible solution that suggests itself is that, for purposes of parole, the two sentences shall be added together and considered as one. Section 133 of the same chapter makes express provision for this in the case where a convicted person is confined under two or more sentences in the State Prison, but no such provision is contained in section 141. Its omission from that section may be due to the fact that persons confined in the State Prison are often confirmed criminals, while persons confined in jails and houses of correction are usually not of that character. At all events, the provision contained in section 133 has not been included in section 141, and it is therefore impossible to apply the latter section as if that provision were included.

It follows that the prisoner's successive sentences must be considered separately. When they are so considered, the question arises whether the fact that a second sentence awaits the prisoner upon expiration of the first renders section 141 inapplicable. I am of the opinion that it does not. The section not only omits special provision for such a case, but it provides no express exception when it arises. After examination of other sections of the same chapter, I am unable to find that the Legislature intended an exception to be implied.

Considering the first sentence separately, as it must be considered, and in the absence of either a special provision or an exception when a second sentence awaits the prisoner upon expiration of the first, I am of opinion that the prisoner in question may be paroled upon his first sentence when not more than six months of it remain unexpired.

I am aware that this conclusion leads to an unusual result. A parole upon the first sentence does not cause it to "expire," as is shown by the fact that the person paroled may be returned to confinement upon a breach of parole. The effect of parole is merely to enlarge the prison to the limits within which the person released is required to remain. Consequently, if the prisoner is paroled upon his first sentence, he cannot be required to begin immediately confinement under his second. As that confinement is to begin from the *expiration* of his first sentence, a restraint of his liberty under the second sentence, prior to such expiration, that is, prior to twelve months from and after Dec. 28, 1919, would be illegal. Unless pardoned for the second offence, therefore, or again paroled, he would be required to return to prison Dec. 28, 1920, to serve his second sentence.

In my annual report to the General Court for the year 1920 I have directed attention to the fact that confusion has arisen where persons are confined upon two or more sentences in penal institutions of the Commonwealth other than the State Prison, and that the opinions of officials charged with the administration of our State and county institutions differ as to the interpretation which should be given to the laws upon this subject. Although the intent of the Legislature is not clear from the language of the statutes, the foregoing opinion states the law as I understand it. It may well be that the Legislature, in passing the act, now embodied in G. L., c. 127, § 141, did not have before it for consideration the application of the law in the case of successive sentences.

CORPORATIONS — FOREIGN CORPORATIONS — DOING BUSINESS —  
 APPOINTMENT OF UNREGISTERED FOREIGN TRUST COMPANY  
 AS TRUSTEE OF REAL ESTATE UNDER A WILL.

A trust company organized under the laws of another State which has not been authorized to do business in this Commonwealth, as required by G. L., c. 167, § 37, cannot be appointed trustee under a will disposing of real estate situated in this Commonwealth.

*Quare*, whether, under G. L., c. 172, § 52, a foreign trust company authorized to do business in this Commonwealth, as required by G. L., c. 167, § 37, could be appointed trustee under a will disposing of real estate situated in this Commonwealth.

You inquire whether a trust company organized under the laws of another State, which has not received authority to transact business in this State, may be appointed and become trustee under a will of property, real and personal, situated in this Commonwealth.

To the Com-  
 missioner of  
 Banks.  
 1921  
 February 3.

G. L., c. 167, § 37, provides, in part: —

No foreign banking association or corporation shall transact business in this commonwealth until it has received a certificate from the board of bank incorporation, authorizing it so to do. . . .

There can be no doubt that a trust company organized under the laws of another State is a “foreign banking association or corporation,” within the meaning of this provision. The question therefore becomes whether such corporation, if it acts as trustee under a will of property situated in this State, is “transacting business in this commonwealth.” In my opinion, it is. G. L., c. 172, §§ 1 and 52, provide: —

SECTION 1. Whenever used in this chapter, unless the context otherwise requires the words “trust company” or “such corporation” mean a trust company incorporated as such in the commonwealth, and the “commissioner” means the commissioner of banks.

SECTION 52. Such corporation may be appointed executor of a will, codicil or writing testamentary, administrator with the will annexed, administrator of the estate of any person, receiver, assignee, guardian, conservator or trustee under a will or instrument creating a trust for the care and management of property, under the same circumstances, in

the same manner, and subject to the same control by the court having jurisdiction of the same, as a legally qualified individual. Any such appointment as guardian shall apply to the estate and not to the person of the ward. Such corporation shall not be required to receive or hold property or money or assume or execute a trust under this section or of section fifty without its assent.

The corporate power of a domestic trust company to act as executor or trustee is derived from these provisions of law. *Old Colony Trust Co. v. Wallace*, 212 Mass. 335. See also *First National Bank v. Fellows, Attorney-General*, 244 U. S. 416. When a domestic trust company acts as trustee pursuant to these powers, it is manifestly transacting a part of the corporate business which it is authorized by law to transact. If a foreign trust company should act as trustee, it would likewise be "transacting business." As a trust of land situated in this Commonwealth is subject to the control of our courts, the principal business of the trust must be transacted here. It follows that a foreign trust company could not act as trustee of land situated in this State without "transacting business in this commonwealth," within the meaning of G. L., c. 167, § 37. As the trust company in question has not received authority to transact business in this Commonwealth, it follows that it cannot become such trustee or act as such.

You do not ask, and I leave for future determination, whether a foreign trust company, admitted to transact business in this State under G. L., c. 167, § 37, *et seq.*, could even then be appointed an executor, administrator or trustee in this commonwealth, in view of the fact that G. L., c. 172, § 52, expressly applies to domestic trust companies only.



## GARAGE — ABUTTER.

A parcel of land does not abut upon another unless it touches it.

A parcel of land across the street from and opposite the site of a proposed garage is not land abutting thereon, within the meaning of St. 1913, c. 577, § 1, as amended by St. 1914, c. 119, § 1.

St. 1913, c. 577, § 1, as amended by St. 1914, c. 119, § 1, provides as follows: —

To the Com-  
missioner of  
Public Safety.  
1921  
February 4.

In the city of Boston no building shall be erected for, or maintained as a garage for the storage, keeping or care of automobiles until the issue of a permit therefor by the board of street commissioners of the city after notice and a public hearing upon an application filed with said board. The application for the permit shall be made by the owner of the parcel of land upon which such building is to be erected or maintained and shall contain the names and addresses of every owner of record of each parcel of land abutting thereon.

You request my opinion whether a parcel of land across the street from and opposite the site of a proposed garage is "land abutting thereon," within the meaning of the section quoted.

In *Corpus Juris*, vol. I, p. 377, an abutter is defined as "one whose property abuts, is contiguous, or joins at a border or boundary, as where no other land, road, or street intervenes." At page 376, "to abut" is defined as "to terminate or border; to be contiguous; to meet." The case of *Hutchinson v. Danley*, 88 Kan. 437, is referred to, where it was said that "abutting" signifies a closer proximity than "adjacent."

I am of opinion that one parcel of land does not abut upon another unless it touches it.

When lots lying upon a street are bounded by the curb line, it is clear that a parcel of land on one side of the street does not abut upon a parcel lying opposite to it on the other side of the street.

The presumption is, however, that where land is bounded by a street, the boundary line is the middle of the street. Where that presumption is borne out by the fact, it is true in a narrow and rather technical sense that lots opposite each other are contiguous. But as a practical matter, the two lots are separated

by the street, for the owners can make no use of the ground over which the street extends that would interfere with its use by the public. The lots abut upon the street rather than upon each other. The definition from *Corpus Juris*, above quoted, includes the phrase "as where no other land, road, or street intervenes," and makes no distinction in the case where lot lines run to the middle of the street.

In *Holt v. Somerville*, 127 Mass. 408, it was held that where a street lay between certain lots and a park, the former did not abut upon the latter. The court did, indeed, remark that the boundary of the park was the side of the street, but they did not intimate that the result would have been otherwise if such had not been the case.

St. 1913, c. 577, § 3, as amended by St. 1914, c. 119, § 2, provides:—

At the time and place specified in the notice for the hearing the said board shall hear all parties interested, and after giving consideration to the interests of all owners of record notified, and the general character of the neighborhood in which is situated the land or building referred to in the application, shall determine whether or not the application shall be granted and a permit issued.

By the two sections quoted a distinction has clearly been made between abutters and "parties interested." The owner of a lot across the street from the site of a proposed garage is a party interested, but not an abutter.

I am of the opinion that your question should be answered in the negative.

---

#### TAXES — RATE OF INTEREST.

Under G. L., c. 59, § 57, where taxes remain unpaid after the expiration of three months from the date on which they became payable, interest is chargeable from the due date at the rate of 6 per cent upon a tax not exceeding \$200, and at the rate of 8 per cent upon that portion of the tax in excess of \$200.

You state that A's tax in one town in one year was \$201, and that the whole amount remains unpaid at the end of three months from and after the due date. You then ask my opinion upon the following question:—

Is interest to be charged from the due date at 6 per cent on \$200 and at 8 per cent on \$1, or is it to be charged at 8 per cent on \$201.

You have my opinion (V Cp. Atty.-Gen., 649) in which the statute (St. 1920, c. 460, now G. L., c. 59, § 57) is set out in full. I quote here, therefore, only that part of section 57 which is directly involved:—

At the rate of six per cent per annum on *all taxes* and, by way of penalty, at the additional rate of two per cent per annum on the *amount* of all taxes *in excess* of two hundred dollars assessed to any taxpayer, in any one city or town, if such taxes remain unpaid after the expiration of three months from the date on which they become payable.

I have italicized certain words of the quoted portion of the section in order to indicate a very significant fact: in the clause prescribing a 6 per cent rate, the word “amount” is not used, but it is used in the clause prescribing an 8 per cent rate. The 6 per cent rate is clearly to be applied to “all taxes.” If the Legislature had intended to apply the 8 per cent rate to “all taxes in excess of two hundred dollars” after expiration of three months, it would probably have said so by employing the phrase quoted, which would have been similar to the language used in the preceding clause. But it inserted the word “amount”. If the 8 per cent rate is to be applied to all taxes, provided only that they be in excess of \$200, then the clause prescribing an 8 per cent rate is construed as if the word “amount” had been omitted entirely. It is an elementary principle of statutory construction, however, that every word of a statute shall be given meaning and effect if possible. In view of the language employed in the preceding clause, effect can be given to the word “amount” only by connecting it with the phrase “in excess,” so that the 8 per cent rate is to be applied only to that amount by which a tax is in excess of \$200.

A more compelling reason for the above interpretation of the statute is the discrimination which would result if the language of the statute were construed otherwise. There appears to be no sound reason why a person whose tax is \$199 should pay interest at the rate of 6 per cent, and one whose tax is \$201 should

pay interest at the rate of 8 per cent upon the whole sum. To hold that all taxpayers shall pay at the rate of 6 per cent on the amount of their aggregate taxes up to \$200, and at the rate of 8 per cent on any amount in excess of \$200, is a more equitable basis of payment.

For the reasons stated, I am of the opinion that, in the case you suggest, interest is chargeable from the due date on \$200 at 6 per cent and on \$1 at 8 per cent.

---

#### BANKS — PRIVATE BANKS — POSSESSION BY COMMISSIONER OF BANKS.

Concerns known as private banks, which are engaged in the business of taking deposits of money and making loans therefrom, as described in G. L., c. 169, § 1, are doing a banking business.

A concern engaged in such business is a "bank," within the definition of G. L. c. 167, § 1, and if it has violated the law, the Commissioner of Banks may take possession of its property and business, under G. L., c. 167, § 22.

You have asked me to advise you whether, under G. L., c. 167, § 22, you may take possession of the property and business of persons engaged in the selling of steamship tickets for transportation to or from foreign countries, which, in conjunction therewith, carries on the business of receiving deposits of money for safe keeping or for the purpose of transmitting the same, or equivalents thereof, to foreign countries, or for some other purpose, so that this business comes under the description contained in G. L., c. 169, § 1. The concern is not bonded or licensed as required by said chapter 169. It also transacts business under a name or title which contains the word "bank" as descriptive of said business, within the prohibition of G. L., c. 167, § 12. You also ask generally whether you may take possession of the property and business of individuals or corporations known as private banks, which engage in the business of receiving deposits of money and making loans therefrom, under the provisions of G. L., c. 167, § 22.

G. L., c. 167, § 22, is as follows: —

Whenever it shall appear to the commissioner that any bank has violated its charter or any law of the commonwealth, or is conducting its business in an unsafe or unauthorized manner, or that its capital is impaired, or if it shall refuse to submit its books, papers and concerns to the inspection of the commissioner or of his duly authorized agents, or if any officer of such bank shall refuse to be examined on oath by the commissioner or his deputies touching its concerns, or if it shall suspend payment of its obligations, or if from an examination or from a report provided for by law the commissioner shall have reason to conclude that such bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue business, the commissioner may take possession forthwith of the property and business of such bank and may retain possession thereof until the bank shall resume business or until its affairs shall finally be liquidated as herein provided.

Assuming that the persons in question have violated some law of the Commonwealth or in some way come within the terms of section 22, the question remains whether they are doing a banking business.

The word "bank," as used in G. L., c. 167, is defined in section 1 as follows:—

"Bank," a savings bank, co-operative bank, trust company or any person, partnership, association or corporation, incorporated or *doing a banking business* in the commonwealth, subject to the supervision of the commissioner of banks.

The precise question is whether any private bank as above described is a "person, partnership, association or corporation, incorporated or doing a banking business in the commonwealth."

Is the taking of deposits of money and making loans therefrom doing a banking business?

The banking business has three different elements, — issuing negotiable notes, discounting notes and receiving deposits. Originally it consisted only of receiving deposits for safe keeping, and even now a bank is primarily a place for the deposit of money, and the receiving of the money of others is a distinctive feature of the business of banking. The exercise of any one or more of the three functions named constitutes a banking

business. *Bank for Savings v. The Collector*, 3 Wall. 495, 512; *Oulton v. Savings Institution*, 17 Wall. 109, 118, 119; *Warren v. Shook*, 91 U. S. 704, 710; *Auten v. United States National Bank*, 174 U. S. 125, 141, *et seq.*; *Reed v. People*, 125 Ill. 592; *Western Investment Banking Co. v. Murray*, 6 Ariz. 215; *Dunn v. State*, 13 Ga. Ap. 314; *State v. Leland*, 91 Minn. 321; *Hamilton National Bank v. American L. & T. Co.*, 66 Neb. 67; *Kiggins v. Munday*, 19 Wash. 233; *MacLaren v. State*, 141 Wis. 577; *Parker v. Marchant*, 1 Younge & C. Ch. 290, 300. In *Engel v. O'Malley*, 219 U. S. 128, 136, the court (Holmes, J.) held in a case involving the constitutionality of a State statute regulating the receipts of deposits of money, entitled "private banking," that the receipt of money by a bank is a branch of the banking business.

Decisions interpreting the meaning of the word "bank," as used in a note describing the place where the note is payable, have no significance. *Way v. Butterworth*, 106 Mass. 75; S. C., 108 Mass. 509, 513; *Commonwealth v. Pratt*, 137 Mass. 98, 104; *Nash v. Brown*, 165 Mass. 384.

It is true that G. L., c. 169, which is applicable to persons engaged in the selling of steamship or railroad tickets for transportation to or from foreign countries, who, in conjunction with said business, carry on the business of receiving deposits of money, is entitled "Deposits with Others than Banks." This title is found for the first time in the General Laws. The act which is now chapter 169 in its original form was entitled "An Act to regulate the taking of deposits by certain banks, associations and persons" (St. 1905, c. 428). In my opinion, the adoption of the present title in the General Laws did not indicate an intention on the part of the Legislature that the business to which the chapter applies should be construed in every case to be outside the description of the business of a "bank," as defined in G. L., c. 167, § 1. It should be noted in that connection that the concerns doing such business have generally been known as private banks.

TAXATION — INCOME TAX — GAINS AND PROFITS — SALE OF  
LEASE CONTAINING OPTION TO PURCHASE REVERSION.

Since an option to purchase the reversion after a lease for years is a covenant which runs with the land and passes as an incident of the leasehold estate, a profit realized from the sale of a lease which contains such an option is not taxable under G. L., c. 52, § 5, cl. (c), unless a profit realized from the sale of the leasehold would be taxable under said provision.

You state in substance the following case:—

A has a written lease of certain land and a building thereon for a term of years. The lease contains an option to purchase the reversion. A sells the lease and option to B, and realizes a net gain of \$50,000. There is no understanding as to the proportionate amount paid for the lease and the option, respectively. G. L., c. 62, § 5, cl. (c), provides, in part, as follows:—

The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, . . . shall be taxed at the rate of three per cent per annum; . . .

You state that your department has construed this clause as including gains realized from the sale of options upon real estate, but not gains from the sale of leaseholds. You ask whether any tax is due under said clause (c) in respect of this option, and if so, how said tax is to be determined.

A naked option to purchase the fee simple confers no interest in the land until it is exercised. *Thacher v. Weston*, 197 Mass. 143. One who is a stranger to it cannot enforce it. *Boyden v. Hill*, 198 Mass. 477, 487. An assignee thereof stands in the shoes of the assignor. In other words, the obligation of such a covenant rests upon privity of contract. If, under its terms, such an option can be exercised at a period too remote, it is bad both under the rule against perpetuities and as a forbidden restraint upon alienation. *Winsor v. Mills*, 157 Mass. 362; *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 153.

An option to purchase the reversion, contained in a lease, is a covenant which runs with the land. *Peters v. Stone*, 193 Mass.

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
February 14.

179, 186; *Ankeny v. Richardson*, 187 Fed. 550; *Prout v. Roby*, 15 Wall. 471; *Hagar v. Buck*, 44 Vt. 285; *Hollander v. Central Metal Co.*, 109 Md. 131. A covenant which runs with the land passes with the estate as an incident thereof, and may be enforced by the assignee, by reason of *privity of estate*, even though the assignee is not a party to the covenant and there is no privity of contract between him and the covenantor. *Donaldson v. Strong*, 195 Mass. 429; *Patten v. Deshon*, 1 Gray, 325, 329. It therefore partakes of the estate to which it is incident. Thus, the covenant to pay rent, which likewise runs with the land, is an incorporeal interest in land, although in form a contract. *Winnisimmet Trust, Inc. v. Libby*, 232 Mass. 491, 492. In this respect the law looks through the outward form to the substance. The distinction between a naked option and an option contained in a lease is emphasized by another line of authority. As above noted, a naked option to purchase the fee is bad if it may be exercised at a period too remote. But the weight of American authority is to the effect that an option to purchase the reversion, contained in a lease, attached to the leasehold and exercisable only during the term, is valid even though the term exceed the period allowed by the rule against perpetuities. *Hollander v. Central Metal Co.*, 109 Md. 131; *Prout v. Roby*, 15 Wall. 471; *Hagar v. Buck*, 44 Vt. 285, 27 Yale L. J. 885; *contra*, Gray, *Perp.* 3d ed., § 230*b*. The rule in England is the other way. *Woodall v. Clifton*, 1905, 2 Ch. 257; *Worthing Corp. v. Heather*, 1906, 2 Ch. 532. But our court has intimated that it would adhere to the American view. In *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, in holding that a naked option to purchase, exercisable at a period too remote, was a forbidden restraint on alienation, Chief Justice Rugg said:—

The question presented on this record has nothing to do with options for purchase or renewal contained in leases. See in this connection *Mann, Crossman & Paulin, Ltd. v. Registrar of Land Registry*, (1918) 1 Ch. 202, and cases collected in 27 Yale Law J. 885.

Under these circumstances, I am of opinion that an option to purchase the reversion, contained in a lease, is an incident



of the lessee's estate, and must be classified with it in respect of any tax to be levied under G. L., c. 62, § 5, cl. (c). If a gain from the sale of that estate is not taxable, a gain from the option which passes as an incident of that estate is not taxable.

---

INSURANCE — FOREIGN MUTUAL FIRE INSURANCE COMPANY  
— ADMISSION — REQUIREMENT OF ASSESSABLE POLICY —  
FIXING OF CONTINGENT MUTUAL LIABILITY.

A foreign mutual fire insurance company cannot be admitted to transact business in this Commonwealth unless by its by-laws and policies it fixes the contingent mutual liability of its members.

You request my opinion as to whether or not a foreign mutual fire insurance company which issues solely a non-assessable policy can be admitted to transact the business of fire insurance in this Commonwealth, provided it complies with the conditions set forth in G. L., c. 175, § 151; in other words, assuming that a foreign mutual fire insurance company has, under chapter 151, paragraph second, clause (2) (a), "net cash assets equal to the capital required of like companies on the stock plan," and has complied with all the other provisions set forth in section 151, can such a company be admitted to transact business in this Commonwealth of issuing a non-assessable policy, that is, a policy without a contingent liability.

To the Com-  
missioner of  
Insurance.  
1921  
February 14.

In answering your question I would first call your attention to G. L., c. 175, § 150, which provides: —

Foreign companies, upon complying with the conditions herein set forth applicable to such companies, may be admitted to transact in the commonwealth . . . any kinds of business authorized by this chapter, *subject to all general laws now or hereafter in force relative to insurance companies*, and subject to all laws applicable to the transaction of such business by foreign companies and their agents; . . .

You will note that foreign companies may be admitted to transact business in this Commonwealth, but such transaction of business is subject to all general laws now or hereafter in force relative to insurance companies.

Turning to the provisions of the General Laws now in force relative to insurance companies, we find that by section 81 of chapter 175 it is provided that —

Mutual fire companies . . . shall charge and collect upon their policies a full mutual premium in cash or notes absolutely payable. Any such company may in its by-laws and policies fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds, but such contingent liability of a member shall not be less than an amount equal to and in addition to the cash premium written in his policy. The total amount of the liability of the policy holder shall be plainly and legibly stated upon the filing-back of each policy. Whenever any reduction is made in the contingent liability of members, such reduction shall apply proportionally to all policies in force.

Accordingly, it becomes necessary to decide whether this section makes it mandatory upon a mutual fire insurance company to have a contingent liability. To determine this, it is necessary to read section 81 together with section 83 of chapter 175. Section 83 provides, in part, that —

If a mutual fire company is not possessed of assets above its unearned premiums sufficient for the payment of incurred losses and expenses, it *shall* make an assessment upon its members liable to assessment therefor, in proportion to their several liabilities, for the amount needed to pay such losses and expenses.

If by reason of any depreciation or loss of its funds or otherwise the assets of such a company, after providing for its other debts, are less than the unearned premiums upon its policies, it shall make good the deficiency by assessment in the mode above provided; . . .

Each policy holder shall be liable to pay his proportional part of any assessments laid by the company in accordance with law and his contract, on account of losses and expenses incurred while a member, if he is notified of such assessment within one year after the expiration or cancellation of his policy; . . .

In *Sanford v. Hampden Paint & Chemical Co.*, 179 Mass. 10, a case involving an assessment levied by a mutual fire insurance company under the provisions of St. 1897, c. 197, the court used this language: —

As a policy holder, the defendant became a member of the insurance company, and, as such, liable to an assessment for the payment of all just claims accruing against it during the continuance of the policies, or either of them; and the liability continued, notwithstanding the expiration of the policies. This liability was imposed by the statute upon the policy holder for the benefit of the other policy holders, and other creditors of the company. It was a part of the fund to which each of the other policy holders was entitled to resort for the payment of his own loss as well as for help in paying the loss of another. This obligation to contribute, if necessary, to pay the loss sustained by any other member, although created by statute, was of a contractual nature, and was a part of the contract between each stockholder and the company.

The wording of the provision in the statute applicable at the time this decision was handed down was as follows: —

Any such company [mutual fire insurance company] may in its by-laws and policies fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds: *provided*, that such contingent liability of a member shall not be less than a sum equal to and in addition to the cash premium written in his policy. The total amount of the liability of the policy holder shall be plainly and legibly stated upon the back of each policy. Whenever any reduction is made in the contingent liability of members such reduction shall apply proportionally to all policies in force.

This is practically the exact language found in the present provisions in G. L., c. 175, § 81.

It is my opinion that a contingent liability is imposed by this language upon the policy holder of a mutual fire insurance company, and that a domestic mutual fire insurance company is required to have an assessable policy. This being so, and being a requirement of the general laws now in force relative to insurance companies, a foreign mutual fire insurance company cannot be admitted to transact business in this Commonwealth unless by its by-laws and policies it fixes the contingent mutual liability of its members.

TAXATION — RETURN — PENALTY FOR FAILURE TO FILE —  
POWER OF COMMISSIONER.

The Commissioner of Corporations and Taxation has discretion, under G. L., c. 62, § 55, to abate the additional tax imposed for failure to file a return, which discretion is not exhausted by one exercise.

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
February 15.

You inquire, in substance, whether the Commissioner may reconsider and revise a refusal by him to abate penalties accruing under G. L., c. 62, § 55, on account of failure to file an income tax return, assuming said penalties have not been paid.

G. L., c. 62, § 55, provides: —

If any person required to file a return under this chapter fails to file the return within the time prescribed therein, the sum of five dollars for every day during which such person is in default shall be added to, and become part of the tax, as an additional tax; but the commissioner may, in his discretion, abate any such additional tax in whole or in part.

The additional tax imposed by this section as a penalty differs from the tax to which it is added. The original tax is measured by the amount of income taxable; the additional tax is measured by the extent of the default, and is in no way dependent upon the amount of income taxable. In my opinion, the abatement of the latter tax is governed by section 55, rather than by sections 43 to 48, which prescribe the mode of abating the original tax. I am further of opinion that the discretion conferred by section 55 is not exhausted by one exercise. The Commissioner has power to reconsider and revise a previous refusal to abate the additional tax, provided that in the exercise of a sound discretion he considers that an abatement is warranted. You do not ask, and I do not decide, whether such an abatement could be made after the additional tax has been paid.

OBLIGATIONS REDEEMABLE IN NUMERICAL ORDER — CO-OPERATIVE BANKS — LOAN AND HOME PURCHASING CONTRACTS.

The business of issuing contracts in series, by the terms of which contract holders are to make payments in instalments and have the privilege of securing loans in the numerical order of their contracts, is in violation of G. L., c. 107, § 7.

A foreign organization doing such business in this Commonwealth may be enjoined, under G. L., c. 107, § 8, from further continuing its business in the Commonwealth.

The doing of such business is not doing business in the manner of a co-operative bank, within the prohibition of G. L., c. 170, § 48.

You have called my attention to the operations of an organization called The Co-operative League of America operating under an agreement and deed of trust filed in Allegheny County, Pennsylvania, having its home office in Pittsburg, Pa., and having a branch office, where it does business, in Springfield, Mass.

To the Commissioner of  
Banks.  
1921  
February 15.

The purpose of the organization is stated to be to accumulate small savings in a trust fund, to be loaned only to those who have created it.

The business of the organization is done by issuing what are called "3 per cent loan and home purchasing contracts," each of which is one of a series, providing for the payment of monthly instalments; the creation of a trust fund, into which are paid all instalments less certain deductions, payments of loans and interest, forfeitures, payments on certificates, etc.; the making of loans to holders of contracts of the same series from the trust fund, in the order of the date of the respective contracts, or the sale of the loan privilege for their benefit; and the division of a portion of the profits among holders of fully paid contracts and participating certificates.

In its essence the business is in accordance with a plan by which contract holders are to pay the sums stated in their contracts, on instalments, and have the privilege of securing loans in the numerical order of their contracts.

You ask my opinion regarding the legality of the operations of the trust in this State.

The laws regulating the conduct of the business of savings banks appear to be inapplicable to the business done by the trust. In determining whether the business done by the trust in Massachusetts is in violation of law, two statutes are material.

1. G. L., c. 170, § 48, prohibiting the doing of business in the manner of a co-operative bank, except by corporations incorporated in the Commonwealth for that purpose. Section 48 is as follows: —

No person, and no association or corporation, except foreign associations and corporations duly licensed by the commissioner prior to April fourteenth, eighteen hundred and ninety-six, to transact business in this commonwealth, shall transact the business of accumulating the savings of its members and loaning to them such accumulations in the manner of a co-operative bank, unless incorporated in this commonwealth for such purpose. Whoever violates any provision of this section shall be punished by a fine of not more than one thousand dollars, and the supreme judicial or superior court shall have jurisdiction in equity to enforce this section.

2. G. L., c. 107, §§ 7 and 8, prohibiting the sale of obligations which by their terms are to be redeemed in numerical order or in any arbitrary order of precedence. Sections 7 and 8 are as follows: —

SECTION 7. No person shall issue, negotiate or sell any bonds, certificates or obligations of any kind, which are by the terms thereof to be redeemed in numerical order or in any arbitrary order of precedence without reference to the amount previously paid thereon by the holder thereof, whether they are sold on the instalment plan or otherwise, nor shall any person redeem any bonds, certificates or obligations in such order, whether they are sold on the instalment plan or otherwise.

SECTION 8. Violations of the preceding section shall be punished by a fine of not more than two thousand dollars or by imprisonment for not more than one year. Any such violation, if by a domestic corporation, shall operate as a forfeiture of its franchise and, if by a foreign corporation, association or organization, as a discontinuance of its right to do business in the commonwealth; and the supreme judicial or superior court, upon the application of the commissioner of corporations and taxation, may enjoin such foreign corporation, association or organization from further continuing its business in the commonwealth. The court may appoint a receiver to take possession of the property of such corpora-

tion, association or organization, and to close up the business, subject to the order of the court.

The decision of the Supreme Judicial Court in *Attorney-General v. Pitcher*, 183 Mass. 513, clearly indicates that the business done in this State by The Co-operative League of America is not the business which is made illegal by G. L., c. 170, § 48. In that case the defendants were doing business under a declaration of trust, under the name of the "New England Home Buyers' Association." Contracts were issued which were quite similar in form to those used in the present instance. Regarding this business the court says as follows (p. 516):—

The Attorney-General contends that this business violates R. L., c. 114, § 1, in relation to co-operative banks, which provides that no person, association or corporation except certain licensed ones "shall transact the business of accumulating the savings of its members and loaning to them such accumulations in the manner of a co-operative bank, unless incorporated in this Commonwealth for such purpose." This is a penal statute which makes an offender punishable by a fine of not more than \$1,000. As a penal statute it must be construed strictly, and we are of opinion that the defendants are not within it. The purchasers of these contracts are not members of the association, and their savings are not savings of members, but of holders of individual contracts from the association. They have no voice in the management of the affairs of the association. No money of members of the association is lent to any of its members; the savings of these contractors are not accumulated and lent to them in the manner of a co-operative bank, but the course of dealing is very different from that of any bank. It may well be said that all the reasons for the enactment of this statute apply with great force to an association transacting a business like that of these defendants. But the defendants are not within the terms of the statute, and they cannot be punished nor enjoined under it.

See also III Op. Atty.-Gen. 372.

In the same decision a majority of the court announced their opinion that the business conducted was in violation of R. L., c. 73, §§ 7 and 8, now G. L., c. 107, §§ 7 and 8, forbidding the sale of obligations to be redeemed in numerical order or in any arbitrary order of precedence. In that case the court held that the Attorney-General could not maintain a suit in equity to

enjoin them from violating the statute, and intimated that the only remedies were those provided by the statute.

I am of opinion that the decision in *Attorney-General v. Pitcher, supra*, is a direct authority against the legality of the method of issuing contracts by The Co-operative League of America, and that the persons who are carrying on that business in this Commonwealth are liable to the penalties provided in section 8. See also *Attorney-General v. Preferred Mercantile Co.*, 187 Mass. 516.

I therefore advise you that the issuing of the contracts appears to be in violation of G. L., c. 107, §§ 7 and 8, and that under section 8 persons who are conducting the business in Springfield are liable to fine or imprisonment, and, upon the application of the Commissioner of Corporations and Taxation, the organization may be enjoined from further continuing its business in the Commonwealth.

---

#### CONSTITUTIONAL LAW — BRIDGE OVER HIGHWAY — PAYMENT OF DAMAGES BY PRIVATE PERSON OR MUNICIPALITY.

In authorizing the construction of a bridge over a highway in order to connect lands on opposite sides of it, the legislature has no power to provide that the damages thereby caused shall be paid by a private person, since this does not adequately secure the payment of compensation to those who may be entitled thereto under the Constitution.

A city cannot be required to pay compensation for the erection of a bridge over a highway for the benefit of private persons, since this involves expenditure of public money for a private purpose.

You have orally requested my opinion as to whether House Bill No. 554, entitled "An Act authorizing George L. Brownell to maintain a bridge over Market Street in the city of Worcester," would be constitutional if enacted.

Section 3 of said bill provides: —

Any person whose property is damaged by reason of the construction or maintenance of the bridge as aforesaid may have his damages determined by a jury, upon petition filed in the superior court within one year after the approval of the permit by the mayor as above provided, and the damages when so determined shall be paid by the said George L. Brownell.



1. In my opinion, the provision that "the damages when so determined shall be paid by the said George L. Brownell" renders the bill unconstitutional as to persons whose property may be damaged, since it does not adequately secure to them the compensation required by the Constitution. The precise point is covered in *Opinion of the Justices*, 208 Mass. 625, 630: —

It is elementary doctrine that such an amendment as is proposed, providing that the damages to persons injured in their property shall be paid by the grantees of the permit, who are private parties, would not secure compensation to such persons in the manner required by the Constitution and as to them, in reference to damages to which they might be entitled under the Constitution, would render the statute invalid.

2. The city of Worcester could not constitutionally incur liability for damages in connection with this bridge if the bridge is erected for a private rather than a public purpose. *Opinion of the Justices*, 208 Mass. 603, 606; *Lowell v. Boston*, 111 Mass. 454. The bill, on its face, discloses no public purpose to be subserved thereby. On the contrary, the description of the premises to be connected and the provision that the petitioner shall pay the damages indicate that the purpose is private. But as this involves a question of fact, I leave the point open.

3. It appears from the petition accompanying said bill that the land opposite to the Brownell premises, upon the other side of Market Street, is "owned and occupied by Worcester Tire Fabric Co." It may be inferred, though it nowhere affirmatively appears, that said tire company assents to the erection of said bridge. This is an important question of fact which bears upon the propriety of the bill. See *Opinion of the Justices*, 208 Mass. 603; *ibid.*, 625.

CONSTITUTIONAL LAW — POLICE POWER — DELEGATION OF  
LEGISLATIVE POWER — SMOKE AND CINDERS.

An act authorizing a city to make ordinances for the control or prevention of harmful smoke and cinders is not unconstitutional either as a forbidden delegation of legislative power or as beyond the limits of the police power.

To the  
Governor.  
1921  
February 18.

You have orally requested my opinion as to the constitutionality of House Bill No. 290, entitled "An Act authorizing the city of Worcester to make ordinances providing for the control or prevention of smoke and cinders." The bill is in two sections. Section 1 provides:—

Section one of chapter one hundred and twenty-three of the acts of nineteen hundred and fourteen is hereby amended by inserting after the word "smoke", in the third and fifth lines, the words:— or cinders, — so as to read as follows:— *Section 1.* The city of Worcester, by vote of its city council, may make ordinances for the control or prevention of the emission of smoke or cinders of such character as shall be adjudged harmful, and for the control or prevention of agencies causing such smoke or cinders, and for the enforcement thereof may appoint officers or agents and appropriate money for salaries and for expenses: *provided*, that no such ordinance shall apply to railroads or railroad operations or employees.

Section 2 provides that the act shall take effect upon its passage.

The present bill amends an act which has been in force for over six years, so as to include cinders within the terms thereof. Cinders are frequently, though perhaps not invariably, an accompaniment of smoke. It may be that they are so closely connected with it that an authority to control or prevent the emission of smoke would, without more, include the power to control or prevent the emission of cinders along with it. But even assuming that this amendment extends the act to any sensible extent, I find no constitutional objection to it. The authority to delegate such power to a municipality seems to be amply established. *Opinion of the Justices*, 234 Mass. 597. The constitutionality of reasonable smoke legislation was upheld in *Northwestern Laundry v. Des Moines*, 239 U. S. 486. In my opinion, the present bill is within the power of the Legislature.

STATE DEPARTMENTS — EXECUTION OF LEASES — GOVERNOR  
AND COUNCIL.

A State department has no power to execute a lease unless authorized so to do by the Legislature.

An appropriation of money to cover the expense of a lease does not ordinarily confer incidental authority to execute it upon the department which is to occupy the leased premises.

Where money has been appropriated to meet the cost of leasing premises for a department, such lease has, by custom, been executed by the Governor and Council on behalf of such department.

You have requested my opinion as to whether or not, in order that the Department of Public Health may execute a lease of property for laboratory purposes, it will be necessary for the Legislature not only to make an appropriation of money for the purpose of leasing such property, but also to pass legislation expressly authorizing the department to execute such a lease.

To the Com-  
missioner of  
Public Health.  
1921  
February 24.

In reply I would state that a State department cannot itself execute a lease unless the Legislature has expressly authorized it to do so. This authority is necessary in addition to the appropriation of money to cover the cost of such a lease.

It has been the custom, however, where money has been appropriated for such a purpose, to have a lease executed by the Governor and Council. In this connection I would call your attention to a recommendation in my annual report for the year 1920, as follows:—

There is no general statutory authority conferred upon any official to execute leases in behalf of the Commonwealth. Departments, commissions and boards are frequently required to occupy quarters outside the State House, and in some instances in cities and towns in different parts of the State. The question how leases in such cases should be executed cannot be answered authoritatively. I recommend the passage of an act authorizing the execution of such leases by heads of departments, with the approval of the Governor and Council.

PUBLIC SCHOOLS — ELECTION OF SUPERINTENDENT OF SCHOOLS  
— CITY CHARTER OF PEABODY.

The provision of the city charter of Peabody requiring that the school committee shall annually elect a superintendent of schools has been modified by G. L., c. 43, § 32. Accordingly, since in Peabody the superintendent has already served for three consecutive years, the school committee may not now elect a superintendent annually.

You ask for my opinion as to whether the city charter of Peabody, which provides that the school committee shall annually elect a superintendent of schools, has been modified by the provisions of G. L., c. 43, § 32. Said section is, in part, as follows: —

The school committee shall elect a superintendent of schools annually, except as provided in section forty-one of chapter seventy-one, . . .

G. L., c. 71, § 41, is, in part, as follows: —

Every school committee, except in Boston, in electing a teacher or superintendent, who has served in its public schools for the three previous consecutive school years, other than a union or district superintendent, shall employ him to serve at its discretion; . . .

Section 32, above cited, is, but for the words “except as provided in section forty-one of chapter seventy-one,” almost identical with Gen. St. 1915, c. 267, § 32. This act was to simplify the revision of city charters, and permitted such municipalities to accept without further legislative enactment one of four plans therein mentioned.

Section 41, above cited, is in substance St. 1914, c. 714, § 1. It was under the provisions of the 1914 statute that Peabody was operating before the acceptance of the city charter in 1916.

In 1918 the General Court enacted chapter 257, making certain substantive corrections in existing laws, and in section 157 of said chapter amended Gen. St. 1915, c. 267, § 32. This was re-enacted as G. L., c. 43, § 32. But the 1918 statute did not become operative, by reason of certain legislative acts, until it appeared in the General Laws.

Inasmuch as the city charter provision of Peabody was at the

time of its enactment in entire harmony with the General Acts of 1915 relative to city charters, there is a strong legislative intent manifested to have all cities conform to the same regulation relative to the election of superintendents, and inasmuch as by subsequent legislation it became the general policy throughout the State to employ superintendents to serve at their discretion after three years of consecutive service, it is my opinion that such general legislation affects the provisions in city charters which require superintendents to be elected annually. Hence, if in Peabody the superintendent has already served for three consecutive years, the school committee may not now elect a superintendent annually, as required by the city charter.

---

#### TRANSIENT VENDORS — CONDUCT OF BUSINESS IN TWO OR MORE CITIES AT THE SAME TIME.

An attempt by a transient vendor licensed under G. L., c. 101, to conduct business in two or more cities of the Commonwealth at the same time constitutes a violation of said statute.

You ask if a transient vendor licensed under G. L., c. 101, may lawfully conduct a transient business in two or more cities of the Commonwealth at the same time.

To the Director  
of Standards.  
1921  
February 28.

Section 3 of said chapter provides:—

It [the license] shall not authorize more than one person to sell goods, wares or merchandise as a transient vendor either by agent or clerk or in any other way than in his own proper person, but a licensee may have the assistance of one or more persons in conducting his business who may aid him but not act for or without him.

Since no person can act for the licensee "without him," and as the licensee cannot be in but one place at one time, it is my opinion that if an attempt is made to conduct a business in two or more places at the same time it constitutes a clear violation of the statute.

CONSTITUTIONAL LAW — FEDERAL CONSTITUTION — CONTRACT  
 CLAUSE — REPEAL OF CHARTER OF A RELIGIOUS COR-  
 PORATION GRANTED WITHOUT RESERVATION OF THE RIGHT  
 TO APPEAL.

A charter granted to a religious corporation is a contract, within the meaning of U. S. Const., art. I, § 10, which cannot be repealed by the Legislature without the consent of the corporation, where no power so to do was reserved. Where a corporate charter was granted to a religious corporation without any reservation of power to alter, amend or repeal it, acceptance by the corporation of an amendment to said charter, which amendment was made after the Legislature has reserved power to alter, amend or repeal corporate charters, does not subject the original charter to such reserved power where the amendment was not granted upon that condition.

To the House  
 Committee on  
 Mercantile  
 Affairs.  
 1921  
 February 28.

You have transmitted to me a copy of Senate Bill No. 190, entitled "An Act to repeal the charter and all corporate powers granted to the Second Society of Universalists in the Town of Boston." This act is in three sections, which provide as follows:—

SECTION 1. The charter and all corporate powers heretofore granted to the Second Society of Universalists in the Town of Boston are hereby repealed.

SECTION 2. The governor of the commonwealth is hereby authorized by and with the consent of the council, to appoint a receiver to take charge of all the property and assets of the corporation, and to administer the same.

SECTION 3. This act shall take effect upon its passage.

You state that the petition for this act is brought at the request of the General Universalist Convention of the United States and by the Massachusetts State Convention, which is the General Universalist Society in charge of churches throughout Massachusetts. The proponents ask that this bill be passed upon the ground that the society is not using its property substantially for the purposes for which it was acquired, and that the society has practically ceased to function. In this connection you state that the church of the society, situated at the corner of Columbus Avenue and Clarendon Street, Boston, where worship was conducted from 1872 until 1914, was de-

stroyed by fire in the latter year; that, owing to litigation, the insurance thereon was not received until 1918; that since the destruction of the church, services have been held in the Fenway Theatre on Sunday mornings throughout most of the year, but there is a dispute as to whether there have been further church activities. The net value of the church property is from \$600,000 to \$700,000, and the income is from \$10,000 to \$15,000 a year. The act is opposed by the entire membership of the society, who allege that they are endeavoring to carry on their church duties to the best of their ability under the circumstances, and who urge that the act would be unconstitutional.

In connection with this bill you ask the following questions: —

*First.* — Whether the Legislature can constitutionally pass this act and revoke the charter of the society.

*Second.* — Whether it is in the province of the Legislature to pass an act authorizing the Governor and Council to appoint a receiver to take charge of the property and assets of the corporation or whether this is a judicial function.

*Third.* — Whether, if this act were passed, the property could be administered for general Universalist Church purposes or would revert to the members of the corporation.

*Fourth.* — Whether the Attorney-General would have authority in this case to intervene if satisfied that the society was misusing its funds.

The society was incorporated by St. 1816, c. 96, which was approved by the Governor on Dec. 13, 1816. This charter constituted a contract between the State and the incorporators, which is within U. S. Const., art. I, § 10, and which cannot be altered, amended or repealed by the Commonwealth unless a power so to do was reserved at the time it was granted. *Derby v. Blake*, (1799) 226 Mass. 618; *King v. Dedham Bank*, 15 Mass. 447; *Boston, etc., R.R. Corp. v. Salem, etc., R.R. Corp.*, 2 Gray, 1; *Dartmouth College v. Woodward*, 4 Wheat. 518. I find no such reservation of power in connection with this charter. The charter itself contains none. The first statute which reserved such a power generally in respect to corporate charters was St. 1830, c. 81, which was approved March 11, 1831, and which expressly applied only to acts of incorporation "which shall be

passed after the passage of this act." This limitation has been preserved in subsequent codifications. R. S., c. 44, § 23; G. S., c. 68, § 41; P. S., c. 105, §§ 2, 3; R. L., c. 109, § 3; St. 1903, c. 437, § 2; G. L., c. 155, § 3. Although Mass. Const. Amend. LIX, which was ratified Nov. 5, 1918, does not contain this express limitation as to time, it cannot be construed to confer any power to alter, amend or repeal an existing corporate charter which was not already subject to such power. It follows that since the charter of this society contained no express reservation of any power to alter, amend or repeal it, and was granted prior to any general reservation of such power by the Legislature, section 1 of the present bill is unconstitutional unless the power to repeal has since attached.

It is suggested that the charter of the society is now subject to repeal because it has been amended since St. 1830, c. 81, went into effect. St. 1896, c. 99, provided, in substance, that the title to the land conveyed to the society by a certain deed should not be invalid by reason of anything contained in the second section of the charter. This act simply waived, in respect to particular land already conveyed, the limitation upon the amount of property which the society was authorized to hold. *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 289. It may be doubted whether it rises to the dignity of a charter amendment. Spec. St. 1918, c. 168, authorized the society to receive and hold property to an amount not exceeding \$1,500,000, exclusive of any meeting house and the lands connected therewith. As this authority is general and prospective, and not merely a waiver in respect to a past conveyance, this act may fairly be considered an amendment to the charter of the society. At the time when this amendment was accepted by the society, the statute which reserved power to alter, amend and repeal corporate charters (St. 1903, c. 437, § 2) provided as follows:—

Corporations organized under general laws shall be subject to the provisions of all laws hereafter enacted which may affect or alter their corporate rights or duties or which may dissolve them; but they shall, notwithstanding their dissolution, be subject to the provisions of sections fifty-two and fifty-three. Such amendment, alteration or dissolu-



tion shall not take away or impair any remedy which may exist by law, consistently with said sections, against such corporations, their stockholders or officers for a liability previously incurred. The charters of all corporations which are subject to the provisions of this act and which have been incorporated by special law since the eleventh day of March in the year eighteen hundred and thirty-one and of all such corporations as may be hereafter incorporated by special law shall be subject to amendment, alteration or repeal by the general court. Corporations of the kind which are subject to the provisions of this act, and which were incorporated by special law before such date, may, by amendment to their certificate of organization, adopted as provided in section forty, and filed as provided in section forty-one, reorganize under this act, and thereupon and thereafter, they shall be governed in all respects by its provisions.

I assume, without deciding, that the provisions of this section would govern the amendment made by Spec. St. 1918, c. 168, even though not expressly incorporated therein. *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 451; affirmed *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 522; *Greenwood v. Union Freight Ry. Co.*, 105 U. S. 13. But this provision is silent as to the effect of an amendment, accepted after power to repeal was reserved, upon a charter previously irrevocable. It nowhere provides that acceptance of the amendment shall subject the entire charter to the reserved power of the Legislature. No such intention can fairly be implied in view of the express provision for a voluntary reorganization which shall subject corporations organized prior to March 11, 1831, to the provisions of St. 1903, c. 437. No express decision in this State that such is the effect of accepting a charter amendment has been cited to me or has been found by me. I do not find that any such rule is established in other States. I am therefore of opinion that the irrevocable character of this charter has not been lost, and that therefore section 1 of Senate Bill No. 190 would, if enacted, be unconstitutional and void.

In view of this conclusion it becomes unnecessary to answer your other inquiries.

CIVIL SERVICE — CONVICTION FOR VIOLATION OF AUTOMOBILE LAWS.

Conviction for violation of the automobile laws, as affecting appointment, employment or retention in the service of the Commonwealth, is within the meaning of the words "conviction of crime against the laws of the Commonwealth," as used in G. L., c. 31, § 17.

To the Com-  
missioner of  
Civil Service.  
1921  
March 1.

You have inquired whether "a conviction for such violation of the automobile laws as overspeeding, having no mirror on car, tail light being out, etc.," is within G. L., c. 31, § 17, which provides: —

No person habitually using intoxicating liquors to excess shall be appointed, employed or retained in any position to which this chapter applies, nor shall any person be appointed or employed in any such position within one year after his conviction of any crime against the laws of the commonwealth.

The laws relative to the operation of motor vehicles are now codified as chapter 90 of the General Laws, and specifically cover the offences as to which you inquire.

I wish to be understood as answering your inquiry only as to the offences specified, namely, overspeeding, having no mirror on car, and tail light being out, as I do not know what you intended to cover by the word "etc."

I see no escape from the conclusion that a conviction for any one of these offences is within the meaning of the words "conviction of any crime against the laws of the Commonwealth," as used in said section 17. If this results in hardship, the remedy lies with the Legislature, which, by G. L., c. 31, § 51, has provided a penalty for violation of the civil service law.

FUEL ADMINISTRATOR — POWER TO REQUIRE INFORMATION FROM  
COAL DEALERS.

The Fuel Administrator, by virtue of his appointment under Gen. St. 1917, c. 342, and St. 1920, c. 610, has the power to summon witnesses and compel testimony for the purpose of ascertaining facts in regard to necessities of life, including coal.

You were appointed Fuel Administrator by the Governor and Council under the provisions of Gen. St. 1917, c. 342, and St. 1920, c. 610. You ask me to advise you whether, under said two acts, you have the power to require coal dealers to give you such information as you may need, or whether you must depend entirely upon their voluntary co-operation.

To the Fuel  
Administrator.  
1921  
March 1.

Gen. St. 1917, c. 342, known as the "Commonwealth Defence Act of 1917," contains two sections material to your inquiry. They are as follows:—

SECTION 12. Whenever the governor shall determine that circumstances warrant the exercise by him of all or any of the powers conferred on him by this act, he may, with the approval of the council, by writings signed by him, confer upon such officials of the commonwealth or any political division thereof, or such officer of the military or naval forces of the commonwealth, or such other person or persons as he may select, full power and authority to do in his name whatever may be necessary to carry the said powers into effect. He may revoke such written authority at any time.

SECTION 23. Whenever the governor, with the advice and consent of the council, shall determine that an emergency has arisen in regard to the cost, supply, production, or distribution of food or other necessities of life in this commonwealth, he may ascertain the amount of food, or other necessities of life within the commonwealth; the amount of land and labor available for the production of food; the means of producing within or of obtaining without the commonwealth food or other necessities of life as the situation demands; and the facilities for the distribution of the same, and may publish any data obtained relating to the cost or supply of such food or other necessities, and the means of producing or of obtaining or distributing the same. In making the said investigation he may compel the attendance of witnesses and the production of documents and may examine the books and papers of individuals, firms, associations and corporations producing or dealing in food or other necessities of life, and he may compel the co-operation

of all officers, boards, commissions and departments of the commonwealth having information that may assist him in making the said investigation.

St. 1920, c. 610, purports to continue for a definite period those provisions of the Commonwealth Defence Act of 1917 "relating to the appointment, duties, authority and powers of a fuel administrator." It provides as follows:—

*Whereas*, In order to secure an adequate supply of fuel for the citizens of Massachusetts, the services of a fuel administrator are indispensable and will continue to be indispensable for an indefinite period; and whereas, the provisions of the Commonwealth Defence Act of nineteen hundred and seventeen relative to the appointment of such a fuel administrator may become inoperative at any time by federal action, therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and convenience.

*Be it enacted, etc., as follows:*

The provisions of the Commonwealth Defence Act of nineteen hundred and seventeen, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, relating to the appointment, duties, authority and powers of a fuel administrator, are hereby made operative until January first, nineteen hundred and twenty-two.

There is no direct reference in the act of 1917 to any official known as a "fuel administrator." There are, however, provisions (contained in section 6 and in the two sections quoted above) which authorize the Governor to take possession of certain property, including fuel, to use, sell or distribute the same, and to fix minimum and maximum prices therefor; to ascertain certain facts in regard to the necessaries of life (of which coal is one), and to publish any data obtained relating thereto; and, with the approval of the Council, by written commission to confer upon any person whom he may select authority to exercise the powers conferred on him by the act. The exercise of these powers is conditional upon the determination by the Governor, with the advice and consent of the Council, that the circumstances warrant such exercise.

For a complete understanding of the meaning of the later act it is important to know what was done under the earlier one.

After the passage of the act of 1917, Mr. James J. Storrow was appointed "fuel director," under a commission signed by the Governor, purporting to act "under the power vested in the executive by chapter three hundred and forty-two of the General Acts of the year nineteen hundred and seventeen, to have supervision over the cost, supply and distribution of coal within the commonwealth, and to perform such other duties relating thereto as are set forth in the act above cited." From the fact of the creation of the office of fuel director and the appointment of Mr. Storrow to that office, it must be inferred that the Governor and Council had previously determined that the circumstances required the exercise of the powers incident to the office. *Cf. National Prohibition Cases*, 253 U. S. 350, 386. Mr. Storrow continued to hold that office until after the passage of the act of 1920. Subsequently he resigned and you were appointed Fuel Administrator by a commission signed by the Governor, purporting to be "under the provisions of chapter three hundred and forty-two of the General Acts of the year nineteen hundred and seventeen and chapter six hundred and ten of the Acts of the year nineteen hundred and twenty."

Section 23 of the act of 1917 authorizes the Governor to compel the attendance of witnesses and the production of documents, and provides that he may examine the books and papers of individuals, firms, associations and corporations producing or dealing in the necessaries of life (including coal), and this power, by section 12, is conferred upon the person appointed by him to the position of fuel director or administrator, with the powers incident to that position.

I am therefore of the opinion that by virtue of your appointment as Fuel Administrator under said acts, you have such powers with respect to summoning witnesses and compelling testimony as are conferred by said section 23, subject to the qualification that the act cannot compel any person to accuse or furnish evidence against himself contrary to article XII of the Declaration of Rights. Witnesses should be instructed as to this constitutional safeguard so that they may invoke it, if they desire, in a proper case.

CONSTITUTIONAL LAW — FEDERAL CONSTITUTION — CONTRACT  
 CLAUSE — PUBLIC CHARITY — LEGISLATIVE RELIEF — *CY  
 PRÈS*.

A corporate charter is a contract within the meaning of U. S. Const., art. I, § 10, and cannot be altered, amended or repealed by the Legislature without the consent of the corporation unless power so to do was either reserved by the Legislature or has since been acquired.

Corporate charters granted prior to March 11, 1831, cannot be altered by the Legislature without the consent of the corporation unless power so to do was reserved in such charter.

A power to alter, amend or repeal corporate charters does not authorize the Legislature to impair contracts lawfully made by such corporation with third parties.

When the donee of property given for a public charitable purpose accepts the gift, he contracts to use such property for the designated purpose in the manner prescribed by the donor, and this contract is within the protection of U. S. Const., art. I, § 10.

The Legislature has no power to authorize the execution of a public charity *cy près*.

Where a corporate charter granted to a church in 1825, without reservation of any power to alter, amend or repeal such charter, vests the control of the corporation in the pewholders of said church, the Legislature has no power to modify the electorate of said church by including non-pewholders therein.

To the Com-  
 mittee on  
 Mercantile  
 Affairs.  
 1921  
 March 4.

You ask my opinion as to the constitutionality of three bills now before your committee, namely, Senate Bill No. 285, entitled "An Act to authorize the union of the South End Reading Room Association with the Peoples Methodist Episcopal Church in Newburyport," House Bill No. 1139, entitled "An Act to authorize the Massachusetts Universalist Convention to hold the Jonathan Stetson Fund free and clear of certain trusts," and House Bill No. 1152, entitled "An Act to authorize the All Souls Unitarian Church in Roxbury to convey its property to the First Church in Roxbury." The titles of these bills indicate their purpose. I assume that the corporations or associations which are seeking legislative relief are of charitable character and hold property upon charitable trusts, the nature of which does not appear. The apparent purpose of the bills is to rearrange to a greater or less extent the administration, and, in one case at least, the application of the property so held. In other words, these corporations are apparently seeking from the Legislature not only authority to alter their corporate powers, but also, with respect to the property involved, relief more or less similar

to that which a court of equity might be asked to afford upon a bill to authorize the administration of these charitable trusts *cy près*.

1. A corporate charter constitutes a contract between the State and the incorporators, which is within the protection of U. S. Const., art. I, § 10, and cannot be altered without the consent of the corporation unless power so to do was reserved at the time the charter was granted or has since been acquired. *Dartmouth College v. Woodward*, 4 Wheat. 518. By St. 1830, c. 81, which was approved on March 11, 1831, the Legislature reserved a general power to alter, amend or repeal all acts of incorporation thereafter granted, which power has been declared anew in codifications of that act and is now embodied in a constitutional amendment. R. S., c. 44, § 23; G. S., c. 68, § 41; P. S., c. 105, §§ 2, 3; R. L., c. 109, § 3; St. 1903, c. 437, § 2; G. L., c. 155, § 3; Mass. Const., Amend. LIX. An express authority to revoke the powers granted to religious corporations was reserved by St. 1834, c. 183, § 7, approved April 1, 1834, which power has been declared anew by subsequent codifications. R. S., c. 20; G. S., c. 30, §§ 4, 27, 43; P. S., c. 38, § 51; R. L., c. 36, § 55. Charters granted subsequent to these reservations of power may be altered, amended or repealed by the Legislature even against the will of the corporation. *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500; *Greenwood v. Union Freight Ry. Co.*, 105 U. S. 13. With the consent of the corporations affected, the Legislature may amend charters granted prior to these reservations of power, and may authorize two corporations, no matter where organized, to consolidate.

In this connection I note that section 6 of House Bill No. 1152 authorizes "any adult member" of the First Church in Roxbury to vote upon the acceptance or rejection of the act. This church was incorporated under St. 1825, c. 133, which was approved on Feb. 26, 1825, prior to the aforesaid reservation of power to alter, amend and repeal corporate charters, and contains no reservation of such power. That act of incorporation vests in the pewholders of the church, as a body politic, the power to control its affairs. Since section 6 of the proposed bill

undertakes to modify the electorate prescribed by the charter, by including therein all adult members, whether pewholders or not, that section appears to be open to constitutional objection unless, in some manner not disclosed, the Legislature has acquired power to amend that charter. *Dartmouth College v. Woodward*, 4 Wheat. 518; see also *Opinion of the Justices*, 226 Mass. 607.

2. Broad as the power to alter, amend or repeal corporate charters may be, it does not authorize the Legislature to annul existing contracts lawfully made by the corporation with third parties. *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453; *Boston & Lowell R.R. Corp. v. Salem & Lowell R.R. Co.*, 2 Gray, 1; see also *Thornton v. Marginal Freight Ry.*, 123 Mass. 32, 34. When property is conveyed for a public charitable purpose, the acceptance of the gift by the donee constitutes a contract with the donor to administer the gift in the manner and for the purpose prescribed. *Cary Library v. Bliss*, 151 Mass. 364. Any conditions consistent with law may be annexed to the gift. The donor may prescribe that the trust shall be managed by a board of trustees constituted in a particular way, or otherwise provide a particular scheme of management. *Cary Library v. Bliss*, 151 Mass. 364; *Boston v. Doyle*, 184 Mass. 373. He may select a particular corporation as trustee, and make it a term of his gift that that corporation shall continue to manage it. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Winthrop v. Attorney-General*, 128 Mass. 258. In so far as the donor prescribes such conditions, either expressly or by fair implication, they become a part of the contract between himself and the donee, which is within the protection of section 10 of article I of the Federal Constitution, and cannot be impaired by the Legislature. *Cary Library v. Bliss*, 151 Mass. 364; *Crawford v. Nies*, 220 Mass. 61, 65; see also *Knapp v. Railroad Co.*, 20 Wall. 117, 122, 123. Such a contract is beyond the scope of the reserved power to amend, alter or repeal corporate charters.

The bills before me do not disclose upon what terms these charities hold their property. It is impossible for me to deter-



mine whether House Bill No. 1152 and Senate Bill No. 285 impair the obligation of an undisclosed contract with the donors. That can be ascertained only by an investigation of each gift. House Bill No. 1139 apparently presents a somewhat clearer case. That bill expressly discharges the trustee of a charitable fund from the obligation to use the property for the purposes apparently prescribed by the donor, and prescribes that it shall be used for other purposes. It seems probable that this violates the contract with the donor of the fund, but this cannot be ascertained with certainty while the precise terms of that contract remain undisclosed. *Crawford v. Nies*, 220 Mass. 61, 65; *S. C.* 224 Mass. 474, 488.

3. Another constitutional question as to the present bills, the answer to which the authorities in this Commonwealth leave uncertain, is whether they invade the judicial power, contrary to article XXX of the Bill of Rights, which provides:—

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

A court possessing full equity jurisdiction has power in a proper case to authorize the administration of a public charity as nearly as possible in the manner prescribed by the donor, in case literal compliance with his directions has become impracticable. There are, however, definite restrictions upon the exercise of this power. It cannot be exercised unless the court finds that the donor intended that the property should be used for charity, even though the precise method of application prescribed should be or become impracticable. *Bowden v. Brown*, 200 Mass. 269; *Gill v. Attorney-General*, 197 Mass. 232, 237. If there be no such dominant charitable purpose, and the precise scheme of application is not practicable, the property reverts to the donor, or to his heirs or next of kin, as the case may be. *Teele v. Bishop of Derry*, 168 Mass. 341. Even if such

dominant charitable purpose exists, the court will not, and, indeed, cannot, alter the scheme of the donor "either as to the objects of the charity or the agents by whom it is to be administered, *unless it appears to be impossible to carry out the scheme according to its terms.*" *Winthrop v. Attorney-General*, 128 Mass. 258, 261; *Cary Library v. Bliss*, 151 Mass. 364, 375; *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Fellows v. Miner*, 119 Mass. 541. When a charitable gift can be administered according to the directions of the donors, the court is not at liberty to modify it upon considerations of policy or convenience. *Eliot v. Trinity Church*, 232 Mass. 517, 522. It is evident, therefore, that the power of a court of equity to authorize the administration of a public charitable trust as nearly as may be according to the directions given by the donor, if literal execution is impracticable, is not a power to vary the contract between the donor and the trustee as the court from time to time may deem wise. On the contrary, it is a power to construe that contract, to ascertain the dominant purpose of the donor and to carry that dominant purpose into effect, even at a sacrifice of some subsidiary purpose, to the end that the dominant purpose shall not be defeated by the expression of a subsidiary desire.

The exercise by a court of equity of the power to execute charitable trusts *cy près*, that is, as nearly according to the intent of the donors as circumstances will permit, is clearly an exertion of the judicial power. In the last analysis it involves a construction and enforcement of the donor's contract. It would seem that if the Legislature should attempt to substitute itself for a court of equity and to discharge this judicial function, it would exercise judicial power contrary to the express mandate of the Bill of Rights. There is an intimation to this effect in *Ware v. Fitchburg*, 200 Mass. 61, 72. It may be that Senate Bill No. 285 is open to special objection upon this ground, since section 3 provides that, until the Supreme Judicial Court shall otherwise order, the property transferred from the South End Reading Room Association to the Peoples Methodist Episcopal Church shall be administered by said church "in accordance with

the terms of the original trusts, or as nearly in accordance therewith as is possible."

It may be suggested, however, that the power of the king over charitable trusts, as *parens patriæ*, is vested in the Legislature, and that this prerogative power may be exerted without invading the judicial function. There is no doubt that in England the king, acting under the sign manual and through the chancellor, had power to designate the application of property given for charity, especially if the particular application prescribed by the donor was illegal or against public policy, or if the gift was to charity generally, without any provision as to the mode of application. 11 C. J., § 75. This power does not pertain to courts of equity in this State. *American Academy v. Harvard College*, 12 Gray, 582, 596; *Jackson v. Phillips*, 14 Allen, 539, 574, 575; *Minot v. Baker*, 147 Mass. 348, 351. But if it pertains to the people it is by no means clear how far it has been delegated to the Legislature. It seems to be settled that the Legislature may authorize trustees who hold land upon a charitable trust to sell such land and convert it into personal property to be held upon like trusts. *Sohier v. Trinity Church*, 109 Mass. 1, 17; *Old South Society v. Crocker*, 119 Mass. 1, 26; *Stanley v. Colt*, 5 Wall. 119, 169. Perhaps this power may be founded upon public policy; that a gift of land to charity should not render such land forever inalienable because the donor omitted to confer an express authority to sell upon the trustees. Be that as it may, such decisions as there are leave much doubt as to whether this power marks the extreme limit of legislative authority, or whether it is a manifestation of a power which may have wider application. It would seem, however, that the twilight zone, which lies between the express limitation imposed by the contract clause of the Federal Constitution and the *cy près* power possessed by courts of equity, is not of great extent, though difficult to define.

For the sake of clearness, I may suggest the following tentative conclusions. The Legislature, even without the consent of the corporation, has power to alter, amend or repeal corporate charters conferred since March 11, 1831, but this reserved power

does not authorize the Legislature either to annul contracts lawfully made by the corporation or to strip the corporation of its property. I cannot advise you whether the present bills impair the obligation of contracts which are not before me. Whether the present bills are improper, upon the ground that the Legislature is in effect attempting to exercise the power of a court of equity to execute a charitable trust *cy près* in a proper case, is open to serious question. The matter is so important, both in its application to the scope of legislative power and to the due management of public charities, that it ought not, in my opinion, to be determined by the Attorney-General.

---

#### USE OF ARMORY FOR PUBLIC BALL.

Under G. L., c. 33, § 52, use of an armory for a public ball, the proceeds of which are to be devoted to a public hospital, is authorized if the ball is incidental to the charity; but if the charity is incidental to the ball, such use is not authorized.

Adams Council, Knights of Columbus, have requested permission to use the armory at Adams for the purpose of holding a public ball. Proceeds of the ball, over and above expenses, will be given to Plunkett Memorial Hospital, which is non-sectarian and is maintained by charitable gifts and by the town of Adams. You have requested my opinion upon the question whether the proposed use of the armory is for "public purposes," within the meaning of G. L., c. 33, § 52.

Said section provides, in part:—

(a) Armories provided for the militia shall be used only by the volunteer militia for the military purposes or purposes incidental thereto designated by the commander-in-chief; provided, that the commander-in-chief, upon terms and conditions prescribed by him and upon an application approved by the military custodian of an armory, may allow the temporary use of such armory for public purposes at such times and in such manner as not to interfere with the military use thereof. . . .

As used in this section the words "public purposes" shall include:

A public meeting or hearing held by a state department or commission.

An examination conducted by the division of civil service.

A meeting of an organization composed of veterans of the civil, Spanish or world war, a board of trade, a chamber of commerce or an occupational organization, or a meeting to raise funds for any non-sectarian charitable or non-sectarian educational purpose.

A meeting to raise funds for a benefit association of policemen or firemen.

Elections, primaries or caucuses, and town meetings.

Meetings of such military organizations of scholars in the public schools of a town as may be approved by the school committee thereof.

The act provides that the phrase "public purposes" shall include "a meeting to raise funds for any non-sectarian charitable or non-sectarian educational purpose." The word "meeting," as used in the statute, connotes a gathering or assembly of persons to deliberate and sometimes to vote upon propositions before them, and also a gathering or assembly of persons to listen to addresses by others. It is not in all cases synonymous with the word "entertainment," nor, as used in the statute, does it include public balls and dances. I am of opinion, therefore, that the proposed use of the armory is not expressly authorized by the last-quoted portion of the statute.

In providing, however, that certain uses shall be included in the phrase "for public purposes," the Legislature has not provided that other public uses shall not be so included. Any temporary use for *public* purposes is authorized, provided that it is allowed by the commander-in-chief, approved by the military custodian, and in accordance with terms and conditions prescribed by the commander-in-chief. The statute does not authorize armories to be used for any *private* purpose whatever. If, therefore, a proposed use is not one of those which the statute expressly includes in the phrase "for public purposes," the question remains whether, apart from the statutory enumeration of particular uses that shall be deemed to be for public purposes, the proposed use is nevertheless for a public rather than a private purpose.

Generally speaking, a use of an armory for a ball would not be a use for a public purpose, because the principal object of such a

social occasion would be the personal enjoyment of the individuals present. If the net proceeds should be paid to a private charity, the use would still be for a private purpose. In the case presented, however, the net proceeds are to be paid to a *public* charity, that is, to a hospital managed and in part maintained by the town of Adams. That fact renders the present case somewhat exceptional.

As a rule, armories are to be used for military purposes only. Other proposed uses should be closely scrutinized to determine whether they are public, and if the principal purpose of them is private, an incidental benefit to the public will not alter the fact that they are for private rather than for public purposes, and therefore are not authorized by the statute. That is the proposition of law with reference to which particular cases must be decided. Application of the law to the facts of particular cases is for the commander-in-chief and his military subordinates.

In the present case, therefore, the commander-in-chief should determine, upon all available facts, whether the principal purpose of the ball is a pleasant social occasion for the guests, or whether the principal purpose is the raising of money for the hospital. Is the ball incidental to the charity, or is the charity incidental to the ball? If the ball is incidental to the charity, then the proposed use is authorized; if the charity is incidental to the ball, then the proposed use is not authorized. In determining the question of fact, the commander-in-chief may properly consider former balls held under similar circumstances and for similar purposes by the same applicant.

EQUITABLE LIEN — CLAIM FOR MATERIALS FURNISHED SUB-  
CONTRACTOR FOR CONSTRUCTION OF BUILDING AT BOSTON  
STATE HOSPITAL — MONEY RETAINED UNDER TERMS OF  
STATUTE AND CONTRACT — TRUST.

A claim filed by a concern that furnished materials to a subcontractor of a principal contractor who built a building at the Boston State Hospital for the Department of Mental Diseases, is within the terms of G. L., c. 30, § 39, provided the claim was seasonably filed.

Under the case of *Nash v. Commonwealth*, 174 Mass. 335, it must be taken that the Commonwealth had money in its hands which the statute cited intended should be security for the payment of the said bill, and that the money came to the Commonwealth for that purpose and was held by it as trustee for the concern.

You have requested my opinion upon the following case: —

In connection with the construction of the dining room, east group, Boston State Hospital, a materialman has filed a claim for material furnished and used in the construction of the building. The general contractor had a contract with a subcontractor for the furnishing of light iron. The contractor has paid to the subcontractor an amount on account of this contract. The materialman furnished the light iron to the subcontractor, and there is due to it from the subcontractor \$688, for which sum the materialman has filed a claim.

To the Com-  
missioner of  
Mental Diseases.  
1921  
March 10.

You ask whether the claim of the materialman is within the provisions of G. L., c. 30, § 39, which are as follows: —

Officers or agents contracting in behalf of the Commonwealth for the construction or repair of public buildings or other public works shall obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security, the claimant shall file with such officers or agents a sworn statement of his claim, within sixty days after the completion of the work.

The point raised by you was decided in the case of *Nash v. Commonwealth*, 174 Mass. 335. Nash filed a bill in equity against the Commonwealth, one Casparis, general contractor, and Smith & Burden, subcontractors, to enforce payment of a claim for

materials furnished by Nash to Smith & Burden, contractors under Casparis, the general contractor, who had a contract with the Metropolitan Water Board for the construction of an aqueduct as a part of the metropolitan water system. The general contractor argued in substance that Nash could not avail himself of the money retained by the Commonwealth because of the want of privity of contract, but our Supreme Judicial Court held that the case rested not alone upon the provisions in the contract, but upon that provision taken in connection with the statute. Under the provisions of law made for the petitioner's benefit, the Commonwealth was held to have money which it held as security for the payment of his claim. It held the money as trustee for the petitioner, not simply by virtue of the article in the contract. The purpose of the statute was to secure the petitioner's claim, and the Commonwealth, having retained a fund for the materialmen in compliance with the statute, is under an implied obligation to hold it for that purpose.

That such a suit may be maintained if the petitioners have a claim that might be the subject of a mechanic's lien is set forth again in the case of *Kennedy v. Commonwealth*, 182 Mass. 480, and the rule was again supported as recently as March 17, 1920, in the case of *Bay State Dredging & Contracting Co. v. W. H. Ellis & Son Co.*, 235 Mass. 263, 268, where the court used this language:—

The right to have the benefit of that security enured to any laborer and materialman who should furnish labor or material which was used or employed in the construction or repair of the public work if he should file a sworn statement of his claim within sixty days after the completion of the work contemplated by the original contract.

Accordingly, it is my opinion that the claim of the materialman is within G. L., c. 30, § 39, provided the said company filed a sworn statement of its claim within sixty days after the completion of the work contemplated by the original contract.



SECOND-HAND AUTOMOBILE — SALE BY SHERIFF UNDER EXECUTION — NOTICE TO REGISTRAR OF MOTOR VEHICLES AND CHIEF OF POLICE.

A sheriff, who by force of an execution is obliged to sell a second-hand automobile, is not required to give notice to the registrar of motor vehicles and the chief of police of the city or town where the sale is to be made, under G. L., c. 140, § 65.

You have requested my opinion as to whether or not a sheriff to whom has been issued an execution, and who by force of such execution is obliged to sell a second-hand automobile, comes within the provisions of G. L., c. 140, § 65, so that he is obliged to give the required notice set forth in that section.

To the Commissioner of  
Public Works.  
1921  
March 11.

G. L., c. 140, § 65, reads as follows: —

Any person not licensed under section fifty-nine, selling or offering to sell any motor vehicle, except to a licensee under class one of section fifty-eight or a person exempted by section fifty-seven, shall, at least four days before such sale, notify in writing the registrar and the chief of police or selectmen in the city or town where the sale is to be made, or, if in Boston, the police commissioner, unless he has secured a release as provided in the preceding section. Such notice shall contain all the information required by law to be set forth in an application for the registration of motor vehicles in the commonwealth, with the names and addresses of the vendor and vendee.

Sections 57 to 69, inclusive, of said chapter 140 relate to the sale of second-hand motor vehicles, and the obvious purpose of the statutory provisions contained in those sections is to serve as a check upon sales of stolen automobiles.

G. L., c. 37, § 11, requires sheriffs and deputies to serve and execute within their counties all precepts lawfully issued to them, and all other process required by law to be executed by an officer. G. L., c. 235, §§ 36 to 45, prescribe the manner in which personal property shall be seized and sold upon execution. Such sale must be at public auction, and there are complete provisions for notice of sale, return of execution, disposition of proceeds of sale, etc. The precise question is whether G. L., c. 140, § 65,

is intended to superadd further requirements in case the property sold on execution is an automobile.

I am of opinion that G. L., c. 140, § 65, does not apply to a sale of an automobile by a sheriff or his deputy, under G. L., c. 235, §§ 36 to 45. That sale must be at auction. It is impossible to give, four days in advance of the sale, the name and address of the auction purchaser. It may be doubted whether the sheriff is the vendor, since he acts merely as auctioneer in executing a power to sell conferred by law. The execution debtor is certainly not the vendor, since the sale is involuntary as to him. Under these circumstances, there seems to be great difficulty in giving the name and address of the vendor. The alternative, namely, procuring from the officials described in G. L., c. 140, § 64, the license to sell required by that section, would make a sale upon execution by order of the court depend upon the permission of those officials. Even if the Legislature had power to subject execution sales to such a condition, I cannot believe that it was the intention to do so, especially since a sale on execution is not less notorious than a sale made in compliance with said section 65.

Accordingly, my answer to your inquiry is in the negative.

---

#### CREDIT UNIONS — RIGHT TO PURCHASE AND OWN REAL ESTATE — OFFICE ACCOMMODATIONS.

Though the power to transact business carries the power to provide a suitable place for the transaction of business, investment of their capital by credit unions in real estate would materially interfere with their primary functions. They may, however, lease real estate for office purposes.

You request my opinion upon the question whether a credit union may, with your approval, purchase and own real estate to be used, either in whole or in part, as a convenient place for the transaction of its business.

A credit union is a corporation, and, like other corporations, possesses powers specifically granted to it, and other powers incidental to those specifically granted and necessary to their

exercise. The power to transact business at all carries with it power to provide a suitable place for the transaction of business.

It does not follow, however, that the power to provide a suitable place for the transaction of business is unlimited. It is necessarily circumscribed and conditioned by the purposes for which a credit union is organized, and by the nature of the activities in which it is authorized to engage. To illustrate by an extreme case: if the entire resources of a credit union consisted of \$25,000, it would not be authorized to purchase an office building for that sum, since to do so would not facilitate the purposes of the organization, but would, in fact, defeat them.

Since the power to provide office accommodations is not unlimited, the question arises, Where is the line of limitation? I believe it must be drawn at the point where operating expenses cease and capital investment begins. The principal purposes of credit unions are two: first, to encourage and develop thrift among the people; second, to provide for persons of limited means a place where they may secure loans for certain necessary and useful purposes. If any considerable portion of available capital is invested in the ownership of real estate, it is plain that less money will be available for loans to members. That is to say, investment of capital to provide office accommodations would in a measure defeat one of the principal purposes of the credit union. I am of opinion, therefore, that a credit union is authorized to lease real estate for office purposes, but not to purchase it. This power is sufficient to effectuate the purposes of organization, and not sufficient to interfere with them.

Up to this point I have discussed the question from the standpoint whether an express power to do business carries with it an implied power to expend capital to provide an office for the transaction of business. The investment of funds is the principal activity of credit unions, and I shall now consider the question presented to me from the standpoint whether a credit union may, as a part of its business of investing funds, invest in real estate to be used by itself for office purposes.

Investment of the funds of credit unions is provided for by G. L., c. 171, §§ 5 and 17, which read as follows:—

SECTION 5. A credit union may receive the savings of its members in payment for shares or on deposit; may lend to its members at reasonable rates, or invest, as hereinafter provided, the funds so accumulated; and may undertake such other activities relating to the purpose of the association as its by-laws may authorize. Section forty-eight of chapter one hundred and seventy shall not apply to credit unions.

SECTION 17. The capital, deposits and surplus funds of a credit union shall be invested in loans to members, with the approval of the credit committee as provided in the following section; and any capital, deposits or surplus funds in excess of the amount for which loans shall be approved by the credit committee may be deposited in savings banks or trust companies incorporated under the laws of the commonwealth, or in national banks located therein, or may be invested in the bonds of any other credit union, or in any securities which are at the time of their purchase legal investments for savings banks in the commonwealth, or, with the approval of the commissioner, may be deposited in other credit unions or may be invested in the shares of other credit unions or co-operative banks incorporated in the commonwealth; provided, that the total amount invested in the shares of other credit unions or co-operative banks shall not exceed thirty per cent of the capital and surplus, and that not more than twenty per cent shall be invested in the shares of other credit unions, nor more than twenty per cent in co-operative bank shares.

These sections provide, in effect, that funds may be invested as follows: in loans to members; in deposits in savings banks and trust companies organized under the laws of Massachusetts, and in national banks situated in Massachusetts; in the bonds of other credit unions; in securities that are legal investments for Massachusetts savings banks; and, under certain conditions, in deposits in other credit unions, and in the shares of other credit unions and of co-operative banks incorporated in Massachusetts. A reading of section 19 of the same chapter indicates that loans may be made to members upon security of real estate, but no provision is made for the use of funds in the purchase of real estate for any purpose whatever. This omission is significant in view of the fact that an express though qualified power to hold real estate for the transaction of its business was first conferred upon savings banks by St. 1870, c. 226, now G. L., c. 168, § 54, cl. 11 (see *Suffolk Savings Bank, Petitioner*,

149 Mass. 1; I Op. Atty.-Gen. 420); and upon trust companies by St. 1888, c. 413, § 18, now G. L., c. 172, § 41 (see II Op. Atty.-Gen. 317).

I am therefore of opinion that a credit union is not authorized, either with or without your approval, to purchase and hold real estate to be used as a convenient place for the transaction of its business.

---

#### PRIVATE BANKERS — SURRENDER OF LICENSE — BOND.

Where an association licensed to do business under G. L., c. 169, § 3, voluntarily surrenders its license, the Treasurer and Receiver-General may, in his discretion, return the bond and the money and securities filed and deposited with him under G. L., c. 169, §§ 2 and 3, before the expiration of the period of one year referred to in said section 3.

You state that the New Bedford Polish Association, Inc., of New Bedford, Mass., filed with the treasury department on Feb. 3, 1920, under the provisions of St. 1907, c. 377, and acts in addition thereto and amendment thereof, a bond for \$15,000, together with a certificate of deposit of the Hanover Trust Company of Boston for \$15,000; that you are now advised by the Commissioner of Banks that the license issued under said bond to the New Bedford Polish Association, Inc., expired on Feb. 3, 1921, and that the said association never did any business under the license. You ask whether, if the license is surrendered, you can legally return the security deposited in lieu of surety on the bond, and the bond itself.

To the  
Treasurer  
and Receiver-  
General.  
1921  
March 14.

The question is governed by G. L., c. 169, § 3. Said section states the requirements of bonds and the terms of licenses to be issued, and provides as follows:—

The license shall be revocable at all times by the commissioner for cause shown, and in the event of such revocation or of a surrender of the license, no refund shall be made in respect of any license fee paid. Every license shall be surrendered to the commissioner within twenty-four hours after written notice to the holder that the license has been revoked. In case of the revocation of the license, the money and securities and the bond, if there be one, shall continue to be held by the state treasurer for

a period of one year from the date of the revocation of the license unless otherwise directed by the order or judgment of a court of competent jurisdiction.

The statute requires that, in case of revocation of the license, the money and securities deposited and the bond shall continue to be held by the Treasurer and Receiver-General for a period of one year, unless otherwise directed by the court. The precise question is whether this requirement includes the case of a voluntary surrender of the license by the licensee.

The word "revocation" means the act of recalling, and signifies an act on the part of a person by whom a right is granted revoking that right. The word "surrender," on the other hand, means a voluntary giving up or giving back of something, and signifies an act on the part of the person having the thing surrendered by which that thing is relinquished. A license is revoked by the licensor and surrendered by the licensee.

The statute quoted refers expressly to the two possible events of "revocation" and "surrender" of a license.

I am of opinion that the word "revocation," in the last sentence of the section under consideration, does not include the case of a surrender, and that the requirement that the Treasurer shall continue to hold the security and the bond for a period thereafter does not apply to the case of a surrender. It may well be that the General Court was of the opinion that in certain cases where a license is voluntarily surrendered the security deposited in lieu of a surety on the bond might be returned; and in a case where an association never did any business under the license, the occasion for retaining the security for the protection of depositors does not seem to be present, as in the ordinary case. I am of opinion that, if you are satisfied that there is no need of holding the bond and security in the present instance, it is within your discretion to return them.

CO-OPERATIVE BANKS — CLASSES OF SHARES — LOANS ON  
SHARES.

Co-operative banks, with respect to loans made by them, are restricted to loans specifically authorized by statute.

Authority to make loans upon any other security than that specifically authorized cannot be implied.

I have the honor to acknowledge a copy of an order passed by the Honorable Senate, which is as follows: —

To the Senate.  
1921  
March 15.

*Ordered*, That the Senate request the opinion of the Attorney-General as to the necessity of enacting House Bill No. 695, being "An Act authorizing loans upon paid-up shares issued by co-operative banks," in order to accomplish the purpose desired.

House Bill No. 695, referred to in the order, as passed to be engrossed by the House, reads as follows: —

Section twenty-seven of chapter one hundred and seventy of the General Laws is hereby amended by inserting after the word "matured," in the fifth line, the words: — or paid-up, — so as to read as follows: — *Section 27.* Loans may be made upon unpledged shares to an amount not exceeding ninety per cent of their withdrawal value at the time of the loan, and for every such loan a note shall be given, accompanied by a transfer and pledge of the shares borrowed upon. Loans may be made upon matured or paid-up shares to an amount not exceeding ninety per cent of their face value, as represented by the certificate. For every such loan a note shall be given accompanied by a transfer of the certificate as collateral for the loan.

The first statute authorizing the establishment of co-operative banks was enacted in 1877 (St. 1877, c. 224).

Until the year 1914 the statute provided for only one class of shares, namely, shares which had not become matured. In that year the statute was amended so as to give a shareholder a right, under certain conditions, to hold ten matured shares. See also St. 1914, c. 643, § 6. No change was made in the provisions of law relative to loans on shares.

In 1915 the Bank Commissioner requested the opinion of the Attorney-General as to whether a co-operative bank was au-

thorized to execute loans on matured shares belonging to a shareholder. The Attorney-General, in stating as his opinion that such loans could not be made, said (IV Op. Atty.-Gen. 389), in part: —

Co-operative banks are not ordinary institutions for savings, and are not intended to be banks where money may remain on deposit indefinitely, although, under certain conditions, ten shares are permitted to be continued in the corporation as matured shares.

The purpose of co-operative banks may be said to be to effect the saving of money by a compulsory method as distinguished from the permissive policy maintained by other banks. The only departure from this purpose is the provision in the statute giving the right to hold ten matured shares as above stated.

The statute does not specifically provide for loans on these matured shares, and in my opinion does not authorize such loans by implication.

In 1918 the statute was further amended so as to authorize loans upon matured shares to an amount not exceeding 90 per cent of their face value as represented by the certificate. See St. 1918, c. 101. This amendment appears in the General Laws as section 27 of chapter 170.

St. 1920, c. 429, for the first time authorized the issue of paid-up shares. This amendment appears in the General Laws as section 12 of chapter 170. No change was made in the provisions of law relative to loans upon shares.

The history of legislation relative to co-operative banks shows that the original purpose was to compel holders of shares to save money under penalty of certain fines and compulsory withdrawal from the bank, and to permit them to borrow money to anticipate the ultimate value of their shares. Members of such corporations could hold only shares which had not matured. Later they were permitted, under certain conditions, to hold ten matured shares, and finally they were also authorized to hold, under certain conditions, ten paid-up shares. Loans were first authorized only upon notes secured by real estate mortgages. Subsequently loans were authorized, under certain conditions, upon shares which had not matured to an amount not exceeding the withdrawal value, and this amount was reduced by later statutes



to 95 per cent and then to 90 per cent of the withdrawal value. Finally loans were also authorized upon matured shares to an amount not exceeding 90 per cent of their face value.

It therefore clearly appears that the intent of the Legislature with respect to loans made by co-operative banks has always been to restrict such banks to loans specifically authorized by statute. Authority to make loans upon any other security than that specifically authorized cannot be implied. I am therefore of the opinion that if the Legislature desires to authorize co-operative banks to make loans on paid-up shares, it is necessary to enact House Bill No. 695.

---

PROVINCE LANDS — TOWN OF PROVINCETOWN — LOCAL TAXATION — STRUCTURES ON FLATS BY LICENSEE OF THE COMMONWEALTH.

The town of Provincetown cannot assess taxes on structures erected by licensees under G. L., c. 91, § 14, upon the flats of the Commonwealth at the said town.

On behalf of the committee on harbors and waterways, which is considering House Bill No. 571, relative to the title to certain province lands owned by the Commonwealth in the town of Provincetown, you have asked my opinion as to whether or not the board of assessors of Provincetown can legally assess and collect taxes on property which is on the land controlled by the Commonwealth in the town of Provincetown. While your inquiry is perhaps collateral to the subject-matter presented by the bill, I am pleased to submit the following for your consideration.

House Bill No. 571 provides as follows:—

Ownership and occupancy, actual or constructive, during any period between June tenth, eighteen hundred and ninety-three, and December first, nineteen hundred and one, by any person owning adjoining land on property lying east and south of lines fixed by section twenty-five of chapter ninety-one of the General Laws is hereby declared to have absolutely divested the commonwealth as of January first, nineteen hundred and two, of any property, rights, title, or interest in any part of said province lands, not over one hundred rods below high-water mark.

To the Senate  
Committee on  
Harbors and  
Waterways.  
1921  
March 15.

I am informed that this bill is introduced as the result of a decision handed down by our Supreme Judicial Court on May 22, 1920, in the case of *Sklaroff v. Commonwealth*, 236 Mass. 87. In that case the facts were that the petitioners had filed in the Land Court a petition to register the title to a parcel of land situated in Provincetown, and the question raised, in brief, was as to whether or not the petitioners' title went to low-water mark, since the Commonwealth claimed that the title to all the land and flats below high-water mark was in the Commonwealth. I understand that your committee has before it the decision, in which the reasons for the court's determination are pointed out, that determination being, in brief, that the Commonwealth had not been deprived of its title to the lands below high-water mark by any acts of the petitioners.

Taking the facts of the Sklaroff situation as a specific case upon which to answer your inquiry, I find that Sklaroff & Sons were given licenses under the provisions of R. L., c. 96 (said licenses being dated Jan. 2 and June 26, 1918), to construct certain structures on the flats below high-water mark at Provincetown. The court having held that the title to the flats is in the Commonwealth, the question arises as to the right of the town of Provincetown to levy taxes upon the structures placed upon the land of the Commonwealth by permission of said licenses.

An early case, *Boston & Maine Railroad v. City of Cambridge*, 8 Cush. 237, would seem, at first sight, to indicate that the structures might be taxable. In that case the Legislature had given the Boston & Maine Railroad, by a specific act, authority to fill certain flats between the channels of the Charles and Miller rivers, outside of the location of the railroad, for the location of engine houses and wood houses, and for other purposes for the use of the railroad, and the court indicated that the structures and lands filled were not exempt from taxation. This decision, however, is not satisfactory for our purposes, as it is not indicated whether the court considered that the title to the land filled was in the Commonwealth or whether the title was in the railroad company, and, being outside of the location, was taxable for that reason.

As to the Provincetown situation, the first question that arises is whether or not the structures standing by permission upon the Commonwealth's land are to be considered, for the purpose of taxation, as real estate or as personalty.

Real estate for the purpose of taxation is defined by G. L., c. 59, § 3, as follows:—

Real estate for the purpose of taxation shall include all land within the commonwealth and all buildings and other things erected thereon or affixed thereto.

In the case of *Flanders v. Cross*, 10 Cush. 514, the facts were as follows: A, residing in another State, owned a building in Lawrence in this State, standing, by consent, on the ground of another person. In arriving at its conclusion the court said:—

Was the property here to be considered as real estate for the purpose of taxation, or as personal? The language of the statute would seem to make it the former. "Real estate," it says, "shall, for the purposes of taxation, be construed to include all lands within the State, and all buildings and other things erected on or affixed to the same." Rev. Sts., c. 7, § 2.

The court also said:—

There is no power in the collector to divide the property, to levy on the building severed from the land, as divisible parts of the same piece of real estate.

In the case of *Milligan v. Drury*, 130 Mass. 428, it was held that a building resting on sills upon the ground is taxable as real estate, although, by agreement between a lessor and lessee of the land, the latter had the right to remove the building at the expiration of the lease. In this case the court again quoted the definition of real estate for the purpose of taxation, and stated that—

The assessors were not obliged to inquire into the private contracts between the parties, but had the right to do as they did, and assess together as real estate the land and the buildings affixed thereto.

Therefore, in my judgment, the structures now standing on the flats of the Commonwealth by license would, for the purpose of taxation, be considered real estate.

The next step is a consideration of the second clause of G. L., c. 59, § 5, which reads as follows:—

The following property . . . shall be exempt from taxation:

Second, Property of the commonwealth, except real estate of which the commonwealth is in possession under a mortgage for condition broken, lands in Boston known as the commonwealth flats, if leased for business purposes, buildings erected by lessees under section twenty-six of chapter seventy-five [this section authorizes the trustees of the Massachusetts Agricultural College to lease to any professor, etc., land in Amherst or Hadley owned by the Commonwealth], and property taxable under chapter five hundred and seventy-five of the acts of nineteen hundred and twenty [this chapter relates to real estate owned by the Commonwealth and held by the Metropolitan District Commission in the town of Hull, and which is leased or occupied for business purposes].

To summarize the above exemption, all property of the Commonwealth is exempted from taxation except where it falls within the four exceptions enumerated above.

The first case in point is *Corcoran v. Boston*, 185 Mass. 325, which involved land on the so-called Commonwealth Flats, for which the Commonwealth had given a bond for a deed, and the land was in possession of Corcoran, who would become entitled to a deed upon payment of the purchase money, and who had erected buildings on the land and was carrying on business there. In deciding the case the court pointed out that the statute then provided that the property of the Commonwealth, except real estate of which the Commonwealth is in possession under a mortgage of condition broken, should be exempt from taxation. Continuing, the court said:—

The language could not be plainer. The words “the property of the Commonwealth” mean the same as “all the property of the Commonwealth.” And the fact that only one exception is made shows that no other exception could have been intended, and that a construction such as contended for by the respondent, namely, that the exemption extends

only to property held by the Commonwealth for governmental purposes, would be unwarranted. The property that was taxed is the property of the Commonwealth, notwithstanding the Commonwealth has contracted to sell it to the petitioner, and the petitioner is in possession, and the exemption attaches to it so long as it continues to be the property of the Commonwealth.

The Corcoran case came up again (193 Mass. 586) after the Legislature had enacted St. 1904, c. 385, providing that the lands of the Commonwealth known as the Commonwealth Flats "shall, if leased for business purposes, be taxed by the city of Boston to the lessees thereof." The court held that the statute did not apply to land occupied under a bond for a deed from the Commonwealth by one who carries on business there, and that the land was exempt from taxation. In this case the petitioner had erected a manufacturing establishment and was carrying on business there as a manufacturer.

In a later case, *Boston Fish Market Corp. v. Boston*, 224 Mass. 31, the petitioners, by indenture entered into with the Commonwealth, had become the lessees of certain parts of the Commonwealth Flats, and the court held that the general exemption from taxation of the property of the Commonwealth did not apply to those portions of the Commonwealth Flats that were leased for business purposes, as they were expressly subjected to taxation. The court in its decision pointed out that the plaintiff was not a mere licensee under R. L., c. 96, § 17. This section is the one authorizing the licensing and erection of structures in tide waters.

This observation by our Supreme Judicial Court strongly indicates that the court would find, if the question were presented to them, that structures erected by a mere licensee upon property of the Commonwealth under R. L., c. 96, § 17 (now G. L., c. 91, § 14), would not be subject to taxation. Accordingly, it is my opinion that the town of Provincetown cannot assess taxes on the structures now standing upon the flats of the Commonwealth at Provincetown by license of the Commonwealth.

While you have not raised the question, and I do not pass upon it, there would appear to be some question as to the constitutionality of House Bill No. 571 in its present form, since it operates

to vest in private parties, for private purposes, and without consideration, lands belonging to the Commonwealth.

A further consideration to be borne in mind is the advisability of expressly reserving in land between high-water mark and low-water mark the public easement for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows.

#### CHARITABLE TRUST — RELIGIOUS SOCIETY — POWER OF LEGISLATURE TO TERMINATE TRUST.

The Legislature has no power to terminate a charitable trust under which the legal title to certain land and a meeting house was vested in trustees for the concurrent use and benefit of a church and a religious society.

Certain property having been left to trustees for public charitable purposes, and the particular mode of administration having been prescribed by the donor, the donee, by accepting the property, bound itself to administer the trust in the manner prescribed. The Legislature cannot interfere to control or change the method.

To the Joint  
Committee on  
Legal Affairs.  
1921  
March 18.

You have asked my opinion as to the legal validity of the provisions contained in House Bill No. 602 in case of its passage.

The bill in question is to authorize George W. Noyes and other trustees to terminate a certain trust and to convey certain property to the Center Congregational Society of Haverhill, and reads as follows: —

George W. Noyes, Charles E. Dole and George O. Hoyt appointed trustees by the probate court for the county of Essex under certain deeds or instruments of trust from David Marsh, Jr., and John Marsh to John Marsh and others, dated December seventeen, eighteen hundred and thirty-four, and an indenture made by John Marsh and others and Eliphalet Kimball and others are hereby authorized to convey the property described in said instruments together with the buildings thereon in fee simple to the Center Congregational Society of Haverhill for the use of said society and upon said conveyance said trust shall terminate and said trustees shall be discharged of their trust under said instruments.

The first trust instrument in this case is that of David Marsh, Jr., and John Marsh, executed Dec. 17, 1834, by which they conveyed to John Marsh and others, a building committee, a

certain parcel of land in Haverhill, with the meeting house standing thereon. The property was conveyed in trust, one of the conditions being that the building committee should convey the land and meeting house to one Kimball and others, who should hold the property in trust for the concurrent use and benefit of the Center Congregational Church and the Center Congregational Society. On the same day John Marsh and others, the said building committee, conveyed to Kimball and others, trustees, the aforesaid parcel of land and meeting house, and the conditions of this second trust deed conformed to a trust deed of a meeting house in the West Parish of Haverhill, as had been directed in the original trust deed of David Marsh, Jr., and John Marsh. In the indenture from the building committee to the original trustees this language is found:—

And it is hereby fully declared and expressly understood that this sale and conveyance is made upon the trusts and for the purposes hereinafter expressed, and to and for no other use, intent or purpose whatever; that is to say, upon this special trust and confidence that the said parties of the second part, the survivors of them and their assigns, and the survivor of them, his heirs and assigns, shall keep, suffer and permit the said meeting house and land at all times hereafter to be used, occupied and enjoyed as and for a meeting house.

An examination of the instrument will disclose express conditions as to the administration of the trust. The trustees agreed that —

They will hold said house and land in joint tenantry, and that they or either will never sue out any writ at common law nor present any petition under the statute for the partition of the said premises, nor attempt the partition thereof in any way whatsoever, or suffer or permit the same to be made, and if any attempt should be made to obtain partition of the premises that this covenant may be pleaded in law thereto by any of the present parties hereto or any other person who may be in any way interested therein, so that this covenant shall forever be an effectual bar to any partition of the said premises.

It appears that as the old trustees died no steps were taken to fill the vacancies, with the result that in 1898 there were no

trustees to administer the trust, and the matter was taken up in the Probate Court of Essex County, and the court appointed George W. Noyes and four others to act as trustees. Two of said trustees have since died, and George W. Noyes, Charles E. Dole and George O. Hoyt are the present trustees.

By the deeds of David Marsh, Jr., and John Marsh to the building committee, and that of the building committee to Kimball and others, trustees, a valid charitable trust was created, under which the legal title to the land and meeting house vested in the trustees for the concurrent use and benefit of the Center Congregational Church and the Center Congregational Society. *Austin v. Shaw*, 10 Allen, 552; *Chase v. Dickey*, 212 Mass. 555; *Ripley v. Brown*, 218 Mass. 33; *Crawford v. Nies*, 220 Mass. 61, 64.

Where property is left to trustees for public charitable purposes, and the particular mode of administration is prescribed by the donor, the donee, by accepting the property, binds itself to administer the trust in the manner prescribed. The Legislature cannot interfere to control or change the method. The court will not, and, indeed, cannot, alter the scheme of the donor "either as to the objects of the charity or the agents by whom it is to be administered, unless it appears to be impossible to carry out the scheme according to its terms." *Winthrop v. Attorney-General*, 128 Mass. 258, 261; *Cary Library v. Bliss*, 151 Mass. 364, 375; *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Fellows v. Miner*, 119 Mass. 541.

Whenever a charitable trust can be administered in accordance with the directions of the donor or founder, our Supreme Judicial Court has said that "it is not at liberty to modify it upon considerations of policy or convenience." *Jackson v. Phillips*, 14 Allen, 539, 591, 592. The conditions laid down in the trust instruments can be carried out by the present trustees.

The language quoted above, that the conveyance was made upon the special trust and confidence that the trustees should permit the meeting house and land at all times hereafter to be used for public worship, in my opinion was a stipulation that the trust should last forever, and that being so, it is doubtful if the



Legislature has power to terminate the trust, as is provided for in the House bill under consideration.

In a recent case (*Crawford v. Nies*, 224 Mass. 474, decided in June, 1916) the Supreme Judicial Court held that the Legislature had no power to terminate a trust where by a deed certain land was conveyed to trustees for the use and benefit of members of a certain church. In view of the decision in that case, I am of opinion that the Legislature has no power to terminate the trust in question.

---

TAXATION — DOMESTIC CORPORATION — LIABILITY OF CORPORATION NOT ENGAGED IN BUSINESS.

A domestic corporation which sold all its assets and ceased doing business prior to Jan. 1, 1920, is not subject to taxation under the provisions of Gen. St. 1919, c. 355, and St. 1920, c. 550, as amended, both of which became effective on or after that date.

Under Gen. St. 1919, c. 355, a domestic business corporation is subject to tax with respect to the doing of business, and not with respect to the privilege of doing business, as under St. 1909, c. 490, pt. III, §§ 39-41.

You state that a domestic corporation sold all its assets on the first day of December, 1919, and since that date has carried on no business whatever. You request my opinion whether said corporation is subject to taxation under the provisions of Gen. St. 1919, c. 355, and St. 1920, c. 550, as amended.

To the Commissioner of Corporations and Taxation.  
1921  
March 21.

---

Said chapter 550 re-enacted for one year sections 1 and 2 and 4 to 9, inclusive, of chapter 255 of the General Acts of 1918. The latter chapter imposed a tax upon corporations incorporated under the laws of this Commonwealth and doing business for profit. On May 27, 1920, the date when said chapter 550 was enacted, the corporation was not "doing business for profit" and therefore was not comprehended by the terms of the act, and did not become taxable thereunder (see *Attorney-General v. Boston & Albany R.R. Co.*, 233 Mass. 460).

Gen. St. 1919, c. 355, became effective on Jan. 1, 1920 (§ 33). On that date the corporation in question was in existence, but was not carrying on any business whatever. The question is squarely raised, therefore, whether a domestic corporation which has not

been dissolved but which has "gone out of business" is subject to the excise tax provided for by chapter 355.

In my communication of Feb. 3, 1921, I expressed the opinion that a corporation doing business at any time during the year 1920, even though it sold all its assets prior to April 1 of that year, was subject to taxation under chapter 355. The question now presented, however, arises in respect to a corporation that was carrying on no business whatever at the time said chapter became effective, and, moreover, has not done business at any time during the period in which said chapter has been in effect.

Section 2 provides, in part: —

Except as is otherwise provided in this section, every domestic business corporation shall be subject to pay annually, with respect to the carrying on or doing of business by it, an excise tax equal to the sum of the following: —

(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

(2) An amount equal to two and one half per cent of that part of its net income as hereinafter defined, which is derived from business carried on within this commonwealth.

The tax thus provided for is computed in part upon corporate excess and in part upon income. So far as it is computed upon corporate excess, it was derived from the tax provided for by St. 1909, c. 490, pt. III, §§ 39–41, which was imposed upon "every corporation organized under the general or special laws of the commonwealth for purposes of business or profit. . . ." As provided for by chapter 490, it was a franchise tax, — a tax upon the *privilege* of doing business; if, after completing its organization, a corporation did not begin business, or if, having begun business, it later sold its assets and transacted no business whatever thereafter, nevertheless it was liable to taxation, for unless and until it was dissolved, it enjoyed the privilege of doing business as a corporation. *Attorney-General v. Massachusetts Pipe Line Gas Co.*, 179 Mass. 15.

The tax provided for by chapter 355 contains a new element, in that it is measured in part by net income. It also differs from

the former tax in the fact that by its terms it is imposed "with respect to the carrying on or doing of business by it." The words quoted are not the equivalent of the words used in the former act, — "*organized* under the general or special laws of the commonwealth for *purposes* of business or profit." Under the former act, the corporation was taxed in respect to the privilege of doing business; under the present act, it is taxed in respect to the exercise of the privilege.

In *Attorney-General v. Boston & Albany R.R. Co.*, 233 Mass. 460, the question was whether a railroad corporation which had leased its lines to another corporation and confined its activities to the receiving of rent and the distribution of the same to its stockholders was "doing business for profit," within the meaning of Gen. St. 1918, c. 255, § 1. The court held that it was not, and, therefore, was not taxable. *A fortiori*, if the corporation had been engaged in no activities whatever, the court would have held that it was not taxable. The words "doing business for profit" have substantially the same meaning as "the carrying on or doing of business" when applied to a business corporation.

The meaning of the words "engaged in business," as used in the corporation tax law of the United States (36 St. at Large, 112, 117), has frequently been construed by the Supreme Court of the United States. In the following cases it was held that the corporation in question was not "engaged in business," and therefore was not subject to the corporation tax: *Zonne v. Minneapolis Syndicate*, 220 U. S. 187; *McCoach v. Minehill & Schuylkill Haven R.R.*, 228 U. S. 295; *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28. In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 145, the court said: —

It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business and with respect to the carrying on thereof.

The tax provided for by Gen. St. 1919, c. 355, is of the same nature.

For the reasons stated, and in view of the authorities referred to, I am of opinion that a corporation which has carried on no business whatever since Dec. 31, 1919, is not subject to taxation under the provisions of said chapter.

---

TRUST COMPANIES — FEDERAL RESERVE SYSTEM — POWER OF COMMISSIONER TO AUTHORIZE A BOSTON TRUST COMPANY WHICH IS A MEMBER OF THE FEDERAL RESERVE SYSTEM TO ACT AS A RESERVE AGENT FOR OTHER TRUST COMPANIES.

Acting under the power conferred by G. L., c. 172, § 75, the Commissioner of Banks may authorize a Boston trust company which is a member of the Federal reserve system to act as reserve agent for other trust companies.

Under G. L., c. 172, § 81, a trust company which becomes a member of the Federal reserve system is governed as to the management of its reserve by the Reserve Act and not by G. L., c. 172, § 75.

To the Com-  
missioner  
of Banks.  
1921  
March 21.

You have requested my opinion on the following case: —

A certain trust company in Boston, which is a member of the Federal reserve system, has applied to the Commissioner of Banks for permission to act as reserve agent for other trust companies under G. L., c. 172, § 75.

You ask whether or not you can authorize said trust company to act as reserve agent.

G. L., c. 172, § 75, provides: —

The commissioner may authorize any trust company in Boston to act as reserve agent for trust companies doing business in the commonwealth; provided, that a trust company shall not keep any part of its reserve in a trust company so authorized to act as reserve agent without first obtaining the written consent of the commissioner. Not less than one half of the reserve of such trust company acting as reserve agent shall consist of lawful money of the United States, gold certificates, silver certificates or notes and bills issued by any lawfully organized national banking association, and the remainder of such reserve may consist of balances, payable on demand, due from any trust company in Boston authorized to act as reserve agent as herein provided, or from any national banking association doing business either in this commonwealth or in the cities of New York, Philadelphia, Chicago or Albany.

Section 81 provides: —

A trust company which becomes a stockholder in a federal reserve bank within the federal reserve district where such trust company is situated, and while such trust company continues as a member bank under the United States "Federal Reserve Act" approved December twenty-third, nineteen hundred and thirteen, or any acts in amendment thereof, shall be subject to the provisions of said "Federal Reserve Act" and any amendments thereof relative to bank reserves, in substitution for the requirements of sections seventy-three to seventy-five, inclusive.

As the trust company under consideration has become a member of the Federal Reserve Bank in Boston, the extent of its reserve and the manner in which such reserve shall be held are governed by the Federal Reserve Act, 38 Stat., pp. 251, 262, c. 6, and amendments thereof, and not by G. L., c. 172, §§ 73 to 75, inclusive. The requirements as to reserve of said Federal Reserve Act, as amended to April 13, 1920, seem to be somewhat less stringent in certain respects than those of said sections 73 to 75, inclusive, of our State act. The precise question, therefore, is whether the Commissioner of Banks may, under the first sentence of said section 75, authorize a trust company in Boston to act as reserve agent for other trust companies, although such Boston trust company, if so designated, need not comply with the "requirements" of the second sentence of said section 75.

In my opinion, such designation may be made. Section 81 provides that any trust company which joins the Federal reserve system "shall" be governed as to reserve by the provisions of the Federal Reserve Act, "in substitution for the requirements of" said sections 73 to 75, inclusive. That which is so substituted must be deemed to be the equivalent in that respect of said sections 73 to 75, irrespective of any apparent differences between the former and the latter. Such substitution of an equivalent for the "requirements" of said sections 73 to 75 as to reserve cannot be held to narrow the power of the Commissioner of Banks to appoint "any trust company in Boston" as a reserve agent for other trust companies. Said section 81 makes it clear that a trust company may join the Federal reserve system and still

retain its State charter. A construction of the State act which would in effect require a Boston trust company to choose between membership in the Federal reserve system and being appointed a reserve agent for other trust companies would, to some extent at least, impose upon such a trust company the very election from which said section 81 was apparently intended to relieve it. I therefore advise you that you have power to make the designation in question. The expediency thereof is for you to determine in each case, in the exercise of a sound discretion.

---

CONSTITUTIONAL LAW — FEDERAL CONSTITUTION — CONTRACT  
 CLAUSE — REPEAL OF CORPORATE CHARTER FOR MISUSER  
 WHERE NO POWER TO AMEND OR REPEAL WAS RESERVED.

Where a corporate charter was granted without reserving any right to alter, amend or repeal the same, the Legislature cannot acquire power to repeal such charter by adding the words "for misuser" to the repealing clause.

If a ground for forfeiting an irrevocable corporate charter exists, such forfeiture must be established by a competent court.

You inquire whether Senate Bill No. 190, entitled, "An Act to repeal the charter and all corporate powers granted to the Second Society of Universalists in the Town of Boston," would be constitutional if the section which purports to repeal the charter were amended by adding the words "for misuser" at the end thereof.

On Feb. 28, 1921 (VI Op. Atty.-Gen. 58) I advised you that the Legislature did not reserve and does not possess power to alter, amend or repeal this charter without the consent of the corporation. The Legislature cannot acquire power to repeal this charter by declaring that the corporation has misused its powers. If a ground of forfeiture exists, it must be established in a suit brought by the Commonwealth before a competent tribunal. *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 274; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 49, 52; *Heard v. Talbot*, 7 Gray, 113, 119. A different question would be presented if the Legislature had reserved a power to repeal this charter for a default upon the part of the corporation, and so possessed the incidental power

to determine whether the condition precedent to such repeal had occurred. *Crease v. Babcock*, 23 Pick. 334. I therefore answer your question in the negative.

---

PENAL INSTITUTION — INMATE AFFLICTED WITH CERTAIN DISEASES — TREATMENT AND DISCHARGE.

The head of a penal institution is justified in holding an inmate whose sentence has expired, provided said inmate is afflicted with one or more of the diseases referred to in G. L., c. 111, § 121.

Such inmates may be isolated from the public, whose health might be endangered by contact with them, but not being bound by prison rules intended to govern the conduct of prisoners under sentence for crime, they may not be punished for violation of such rules.

The provisions of G. L., c. 268, § 16, relating to escaped prisoners, refer solely to persons under sentence, and have no application to inmates held under G. L., c. 111, § 121.

You direct my attention to G. L., c. 111, § 121, which provides that an inmate of a penal institution who, at the expiration of his sentence, is afflicted with certain diseases, shall be retained in said institution until symptoms of disease shall have disappeared and his discharge will not endanger the public health.

To the Com-  
missioner of  
Correction.  
1921  
March 24.

In respect to this statute you request my opinion upon three questions: —

1. Is the head of a penal institution justified in holding an inmate whose sentence has expired, provided said inmate is afflicted with one or more of the diseases referred to in the statute?
2. If said inmate is so held, may he be punished by solitary confinement or otherwise for infraction of the prison rules?
3. If an inmate so held escapes from the institution, is he liable to prosecution under the "escape law"?

The section in question provides: —

An inmate of a public charitable institution or a prisoner in a penal institution who is afflicted with syphilis, gonorrhœa or pulmonary tuberculosis shall be forthwith placed under medical treatment, and if, in the opinion of the attending physician, it is necessary, he shall be isolated until danger of contagion has passed or the physician determines his isolation unnecessary. If at the expiration of his sentence he is af-

flicted with syphilis, gonorrhœa or pulmonary tuberculosis in its contagious or infectious symptoms, or if, in the opinion of the attending physician of the institution or of such physician as the authorities thereof may consult, his discharge would be dangerous to public health, he shall be placed under medical treatment and cared for as above provided in the institution where he has been confined until, in the opinion of the attending physician, the said symptoms have disappeared and his discharge will not endanger the public health. The expense of his support, not exceeding three dollars and fifty cents a week, shall be paid by the town where he has a settlement, after notice of the expiration of his sentence and of his condition to the overseers of the poor thereof, or, if he is a state pauper, to the department of public welfare.

I proceed to discuss the three questions raised by your request in the order in which I have stated them.

1. A citizen may not be committed to prison or held therein as a criminal unless he has been duly convicted of crime and has been sentenced to confinement by a court of competent jurisdiction. He may not be imprisoned by legislative or executive fiat, nor may his imprisonment be continued by legislative or executive fiat after the expiration of his sentence. These propositions I take to be axiomatic.

But while the Legislature is under a duty not to interfere arbitrarily with the liberty of the individual, it is also under a duty to provide for safeguarding the public health. Personal liberty leaves off where public safety begins. In consequence, the State may compel vaccination (G. L., c. 111, §§ 181-183), and may make quarantine regulations and provide for the compulsory isolation of persons afflicted with infectious diseases (G. L., c. 111, §§ 176-180). See *Commonwealth v. Pear*, 183 Mass. 242; *Jacobson v. Massachusetts*, 197 U. S. 11.

The statute above quoted is designed to protect the public by providing that certain persons whose liberty would be a menace to the public health shall not be permitted to mingle with, and possibly infect, healthy members of the community. It is a quarantine statute. It provides in effect that a person previously restrained of his liberty because guilty of crime shall, at the expiration of his sentence, continue to be restrained and kept under



treatment until the danger of infecting the public shall have disappeared. So construed, the act is constitutional and valid.

I am of opinion that your first question should be answered affirmatively.

2. Section 121 was not intended to provide punishment for persons afflicted with disease, nor was it intended to extend or prolong expired sentences. As already indicated, it is a quarantine statute. In consequence, while diseased persons may be isolated and restrained of their liberty pursuant to its provisions, after expiration of their sentences they are not to be dealt with as convicted criminals still under sentence. In the eyes of the law, they are invalids rather than criminals. They may be kept isolated from the public, whose health would be endangered by contact with them, but they are not bound by prison rules intended to govern the conduct of persons under sentence for crime. If, therefore, they violate such rules, they may not be punished for such violation either by solitary confinement or by other methods designed to effectuate the discipline and control of persons serving sentences for crime. (See G. L., c. 137, §§ 39-47.) The correctness of this conclusion appears from the section itself, which provides that a diseased person whose sentence has expired "shall be placed under medical treatment and cared for as above provided in the institution where he *has been* confined," and which provides also for the support of such persons by the towns wherein they have settlements.

I answer your second question in the negative.

3. By the term "escape law" I assume that you have reference to G. L., c. 268, § 16, which provides: —

A prisoner who escapes or attempts to escape from any penal institution, or from land appurtenant thereto, or from the custody of any officer thereof or while being conveyed to or from any such institution, may be pursued and recaptured and shall be punished by imprisonment in the institution to which he was originally sentenced for a term not exceeding five years. If the prisoner has escaped or attempted to escape from the prison camp and hospital, the expense of supporting him shall be paid by the institution to which he is sentenced and the expense of committing him shall be paid by the prison camp and hospital. In im-

posing sentence under this section the court shall observe the provisions of law regarding sentences and commitments to the various penal institutions.

This section, by its terms, has reference to "a prisoner," which term as used in the section is equivalent to the phrase "convict under sentence." It is intended to prevent escapes and attempts to escape by persons serving sentences for crime. It clearly has no application to persons restrained of their liberty by virtue of a quarantine regulation contained in a statute. The Legislature cannot be presumed to have intended to establish a sentence of five years' imprisonment as a punishment for escape from quarantine. The section is penal, and is, therefore, to be construed strictly. So construed, it has application only to persons under sentence.

I answer your third question in the negative.

4. A question may be raised whether, since the statute provides for the quarantine of ex-prisoners only and not of all persons in the Commonwealth afflicted with the diseases referred to in the statute, the latter may not be invalid as an exercise of the police power, on the ground that it is unduly discriminatory. I have not been unmindful of this limitation in my answer to your first question. However, the question of what measures are best calculated to safeguard the public interest, and especially the public health, is, in the first instance, for the consideration of the Legislature, and every intendment is to be made in favor of the constitutionality of a statute enacted by the General Court after full consideration and discussion by them of the questions of law and public policy involved.

## POLL TAXES — EXEMPTION — MILITARY OR NAVAL SERVICE.

The exemption from the payment of poll taxes, provided by Gen. St. 1918, c. 49, § 1, as amended by Gen. St. 1919, c. 9, is still in effect, regardless of Public Resolution No. 64, 66th Congress, effective March 3, 1921, entitled "A Resolution declaring certain acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency expired."

Gen. St. 1918, c. 49, § 1, as amended by Gen. St. 1919, c. 9, provides: —

To the Commissioner of Corporations and Taxation.  
1921  
March 24.

Inhabitants of this commonwealth who were engaged in the military or naval service of the United States in the present war before the passage of this act, and those who hereafter engage in said service during said war, shall be assessed for, but shall be exempt from, the payment of all poll taxes assessed for the year nineteen hundred and seventeen and during the continuance of the war, and thereafter up to and including the year of their discharge.

You direct my attention to Public Resolution No. 64, 66th Congress, effective March 3, 1921, entitled "A Resolution declaring certain acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency expired," and you request my opinion whether the effect of said resolution is to terminate the exemption from payment of poll taxes provided for by Gen. St. 1918, c. 49, as amended.

In an opinion rendered to the Commissioner of Corporations and Taxation, on July 8, 1920 (V Op. Atty.-Gen. 601), I said: —

Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, applies "during the continuance of the war." The latter act was approved on Feb. 17, 1919, over three months subsequent to the armistice. The phrase "during the continuance of the war" cannot, therefore, be construed to mean continuance of hostilities. It must refer to the legal termination of the war. A state of war legally continues until terminated by a treaty of peace or by a proclamation of peace. *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161; *Hijo v. United States*, 194 U. S., 315, 323. Neither of these events has as yet occurred. It follows that Gen. St. 1919, c. 9, was still in force on April 1, 1920, and operated to exempt those within its terms from the \$5 poll tax imposed under Gen. St. 1919, c. 283, § 10. To avoid misconception, I may add that a discharge from the service

prior to April 1, 1920, does not affect the operation of the act. The clause "and *thereafter* up to and including the year of their discharge" refers to a discharge subsequent to the termination of the war.

Unless, therefore, said resolution of Congress terminated the war with the Central Powers, the poll tax exemption above referred to is still in effect.

Whether a state of war may be terminated by congressional resolution is a question that I am not at present called upon to answer, for I am of opinion that the resolution above referred to was not intended to have that effect; indeed, the expression "as if the war had ended," which is included in the title of the resolution, constitutes legislative recognition of the continued existence of a state of war. Certain resolutions and statutes of Congress, and also certain proclamations, were made necessary and were adopted to meet emergencies created by actual hostilities, and similarly there was need for emergency legislation and for proclamations by the Executive to meet the conditions which attended the demobilization of the agencies and instrumentalities incident to the active prosecution of war. The emergency having been met, Congress has determined that certain legislative provisions incident to it are no longer necessary or desirable, and has therefore resolved that they shall be construed in the light of the changed conditions. The resolution enacted was not by any means the equivalent of the so-called "Knox Resolution," introduced in the United States Senate last year, and was not intended to operate as a termination of the war.

I am of opinion that the exemption provided for by Gen. St. 1918, c. 49, as amended by Gen. St. 1919, c. 9, is still in effect.

SALARIES OF OFFICERS AND EMPLOYEES OF THE COMMONWEALTH  
 — EMPLOYEES OF THE MASSACHUSETTS AGRICULTURAL COL-  
 LEGE PAID WHOLLY OR IN PART FROM FEDERAL FUNDS —  
 SUPERVISOR OF ADMINISTRATION.

Salaries of employees of the Massachusetts Agricultural College, paid from State appropriations, must be fixed by the trustees of the college, under G. L., c. 75, § 13, in accordance with the classification and specifications of the Supervisor of Administration, under G. L., c. 30, § 46, and hence are subject to his supervision and approval.

Employees who are paid wholly or in part from Federal funds, under the Smith-Lever act of May 8, 1914, chapter 79, are nevertheless State employees, and their salaries are subject to the supervision and approval of the Supervisor, since the funds are paid to the State and the salaries are paid by the State.

Employees who receive salaries from so-called "States Relations Service" funds, coming directly from the Federal Department of Agriculture, are joint employees of the State and Federal governments, and their salaries, so far as they are received from the Federal government, are not subject to the supervision and approval of the Supervisor.

You have asked my opinion with reference to the right of the Supervisor of Administration to fix salaries of employees of the Massachusetts Agricultural College in cases where such employees are paid wholly or in part from Federal funds. Your question relates more specifically to salaries of employees in the Department of Extension Service, paid from funds paid by the Federal government, under the so-called Smith-Lever act, to the Treasurer and Receiver-General of the Commonwealth, and from so-called "States Relations Service" funds paid by the United States Department of Agriculture directly to the employees of the Department of Extension Service.

The Smith-Lever act of May 8, 1914, chapter 79, provided for agricultural extension work to be carried on by agricultural colleges in co-operation with the United States Department of Agriculture. The colleges to be benefited were to be selected by agreement with the Secretary of Agriculture, and the act required that before funds should become available to any college, plans should be submitted by the proper officials of such college and approved by the Secretary of Agriculture. It appropriated sums, increasing annually, to be paid to each State which should by its Legislature assent to the provisions of the act. It provided that

To the Com-  
 missioner  
 of Education.  
 1921  
 March 25.

the sums appropriated for extension work should be paid to the State treasurer or other officer authorized to receive the same.

This act was accepted by the Commonwealth by St. 1914, c. 721, and the Treasurer and Receiver-General was designated to receive the appropriations annually, to be applied by him under and for the purposes of the act, and the Massachusetts Agricultural College was authorized to receive said grants of money.

It has been held, with respect to similar provisions in an earlier act making appropriations to agricultural colleges, that the grant so made was to the State and not to any institution established by the State, to be held for the purposes stated in the act. *Wyoming, ex rel. Wyoming Agricultural College v. Irvine*, 206 U. S. 278; *Massachusetts Agricultural College v. Marden*, 156 Mass. 150, 156.

Following the act of 1914 and the State acceptance thereof, a memorandum of understanding, so called, was executed between the Massachusetts Agricultural College and the United States Department of Agriculture regarding extension work in agriculture and home economics in the State of Massachusetts. By this understanding the college agreed to organize and maintain a division for the conduct of extension work in agriculture and home economics, to administer through such extension division any and all funds received for such work, and to co-operate with the Department of Agriculture in such extension work. The Department of Agriculture agreed to organize a States Relations Service, and to conduct, in co-operation with the college, all forms of extension work in agriculture and home economics which the department was authorized by Congress to conduct in the State of Massachusetts. It was mutually agreed that such co-operative extension work, involving the use of direct congressional appropriations, should be planned under joint supervision; that all agents appointed for such co-operative extension work, involving the use of direct congressional appropriations, should be joint representatives of the college and the department unless otherwise provided in the project agreements; and that the plans for the use of the Smith-Lever funds, except so far as those funds should be employed in co-operative projects involving the use of depart-

ment funds, should be made by the extension division of the college, but should be subject to the approval of the Secretary of Agriculture, in accordance with the terms of the Smith-Lever act, and when so approved should be executed by the extension division of said college.

Thereafter a States Relations Service was organized in the Department of Agriculture, by which appropriations received from Congress are transmitted directly to the employees of the extension division. Smith-Lever funds, on the other hand, are transmitted through the Treasurer and Receiver-General.

The Massachusetts Agricultural College was incorporated by St. 1863, c. 220. By Gen. St. 1918, c. 262, this corporation was dissolved, and it was provided that thereafter the college should be maintained as a State institution under the same name.

Section 5 of that act is as follows: —

All employees of the institution shall be considered state employees, but shall not be subject to the civil service laws and regulations.

G. L., c. 15, § 19, provides that the trustees of the Massachusetts Agricultural College shall serve in the Department of Education.

G. L., c. 75, § 13, is, in part, as follows: —

The trustees shall elect the president, necessary professors, tutors, instructors and other officers of the college *and fix their salaries* and define their duties and tenure of office.

Similar provisions may be found in the General Laws authorizing the heads of the various departments and other institutions to fix the salaries of employees under their direction.

G. L., c. 30, §§ 45 to 50, inclusive, provide for the classification of "all appointive offices and positions in the government of the Commonwealth, except those in the judicial branch and those in the legislative branch other than the additional clerical and other assistants in the sergeant-at-arms' office." Section 46 is, in part, as follows: —

The salaries of all officers and employees holding offices and positions required to be classified under said section, except those whose salaries

are now or shall be otherwise regulated by law and those whose salaries are required by law to be fixed subject to the approval of the governor and council, shall be fixed in accordance with such classification and specifications.

In an opinion rendered by me to the Supervisor of Administration, under date of May 12, 1920 (V Op. Atty.-Gen. 552), I advised him that the phrase "salaries . . . regulated by statute," in Gen. St. 1919, c. 320, § 1, and now appearing in G. L., c. 30, § 46, as "salaries . . . regulated by law," meant "salaries fixed by law either in some definite sum or by a sliding scale which is automatically effective."

I am of opinion that the salaries of employees of the Massachusetts Agricultural College paid in the ordinary way from State appropriations, while they must be fixed by the trustees, under G. L., c. 75, § 13, must also be fixed in accordance with the classification and specifications of the Supervisor of Administration, under G. L., c. 30, § 46, and hence are subject to his supervision and approval.

It remains to consider whether the situation is altered in cases where salaries are paid wholly or in part from Smith-Lever funds or States Relations Service funds.

Smith-Lever funds are paid to the State, to be applied for the purposes stated in the act, namely, for co-operative agricultural extension work between the agricultural colleges and the United States Department of Agriculture. The act provides that the work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the colleges receiving the benefits of the act, and requires that plans shall be submitted by the proper officials of each college and approved by the Secretary of Agriculture. According to the memorandum of understanding between the Massachusetts Agricultural College and the Secretary of Agriculture, plans for the use of the Smith-Lever funds shall be made by the extension division of the college, but shall be subject to the approval of the Secretary of Agriculture, in accordance with the terms of the act, and when so approved shall be executed by the extension division of the college.



There may be some ambiguity in the use of the word "plans," as used in the act and in the memorandum of understanding, but the meaning of the word in its practical application is shown by the form of plan which has been annually submitted and approved. This form of plan for each fiscal year for "Co-operative Extension Work in Agriculture and Home Economics" is said to be submitted "in accordance with the act of Congress dated May 8, 1914," — the Smith-Lever act. It contains a list of projects, a budget statement showing assignment of funds to projects, and so-called personal statements showing the funds from which the salaries are paid of all employees in the extension service. In practice, therefore, the payment of salaries from Smith-Lever funds has been submitted as a part of the annual plans for the approval of the Secretary of Agriculture.

Employees of the extension division whose salaries are paid wholly or in part from Smith-Lever funds, while the payment of those salaries is thus subject to the approval of the Secretary of Agriculture, are, in my opinion, State employees, whose salaries are subject to the supervision and approval of the Supervisor of Administration. He will bear in mind, no doubt, that Smith-Lever funds are Federal funds, that they are paid to employees whose work is carried on by the college in co-operation with the Department of Agriculture, and that the Commonwealth has accepted the benefits of the act with that understanding.

States Relations Service funds are paid by the Department of Agriculture directly, as salaries, to employees of the extension division. These payments also are shown in the annual plans above referred to.

By the memorandum of understanding it was agreed that agents appointed for co-operative extension work involving the use of direct congressional appropriations to the Department of Agriculture should be joint representatives of the college and of the department unless otherwise expressly provided in the project agreements, and this agreement must be recognized as binding. Gen. St. 1918, c. 262, dissolving the Massachusetts Agricultural College, expressly provided that the Commonwealth should be subject to the legal obligations of the college. There is no pro-

vision in the laws of the Commonwealth requiring employees of State institutions to give their whole time to the service of the Commonwealth, or prohibiting them from receiving salaries from other sources. (*Cf.* Const. pt. 2nd, c. VI, art. II; G. L., c. 30, §§ 21, 23. Employees of the extension division, receiving payments for salaries from States Relations Service funds, must therefore be regarded, unless other provision is made in some project agreement, as joint employees of the State and Federal governments.

The word "salaries" as used in G. L., c. 30, § 46, in my opinion, signifies salaries paid by the Commonwealth. There would be no object in providing that salaries of employees received from other sources should be under the supervision of the Supervisor of Administration.

I am therefore of the opinion that the Supervisor has no right to disapprove the salaries of employees in the Department of Extension Service in so far as those salaries are paid by agreement between the college and the Department of Agriculture out of States Relations Service funds. He has authority to supervise salaries paid out of other funds to employees who receive also States Relations Service funds. In so doing he should bear in mind that such employees are joint employees of the State and Federal governments, and that they are employed for work which the Commonwealth has agreed shall be carried on in co-operation with the Department of Agriculture.

I am informed that the statements and estimates submitted by the trustees to the Supervisor of Administration, as required by G. L., c. 39, § 3, do not show specifically what salaries or parts thereof are paid from States Relations Service funds. In that respect the practice should be changed so that the Supervisor may have detailed information as to all payments of salaries either from State funds or from Smith-Lever funds.

LICENSED BOXING MATCHES — SURRENDER OF LICENSE —  
REFUND OF LICENSE FEE.

A license issued under the provisions of G. L., c. 147, §§ 32-51, does not give rise to a contract between the Commonwealth and the holder. If the licensee prefers not to exercise the privilege, he may forbear to do so, but there is no legislative authority to refund all or a part of the fee paid therefor.

You state that under the provisions of G. L., c. 147, §§ 32-51, a license was issued on Jan. 12, 1921, by the State Boxing Commission to the Fenway Athletic Association, Inc. Said license authorized the holder thereof to conduct boxing exhibitions in the city of Boston up to and including Dec. 31, 1921. Under the regulations of the Commission, the holder paid \$800 for the license. One exhibition has been held under it, and the holder, or rather, one of the officials of said association who personally advanced said sum of \$800, desires to surrender the license and have refunded to him all or a part of the license fee. You desire my opinion whether the commission may accede to this request.

To the Commissioner of  
Public Safety.  
1921  
March 29.

The pertinent statutory provisions are as follows: —

In section 32 it is provided: —

Applications for the license shall be accompanied by such fee, not less than twenty-five nor more than eight hundred dollars, as the commission may establish. . . .

Section 33 provides: —

The commission may, subject to the provisions of sections thirty-two to forty-seven, inclusive, issue licenses to conduct boxing or sparing matches and exhibitions, which shall expire on December thirty-first of the year of issue.

Section 42 provides: —

Any license may be revoked or suspended by the commission for a violation of any provision of sections thirty-two to forty-seven, inclusive, or of any other law of the commonwealth or of any rule or regulation adopted by the commission or whenever the licensee has, in the judgment of the commission, been guilty of any act or offence detrimental to the public interest.

It appears from the sections above quoted that the Legislature has provided for the issue of licenses, for their expiration and for their revocation. But there is no provision whatever for the voluntary surrender of a license and the return of all or part of the fee. If the Legislature had intended such refunds to be made, I am of opinion that it would have made suitable provision therefor.

A license is the grant of a privilege. If a fee is exacted, the fee is in the nature of an excise. *Boston v. Schaffer*, 9 Pick. 415. The license does not give rise to a contract between the Commonwealth and the holder. *Calder v. Kurby*, 5 Gray, 597; *Commonwealth v. Brennan*, 103 Mass. 70. When the license is issued, the licensee has received the privilege in exchange for which an excise has been exacted. If he prefers not to exercise the privilege, he may forbear to do so, but the fact remains that he may, if he desires, exercise it at any time before the license expires. See *Attorney-General v. Mass. Pipe Line Gas Co.*, 179 Mass. 15.

I am of opinion that there is no legislative authority to refund all or a part of the fee paid for a license to conduct boxing exhibitions.

---

CONSTITUTIONAL LAW — TAXATION — APPROPRIATIONS — PUBLIC PURPOSE.

The Legislature has no power to authorize cities and towns to expend money to procure headquarters for a camp of the United Spanish War Veterans, since such expenditure is not for a public purpose.

You request my opinion upon the constitutionality of a bill (Senate No. 318) entitled, "An Act authorizing cities and towns to provide quarters for camps of the United Spanish War Veterans," which provides: —

Chapter forty of the General Laws is hereby amended by inserting after section nine the following new section:— *Section 9A.* A city or town may, for the purpose of providing suitable headquarters for a camp for the United Spanish War Veterans, lease for a period not exceeding five years a building or part of a building, which shall be under the direction and control of such camp subject to regulations made in cities by the mayor with the approval of the council and in towns by vote of the town, and for such purpose may annually appropriate a sum not exceeding in any one year, one fiftieth of one per cent of its valuation.

I assume that because of the case of *Kingman v. Brockton*, 153 Mass. 255, you doubt the constitutionality of the bill now before you. I am of opinion that this doubt is well founded, and that the present bill is governed by that decision.

In *Kingman v. Brockton*, *supra*, ten taxpayers of Brockton brought a bill in equity to restrain the city from carrying out an order appropriating (pursuant to a statute) \$40,000 for the purpose of erecting "a memorial hall and public library building, . . . a portion of said building to be for the use of Fletcher Webster Post G. A. R. No. 13, so long as it shall exist as an organization." The court enjoined the expenditure of public funds in order to provide quarters for the post, and, in holding that such expenditure was not for a public purpose, said: —

The general rule is well established, and is illustrated by a great variety of decided cases, that taxation must be limited to public purposes. It was accordingly held in the recent case of *Mead v. Acton*, 139 Mass. 341, that a statute authorizing a town to pay bounties to soldiers who re-enlisted in 1864 and were credited to the town was unconstitutional, the purpose being to benefit individuals and not the public. The Fletcher Webster Post G. A. R. No. 13 is not a public body, but it is an association of individuals. To support and maintain such an association cannot be deemed to be a public purpose. If a city or town may be authorized to erect a building to be devoted in part to the use of such an association so long as it shall exist as an organization, it is not easy to see why it may not be authorized to erect one exclusively for that purpose, and to provide the necessary furniture, and, indeed, to bear all the expenses of maintaining the association. If a city or town may be authorized to give such assistance to a body of persons who have been soldiers or sailors in the war, the same principle would seem to extend so far as to include those who have rendered other great and meritorious services, and thus are entitled to public gratitude, such, for example, as societies of disabled or past firemen or policemen. If once the principle is adopted that a city or town may be authorized to raise money by taxation for conferring benefits on individuals merely because in the past they have rendered important and valuable services for the benefit of the general public, occasions will not be wanting which will appeal strongly to the popular sense of gratitude, or to the popular emotion; and the interests and just rights of minorities will be in danger of being disregarded. If the body of persons to be benefited is numerous, the greater is the influence that may probably be brought to bear to secure such an appropriation of the public money.

I am unable to distinguish between an expenditure to erect a building to be in part used by a G. A. R. post and expending public money to lease quarters for such a post. No sound distinction can be made between a G. A. R. post and a camp of Spanish War Veterans. I am not unmindful of the similarity between this act and certain provisions of G. L., c. 40, § 9, but I am unable to discover that those provisions of that statute have ever been passed upon by the Supreme Judicial Court or distinguished from *Kingman v. Brockton, supra*. I am therefore constrained to advise you that the proposed bill would, if enacted, be unconstitutional for the reasons set out in *Kingman v. Brockton*.

---

#### PRISONERS — PAROLES — DEDUCTIONS FOR GOOD BEHAVIOR.

The deduction provided for by G. L., c. 127, § 130, is not a deduction from sentence but a deduction from the period of confinement only, and allowance of such deduction does not cause the sentence to "expire" previous to the date on which it would expire by its own terms. Accordingly, such deduction is not to be considered in determining whether a prisoner is eligible to release on parole under the provisions of G. L., c. 127, § 141.

G. L., c. 127, § 130, provides, in effect, that prisoners shall be entitled to deduction from the period of confinement to which they have been sentenced if their behavior as prisoners has been good. Section 141 of the same chapter provides for the parole of prisoners sentenced to certain institutions for not more than six months, "or upon a longer sentence of which not more than six months remain unexpired." You request my opinion upon the following question: —

In determining whether "not more than six months remain unexpired," as provided in section 141, are deductions on account of good behavior, as provided by section 130, to be considered?

The sections referred to provide: —

SECTION 130. Every officer in charge of a prison or other place of confinement, except the Massachusetts reformatory, the reformatory

for women and the state farm, shall keep a record of the conduct of each prisoner in his custody whose term of imprisonment is four months or more. Every such prisoner, except a prisoner sentenced to the state prison for a crime committed on or after January first, eighteen hundred and ninety-six, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment shall be entitled to a deduction from the term of his imprisonment, which shall be estimated as follows: upon a sentence of not less than four months and less than one year, one day for each month; upon a sentence of not less than one year and less than three years, three days for each month; upon a sentence of not less than three years and less than five years, four days for each month; upon a sentence of not less than five years and less than ten years, five days for each month; upon a sentence of ten years or more, six days for each month. If a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which the deduction shall be estimated. A prisoner who is entitled to such deduction from the term of his imprisonment shall receive a written permit to be at liberty during the time so deducted, upon such terms as the board which grants the permit shall prescribe. If a prisoner violates any of the rules of his prison or other place of confinement, the board authorized to grant permits shall decide what portion of the time, which would otherwise be deducted from the term of his imprisonment, shall be forfeited by such violation.

SECTION 141. A probation officer may, with the consent of the county commissioners, or, in Suffolk county, of the penal institutions commissioner of Boston, investigate the case of any person imprisoned in a jail or house of correction upon a sentence of not more than six months, or upon a longer sentence of which not more than six months remain unexpired, or for failure to pay a fine, for the purpose of ascertaining the probability of his reformation if released from imprisonment. If after such investigation he recommends the release of the prisoner, and the court which imposed the sentence, or, if the sentence was imposed by the superior court, the district attorney, certifies a concurrence in such recommendation, the county commissioners or the penal institutions commissioner may, if they consider it expedient, release him on parole, upon such terms and conditions as they may prescribe, and may require a bond for their fulfilment. The surety upon any such bond may at any time take and surrender his principal, and the county commissioners or the penal institutions commissioner may at any time order any prisoner released by them to return to the prison from which he was released. This section shall not apply to persons held upon sentences of the courts of the United States.

The "deduction" provided for by section 130 is not a deduction from sentence, but a deduction from the period of confinement only. When a prisoner is released on the date when his deductions require him to be released, he is not to be discharged, but he "shall receive a written permit to be at liberty during the time so deducted, upon such terms as the board which grants the permit shall prescribe." Section 148 provides that "the board or officer granting to a prisoner a permit to be at liberty may revoke it at any time previous to its expiration." It is clear, therefore, that during the period of time covered by his deduction a prisoner does not receive his liberty without qualification; he is released from confinement in prison, but it may be made a condition of his permit that he remain in Massachusetts, and that he report regularly to the proper official. If he violates a condition of his permit, the latter is "void" (§ 147) and may be revoked. It follows that allowance of the deduction does not cause the sentence to "expire" previous to the date on which it would expire by its own terms.

Since the release on parole provided for by section 141 may be granted only to prisoners under sentence of not more than six months "or upon a longer sentence of which not more than six months remain *unexpired*," it follows that the deduction provided for by section 130 is not to be considered in determining whether a prisoner is eligible to release on parole under the provisions of section 141.



CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT — APPROPRIATIONS — ZOÖLOGICAL SOCIETY UNDER PRIVATE CONTROL.

A corporation chartered to hold and manage a public aquarium and zoölogical park in an educational and charitable undertaking, within the meaning of the Forty-sixth (“Anti-Aid”) Amendment.

Where the charter of a corporation organized to hold and manage a public aquarium and zoölogical park provides that five of the seven directors shall be selected by the members of the corporation, who are private citizens, the society is not “under the exclusive control, order and superintendence of public officers or public agents,” within the meaning of the Forty-sixth (“Anti-Aid”) Amendment, even though the other two directors are the mayor of Boston and chairman of the park department *ex officio*, and the corporation itself is described as a public agent or public trustee.

Under the provisions of the Forty-sixth (“Anti-Aid”) Amendment, the Legislature has no power to authorize the city of Boston to convey a public aquarium and zoölogical park to a corporation so organized, and to provide further that such park may be maintained out of public funds, even though the bill describes the corporation as a trustee or agent for the city.

You ask my opinion as to the constitutionality of the redrafted form of House Bill No. 1137, entitled “An Act to charter a zoölogical society in the city of Boston.” The title does not fully describe the purposes of the bill. In brief, it incorporates certain persons under the name of the Boston Zoölogical Society, and authorizes the city of Boston to assign or transfer to said society, “as trustees or agents for the city,” the control, direction and administration of the Boston Aquarium and of that part of Franklin Park which may be defined by the mayor and council as a zoölogical park —

for the purpose of maintaining by appropriations to be made therefor by said city, and to be expended for said purpose by said corporation, said aquarium and said portions of said Franklin Park, for free public exhibition, and for the recreation of the public and for opportunities for the free public study of zoölogy.

No question can be made that the Legislature has power to incorporate the society. The serious question is whether the so-called “anti-aid” amendment (Amend. XLVI) permits the management of the aquarium and the zoölogical park to be vested in this society, especially in view of the provision for supporting

To the Committee on Bills in the Third Reading.  
1921  
April 1.

both by appropriations of public money. The second section of said amendment provides, in part: —

. . . and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . .

The first question is whether said aquarium and zoölogical park are, respectively, an “educational, charitable or religious undertaking,” within the meaning of the amendment. These are words of broad import. In *Jackson v. Phillips*, 14 Allen, 539, 556, Gray, J., defined a charity as follows: —

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.

A gift of money to establish or maintain a public park is a public charity within the meaning of this definition. *Bartlett, Petitioner*, 163 Mass. 509, 514. So, also, is a gift of a house and grounds to be used, respectively, as a museum of antiques and for the study of botany. *Richardson v. Essex Institute*, 208 Mass. 311. The aquarium and zoölogical park combine the recreational features of a park with the educational features of a museum. While no religious features enter into the management or maintenance of either, I am of opinion that both constitute an educational and charitable undertaking, within the meaning of the Forty-sixth Amendment.

The next question is whether the management of this undertaking and the expenditure of appropriations for its maintenance

can constitutionally be vested in the zoölogical society in the manner provided in this bill. The bill provides that the property shall be transferred to the society "as trustees or agents for the city of Boston," under such agreement as shall be mutually satisfactory to the city and the society. But the bill further provides that five of the seven directors "shall be chosen by and from the members of the corporation." The members of the corporation are certain named private citizens, and such other citizens "as may under the provisions of its by-laws, become members of the corporation." Although the other two directors are to be the mayor and the chairman of the park department, it is evident that the control of the corporation is vested in five citizens chosen by and from such citizens as may become members of the corporation. A corporation so governed is not "under the exclusive control, order and superintendence of public officers or public agents," within the meaning of the Forty-sixth Amendment. V Op. Atty.-Gen. 315.

The difficulty is not overcome by describing the corporation itself as a "trustee or agent for the city of Boston." Public money is derived from taxes laid according to law upon the citizens. It can be expended only for a public purpose. *Lowell v. Boston*, 111 Mass. 454; *Kingman v. Brockton*, 153 Mass. 255. The plain intent of this amendment is to require that the expenditure of public money for any educational, charitable or religious undertaking which possesses the requisite public character shall be under exclusive public control. That requirement of the amendment cannot be met by giving to a corporation which is in fact under private control the name of "public agent." The constitutional mandate is not satisfied by a description which does not accord with the facts.

I am not unmindful of *Ware v. Fitchburg*, 200 Mass. 61, but as that case was decided prior to the adoption of the Forty-sixth Amendment, it does not determine what measure of public control that amendment requires.

I am therefore constrained to advise you that this bill would be unconstitutional in so far as it purports to authorize this corporation to manage the property in question or to receive and expend public money for that purpose.

GOVERNOR AND COUNCIL — POWER TO REQUIRE THE COMMISSIONER OF BANKS TO FURNISH INFORMATION.

Under Mass. Const., pt. 2d, c. II, § I, art. IV, and c. II, § III, art. I, the Governor and Council have incidental power to require the Commissioner of Banks to furnish such information as the Governor and Council, under the obligation imposed by their several oaths of office, determine that they require to guide them in ordering the affairs of the Commonwealth agreeably to the Constitution and the laws of the land.

G. L., c. 167, § 2, does not limit this power to require the Commissioner of Banks to furnish information for such purpose.

To the Commissioner of  
Banks.  
1921  
April 2.

You inquire as to the duty imposed upon you by the following request of the Governor and Council: —

Will you please furnish to the Governor and Council the names of any members of the General Court who borrowed money during the year 1918 from one or more of the trust companies which have been closed by you.

In respect to each loan please state the date and amount of the note; whether or not any collateral was furnished; the nature of the security, if any; the names of any endorsers upon the note; and whether such notes are paid or unpaid at the present time.

Mass. Const., pt. 2d, c. II, § I, art. IV, provides: —

The governor shall have authority, from time to time, at his discretion, to assemble and call together the councillors of this commonwealth for the time being; and the governor with the said councillors, or five of them at least, shall, and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, agreeably to the constitution and the laws of the land.

Pt. 2d, c. II, § III, art. I, also provides, in part: —

The governor, with the said councillors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the commonwealth, according to the laws of the land.

Amendment LXVI provides as follows: —

On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized

in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law.

Pursuant to this mandate of the Constitution the Legislature, by St. 1919, c. 350 (now G. L., cc. 6-28), organized the executive and administrative work of the Commonwealth into twenty departments. In addition to the department of the Governor and Council, there are four other departments headed by officers created by the Constitution and elected by the people, namely, the Secretary, the Treasurer and Receiver-General, the Auditor and the Attorney-General, and fifteen departments under the direction of officers or commissions appointed by the Governor, by and with the consent of the Council, and who may be removed in like manner. Included in the said fifteen departments is the Department of Banking and Insurance, which is divided into three divisions, one of which is the Division of Banks and Loan Agencies. The precise question, therefore, is whether the Governor and Council may request from one of the said fifteen departments information which the Governor and Council may deem necessary for the proper and effective discharge of the executive duties which the Constitution imposes upon them. A different question might perhaps be presented by a similar request addressed by the Governor and Council to one of the other four officers who, under the Constitution, are elected by the people, and are, under their oath of office, directly responsible to the people.

The Governor and Council are authorized by the Constitution from time to time to "hold and keep a council for the ordering and directing the affairs of the Commonwealth agreeably to the Constitution and the laws of the land." They cannot effectively discharge this duty without information touching the "affairs of the Commonwealth." Subject to the solemn obligation imposed upon the Governor and the members of the Council by their several oaths of office, it is for the Governor and Council to determine what information they require to enable them to perform their constitutional duty. When they address a request for information

to a department head, he is bound to presume that the Governor and Council have so determined that the information requested is required in order to guide them in ordering the affairs of the Commonwealth agreeably to the Constitution and the laws of the land, and that such information, if furnished, will be used only for constitutional and lawful ends. He is not vested with power nor charged with the duty to review their action in these respects. See *Rice v. The Governor*, 207 Mass. 577. No legal wrong could, in my opinion, be caused to individuals by a disclosure to the Governor and Council of information to guide them in the discharge of duties imposed upon them by law. In the inconceivable case of misuse of such information the responsibility would rest, not upon the official who furnished it, but upon the official who so misused it. In my opinion, the head of a department who is appointed, and may be removed, by the Governor and Council must furnish to the Governor and Council, upon proper request, such information as his department has lawfully acquired in the discharge of the duties laid upon it by law, provided that no law affirmatively forbids such disclosure. See III Op. Atty.-Gen. 226; *ibid.* 403.

I find no limitation imposed by law upon the disclosure of the information requested in the instant case. In so far as the information requested has come to the knowledge of your department by reason of the periodic investigations required by G. L., c. 167, § 2, disclosure thereof to the Governor and Council seems to be expressly authorized by that portion of said section which provides:—

Such records, and information contained in reports of such banks, other than information required by law to be published or to be open to the inspection of the public, shall be open only to the inspection of the commissioner, his deputy, examiners and assistants, and such other officers of the commonwealth as may have occasion and authority to inspect them in the performance of their official duties.

The law authorizing the Commissioner of Banks to take possession of a bank or trust company contains no limitation upon the use of information thereby acquired. In the absence of such

limitation, it is information lawfully in the possession of the department, and with respect to the question now before me is not to be distinguished from the information acquired in the course of the periodical examinations required by law.

If some part of the information now requested of you has lawfully come to the knowledge of your department in connection with the taking possession or liquidation of certain trust companies, pursuant to law, disclosure thereof is, in my opinion, justified and required by the general principles already considered.

I therefore advise you that you should furnish, so far as you possess it, the information requested in the communication of the Governor and Council.

To avoid possible misconception, I may point out that this opinion is confined to the facts now before me. I note that you describe the communication addressed to you as a "communication of the council." Inspection of the records discloses that this communication was sent pursuant to a vote taken at a meeting of *the Governor and Council*, and that the information is to be furnished to *the Governor and Council*. A wholly different question would be presented if it appeared that the request was made by the Council alone and not by the Governor and Council. Upon this question I do not attempt to pass, as it is not now before me.

---

#### WEIGHTS AND MEASURES — FILLING POINT OF GLASS BOTTLES OR JARS USED FOR THE DISTRIBUTION OF MILK OR CREAM.

Under G. L., c. 98, § 15, where milk or cream is sold in a bottle or jar not having a definite measuring point, and said container is not filled to the level of the bottom of the cap or stopple thereof, a person selling the same is guilty of giving a false or insufficient measure.

I am in receipt of a communication from you relative to the construction of G. L., c. 98, § 15. You ask if this section should be construed as requiring that glass bottles or jars used in the distribution of milk or cream at retail must be filled to the level of the bottom of the cap or stopple, in the absence of any other definite filling point. You also ask if a person is liable to prosecution for giving false or insufficient measure if such bottles

To the  
Director of  
Standards.  
1921  
April 7.

or jars are not filled to the level of the bottom of the cap or stopple.

The statute referred to is as follows:—

Glass bottles or jars used for the distribution of milk or cream to consumers, and holding, when filled to a level with the bottom of the cap or stopple or other definite filling point, not less than three ounces and seven drams and not over four ounces and two drams; not less than seven ounces and six drams and not over eight ounces and two drams; not less than fifteen ounces and five drams and not over sixteen ounces and four drams; not less than thirty-one ounces and four drams and not over thirty-two ounces and four drams; not less than forty-seven ounces and three drams and not over forty-eight ounces and five drams; not less than sixty-three ounces and two drams and not over sixty-four ounces and six drams, shall be sealed as measures under section forty-one or by the manufacturer. Dealers in milk or cream using glass bottles or jars for the distribution of milk or cream to consumers, not sealed by the manufacturer, shall bring them into the office of the sealer in their town, to be sealed; but no fee shall be charged or received for sealing them. If a bottle or jar has once been sealed by a sealer or manufacturer, it need not be sealed again while used for the distribution of milk or cream to consumers. Glass bottles or jars sealed hereunder shall be legal measures only for the distribution of milk or cream to consumers. Bottles or jars sealed by the manufacturer shall be marked with his name, initials, or trade-mark, and by any other mark required by the director. The sealing of such bottles or jars by the manufacturer shall not affect any law relating to the giving of false measure or the using, or having in possession, of false measures with intent to use the same. The director, on approval by the commissioner of labor and industries may revoke the authority given by him to any manufacturer under this section, on proof that the authorized seal or designating mark has been affixed to any bottle or jar not conforming to the respective capacities provided for in this section.

By St. 1900, c. 369, provision was made for the sealing of cans, bottles and other receptacles used for the distribution of milk or cream.

There was a provision in P. S., c. 65, § 17, that the sealer "shall in no case seal or mark as correct any weights, measures or balances which do not conform to the standards," which, on account of the fact that glass bottles or jars are not always of



uniform capacity, made it necessary for further legislative enactment on the subject.

By St. 1901, c. 360, certain maximum and minimum capacities for glass bottles or jars used in the distribution of milk or cream to consumers were established, and provision was made that sealers should seal such bottles or jars as measures for milk or cream only, provided that their capacities were within the established range when filled to the level of the bottom of the cap or stopple. This statute later appeared as R. L., c. 62, § 43, which was amended by St. 1909, c. 531, so as to permit sealing by the manufacturer, with the further provision that "the sealing of such bottles or jars by the manufacturer shall not be held to affect the provisions of law relating to the giving of false measure, or the using of a false measure, or the having in possession of a false measure with intent to use."

In 1920 this section was amended so as to permit a definite filling point other than the level of the bottom of the cap or stopple. This change was made, I am informed, because in the case of pasteurized milk, owing to the expansion and contraction of the milk due to the heating and subsequent cooling, it was impossible to have the bottle or jar filled to the top.

The history of this legislation leads to the conclusion that the Legislature intended to establish a legal measure for milk and cream other than the standard liquid measure, which might be used if desired, and that where milk or cream was to be sold by jar or bottle which had no definite filling point, the legal requirements were complied with by filling to the level of the bottom of the cap or stopple. In other words, a milk or cream bottle or jar may have a definite measuring point, sealed in accordance with law. In the absence of such definite measuring point, if the bottle or jar complies with section 15, above quoted, then it must be filled to the bottom of the cap or stopple. Where milk or cream is sold in a bottle or jar not having a definite measuring point, and said container is not filled to the bottom of the cap or stopple, a person selling the same is guilty of giving a false or insufficient measure. Hence, both questions submitted by you must be answered in the affirmative.

SETTLEMENT — MARRIED WOMAN — STATUTORY PERIOD OF ABSENCE — MINOR CHILD.

The settlement of a married woman is not dependent upon her physical presence in the town of her husband's settlement. The statutory period of absence necessary to defeat the settlement of a wife or a widow is to be reckoned from the date of the husband's divorce or death.

Upon marriage, the wife acquires the settlement of her husband, and the death of the husband does not revive her ante-nuptial settlement.

A married woman living apart from her husband for five years prior to his death does not lose her settlement upon his death; she is constructively present until the marriage is terminated, unless she acquires a separate domicile for purposes of divorce.

G. L., c. 116, § 1, is not retrospective and does not apply to the case of a minor child whose father died prior to the enactment thereof (originally St. 1911, c. 669).

Inability of a husband or father to maintain a wife or minor child committed to a State hospital or institution of charity prevents the acquisition by him of a settlement unless reimbursement of the cost of such maintenance is made under G. L., c. 116, § 2.

To the Commissioner of Public Welfare. 1921 April 8.

You request my opinion upon several questions in respect to the settlement of paupers.

The statutory provisions pertinent to your request are section 1 of chapter 116 of the General Laws down to and including the third clause of said section, and sections 2, 4 and 5 of the same chapter. Said provisions are as follows:—

SECTION 1. Legal settlements may be acquired in any town in the following manner and not otherwise:

First, Except as provided in the following clause, each person who, after reaching the age of twenty-one has resided in any town within the commonwealth for five consecutive years, shall thereby acquire a settlement in such town.

Second, A married woman shall follow and have the settlement of her husband; but if he has no settlement within the commonwealth, she shall retain the settlement, if any, which she had at the time of her marriage and may acquire a settlement under the preceding clause.

Third, Legitimate children shall follow and have the settlement of their father if he has one within the commonwealth, otherwise they shall follow and have the settlement of their mother if she has one; if the father dies during the minority of his children they shall thereafter follow and have the settlement of the mother. Upon the divorce of the parents the minor children shall follow and have the settlement of the parent to whom the court awards their custody.

. . . . .

SECTION 2. No person shall acquire a settlement, or be in process of acquiring a settlement, while receiving relief as a pauper, unless, within two years after receiving such relief, he tenders reimbursement of the cost thereof to the commonwealth or to the town furnishing it.

SECTION 4. No person who actually supports himself and his family shall be deemed to be a pauper by reason of the commitment of his wife, child or other relative to a state hospital or institution of charity, reform or correction by order of a court or magistrate, and of his inability to maintain such person therein; or who, to the best of his ability, has attempted to provide for himself and his dependents and has not been a medicant, and who, through no crime or misdemeanor of his own, has come into grievous need and receives aid or assistance given temporarily, or partial support continuously, to him or his family: provided, that nothing herein shall be construed to affect, directly or indirectly, settlement, poor, or pauper laws, or laws under which any charity, aid or assistance is furnished by public authority.

SECTION 5. Each settlement existing on August twelfth, nineteen hundred and eleven, shall continue in force until changed or defeated under this chapter, but from and after said date absence for five consecutive years by a person from a town where he had a settlement shall defeat such settlement. The time during which a person shall be an inmate of any almshouse, jail, prison, or other public or state institution, within the commonwealth, or in any manner under its care and direction or that of an officer thereof, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two. The settlement, existing on August twelfth, nineteen hundred and sixteen, of a soldier and his dependent eligible to receive military aid and soldiers' relief under existing laws shall be and continue in force while said soldier or dependent actually resides in the commonwealth and until a new settlement is gained in another town in the manner heretofore prescribed.

1. Your first question is as follows: If a married man, having a settlement within the Commonwealth, dies or is divorced, is the five years' absence necessary for his widow to lose her settlement to be reckoned from the death (or divorce), or, if the widow was absent from the town of her husband's settlement immediately prior to his death or his divorce from her, may said five years be reckoned from the beginning of said period of absence?

Up to the time of the death or divorce, the wife's settlement was not dependent upon her physical presence in the town of

her husband's settlement. If she had been absent therefrom for ten years prior to the death or divorce, she would nevertheless have retained as her settlement the settlement of her husband, for, under the provisions of the second clause of section 1, a married woman has the settlement of her husband unless he has no settlement within the Commonwealth.

A settlement is generally acquired by residence. The reason for the rule that a wife's settlement follows that of her husband is that she is presumed to reside with him. Subject to statutory qualifications, she is constructively present at the residence of her husband. I am therefore of opinion that the wife's absence from the town of her husband's settlement prior to his death or divorce is immaterial, and that the five years must be reckoned from the date of the death or divorce. *Dalton v. Bernardston*, 9 Mass. 201.

2. Your second question is as follows: If a woman marries, subsequent to Aug. 12, 1911, a man having a settlement within the Commonwealth, and if the husband dies while residing elsewhere than in the town of his settlement but before completing an absence of five years from said town, should any part of the widow's absence from said town prior to her marriage be counted in computing the time for losing her settlement?

Immediately upon her marriage the wife acquired the settlement of her husband, regardless of her previous residence elsewhere. Upon the death of the husband, the wife's ante-nuptial settlement would not revive, but she would retain the settlement of her husband until she lost it by five years' absence or until she should acquire a new settlement by remarriage. Absence from the town of settlement prior to the time when said settlement was acquired is not material, and I am of opinion that it may not be included in reckoning the five years' absence necessary for the loss of a settlement.

3. Your third question is as follows: If a married man resides in the town of his settlement until his death, and his wife has been living apart from him voluntarily for five years prior to his death, would she lose her settlement immediately upon the death of her husband?

As stated above, in the absence of a provision of law to the contrary (as in clause second of section 1, where it is provided that a married woman may retain or acquire a settlement if her husband has no settlement within the Commonwealth), a married woman is constructively present at her husband's residence. This constructive presence continues until the marriage is terminated unless the wife acquires a separate domicile for purposes of a suit for divorce. It follows that your third question should be answered in the negative. *Dalton v. Bernardston, supra*.

4. Your fourth question is as follows: Does the third clause of section 1 apply to a case where the father died prior to the enactment of St. 1911, c. 669, which is now codified as G. L., c. 116, § 1?

Ordinarily statutes are construed as prospective in their operation. *McNamara v. Boston & Maine Railroad*, 216 Mass. 506. I find nothing in the present statute which indicates that St. 1911, c. 669, was intended to operate retrospectively upon the case of a minor child whose father died prior to the enactment thereof. Your fourth question is answered in the negative.

5. Your fifth question is as follows: Does the inability of a husband or father to maintain a wife or minor child who has been committed to a State hospital or institution of charity prevent him from acquiring a legal settlement?

G. L., c. 116, § 2, prevents a pauper from acquiring a settlement unless he makes the reimbursement therein provided. Aid furnished by public authority and according to law to the wife or minor child of a person, with his consent or knowledge, is equivalent to like aid furnished to the party himself, and prior to the enactment of St. 1913, c. 266, rendered him a pauper during the time such aid is furnished, and during a like period prevented him from acquiring a settlement. *Charlestown v. Groveland*, 15 Gray, 15; *Woodward v. Worcester*, 15 Gray, 19n; *Somerville v. Commonwealth*, 225 Mass. 589, 592. Unless that statute (now G. L., c. 116, § 4) permits him to gain a settlement under such circumstances, he still cannot do so. But while G. L., c. 116, § 4, declares that a person shall not be deemed a pauper by reason of his inability to support a wife, child or other relative in a State hospital or institution of charity, this is coupled with the express

proviso that nothing in said section shall be construed to affect, "directly or indirectly, settlement, poor or pauper laws." The proviso, in my opinion, excepts settlement, poor and pauper laws from the operation of the section. Your fifth question must be answered in the affirmative.

---

#### PRIVATE BANKERS — SURRENDER OF LICENSE — BOND.

Where a person licensed to do business under G. L., c. 169, § 3, proposes to surrender his license and to take out a new license, in the exercise of a proper discretion the old bond may be given up and a new bond in a reduced amount accepted, but the new bond should be conditioned to apply to business previously done as well as to business to be done.

To the Com-  
missioner  
of Banks.  
1921  
April 13.

You ask whether a person having a license to receive deposits of money for safe keeping and transmission abroad, and having given the required bond, who proposes to give up his license and to take out a license for receiving deposits of money for transmission abroad only, may have his bond reduced to a smaller sum.

G. L., c. 169, § 3, provides, in part, as follows: —

In case of the revocation of the license, the money and securities and the bond, if there be one, shall continue to be held by the state treasurer for a period of one year from the date of the revocation of the license unless otherwise directed by the order or judgment of a court of competent jurisdiction.

In an opinion to the Treasurer and Receiver-General (see VI Op. Atty.-Gen. 81) I stated my view to be that the word "revocation," in the sentence above quoted, does not include the case of a surrender, and that the requirement that the Treasurer shall continue to hold the security and the bond for a period thereafter does not apply to the case of a surrender. I advised the Treasurer that I believed that if he was satisfied that there was no need of holding the bond and security in the case in question, it was within his discretion to return them.

In the case in which the Treasurer requested my opinion, although a license had issued, the licensee at the time of the surrender had done no business under the license, so that there was

little ground for the Treasurer, in the exercise of his discretion, continuing to hold the bond and security. The present case presents a different situation, and calls for the exercise of a discretion in determining whether or not the bond and security should be continued until a year after the licensee ceases to do a business of receiving deposits of money for safe keeping as well as for transmission abroad, unless he receives an order or judgment of a court directing otherwise. In the event that a new bond of the reduced amount is accepted, the bond should be conditioned to apply to business done previous to the issuance of the new bond as well as business to be done in the future.

---

GOVERNOR AND COUNCIL — DETERMINATION OF A SALARY —  
WHETHER BY CONCURRENT ACTION OR BY ACTION AS A  
SINGLE BOARD.

The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the Governor and Council acting together as a single executive board; and the other, that which is to be done by concurrent action of the Governor, as executive magistrate, and of the Council.

Ordinarily, if a statute provides that the act shall be done by the Governor, by and with the advice and consent of the Council, it requires concurrent action by the Governor and by the Council.

Ordinarily, if a statute provides that an act shall be done by the Governor and Council, it requires action by a single executive board composed of the Governor and Council, in which the Governor has one vote.

Where a statute provides that a salary shall be fixed by the Governor and Council, the substance of the subject-matter is of greater significance than niceties of verbal construction, and the statute will ordinarily be construed to require concurrent action by both Governor and Council, since such action may impose a fixed charge upon the treasury.

G. L., c. 14, § 2, requires that the salary in question be fixed by concurrent action of the Governor and of the Council.

G. L., c. 14, § 2, provides as follows: —

Upon the expiration of the term of office of a commissioner, his successor shall be appointed for three years by the governor, with the advice and consent of the council. The commissioner shall receive such salary, not exceeding seventy-five hundred dollars, as the governor and council determine.

To the  
Governor.  
1921  
April 14.

You orally inquire whether the salary in question is to be determined by the concurrent action of the Governor and of the Council acting separately, or by the Governor and Council acting as one body in which the Governor has one vote.

In *Opinion of the Justices*, 190 Mass. 616, 618, the court said:—

The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the Governor and Council acting together as an executive board, and the other, business to be done by the Governor, acting under the responsibility of his office as supreme executive magistrate, by and with the advice and consent of the Council.

In *Opinion of the Justices*, 210 Mass. 609, 611, the court, in advising as to the nature of the pardoning power, which, under the Constitution, is to be exercised by the Governor “by and with the advice of council,” said:—

The granting of a full or a partial pardon is the result of concurrent action by both the Governor and the Council. Neither alone can take effective action. Both must agree before the Constitution is satisfied.

In *Opinion of the Justices*, 211 Mass. 632, the question submitted to the Supreme Judicial Court was whether St. 1909, c. 504, § 18, which authorized the trustees of a State hospital to fix the salary of the superintendent and other officers, “subject to the approval of the governor and council,” required concurrent approval by the Governor and by the Council acting separately, or by the Governor and Council sitting as one body in which the Governor had one vote. In advising upon this question the court said:—

The substance of the subject-matter to be acted on is of greater significance than nicety of verbal construction in determining the intent of the Legislature. The power ultimately to fix the salaries of the officers and employees of the various public institutions is important in its bearing upon the finances of the Commonwealth. It affects or may affect the general State tax to an appreciable extent. The Constitution creates the Governor the “supreme executive magistrate,” and by two separate articles clothes him with individual responsibility touching the



finances. In c. 1, § 1, art. 4, it is provided that the receipts from taxes and excises shall be "issued and disposed of by warrant, under the hand of the governor . . . with the advice and consent of the council," while in c. 2, § 1, art. 11, is this language: "No moneys shall be issued out of the treasury of this Commonwealth . . . but by warrant under the hand of the Governor for the time being, with the advice and consent of the Council." As chief executive he is answerable in a general sense for the administration of government. These articles of the Constitution impose upon him a particular duty respecting the finances of the Commonwealth. Although under our Constitution he is only a part of the executive department, he is styled the "supreme executive magistrate." c. 2, § 1, art. 1.

Under that portion of our Frame of Government which creates a chief executive, it is a fundamental conception that he may be held by the people to some degree of direct accountability for the disposition of the public revenue. All public funds come directly or indirectly from taxation. The expenditure of public money is of direct interest to all the people. Respecting all appropriations made by the legislative department of government the Governor may be held answerable on account either of his approval or of his veto.

Many statutes have been enacted which fix salaries of public officers or employees. The Governor for the time being may be held to a certain responsibility for these by reason of his duty of approval or disapproval. It would seem an incongruity to hold that the shifting of such responsibility from the Governor as an integral part of the Executive Department to an executive board of which he is one with eight others, was wrought without plain language expressive of such intent.

The words "Governor and Council," when used respecting many matters, indicate the single executive board composed of the Governor and the councillors. *Sparhawk v. Sparhawk*, 116 Mass. 315, 317. But as employed in the statute now under consideration touching the creation of that which may become in the nature of a fixed charge against the treasury of the Commonwealth, we incline to the view that they require separate approval by the Governor and also by the Council. Each must act independently of the other, and both must concur to effect the increase in salary.

In the present statute (G. L., c. 14, § 2) the Legislature has used different words in respect to the appointment of the commissioner and in respect to the determination of his salary. He is to be appointed "by the governor with the advice and consent of the council." This provision clearly requires that the Governor and the Council, acting separately, shall concur in the

appointment. *Opinion of the Justices*, 190 Mass. 616; *Opinion of the Justices*, 210 Mass. 609. His salary is to be determined by "the governor and council." This provision, when contrasted with the provision for appointment, is susceptible of a construction which would require that the salary be fixed by the Governor and Council sitting as one body, in which the Governor would have one vote. But a statute which subjects the creation of what may be a fixed charge upon the treasury to "the approval of the governor and council" is susceptible of a construction which would require concurrent approval of such charge by both the Governor and the Council acting separately. *Opinion of the Justices*, 211 Mass. 632. Except for the difference in the form of the two provisions, there is nothing in the act which indicates that the Legislature intended that the appointment should be made in one manner and that the salary should be determined in another manner. The determination of a salary, which involves a charge upon the treasury, is a question upon which the independent judgment of both the Governor and the Council may fittingly be exerted. The substance of the subject-matter is of greater significance than nicety of verbal construction in determining the intent of the Legislature. *Opinion of the Justices*, 211 Mass. 632, 634. Under these circumstances, I am of opinion that the salary is to be determined in the same manner that the appointment is made, namely, by the concurrent action of the Governor and of the Council acting separately, and not by the Governor and Council sitting as one body in which the Governor has one vote.

I am not unmindful that a different opinion upon a somewhat similar statute was rendered to the executive secretary on July 21, 1911, by one of my predecessors, but as that opinion was apparently based upon the *Opinion of the Justices* in 190 Mass. 616, and makes no reference to the opinion in 211 Mass. 632, which was handed down upon June 5, 1911, about six weeks previously, I am constrained not to follow it.

CONSTITUTIONAL LAW — ATTORNEYS AT LAW — CITIZENSHIP AS  
 REQUIREMENT FOR ADMISSION TO BAR.

The Legislature may constitutionally require that applicants for admission as attorneys at law be citizens of the United States.  
 A State may deny to non-citizens the privilege of being its officers or employees.

You request me to consider Senate Bill No. 114, entitled "An Act requiring that applicants for admission as attorneys at law be citizens of the United States."

To the  
 Governor.  
 1921  
 April 15.

A statute requiring citizenship as a qualification for admission as an attorney at law was first enacted in 1836. R. L., c. 88, § 19. This act remained unchanged until 1852, and its constitutionality was never questioned. In that year aliens who had made their primary declaration of intention to become citizens of the United States were permitted to take the examination for admission to the bar. St. 1852, c. 154. This statute has, in substance, remained in force to the present day.

It is significant that the constitutionality of these requirements has never been questioned. The court has referred to the requirement of citizenship as a qualification for admission to the bar, if not with approval, at least without disapproval. *Robinson's Case*, 131 Mass. 376, 382; *Opinion of the Justices*, 136 Mass. 578, 582. The fact that a requirement of a declaration of intention to become a citizen of the United States as a qualification for admission as an attorney at law remained in force and unchallenged for almost seventy years is a strong indication of its constitutionality. The difference between such a requirement and the requirement of citizenship is one of degree, and it would seem that the difference in degree is not so great as to render a requirement of citizenship as a qualification for admission to the bar unconstitutional.

An attorney at law is an officer of the court, exercising a privilege or franchise during good behavior. *Matter of Samuel Carver*, 224 Mass. 169, 172. He is in a sense an officer of the State. *Bergeron, Petitioner*, 220 Mass. 472, 476. He is required upon his admission to take and subscribe the oaths to support the Constitution of the United States and of the Commonwealth

(G. L., c. 221, § 38), and this requirement is recognized as constitutional by the court. *Robinson's Case*, 131 Mass. 376, 379. Women were not entitled to be admitted to the bar until 1882. *Robinson's Case, supra*; St. 1882, c. 139. A State may undoubtedly deny to non-citizens the privilege of being its officers or employees. *Heim v. McCall*, 239 U. S. 175.

In my opinion, therefore, the proposed bill, if enacted, would be constitutional, and I observe no defect of form.

---

#### TAXATION — INCOME TAX — SALE OF LEASE.

The sum received from a sale of a leasehold interest is taxable, under G. L., c. 62, § 5, cl. (c), as a gain from the sale of intangible personal property.

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
April 18.

You state the following facts: A, having paid nothing for a lease of a business building except an annual rent, assigns said lease to B before it has expired, and in consideration of said assignment B pays to A the sum of \$55,000. You request my opinion whether said sum is taxable as a gain from the sale of intangible personal property, under the provisions of G. L., c. 62, § 5, cl. (c).

Said clause provides, in part: —

The excess of the gains over the losses received by the taxpayer from purchases or sales of intangible personal property, whether or not said taxpayer is engaged in the business of dealing in such property, shall be taxed at the rate of three per cent per annum.

Your inquiry raises two questions: First, is a leasehold interest real or personal property? Second, if it is personal property, is it tangible or intangible?

In the early days of our law, leases were considered contracts and were so defined. 2 Blackstone 142; Bac. Abr. Tit. "Leases;" *Thomas v. West Jersey R.R. Co.*, 101 U. S. 71. If so considered and defined to-day, they would be choses in action, and profits derived from the sale of them would, therefore, be taxable under the section above quoted. But as the law developed, leases came to be more than contracts, and were held to create an actual estate in the land demised. *Leake's Property in Land*, 2d ed., pp. 30, 31; Wash-

burn's Real Property, §§ 604, 605; *Sanders v. Partridge*, 108 Mass. 556, 558; G. L., c. 186, § 1; G. L., c. 235, § 46.

At this point, consistency would seem to have required that leasehold interests, like freehold interests, should be deemed real property. But considerations of consistency did not prevail; leases came to be described as "chattels real," and were held to descend to the administrator as personal property rather than to the heir as realty. *In re Gay*, 5 Mass. 419. The law is unchanged in that respect to-day. Moreover, leasehold interests are levied upon as personalty (G. L., c. 235, § 46; *Chapman v. Gray*, 15 Mass. 439), and our statutes providing for the recording of conveyances of real property do not apply to leases for a term of less than seven years (G. L., c. 183, § 4).

From the standpoint of the limitation of estates, therefore, leasehold interests are considered realty, while for purposes of devolution and levy they are dealt with as personalty, and statutes providing for the recording of conveyances of land do not generally apply to them. Nor have they lost their original contractual aspect.

Since terms for years have a double aspect, it is important to notice how they have been dealt with for purposes of taxation. In at least two States they have been classified as personalty in that respect. *Wilgus v. Commonwealth*, 9 Bush. (Ky.) 556; *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605. In Massachusetts and generally throughout the country it is customary to assess real estate to the owner of the freehold and not to the owner of a term for years.

In *Freedman v. Bloomberg*, 225 Mass. 491, the question was whether a mortgage of a leasehold interest must be recorded in the city clerk's office under R. L., c. 198, § 1, now G. L., c. 255, § 1, which required mortgages of "personal property" to be so recorded. The court did not expressly determine whether the mortgage was of personalty or realty, but held that the statute in question applied, in the language of Shaw, C.J., in *Marsh v. Woodbury*, 1 Met. 436, "only to goods and chattels capable of delivery, and not to the defeasible or conditional assignment of a chose in action." While the court said that the term "personal property" was not

“accurate” as a description of a term for years, they did not by any means hold that such property was realty.

In general, and particularly for purposes of taxation, leasehold interests seem frequently to be treated as personalty. I cannot, therefore, advise you that they should be treated as realty in respect to the income tax law.

I next consider the question whether, if a leasehold interest is personalty, it is tangible or intangible. Leases are frequently described as “chattels real,” and the word “chattel” connotes a movable, a piece of property susceptible of manual delivery, and therefore tangible. But the case of *Freedman v. Bloomberg, supra*, seems to hold that a leasehold interest is not tangible personal property. If, therefore, it is personalty, it seems to be intangible. If there is anything whatever of a tangible nature in connection with a leasehold interest, it seems to be land and not personalty.

Your question is novel. An answer either way is not free from doubt. I do not feel that I ought to resolve that doubt against the Commonwealth, which has no opportunity to appeal from my opinion. The Commonwealth and the citizen stand on equal terms in this respect if the tax be assessed and the citizen tests the validity thereof in open court.

---

ATTORNEY-GENERAL — TRAVEL OUTSIDE COMMONWEALTH —  
EXPENSES.

St. 1920, c. 253, does not apply to the Attorney-General.

In view of the duties imposed by law upon the Attorney-General, he is not required by St. 1920, c. 253, to obtain the authority of the Governor to travel at public expense upon public business outside the Commonwealth or to specify the places to be visited and the probable duration of his absence.

You have asked my opinion as to the application of St. 1920, c. 253, to the Attorney-General. That act provides: —

Section eleven of chapter four of the Revised Laws is hereby amended by adding at the end thereof the following: — No officer or employee of the commonwealth shall travel outside the commonwealth at public expense unless he has previously been authorized by the governor to leave the commonwealth, and in applying for such authorization the

officer or employee shall specify the places to be visited and the probable duration of his absence. — so as to read as follows: — *Section 11.* The governor may appoint state officers as delegates to represent the commonwealth at such conventions as may be held in any part of the United States for the purpose of considering questions of charity, reform, statistics, insurance and other matters affecting the welfare of the people. The necessary expenses of such delegates may be paid from such appropriations as the general court shall make from year to year for the traveling and contingent expenses of such officers. No officer or employee of the commonwealth shall travel outside the commonwealth at public expense unless he has previously been authorized by the governor to leave the commonwealth, and in applying for such authorization the officer or employee shall specify the places to be visited and the probable duration of his absence.

In colonial times the Attorney-General was the chief law officer of the province. The powers and duties of the office were such as pertained to it at common law. It was continued as a State office by article IX of section I of chapter II of part second of the Constitution adopted in 1780, and the powers and duties of the office were continued by Mass. Const., pt. 2d, c. VI, art. VI. Amendments XVII and LXIV now provide that he shall be elected by the people, and prescribe his term of office. While the powers and duties of the office have since been declared to some extent by statute (see G. L., c. 12, §§ 1–11), he still possesses additional common-law powers. *Parker v. May*, 5 Cush. 336, 340; *McQuesten v. Attorney-General*, 187 Mass. 185.

Putting aside the question whether and to what extent the Legislature could limit the power of a constitutional officer to perform his duties, it will be sufficient in this case to determine whether this act purports to do so.

The Attorney-General, as the name of his office implies, is the chief law officer of the Commonwealth. Proper discharge of his duties may require him to travel beyond the borders of the Commonwealth — for example, to represent the Commonwealth before the Supreme Court of the United States. The occasion for his presence in Washington, or elsewhere, to represent the Commonwealth may arise suddenly, under circumstances which would preclude him from applying to the Governor before he

starts. If this statute should be held to apply to him he could not discharge his duty to the Commonwealth if the Governor could not be reached or should refuse his approval. The statute, in my opinion, was not intended to apply to the Attorney-General, and does not apply to him under such or similar circumstances. It amends an act relative to sending delegates to conventions outside the State. Such an act has no natural application to the Attorney-General when he is acting in the discharge of the duties of his office. This view is in entire accord with the requirement of the amendment that the officer or employee "shall specify the places to be visited and the probable duration of his absence,"—a requirement with which the Attorney-General might well find it impossible to comply, owing to the exigencies which might arise in the discharge of those duties.

While the Auditor of the Commonwealth has raised the question upon expenses incurred by me or those acting by my direction in the discharge of their official business, the question presented is the broad question of the authority vesting in the office, and its decision is equally applicable to those who shall hold the office of Attorney-General in the future. Because, however, for the moment it involves a decision as to my own powers, I submitted the question in writing to three former Attorneys-General, and they have severally advised me that in their opinion the act does not apply and was not intended to apply to the Attorney-General when he is acting in the discharge of the duties of his office.



CONSTITUTIONAL LAW — PHYSICIANS AND DENTISTS — CITIZENSHIP AS REQUIREMENT FOR REGISTRATION — REASONABLE REGULATIONS FOR PUBLIC HEALTH.

Reasonable regulations and rational means designed to protect the public health are constitutional.

The power to make regulations cannot be used arbitrarily or unreasonably.

The purpose of a statute must be found in its natural operation and effect.

An act requiring that applicants for registration as physicians or dentists be citizens of the United States or aliens who have made the primary declaration of intention to become citizens, and that the registration of aliens be canceled unless they become citizens within seven years from the date of their registration, is so arbitrary and unreasonable as to be unconstitutional.

You request my opinion as to the constitutionality of House Bill No. 1464, entitled "An Act providing that registered physicians and dentists practising in this Commonwealth shall be citizens of the United States."

To the House  
Committee on  
Bills in the  
Third Reading.  
1921  
April 20.

Section 1 of the proposed bill requires that applicants for registration as qualified physicians be citizens of the United States or aliens who have made the primary declaration of intention to become citizens; that the Board of Registration in Medicine shall revoke any certificate of registration hereafter issued by it to an alien, and cancel his registration unless he becomes a citizen of the United States within seven years from the date of said certificate; and that the Board shall not reissue any certificate formerly issued by it or issue a new certificate and register anew any physician whose certificate was revoked and whose registration was canceled when the cause of revocation or cancellation was non-citizenship. Section 2 makes similar requirements and provisos with respect to applicants for registration in dentistry. Section 3 provides that every alien registered in this Commonwealth as a physician or a dentist, at the time the act takes effect, shall within seven years thereafter become a citizen of the United States; otherwise his certificate of registration shall be revoked and his registration canceled by the board which registered him.

The State may make such regulations as it deems proper to protect the public health without contravening the provisions or

spirit of the State or Federal constitutions. *Collins v. Texas*, 223 U. S. 288, 296; *Reetz v. Michigan*, 188 U. S. 505, 506; *Commonwealth v. Poru*, 196 Mass. 326, 329; *Commonwealth v. Zimmerman*, 221 Mass. 184, 189.

The power to make such regulations cannot, however, be used arbitrarily or unreasonably. A State may classify with reference to the evil to be prevented, and if the class discriminated against is, or reasonably might be, considered to define those from whom the evil is mainly to be feared, it properly may be picked out. *Patson v. Pennsylvania*, 232 U. S. 138, 144. But such classification must have some reasonable basis upon which to stand. It must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Truax v. Raich*, 239 U. S. 33; *Gulf, Colorado & Santa Fé Ry. v. Ellis*, 165 U. S. 150, 155. If the regulations bear no relation to the calling or profession, they are unconstitutional. In *Truax v. Raich*, *supra*, the Supreme Court of the United States said, at page 41:—

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 762; *Barbier v. Connolly*, 113 U. S. 27, 31; *Yick Wo v. Hopkins*, *supra* (118 U. S. 356, 369); *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590; *Coppage v. Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

See also *Deut v. West Virginia*, 129 U. S. 114, 122; *Hawker v. New York*, 170 U. S. 189, 195.

Our own courts have held that *reasonable* regulations do not impair the provisions of the State and Federal constitutions, and that any *rational* means designed to protect the public health must be upheld. *Commonwealth v. Zimmerman*, 221 Mass. 184, 189; *Commonwealth v. Porn*, 196 Mass. 326, 329.

Does the proposed bill bear so little relation to the protection of public health that it can be said to be arbitrary and unreasonable? The purpose of the act must be found in its natural operation and effect. *Truax v. Raich*, 239 U. S. 33, 40. The act itself is entitled "An Act providing that registered physicians and dentists practising in this Commonwealth shall be citizens of the United States." This would seem to indicate that the primary purpose of the proposed bill was not to legislate relative to the qualifications of physicians and dentists. Under the proposed bill aliens who are now practising medicine or dentistry, and aliens who have made their primary declaration of intention to become citizens and are registered in medicine or dentistry, may carry on their respective professions for a period of seven years without becoming citizens of the United States. This would seem to indicate that in the opinion of the Legislature the requirement of citizenship bears no relation to the fitness of an individual as a physician or dentist, since otherwise the Legislature would not permit the public health to be endangered for a period of seven years.

I cannot see any reasonable or rational relation between citizenship and fitness as a physician or dentist. I cannot see how citizenship can have any real bearing upon an applicant's knowledge, education or character, which are the prime tests of his qualifications. In my opinion, therefore, the proposed bill is so arbitrary as to render it unconstitutional.

Section 3 applies to aliens registered as physicians and dentists at the time of the passage of the act. If the requirement of citizenship were constitutional, this section would not be unconstitutional merely by reason of its effect upon persons who had, previous to the passage of the act, been registered as qualified physicians or dentists. *Collins v. Texas*, 223 U. S. 288, 297; *Reetz v. Michigan*, 188 U. S. 505, 510; *Hawker v. New York*, 170 U. S. 189, 200; *Dent v. West Virginia*, 129 U. S. 114, 123.

INSURANCE — FOREIGN MUTUAL FIRE INSURANCE COMPANY —  
ADMISSION — GUARANTY CAPITAL — NET CASH ASSETS —  
LIABILITIES.

A foreign mutual fire insurance company having a paid-up guaranty capital of \$100,000, liabilities of \$58,240.01, a surplus over liabilities (excluding guaranty capital) of \$27,518, and contingent assets of \$136,385.14, is qualified for admission to do business in the Commonwealth, under G. L., c. 175, § 151, cl. 2d (3), since the company has net cash assets equal to its total liabilities, and contingent assets of not less than \$100,000.

The guaranty capital of the company, in the interpretation of this particular section, is not to be construed as a liability.

To the Com-  
missioner of  
Insurance.  
1921  
April 20.

You request my opinion on a question of law raised by the following set of facts: —

A foreign mutual fire insurance company has applied for admission to do business in this Commonwealth. Its financial statement shows that it has a paid-up guaranty capital of \$100,000, liabilities of \$58,240.01, a surplus over liabilities (excluding guaranty capital) of \$27,518, its contingent assets amounting to \$136,385.14. You ask the following questions: —

1. Whether or not the company can qualify under any of the options set forth in G. L., c. 175, § 151, cl. 2 (3).

2. Whether or not the term “net cash assets,” as used in the second clause of said section 151, includes guaranty capital.

3. Whether or not the said term “net cash assets” means surplus over all liabilities, including in liabilities guaranty capital.

4. Whether or not guaranty capital is a liability, within the meaning of clause 2 (3) (d) of said section 151.

Section 151, so far as it is pertinent to the questions raised by you, reads as follows: —

No foreign company shall be admitted and authorized to do business until —

Second, It has satisfied the commissioner that . . . (3) it has, if a mutual company, other than life, (a) net cash assets equal to the capital required of like companies on the stock plan; or (b) net cash assets of not less than fifty thousand dollars and contingent assets of not less than three hundred thousand dollars, or (c) net cash assets of not less

than seventy-five thousand dollars, with contingent assets of not less than one hundred and fifty thousand dollars, or (d) net cash assets equal to its total liabilities and contingent assets of not less than one hundred thousand dollars; . . .

If the said foreign mutual fire insurance company qualifies under any of these provisions, it is under subdivision (d), as having net cash assets equal to its total liabilities and contingent assets of not less than \$100,000 and the specific question to be determined is as to whether or not the guaranty capital of the company, amounting to \$100,000, is to be included in the term "net cash assets."

Section 79 of said chapter 175 provides that "a mutual fire company may be formed with, or an existing mutual fire company may establish, a guaranty capital of not less than twenty-five thousand nor more than two hundred thousand dollars," and its guaranty capital shall be applied to the payment of losses only when the company has exhausted its assets exclusive of uncollected premiums.

As was said in *Commonwealth v. Berkshire Life Ins. Co.*, 98 Mass. 25, 29, guaranty capital "is a capital furnished by way of guarantee against losses in excess of premiums."

The tenth paragraph of section 1 of said chapter 175 defines "net assets" as "the funds of a company available for the payment of its obligations in the commonwealth, including, in the case of a mutual fire company, its deposit notes or other contingent funds, . . . and also including uncollected and deferred premiums not more than three months due on policies actually in force, after deducting from such funds all unpaid losses and claims, and claims for losses, and all other debts and liabilities inclusive of net value of policies and exclusive of capital." In other words, capital is to be excluded as a liability item when computing the net assets of a company which are available for the payment of its obligations in the Commonwealth.

While it is true that guaranty capital is in no proper sense the capital of the company, and the shares do not, as in stock corporations, represent aliquot fractional interests in the property and franchise, and is a liability rather than a part of the assets of the

corporation, and should be so included in every statement of its pecuniary condition (*Commonwealth v. Berkshire Life Ins. Co.*, 98 Mass. 25), nevertheless, guaranty capital, in my opinion, where the question is whether or not a foreign company has the proper assets to be admitted under one of the subdivisions enumerated in the second clause of section 151 set forth above, should not be included among the liabilities of the corporation.

It will be noted that the requirements are practically divided into two divisions, that is, net cash assets and contingent assets, the former being the funds of the company available for the payment of its obligations in the Commonwealth, and the latter, the liability the policyholders are under to pay an assessment if a mutual fire company is not possessed of assets above its unearned premiums sufficient for the payment of incurred losses and expenses, as provided for in section 83 of said chapter 175.

Accordingly, I am of the opinion that the foreign mutual fire insurance company, on its financial statement set forth above, does qualify under G. L., c. 175, § 151, cl. 2, (3) (*d*), since the figures show that it has net cash assets equal to its total liabilities and contingent assets of not less than \$100,000, it having net cash assets equal to its total liabilities, as the guaranty capital, in the interpretation of this particular section, is not to be construed as a liability.

The above answers your questions 1, 2 and 4, and it follows, of course, that the answer to your third question is in the negative.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT — EASTERN  
MASSACHUSETTS STREET RAILWAY COMPANY.

Spec. St. 1918, c. 188, constitutes a contract between the Commonwealth and the Eastern Massachusetts Street Railway Company, giving to the trustees appointed thereunder the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished, and giving to the directors the right to pass upon contracts for the construction and operation of additional lines.

St. 1920, c. 613, as amended by St. 1920, c. 637, which contains provisions directing the trustees to construct additional lines and regulating rates of fare, is an impairment of the contract contained in Spec. St. 1918, c. 188, and is therefore unconstitutional.

Consequently, a bill to provide further for the carrying into effect of said St. 1920, c. 613, as amended, if enacted, would also be unconstitutional.

I have the honor to acknowledge the receipt of the following communication: —

To the House  
Committee on  
Street Railways.  
1921  
April 22.

The committee on street railways desires your opinion on the constitutionality of House Bill No. 779, relative to the public operation of street railway lines in the Hyde Park district of the city of Boston; also your opinion on the constitutionality of a bill permitting the city of Boston to take by eminent domain the street railway lines of the Eastern Massachusetts Street Railway Company, located in the Hyde Park district of the city of Boston, as designated in chapter six hundred and thirteen of the acts of nineteen hundred and twenty.

House Bill No. 779, now pending before your committee, provides as follows: —

The city of Boston is hereby directed to pay such sums as are specified in chapter six hundred and thirteen, as amended by chapter six hundred and thirty-seven, of the acts of nineteen hundred and twenty in the manner and to the parties therein specified in order to carry out the provisions of said acts. Upon such payment to the Hyde Park Transportation District said corporation is directed to commence operating said lines forthwith.

St. 1920, c. 613, is entitled "An Act to provide for the public operation of street railway lines in the Hyde Park district of the city of Boston." Before stating its provisions it will be convenient to refer to Spec. St. 1918, c. 188, under which the Eastern Massa-

chusetts Street Railway Company was organized and has been operated by trustees.

Spec. St. 1918, c. 188, provides in section 1 for the organization of a new company to acquire the railways, property and franchises of the Bay State Street Railway Company, and to hold and possess the same under St. 1906, c. 163, pt. III, §§ 144 and 145. Section 2 provides for the appointment of trustees by the Governor, with the advice and consent of the Council, to manage and control the new company for a period of ten years. Section 11 provides that the trustees shall manage and operate the new company for the period specified in section 2, and shall have, and may exercise, all the rights and powers of the new company. Said section contains this provision:—

They shall have the right to regulate and fix rates and fares, including the issue, granting and withdrawal of transfers, and the imposition of charges therefor, and shall determine the character and extent of the service and the facilities to be furnished, and in these respects their authority shall be exclusive, and shall not be subject to the approval, control or discretion of any other state board or commission except as provided in this act, and except as to joint rates and fares or service with connecting companies other than the Boston Elevated Railway Company.

Section 12 is as follows:—

No contracts for the construction, acquisition, rental or operation of any additional lines or for the extension, sale or lease of existing lines or any portion thereof shall be entered into without the consent of the directors of the new company, unless, after such consent has been refused, the public service commission shall determine after a public hearing that public necessity and convenience require such construction, acquisition or extension, sale or lease, and that the same will not impair the return on outstanding stock, bonds and other evidences of indebtedness contemplated by the provisions of this act; and in case of such determination the directors shall have a right of appeal to the supreme judicial court, and if the court shall decide that the said return would so be impaired, the contemplated action shall not be taken.

Section 23 provides that the act shall take effect upon its passage as to sections 1, 2 and 3, and as to the remaining sections upon its



acceptance by the company, given by a vote of the holders of two-thirds of each class of stock at a meeting held for the purpose.

The above provisions in section 11 in regard to the right of the trustees to regulate and fix fares and to determine the character and extent of the service and the facilities to be furnished, and in section 12 in regard to the right of the directors to pass upon contracts for the construction or operation of additional lines, in my judgment, constitute a contract between the Commonwealth and the Eastern Massachusetts Street Railway Company which cannot be impaired without violating section 10 of article I of the United States Constitution. II Op. Atty.-Gen. 261, 426; III Op. Atty.-Gen. 396, 400.

St. 1920, c. 613, as amended by St. 1920, c. 637, for the purposes of the act, constitutes the trustees appointed under Spec. St. 1918, c. 159, a corporation. It directs the trustees of the Eastern Massachusetts Street Railway Company to construct a double track line on Hyde Park Avenue, and authorizes the city of Boston to pay to the corporation \$30,000 for repairs and reconstruction of tracks, etc., within the district. It provides that thereupon said company shall cease to operate the street railway lines within the Hyde Park district, and shall permit the corporation to take over and operate the same at a specified annual rental. It provides that said street railway lines shall be managed and operated by the corporation in behalf of the city of Boston, and that the rate of fare within the Hyde Park district shall not exceed the unit rate of fare which the Boston Elevated Railway Company now charges or may hereafter charge on its system. In my opinion, this act is an impairment of the contract contained in Spec. St. 1918, c. 188, and is therefore unconstitutional.

I do not need to consider, therefore, the question whether the statute is also unconstitutional in its directions with respect to the construction and operation of street railway lines. *Mayor, etc., of Worcester v. Norwich & Worcester R.R. Co.*, 109 Mass. 103; *Brownell v. Old Colony R.R.*, 164 Mass. 29; *Atlantic Coast Line v. N. Car Corp. Com'n*, 206 U. S. 1; *Wilson v. New*, 243 U. S. 332, 384.

Since St. 1920, c. 613, as amended, is unconstitutional, I have to advise you that the proposed legislation appearing in House Bill No. 779, purporting to direct the city of Boston to pay certain sums as therein specified, in order to carry out the provision of that act, and to direct the Hyde Park Transportation District to commence operating said lines, is also unconstitutional.

As to your second question, relative to the constitutionality of a bill permitting the city of Boston to take by eminent domain the street railway lines of the Eastern Massachusetts Street Railway Company located in the Hyde Park district I am unable to comply with your request, as there is no pending bill before me for consideration.

---

INSURANCE — SERVICES FURNISHED BY AN AUTOMOBILE SERVICE  
COMPANY — CONTRACT OF INSURANCE.

An agreement by an automobile service company to furnish towing, repairs and automobile goods incidental to the operation of a car through the period of a year, for a fixed sum, is not a contract of insurance.

You have requested my opinion as to whether any features contained in a contract of the Emergency Auto Service Company involve insurance.

Under the contract submitted to me the Emergency Auto Service Company, upon the receipt of a fixed sum from an automobile owner, agrees to furnish service for one year in connection with the owner's automobile on any passable road in the New England States where the automobile may have become disabled while in actual use so that it cannot be operated. The service to be furnished includes: —

1. The towing of the automobile to the nearest station of the company, when the cause of its failure to operate is a break or defect in its mechanism. The company will tow the automobile to a further point, but in such case the owner is to pay for mileage in excess of mileage to the nearest station of the company.

2. Furnishing a mechanic to make repairs; but the owner is to pay market prices for labor performed and all materials and

supplies used, but no charge is to be made for the time of the mechanic to and from the job, nor for transportation.

3. Furnishing gasolene, tires, tubes, oil, batteries and other general equipment; the owner to pay for all goods so supplied at the market prices prevailing at the time and place of delivery, but the company is to make no charge for the delivery.

4. Furnishing special parts or special equipment for the automobile; the owner to pay for goods so supplied at market prices prevailing at the time and place of shipment, together with freight and express charges to the nearest station of the company, but the company is to make no charge for transportation of such goods between said station and place of delivery.

These are the pertinent features of the agreement, so far as the question asked is concerned.

The nature of an insurance contract, both at common law and under the statutes of this Commonwealth, has been discussed in various opinions of the Attorney-General. I Op. Atty.-Gen. 33, 37, 153, 164, 345 and 544; II Op. Atty.-Gen. 123, 226, 251 and 419; III Op. Atty.-Gen. 222; V Op. Atty.-Gen. 206.

By G. L., c. 175, § 2, a contract of insurance is defined to be "an agreement by which one party for a consideration promises to pay money or its equivalent, or to do an act valuable to the insured, upon the destruction, loss or injury of something in which the other party has an interest."

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. I Op. Atty.-Gen. 544.

In my opinion, the contract of the Emergency Auto Service Company is not one of insurance. The element of hazard is wanting. It is an agreement to furnish towing, if necessary, to furnish repairs and to furnish automobile goods such as may be expected to be incidental to the operation of an automobile, through a period of one year. It is obvious that an automobile owner will require the services enumerated from time to time during such a period. The contract is an agreement to furnish such services for a fixed sum. The language used by a former Attorney-General is in point in the present case. Construing a

contract by which a company, in consideration of a fixed sum, agreed to inspect, repair and maintain electrical machinery, this language was used (I Op. Atty.-Gen. 544, 547):—

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.

This line of reasoning has subsequently been followed in II Op. Atty.-Gen. 226, and V Op. Atty.-Gen. 206.

In accordance with the opinions rendered to your department by former Attorneys-General, I am of the opinion that the agreement now under consideration, providing for the services enumerated above, is a contract of service rather than of insurance.

---

CIVIL SERVICE — CHIEF MATRON AND ASSISTANT CHIEF MATRON  
— HOUSE OF DETENTION IN BOSTON.

Appointments to the positions of chief matron and assistant chief matron at the house of detention in the city of Boston, created by St. 1887, c. 234, § 3, are not subject to civil service rules and regulations.

To the Com-  
missioner of  
Civil Service.  
1921  
April 28.

You have requested my opinion as to whether or not the positions of chief matron and assistant chief matron at the house of detention in the city of Boston, created by St. 1887, c. 234, § 3, are classified under the Civil Service Law and Rules.

The provisions as to the appointment of the chief matron and assistant chief matron at the house of detention in the city of Boston are found in section 3 of said chapter 234. This was an act providing for the appointment of police matrons in cities, and for the establishment of a house of detention for women in the city of Boston. The act consisted of six sections, and, with the exception of section 3, applied generally to police matrons at police stations. The provisions as to police matrons were carried into the Revised Laws, and were found in chapter 108, sections 32 to 35, inclusive. They are now found in G. L., c. 147, §§ 18-21, inclusive.

When the provisions were carried into the Revised Laws, said chapter 234, with the exception of section 3, was repealed by R. L., c. 227. This section related to the establishment of a house of detention in the city of Boston, and contained the provisions as to the chief matron and assistant chief matron, etc. The pertinent provisions read as follows:—

The officers of such house of detention shall consist of a chief matron, an assistant chief matron, and as many assistant matrons and other male and female assistants as said board of police may deem necessary for the proper management of the same. The chief matron and assistant chief matron shall be appointed by the board of police, but no woman shall be so appointed unless suitable for the position and recommended therefor in writing by at least twenty-five women of good standing, residents of the city of Boston; they shall be appointed to hold office until removal, and they may be removed at any time by said board by written order stating the cause of removal.

At the time of the passage of said section 3 the Civil Service Commissioners, under the provisions of St. 1884, c. 320, were authorized to prepare rules not inconsistent with existing laws or with the provisions of this act (chapter 320), and adapted to carry out the purposes thereof, for the selection of persons to fill offices in the government of the Commonwealth and of the several cities thereof, which are required to be filled by appointment, and for the selection of persons to be employed as laborers or otherwise in the service of the Commonwealth and of the several cities thereof.

Ordinarily, the passage of an act creating appointive positions in the government of the Commonwealth, or of the several cities thereof, would be subject to the provisions of St. 1884, c. 320 (R. L., c. 19; G. L., c. 31), for the reason that it is not to be presumed that the Legislature intends to repeal or affect general laws passed by its predecessors unless there is something in the subsequent act which indicates an intention that the provisions of the general law are not applicable. IV Op. Atty.-Gen. 619.

It necessarily follows that if nothing was said relating to the civil service in St. 1887, c. 234, § 3, the positions created by the act would be subject to the provisions of the general law relating

to the civil service, unless there was inconsistency in their application or some other distinction which indicated an intention that the provisions of the general law should not be applicable.

A former Attorney-General made this statement in an opinion (I Op. Atty.-Gen. 71):—

Without undertaking to lay down any rule of construction applicable to all cases, . . . 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 offices and positions to be filled under civil service rules are classified in two divisions, the first to be known as the Official Service of the Commonwealth and the several cities thereof, the second as the Labor Service. I do not find that the chief matron and the assistant chief matron at the house of detention in the city of Boston have been set forth as one of the classes in the first division — the Official Service.

If the chief matron and assistant chief matron are included in the civil service, the question would then arise whether they should be included in the Official Service. The Police Commissioner, in his letter to you of Jan. 14, 1921, takes the position that neither the chief matron nor the assistant chief matron can properly be classified under the Labor Service, as they are not charged with the duties of matrons in other departments, and are not called upon to do manual work.

In the view that I take of the case, however, it is not necessary to consider what would be the proper classification for these matrons under the Civil Service Law and Rules. St. 1887, c. 234, § 3, was passed three years subsequent to the civil service law, and so far as the positions of chief matron and assistant chief matron are concerned, the requisite classifications appear to have been established without any apparent purpose to include them within the provisions of the civil service law. The appointment to these

offices is made by the board of police, and the appointee must be "suitable for the position." The natural inference would be that it was intended that the board having the power of appointment would determine whether the appointee was suitable, because, if the selection was to be made under the civil service, the express provision that the woman must be suitable for the position would be unnecessary.

It is more significant, however, that the appointee must be "recommended therefor in writing by at least twenty-five women of good standing, residents of the city of Boston." Under the Civil Service Law and Rules an applicant for a place in the civil service must present recommendations from three persons before examination. I am unable to learn of any instance in which, under the civil service, the recommendation of twenty-five persons is required. If these offices are held to be within the classified service, the question might fairly arise whether the recommendation of twenty-five persons is required before examination, and, if only three recommendations are required before examination, whether twenty-five or only twenty-two additional recommendations are required after examination.

The strongest indication, however, that it was not intended that these positions should be within the classified service is contained in the provision that the appointees "shall be appointed to hold office until removal, and they may be removed at any time by said board by written order stating the cause of removal." If they were appointed under civil service they could not be removed at any time by the appointing board merely upon a written order stating the cause of removal.

For the foregoing reasons I am of the opinion that the act of 1887, so far as it relates to the chief matron and assistant chief matron, falls within the exceptions to the general rule, which requires that a special act shall be held to be subject to the provisions of a general law previously enacted, and that these two positions are therefore not within the classified service.

STATE HIGHWAY — ANCIENT CULVERTS — ARTIFICIAL STREAM —  
EASEMENT BY PRESCRIPTION.

In 1894 the Commonwealth, in laying out and constructing a State highway in the town of Holden, rebuilt certain ancient culverts in their same locations, and have maintained them during the intervening twenty-seven years.

If water has been collected into an artificial stream or channel and been cast upon an abutter's property during this long period, the Commonwealth has acquired, by prescription, an easement to cast water on the land in question.

To the Com-  
missioner of  
Public Works.  
1921  
May 3.

You have asked my opinion on the following set of facts:—

A resident of the town of Holden has complained to your department that State highway employees have been opening up culverts and turning a flow of water onto his property. You state that the highway wherein the culverts are located was made a State highway in 1894, at which time, in the process of the construction of a road, the old culverts which then existed were rebuilt in the same locations and have been maintained by the Commonwealth since that time. This maintenance has consisted of keeping the culverts and the outlets clear, so that the water would run through and away from the culverts. This clearing permitted and caused water from the culverts to flow onto the adjoining land. You ask as to the legal right of the Commonwealth to maintain these culverts.

The rights of public authorities with respect to the handling of water in connection with highways are covered with thoroughness in a memorandum written for the Massachusetts Highway Commission in 1915 by Edwin H. Abbot, Jr., Esq., said memorandum being entitled "Ways and Waters in Massachusetts," and reprinted in the "Harvard Law Review," vol. 28, p. 478.

Summarizing the law as stated in that memorandum, in so far as it is pertinent to the question raised by the complaint aforesaid, I would point out that the question must be considered from two points of view, to wit: (1) the rule of law that applies if the flow of water upon adjoining property is that of surface water; and (2) the rule of law where public authorities have gathered surface water on the highway into a channel by means of a culvert, and turned the channel upon abutting land.

If the fact is that surface water is being turned upon the premises



of the abutter, there is no liability in tort upon the Commonwealth, and no action lies for the damage thereby occasioned. *Turner v. Dartmouth*, 13 Allen, 291; *Flagg v. Worcester*, 13 Gray, 601; *McMahon v. Holyoke*, 226 Mass. 450.

The Commonwealth is within its right in collecting the surface water which gathers within the highway and in discharging it upon the plaintiff's land. *Kennison v. Beverly*, 146 Mass. 467; *Collins v. Waltham*, 151 Mass. 196; *Beals v. Brookline*, 174 Mass. 1, 20; *Hewett v. Canton*, 182 Mass. 220. The plaintiff's remedy in such a case is to erect a barrier on his own land which would throw this surface water back upon the highway. *Franklin v. Fisk*, 13 Allen, 211.

On the other hand, the authorities of the Commonwealth may not gather surface water on a highway into a channel and turn the channel upon abutting land. *Franklin v. Fisk*, 13 Allen, 211; *Daley v. Watertown*, 192 Mass. 116.

However, in connection with the facts in the case at hand it is to be noted that the decisions in this Commonwealth hold that an easement to cast water by an artificial stream or channel upon adjoining property may be acquired by prescription. *White v. Chapin*, 12 Allen, 516; *Rathke v. Gardner*, 134 Mass. 14; see also *Stimson v. Brookline*, 197 Mass. 568; *Dickinson v. Worcester*, 7 Allen, 19, 22.

On the facts stated, the culverts in question were rebuilt by the Commonwealth and have been maintained in the same location since 1894, a period of twenty-seven years. If the situation is that the water has been collected into an artificial stream or channel and cast upon the property in question during this long period, the Commonwealth has acquired, by prescription, an easement to cast water in that manner.

Finally, it is to be remembered that the highway statutes make provision for those injured by public work in respect of highways, and that injury due to surface water has been held a proper element of such damage. So far as the present case is concerned, it is only necessary to state that the statutory period within which a person, who sustained damage in this respect, might have brought a petition for assessment of damages has long since expired.

TRUST COMPANIES — ISSUE OF STOCK — PAYMENT IN CASH OR BY NOTE — ENFORCEMENT OF NOTE — STATUS OF SUBSCRIBER — SCOPE OF ADVISORY POWER OF ATTORNEY-GENERAL.

The statutes which govern the issue of stock require that such stock shall be paid for in cash.

If stock of a trust company be issued in exchange for a note, the illegality of such action is not a defence to enforcement of the note.

If stock of a trust company be illegally issued for notes, and the company confers upon the debtor, and the debtor accepts, the status of stockholder, such stockholder may, in a proper case, be assessed as such in addition to the liability to pay such notes.

To the Com-  
missioner  
of Banks.  
1921  
May 3.

I have considered the facts set forth in your recent letter. It is not the function of the Attorney-General to decide cases where the rights of third parties are or may be involved. Cases are best determined by actual litigation. See *Opinion of the Justices*, 122 Mass. 600; *Opinion of the Justices*, 237 Mass. 613. Setting aside the facts recited by you, I advise you as to certain rules of law which may prove applicable, in order that you may determine what course you should pursue.

In my opinion, the statutes require that stock in trust companies be paid for in cash. R. L., c. 116, § 5, as amended by Gen. St. 1916, c. 37; G. L., c. 172, § 18. See also R. L., c. 116, § 33; G. L., c. 172, § 39.

In my opinion, if stock of a trust company be issued in exchange for a note, the transaction, though illegal in certain respects, is not a nullity, and the trust company, or a receiver thereof, or the Commissioner of Banks, who is in effect a statutory receiver, may enforce the note. The debtor cannot defend against the note given instead of cash, upon the ground that he ought to have paid cash at the time the stock was issued.

If the trust company confers upon such debtor, and the debtor accepts, the status of stockholder, he thereby becomes, in my opinion, subject to the liabilities of a stockholder. The liability of a stockholder to assessment if the assets of the trust company are insufficient to pay its debts is not in nature different from the obligation to pay for the stock. One who has assumed the liabili-

ties of a stockholder cannot, in my opinion, defend a suit to enforce an assessment upon the stock upon the ground that he illegally failed to pay for the stock in cash, as required by law. It is unnecessary to determine at the present time what action a solvent trust company might take to terminate the right of the stockholder to the stock in case he failed to meet his obligation to pay for it.

If the court should find that the purported cancellation of notes and stock was a fraud upon creditors and other stockholders, such cancellation would defeat neither an action to enforce the notes given for the stock nor an assessment upon such stock. In my opinion, such a finding might be made upon the facts stated in your letter.

---

TAXATION — LEGACY AND SUCCESSION TAX — GIFT TO WIFE OF  
PROMISSORY NOTE.

Prior to the enactment of St. 1920, c. 478, a gift by a husband to his wife of a promissory note took effect on his death, and the property was subject to a legacy and succession tax.

A decedent, resident of Massachusetts, being the payee of a promissory note, in a conversation with his wife some time before his death stated that he gave the note to her and she replied that she was willing. He retained the note in his possession, and it was found among his effects after his death, at which time it was long overdue. You ask my opinion whether said note is subject to a legacy and succession tax.

I assume that a valid gift may be made *inter vivos* of a promissory note payable to the order of the donor without formal endorsement or assignment, where the instrument itself is delivered. *Grover v. Grover*, 24 Pick. 261; *Herbert v. Simson*, 220 Mass. 480.

But in the present case the attempted gift was from a husband to his wife. The common-law rule in Massachusetts has always been that personal property given by a husband to his wife remains the property of the husband during his lifetime; but that on his death, if the gift has not previously been revoked, the title passes to the widow as against his executor, if rights of creditors are not

To the Commissioner of  
Corporations  
and Taxation.  
1921  
May 5.

---

impaired. *Thomson v. O'Sullivan*, 6 Allen, 303; *Marshall v. Jaquith*, 134 Mass. 138; *Brown v. Brown*, 174 Mass. 197; *Ginn v. Almy*, 212 Mass. 486, 497. As is said in *Marshall v. Jaquith*, *supra*, p. 140, "between husband and wife the requisites and effects of gifts *inter vivos* and *causa mortis* are nearly identical."

Recently, by statute, this rule has been changed. St. 1920, c. 478, approved May 19, 1920 (G. L., c. 209, § 3), amends R. L., c. 153, § 3, by substituting the following:—

Gifts of personal property between husband and wife shall be valid to the same extent as if they were sole.

As the decedent died prior to the date of the enactment of that statute, obviously it is not applicable.

The question whether the note referred to is subject to a legacy and succession tax depends upon the provisions of Gen. St. 1916, c. 268, which were in force at the time of the death of the decedent. Section 1 of said act provides, in part:—

All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, . . . which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, . . . to any person, absolutely or in trust, . . . shall be subject to a tax as follows:— . . .

It is my opinion that the note in question, the title to which passed by gift at the moment of the death of the donor, prior to the enactment of St. 1920, c. 478, is property subject to the tax provided for by Gen. St. 1916, c. 268, § 1. See *New England Trust Co. v. Abbott*, 205 Mass. 279, 282; *State Street Trust Co. v. Treasurer and Receiver-General*, 209 Mass. 373, 378.

JUVENILE OFFENDERS — CUSTODY — TERM OF DETENTION —  
PAROLE.

A boy transferred from the Massachusetts Reformatory to the Industrial School for Boys, or a girl transferred from the Reformatory for Women to the Industrial School for Girls, under G. L., c. 120, is in the custody of the institution to which he or she is transferred.

Such transfer does not operate to extend the term for which the boy or girl was originally committed; when the term expires the inmate should be discharged, but if the term extends beyond the minority of the child, the child should be returned to the reformatory.

Boys and girls so transferred may be paroled only in accordance with G. L., c. 120, § 21.

You ask my opinion regarding the status of a boy who is transferred by the Commissioner of Correction from the Massachusetts Reformatory to the Industrial School for Boys, or of a girl who is transferred from the Reformatory for Women to the Industrial School for Girls, (1) with respect to the legal custody of such child, (2) with respect to the term of detention, and (3) with respect to the custody if paroled.

To the Commissioner of  
Public Welfare.  
1921  
May 6.

(1) *Legal Custody.*

G. L., c. 120, § 15, provides as follows: —

With the consent of the trustees the commissioner of correction may transfer to the industrial school for boys any boy under seventeen sentenced to the Massachusetts reformatory, or to the industrial school for girls any girl under seventeen sentenced to the reformatory for women.

There is no express provision in respect to the custody of a child so transferred.

It is, however, plainly to be inferred from the provisions of said chapter 120 that all such children are in the custody of the institution to which they are transferred. Section 4 requires the trustees to establish rules, regulations and by-laws for the instruction and discipline of the inmates of each institution, to provide employment, education and training for them, to parole, discharge or remand them as provided in said chapter, and to exercise a vigilant supervision over them. Section 5 requires the trustees to provide for the instruction of boys and girls in such institutions. Section

7 provides that "the superintendent of each school with the subordinate officers *shall have general charge and custody of the inmates thereof,*" and requires him, under the direction of the trustees, to "discipline, govern, instruct and employ and use his best endeavors to reform the inmates." Section 16 provides, in part, as follows:—

The trustees may transfer any person committed or *transferred* to the industrial school for boys or to the Lyman school for boys, *still in the custody of said trustees*, who has proved unmanageable or an improper person to remain in either of the said institutions, to the Massachusetts reformatory; and in the same way may transfer any person committed or *transferred* to the industrial school for girls, *still in the custody of the trustees*, to the reformatory for women. . . .

Section 17 provides as follows:—

The legal custody for the remainder of his or her minority of any boy or girl transferred to the Massachusetts reformatory or to the reformatory for women by the trustees is thereby surrendered by them, and shall thereafter be in the institution to which the transfer has been made.

G. L., cc. 124-127, relating to prisons, imprisonment, paroles and pardons, contain no provisions with respect to transfers from said reformatories to said industrial schools. See especially chapter 127, sections 97-115, inclusive.

(2) *Term of Detention.*

G. L., c. 120, § 15, is derived from St. 1908, c. 639, § 4, and from Gen. St. 1918, c. 100. St. 1908, c. 639, is entitled "An Act to provide for the establishment of the Industrial School for Boys." Section 4 contained the following provision:—

With the consent of the trustees, the prison commissioners may remove to said industrial school any boy under the age of seventeen years who is sentenced to the Massachusetts reformatory. When a boy is removed or returned under this act, all mittimuses, processes and other official papers, or copies thereof, by which he is held, shall be removed or returned with him; *and he may be held in the institution to which he is removed or returned until the expiration of the term for which he was originally committed.*

The clause in italics does not appear in the General Laws.

Gen. St. 1918, c. 100, is entitled "An Act providing for the transfer of certain inmates from the Reformatory for Women to the Industrial School for Girls," and provides as follows: —

With the consent of the trustees of the Massachusetts training schools, the director of prisons may remove to the industrial school for girls any girl under the age of seventeen years who has been sentenced to the reformatory for women. Any person so transferred shall be accompanied by all mittimus and processes in the case, by a copy of the medical report and by the facts covering the history and conduct of the person and the home circumstances of such person, so far as they can be ascertained.

G. L., c. 120, § 13, provides, in part: —

All boys and girls committed to the Lyman school, the industrial school for boys or the industrial school for girls shall be there kept, disciplined, instructed, employed and governed, under the direction of the trustees, until they become twenty-one or are paroled, legally transferred or discharged.

There is no statutory provision of which I am aware which extends the term of detention of a boy or girl transferred from such reformatory to such industrial school. It is my opinion that such transfer does not operate to extend the term for which the boy or girl was originally committed, and that when the term expires the inmate should be discharged. But if the term of detention in any case extends beyond the minority of such child, the child should be returned to the reformatory to which he or she was originally committed.

(3) *Custody if Paroled.*

Since boys and girls transferred from the reformatories to the industrial schools under the provisions above referred to are, as I have advised you, in the custody of the particular institution to which they are transferred, it follows clearly that they may be paroled only in accordance with the provisions of chapter 120, section 21, which provide for the release on parole of children in such custody, and for the resumption by the trustees of the care and custody of children released on parole.

ACCOUNTS OF INSTITUTIONS — APPROVAL BY TRUSTEES OR COMMISSIONER OF DEPARTMENT — AUDITOR.

Accounts of sales of property by an officer of a State institution may be approved by the head of the department having supervision and control of the institution, or by the trustees or other supervising board or officer.

Requirements for approval of bills for articles furnished and expenses incurred in such institutions depend on particular statutory provisions relating to each institution, which are quoted or referred to and considered.

By G. L., c. 11, § 7, the Auditor is authorized to require affidavits with respect to such expenditures, to be made by the disbursing officers of the various institutions.

To the  
Auditor.  
1921  
May 9.

You ask my opinion whether it is necessary for the trustees of the various institutions of the Commonwealth to approve bills for expenditures and returns of sales, or whether you would be justified in accepting the approval of the commissioner of the department in which such institutions are placed.

G. L., c. 11, § 7, defining the duties of the Auditor, is, in part, as follows: —

He shall examine all accounts and demands against the Commonwealth, excepting those for the salaries of the governor and of the justices of the supreme judicial court, for the pay rolls of the executive council and members of the general court, and those due on account of the principal or interest of a public debt. He may require affidavits that articles have been furnished, services rendered and expenses incurred, as claimed. Such affidavit for any institution shall be made by the disbursing officer thereof. . . . If the general court, by express statute, authorizes a department or public officer to approve accounts or demands against the commonwealth, and an appropriation therefor has been made, the auditor shall, when such accounts or demands have been properly approved, promptly audit and certify such an amount, not exceeding the appropriation therefor, as he may deem correct; . . .

G. L., c. 30, § 41, provides as follows: —

If sales of property of the commonwealth are made by any officer of a state institution, the superintendent thereof shall submit to the trustees or other supervising board or officer an itemized account, on oath, of such sales, for their approval in the same manner as accounts for materials and supplies for such institutions are approved, and such account shall be filed with the state treasurer when the proceeds are paid over to him.



So far as concerns accounts of sales of property, it is my opinion that such accounts may be approved by the head of the department having supervision and control of a State institution, or by the trustees or other supervising board or officer, and that you may accept accounts so approved.

I find no provision which in general terms expressly requires the approval by any supervising board or officer of bills for articles furnished and expenses incurred, although by G. L., c. 11, § 7, the Auditor is authorized to require an affidavit with respect to such expenditures, which, in the case of any institution, must be made by the disbursing officer thereof. I am of opinion, therefore, that the particular statutory provisions relating to each institution must be examined, and that the answer in each case will depend upon the nature of those provisions. In that connection the provision, above quoted, in G. L., c. 11, § 7, requiring the Auditor, where "the general court, by express statute, authorizes a department or public officer to approve accounts or demands against the commonwealth, and an appropriation therefor has been made," to audit and certify such accounts or demands when properly approved, should be noticed.

The various State institutions to which reference should be made are under the supervision and control of the Department of Education, the Department of Public Health, the Department of Public Welfare, or the Department of Mental Diseases.

*Institutions in the Department of Education.*

G. L., c. 15, contains provisions relative to the Department of Education. Section 1 provides that the department shall be under the supervision and control of a commissioner of education and an advisory board, and section 4 provides that the commissioner shall be the executive and administrative head of the department. Section 19 provides as follows:—

The trustees of the Massachusetts Agricultural College, the board of commissioners of the Massachusetts Nautical School, the trustees of the Bradford Durfee Textile School of Fall River, the trustees of the Lowell Textile School and the trustees of the New Bedford Textile School shall serve in the department.

Sections 20 to 23 contain provisions with respect to the membership of the boards of trustees of said Massachusetts Agricultural College and said textile schools and of the board of commissioners of the Massachusetts Nautical School.

G. L., c. 74, § 42, provides that the New Bedford Textile School, the Bradford Durfee Textile School of Fall River and the Lowell Textile School shall be State institutions, and the following sections contain references to the board of trustees of each of said schools. There is no provision relating to the approval of accounts for expenditures.

G. L., c. 74, §§ 49-51, provide for the maintenance of the Massachusetts Nautical School by a board of commissioners. Said sections contain no provisions with reference to the approval of accounts.

G. L., c. 75, § 1, provides as follows: —

The Massachusetts Agricultural College shall continue to be a state institution.

Section 5 provides as follows: —

Expenditures for maintenance shall be authorized by the trustees or by their duly appointed committee. The expenditure of special appropriations shall be directed by such trustees, and shall be authorized and accounted for as are appropriations for maintenance.

There is no provision which requires the approval of accounts by the trustees.

I am of opinion that accounts of institutions under this heading, approved by the Commissioner of Education as supervising officer, may be accepted by you, although you may require affidavits as provided in G. L., c. 11, § 7.

*Institutions in the Department of Public Health.*

G. L., c. 17, relates to the Department of Public Health. Section 2 provides that the commissioner shall be the executive and administrative head of the department. Section 8 provides as follows: —

The division of sanatoria shall include the state sanatoria at Rutland, North Reading, Lakeville and Westfield. The commissioner may also place the Penikese hospital in said division.

G. L., c. 111, §§ 63-69, relate to the State sanatoria and the Penikese Hospital. They provide that the commissioner shall have general supervision and control of those institutions. They contain no provisions relating to the approval of accounts.

It is my opinion that you may accept the accounts of such institutions when approved by the Commissioner of Public Health.

*Institutions in the Department of Public Welfare.*

G. L., c. 18, relates to the Department of Public Welfare. Section 2 provides that the department shall be under the supervision and control of a commissioner of public welfare and an advisory board. Sections 8, 10, 11, 12 and 13 contain provisions with reference to the membership of boards of trustees of the State Infirmery, the Massachusetts Hospital School and the Massachusetts Training Schools.

G. L., c. 120, relates to the Massachusetts Training Schools. Sections 1 to 6, inclusive, state the powers and duties of the trustees. I find no section requiring the accounts of those institutions to be approved by the trustees.

G. L., c. 121, §§ 28-37, relate to the Massachusetts Hospital School, and contain provisions defining the powers and duties of the trustees.

Section 28 provides, in part, as follows:—

. . . The board of trustees of said school shall have the same powers and shall be required to perform the same duties in the management and control of the school as are vested in and required of the trustees of the various state hospitals under chapter one hundred and twenty-three, so far as applicable.

G. L., c. 123, § 32, provides that—

All accounts for the maintenance of each of the state hospitals shall be approved by the trustees thereof and filed with the state auditor, . . .

G. L., c. 122, contains provisions relating to the State Infirmiry and the powers and duties of the trustees. Section 1 contains the following provision: —

. . . The trustees shall audit and approve the accounts and bills of the superintendent before payment. . . .

Section 6 contains the following provision: —

All accounts for the maintenance of the state infirmiry and the support of the inmates shall be approved by the trustees and filed with the state auditor at the end of each month.

I am of opinion that by virtue of the provisions above quoted the accounts and bills for the maintenance of the Massachusetts Hospital School and of the State Infirmiry should be approved by the trustees of those institutions before they are approved by you, but that with respect to the other institutions such approval of the trustees is not necessary.

*Institutions in the Department of Mental Diseases.*

G. L., c. 19, relates to the Department of Mental Diseases. Section 4 provides that the commissioner shall be the executive and administrative head of the department. Section 5 is as follows: —

The boards of trustees of the following public institutions shall serve in the department: Boston Psychopathic Hospital, Boston State Hospital, Danvers State Hospital, Foxborough State Hospital, Gardner State Colony, Grafton State Hospital, Massachusetts School for the Feeble-minded, Medfield State Hospital, Monson State Hospital, Norfolk State Hospital, Northampton State Hospital, Taunton State Hospital, Westborough State Hospital, Worcester State Hospital and Wrentham State School.

Section 6 provides for the membership of the boards of trustees of each of said institutions.

G. L., c. 123, § 25, provides that the State institutions under the control of the department shall be those institutions stated in G. L., c. 19, § 5. Sections 26-32, inclusive, contain provisions

defining the powers and duties of the trustees of said State institutions. Section 32 provides as follows: —

All accounts for the maintenance of each of the state hospitals shall be approved by the trustees thereof and filed with the state auditor, and shall be paid by the commonwealth. Full copies of the pay rolls and bills shall be kept at each hospital.

I am of opinion that by virtue of said provision the accounts of all said State hospitals must be approved by the trustees thereof before they are approved by you.

The foregoing examination of the laws relating to the various departmental institutions discloses no established policy with respect to the requirements for approval of accounts for expenditures, and no reason is apparent why in some instances approval by the trustees of expenditures is required and in other cases payment of expenditures is not made subject to their approval.

Under the authority vested in you by G. L., c. 11, § 7, you would be justified, in lieu of approval by the trustees, in requiring the affidavit of the disbursing officer for expenditures in those institutions where approval by the trustees is not made a prerequisite of payment.

---

POWER TO COMPROMISE A CLAIM DUE TO THE COMMONWEALTH —  
TREASURER AND RECEIVER-GENERAL — POWER OF ATTORNEY-GENERAL TO COMPROMISE A PENDING CASE.

Authority to compromise a claim due to the Commonwealth is not ordinarily incident to the power of an executive officer.

The Treasurer and Receiver-General has no power to compromise claims due to the Commonwealth.

Under G. L., c. 12, § 3, the Attorney-General has incidental power, in the exercise of a sound discretion, to compromise a civil proceeding in which the Commonwealth is a party or is interested.

You have asked my opinion upon the following questions: —

1. Whether the Treasurer and Receiver-General has power to compromise a claim due to the Commonwealth, if in the exercise of a sound discretion he determines that such compromise is financially more beneficial to the Commonwealth than to prosecute the claim.

To the  
Treasurer and  
Receiver-  
General.  
1921  
May 13.

2. Whether the Attorney-General, after the commencement of proceedings, may compromise an action brought upon behalf of the Commonwealth to enforce a claim due to it.

1. Authority to compromise a claim due to the Commonwealth is not ordinarily incident to the power of an executive officer. *Wm. Cramp & Sons, etc., Co. v. United States*, 216 U. S. 494; *District of Columbia v. Bailey*, 171 U. S. 161, 176. It is significant that where the Legislature has intended to confer this power it has done so by express enactment. G. L., c. 58, § 27; c. 59, §§ 58, 71 and 72; c. 63, § 71; c. 65, § 14. Examination has not disclosed any statute which confers authority upon the Treasurer and Receiver-General to compromise claims due to the Commonwealth. In my opinion, he does not possess this power.

2. By G. L., c. 12, § 3, the Attorney-General represents the Commonwealth in all suits and other civil proceedings in which the Commonwealth is a party or is interested. This necessarily confers authority to conduct such suits and proceedings in such manner as he, in the exercise of a sound discretion, shall deem to be for the best interests of the Commonwealth. He possesses, further, not only those powers which have been declared and defined by statute, but also those powers which are incident to the office at common law. *Parker v. May*, 5 Cush. 336, 338-340; *Attorney-General v. Parker*, 126 Mass. 217, 219; *McQuesten v. Attorney-General*, 187 Mass. 185. Although the Attorney-General of the United States draws his powers wholly from statute, his statutory authority to control suits in which the United States is a party or is interested carries incidental power to compromise such litigation. *Confiscation Cases*, 7 Wall. 454, 458; 2 Op. A. G. (U. S.) 482, 486; 22 Op. A. G. (U. S.) 491, 494. A United States district attorney does not possess this power except under special circumstances. *United States v. Beebe*, 180 U. S. 343. I am unable to believe that the authority of the Attorney-General of the Commonwealth is more restricted in this particular than that of the Attorney-General of the United States. In my opinion, the Attorney-General of the Commonwealth may, in the exercise of a sound discretion, compromise a civil suit or proceeding in which

the Commonwealth is a party or is interested. If this were not so, the Commonwealth would be at a disadvantage as compared with other litigants in any case where a compromise beneficial to the Commonwealth could be effected.

---

COMMONWEALTH — PAYMENT BY CHECK — MAILING — DUPLICATE CHECK.

The mailing of a letter containing a check to the person entitled to receive it does not constitute payment, unless by the payee's express direction or assent, the usual course of dealing between the parties, or through facts from which such direction or assent may be inferred, the payee has authorized the money to be thus delivered to him.

Where the Treasurer and Receiver-General mailed a check to the payee without express or inferred authority, and the payee, whose endorsement was forged, was not negligent in giving notice of the forgery, or, if negligent, the Commonwealth was not injured by such negligence, a duplicate check should be issued.

Such checks can be issued only on warrant in the usual manner.

You request my opinion relative to your authority to issue a duplicate check, payable under the provisions of Gen. St. 1919, c. 283, in cases where the original check was never received by the payee, and was unlawfully obtained by some person who forged the payee's endorsement and cashed the check.

To the  
Treasurer and  
Receiver-  
General.  
1921  
May 13.

The facts, as stated in your letter, are that upon application a check for \$100 was issued to a person entitled to receive it, under the provisions of the foregoing statute, drawn on the National Shawmut Bank and sent to the payee on Oct. 23, 1919. The check was returned to you as paid by the National Shawmut Bank on Oct. 29, 1919. On April 21, 1921, the payee inquired about his check and informed you that the endorsement on the paid check was a forgery. This you accept as a fact. You orally informed me that neither this payee nor the other persons entitled to the payment of \$100 under the provisions of the act authorized you expressly or impliedly to mail the checks to them, but you established a regulation, in the interest of safety with respect to identity, that the checks be sent to them by mail.

Gen. St. 1919, c. 283, as amended by St. 1920, c. 250, and by St. 1921, cc. 326 and 354, provides that the sum of \$100 "shall be

allowed and paid out of the treasury of the Commonwealth" to certain classes of individuals. This is mandatory.

Depositing in the post office a letter containing a check and addressed to the person entitled to receive it does not constitute payment, unless by the payee's express direction or assent, the usual course of dealing between the parties, or other facts from which such direction or assent may be inferred, the payee has authorized the money to be thus delivered to him. *Buell v. Chapin*, 99 Mass. 594; *Campbell v. Knights of Pythias*, 168 Mass. 397, 400; *Shea v. Mass. Benefit Assn.*, 160 Mass. 289, 295; *Morgan v. Richardson*, 13 Allen, 410; *Gurney v. Howe*, 9 Gray, 404.

You were not notified of the forgery until eighteen months after the check was cashed. Unless there was negligence in failing to discover the forgery or in failing to notify you immediately after the discovery, and the Commonwealth can show that it was injured by reason of such negligence, the delay is of no consequence and cannot prevent recovery. *Murphy v. Metropolitan Natl. Bank*, 191 Mass. 159, 165; *A. Blum Jr.'s Sons v. Whipple*, 194 Mass. 253, 258; *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 411.

I am therefore of the opinion that the Treasurer and Receiver-General should issue a duplicate check payable under Gen. St. 1919, c. 283, in cases where he is satisfied that there was no express or inferred authority to mail the check, and where he is of the opinion that the payee was not negligent in failing to give earlier notice to the Treasurer and Receiver-General of the forgery, or, if negligent, that the Commonwealth was not injured by such negligence. Such checks can be issued only on warrant in the usual manner. Mass. Const., pt. 2d, c. II, § 1, art. XI; *Opinion of the Justices*, 13 Allen, 593.



SAVINGS BANKS — AUTHORIZED INVESTMENTS — COMMISSIONER OF BANKS.

It is the duty of savings banks subject to G. L., c. 168, to determine the legality of proposed investments in bonds of gas, electric or water companies, under G. L., c. 168, § 54, cl. 6, and of the Commissioner of Banks, under G. L., c. 167, §§ 2 and 5, to determine whether the statutory provisions have been complied with.

There is no provision giving to the Department of Public Utilities authority to decide whether bonds of such companies which have been issued may or may not be purchased by savings banks.

You ask me to advise you whether the Department of Public Utilities, Commissioner of Banks or the savings banks should decide the legality of bonds of gas, electric or water companies as an investment for savings banks under the provisions of G. L., c. 168, § 54, cl. 6.

To the Commissioner of Banks.  
1921  
May 16.

Said section and clause provide as follows: —

SECTION 54. Deposits and the income derived therefrom shall be invested only as follows:

Sixth. In the bonds of a gas, electric or water company secured by a first mortgage of the franchise and property of the company: provided, that the net earnings of the company, after payment of all operating expenses, taxes and interest, as reported to, and according to the requirements of, the proper authorities of the commonwealth, have been in each of the three fiscal years preceding the making or renewing of such loan equal to not less than four per cent on all its capital stock outstanding in each of said years; and, provided, that the gross earnings of the company in the fiscal year preceding the making or renewing of the loan have been not less than one hundred thousand dollars.

By section 2 of said chapter it is provided, in part, that —

Savings banks incorporated or doing business in the commonwealth shall be subject to this chapter so far as is consistent with the provisions of their respective charters; . . .

There can be no doubt but that it is the duty of savings banks subject to chapter 168 to determine the legality of any proposed

investment in the bonds of a gas, electric or water company under the provisions of said clause sixth.

G. L., c. 167, § 2, provides, in part, that —

The commissioner, either personally or by his deputy or examiners, or such others of his assistants as he may designate, shall . . . visit each bank, . . . and ascertain whether it has complied with the law.

Section 5 of said chapter provides, in part, that —

If, in the opinion of the commissioner, a bank or its officers or trustees have violated any law relative thereto, he may forthwith report such violation to the attorney general, who shall forthwith, in behalf of the commonwealth, institute a prosecution therefor. . . .

Clearly, it is the duty of the Commissioner to determine whether, with respect to investments in the bonds of gas, electric or water companies by savings banks, they have complied with the provisions of G. L., c. 168, § 54, cl. 6.

G. L., c. 164, §§ 14 and 15, regulate the issue of stock and bonds by gas and electric companies, and make them subject to the supervision and approval of the Department of Public Utilities. There is, however, no provision in the statutes giving to that department any authority to decide whether or not bonds of such companies which have been issued may or may not be purchased by savings banks.

CONSTITUTIONAL LAW — POWER OF LEGISLATURE TO RATIFY ACTS  
OF CITY OFFICIALS DONE UNDER AN UNCONSTITUTIONAL  
CHARTER — WHEN A LOCAL ACT MAY BE LIMITED TO TAKE  
EFFECT UNDER THE FORTY-EIGHTH AMENDMENT.

The Legislature may properly repeal a city charter which is void because of failure to comply with the Second Amendment.

An act which purports to ratify acts done by city officials under a void city charter should expressly limit such ratification to matters within the constitutional power of the Legislature.

A bill whose operation is restricted to a particular town, city or other political subdivision may be made to take effect upon its passage, since it is not subject to a referendum under Amend. XLVIII. The Referendum, pt. III, § 2.

You have inquired whether House Bill No. 1535, entitled "An Act ratifying and validating certain acts of the town of Methuen," would be constitutional if enacted into law.

To the  
Governor.  
1921  
May 18.

Section 1 of the proposed bill repeals Spec. St. 1916, c. 116, which provided for precinct voting, limited town meetings, town meeting members, and divers other matters in the town of Methuen, and also repeals Spec. St. 1917, c. 289, which purported to erect the town of Methuen into a city. Both said special acts have been held to be unconstitutional and void for failure to comply with jurisdictional requirements imposed by Mass. Const. Amend. II. *Attorney-General v. Methuen*, 236 Mass. 564; see also *Opinion of the Justices*, 229 Mass. 601. No question can be made that the Legislature may properly remove these two void enactments from the statute books.

Sections 2 and 3 of the proposed bill provide, in substance, that "all acts done, elections held and votes passed" under the provisions and within the scope of general law or of said special statutes, with certain exceptions not here material, "are hereby ratified, confirmed and made valid." Section 4 ratifies all acts of certain selectmen of Methuen in incurring indebtedness and making payments on behalf of the town between certain dates. Section 5 confirms a certain election. Section 6 provides that the act shall take effect on its passage.

As the bill defines by general description the acts, elections and votes to be ratified and confirmed, it is impossible for me, in the

absence of the facts, to advise Your Excellency as to whether the bill or some provision thereof extends to and includes some matter, thing or transaction which the Legislature may not have constitutional power to make valid. If such be the fact (which I do not intimate), a question would arise whether the whole bill would be unconstitutional, or whether the unconstitutional provision (if such there be) is severable. To guard against this possibility, I suggest that it would be expedient to insert a new section to the following effect: —

This act shall apply only in so far as the general court has constitutional power in the premises.

If such a provision be inserted, it would, in my opinion, enable the Legislature to exert its broad power to validate the acts of municipalities, in so far as it is not restrained by constitutional limitations.

As the bill is one whose operation "is restricted to a particular town, city or other political division," within the meaning of Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, it is not subject to a referendum petition, and may properly be made to take effect upon its passage without inserting an emergency preamble. Section 6 of the present bill may, therefore, be retained as section 7 if the suggested provision be inserted as section 6.

---

#### FISHERIES AND GAME — RIGHT OF PROPERTY — EXTENSION OF PRIVILEGE TO USE FISHERIES.

The State exercises not only the right of sovereignty, but also the right of property, as to its fisheries and game.

A State may prohibit the citizens of another State from using its fisheries.

An act extending the privilege of using fisheries to aliens who meet certain requirements is constitutional.

You request my opinion as to the constitutionality of a proposed act entitled "An Act relative to the granting of licenses for the catching of lobsters."

The bill, if enacted, will amend the present statute by enabling "individuals who are aliens and who have resided in the Common-

wealth and have been actually engaged in lobster fishing therein for five years next preceding the date of the license" to obtain licenses to catch or take lobsters from the waters of the Commonwealth within three miles of the shore. The bill would enlarge the class of persons to whom such licenses may now be granted.

The State exercises not only the right of sovereignty, but also the right of property, as to its fisheries and game. Legislation regulating and controlling the fisheries is, in effect, nothing more than a regulation of the use by the citizens of their common property, and is constitutional. *Patson v. Pennsylvania*, 232 U. S. 138; *Geer v. Connecticut*, 161 U. S. 519; *McCready v. Virginia*, 94 U. S. 391; *Commonwealth v. Hilton*, 174 Mass. 29; *Commonwealth v. Vincent*, 108 Mass. 441. A State may prohibit citizens of another State from using its fisheries. *McCready v. Virginia*, 94 U. S. 391. It follows that a State may constitutionally extend the privilege of using its fisheries to aliens who meet certain requirements.

In my opinion, therefore, this bill, if enacted, would be constitutional.

---

#### AUTOMOBILES — OPERATION — LIGHTS.

An automobile parked on a highway, with no one in charge, is being "operated," within the purview of G. L., c. 90, § 7.

The display by such automobile of a single white light during the period from one-half an hour after sunset to one-half an hour before sunrise does not comply with the statute.

You request my opinion as to whether the display by an automobile of a single park light, showing one red light to the rear and one white light to the front, complies with the requirements of the law relative to display of lights, if the car is parked on the highway with no one in charge.

G. L., c. 90, § 7, provides, in part: —

Every automobile operated during the period from one half an hour after sunset to one half an hour before sunrise shall display at least two white lights, or lights of yellow or amber tint, . . . which shall be visible not less than two hundred feet in the direction toward which the vehicle is proceeding; and every such motor vehicle shall display at least one red light in the reverse direction.

To the Com-  
missioner of  
Public Works.  
1921  
May 20.

In the case of *Commonwealth v. Henry*, 229 Mass. 19, the court, in considering practically the same provision of law, said, at pages 21 and 22:—

The statute under which the complaint is drawn was enacted largely for the protection of travellers upon highways, by guarding against collisions with automobiles after dark when it would be difficult or impossible to know of their presence. The question is, whether a motor car which is left standing upon a highway after dark without lights and with the engine at rest can be found to be "operated" within the meaning and intent of the statute.

It is obvious that a motor car standing upon a highway under such conditions may be fully as great a menace to the safety of travellers as if running upon the way without lights, and that the danger of serious injury to travellers by coming in contact with such a car would be very great. . . .

The statute must be read with reference to its manifest intent and spirit and cannot be limited to the literal meaning of a single word. It must be construed as a whole and interpreted according to the sense in which the words are employed, regard being had to the plain intention of the Legislature. So considered, we cannot doubt that the statute is broad enough to include automobiles at rest, as well as in motion, upon the highways.

In construing a similar statute the Supreme Court of the State of Washington said, in *Jaquith v. Worden*, 73 Wash. 349, 360:—

An automobile does not cease to be "driven" when stopped or left standing on a public highway during the hours of darkness. It cannot be said that the driver of such a machine must carry lights while it is moving, but that he may stop it during the hours of darkness in the roadway, turn off the lights, and leave it standing, without violating the law. The statute must be read with reference to its plain spirit and intent. Its spirit may not be destroyed by narrowing it to the literal meaning of a single word.

To the same effect is the case of *Stroud v. Water Commissioners*, 90 Conn. 412.

The case of *Harlan v. Kraschel*, 164 Iowa, 667, which appears to be contra to this view, is not followed by our court. See *Commonwealth v. Henry*, 229 Mass. 19, 23.

I am therefore of the opinion that an automobile parked on the highway, with no one in charge, is being "operated," within the purview of the statute, and that the display by an automobile of a single white light during the period from one-half an hour after sunset to one-half an hour before sunrise does not comply with the statute.

---

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER —  
 ACT WHICH AUTOMATICALLY CHANGES TO CONFORM TO SUB-  
 SEQUENT FEDERAL LEGISLATION — EIGHTEENTH AMEND-  
 MENT.

Power to enact laws cannot be delegated by the Legislature.

The Legislature may confer upon municipal corporations power to enact local ordinances or by-laws.

The Legislature may confer upon the Executive power to make administrative regulations in execution of a general law.

Within limits the Legislature may enact contingent legislation.

The "concurrent power" conferred upon or reserved to the States by the Eighteenth Amendment to the Federal Constitution does not authorize the Legislature to delegate to Congress any of the legislative power so conferred or reserved.

The Legislature has no power to provide that an act passed to execute the Eighteenth Amendment to the Federal Constitution shall automatically change so as to conform to legislation which may hereafter be passed by Congress in order to execute said amendment.

The Legislature has no power to provide that liquor for non-beverage purposes may be manufactured, purchased, delivered or possessed, "but only as provided by the laws of the United States and the regulations made thereunder," since, under such a provision, the law of this Commonwealth would automatically change to conform to such Federal laws and regulations.

The Legislature may provide that a carrier shall not deliver liquor except to persons who present a verified copy of a permit required by the laws of the United States, since this imposes a condition precedent to such delivery which involves no delegation of legislative power to Congress.

You have submitted for my consideration House Bill No. 1612, entitled "An Act to carry into effect, so far as the Commonwealth of Massachusetts is concerned, the Eighteenth Amendment to the Constitution of the United States." You direct my attention to fifteen provisions of the bill which make the operation of the proposed law depend upon the laws of the United States and the regulations made thereunder. These provisions are, broadly speaking, of two kinds: first, those which in effect incor-

To the Senate.  
 1921  
 May 23.

porate into the present bill "the laws of the United States and the regulations made thereunder"; and second, those which require the possession of the permit required by those laws and regulations as a condition precedent to some act otherwise prohibited. You inquire, in each instance, whether the provision in question is "an unconstitutional delegation by the General Court to the Congress of the United States of the power of the General Court to make laws for this Commonwealth." In view of the importance and delicacy of the subject and the number and scope of your inquiries, I shall consider, first, what constitutes an unconstitutional delegation of the power to enact laws; and second, the effect of the provisions of the proposed bill to which you call my attention.

1. The power to enact laws is a prerogative of sovereignty. It is vested in the people of Massachusetts except in so far as it has been surrendered or limited by the Constitution of the United States. By the Constitution of Massachusetts the people have delegated a portion of this power to the General Court. They have prescribed therein the manner in which the authority so delegated may be exerted. No bill can become a law unless it has been duly enacted by both branches of the Legislature and been either approved by the Governor or passed over his veto. There is no substitute for this procedure except enactment under the initiative provisions of the Forty-eighth Amendment. Thus the power of the General Court to make laws differs fundamentally from that possessed by the people. The power of the people is inherent in them and may be delegated by them upon such terms as they may from time to time see fit to fix; the powers of the General Court are derived from the people, have been limited by the people and can be exerted only in the manner prescribed by the people.

The General Court cannot delegate its power *to make laws*. No other body can exercise the power in the manner prescribed by the Constitution. This of itself is sufficient to preclude delegation. Yet the people have added to this inherent limitation upon the power the express prohibition contained in article XXX of the Bill of Rights. In *Boston v. Chelsea*, 212 Mass. 127, the court, in



holding that the Legislature could not delegate to a commission appointed by the court power to ascertain and prescribe to what extent (if any) the expense of the county of Suffolk should be borne by Chelsea and Winthrop, said: —

Article 30 of the Declaration of Rights of our Constitution provides that "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." It has been decided many times that the Legislature cannot delegate the power to make laws conferred upon it by a constitution sharply separating the three departments of government. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481; *Commonwealth v. Maletsky*, 203 Mass. 241, 247; *Brodbine v. Revere*, 182 Mass. 598, 600; *Opinion of the Justices*, 160 Mass. 586; *Stone v. Charlestown*, 114 Mass. 214, 220. When the attempt is to confer the power to make laws upon one of the other two departments of government, there is encountered the double prohibition of the Constitution against delegation of the law-making powers by the legislative, and against the exercise of that power by the co-ordinate department. It applies as strongly to the one as to the other. It is operative in equal degree upon the judicial and upon the other two departments of government. *Case of Supervisors of Election*, 114 Mass. 247. The question is whether Resolves of 1910, c. 109, as amended by c. 482 of the Acts of 1911, violates this article of the Constitution by imposing a law-making power upon the judicial department.

So, also, the Legislature, unless authorized by a constitutional provision for a referendum, cannot draft a *general* law and leave the enactment of it to the people at the polls. *Opinion of the Justices*, 160 Mass. 586; *Barto v. Himrod*, 8 N. Y. 483. Other instances might be given, but these suffice. The manner in which the Legislature must exert its delegated power to make laws, the express prohibition of article XXX of the Bill of Rights, and settled authority, all forbid the Legislature to delegate its authority to enact laws. *Attorney-General v. Old Colony R.R.*, 160 Mass. 62, 92; *Brodbine v. Revere*, 182 Mass. 598, 600; *Graham v. Roberts*, 200 Mass. 152, 158; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481. See also *Dinan v. Swig*, 223 Mass. 516.

There are seeming exceptions to the general rule that the Legislature cannot delegate legislative power, which, upon examination, prove not to be exceptions at all. The first of these seeming exceptions relates to the powers of local self-government which may be possessed by or conferred upon counties, cities, towns and other municipal corporations. The colonists brought with them from England the conception of local self-government. The settlement and organization of towns preceded any general colonial government. Many towns (now cities) are far older than the Constitution. Legislation in towns, by by-laws, has been a part of the law of Massachusetts from the earliest times. *Graham v. Roberts*, 200 Mass. 152, 158; *Dewey v. Richardson*, 206 Mass. 430, 433. *Stoutenburgh v. Hennick*, 129 U. S. 141, 147. The continued existence of counties and towns was expressly recognized by the Constitution at the time of its adoption, and has continued ever since. Mass. Const. pt. 2d, c. I, arts. I and II; Amend. II.

The authority of towns and other municipal corporations to regulate local matters by local ordinances or by-laws was not destroyed by the adoption of the Constitution, but became subject to the legislative power conferred upon the General Court. The Legislature may, subject to constitutional limitations, enlarge or diminish the authority of any city or town to regulate matters of local concern by reasonable ordinances, regulations or by-laws applicable only within its corporate limits. *Opinion of the Justices*, 234 Mass. 597, 603; *Commonwealth v. Theberge*, 231 Mass. 386, 389; *Commonwealth v. Slocum*, 230 Mass. 180, 190; *Commonwealth v. Fox*, 218 Mass. 498; *Opinion of the Justices*, 208 Mass. 625, 629; *Commonwealth v. Kingsbury*, 199 Mass. 542, 546; *Brodhine v. Revere*, 182 Mass. 598, 600; *Commonwealth v. Plaisted*, 148 Mass. 375, 382; *Bradley v. Richmond*, 227 U. S. 477. So, also, the Legislature may prescribe some administrative purpose and direct the municipality to put that purpose into local effect, such as, for example, the division of the city into wards (*Fitzgerald v. Boston*, 220 Mass. 503); or the ascertainment of the districts to which certain limitations upon the height of buildings shall apply (*Welch v. Swasey*, 193 Mass. 364, 375; 214 U. S. 91). But all these instances are matters of local administration which differ

widely in degree, and perhaps in kind, from any delegation of power to enact general laws applicable throughout the Commonwealth.

The second seeming exception relates to the extent of administrative power which may be conferred upon the Executive or some administrative official, board or commission in order to execute a given law. Laws do not execute themselves. They require human action to put them into effect. The effective administration of laws may, and often does, require a considerable measure of administrative or executive discretion in order to fit the law to varying states of fact which cannot be foreseen and prescribed for specifically in advance. The executive is one of the three coordinate departments of the government. The prohibition upon delegating power to make laws does not prevent or prohibit a grant of administrative discretion appropriate to the execution of an otherwise valid law. Such a grant of administrative discretion may include authority to prescribe administrative regulations which are subordinate to and in execution of the law itself and are appropriate to carry it into effect. Such grants of administrative discretion to make appropriate executive regulations have frequently been made and upheld upon the ground that they do not confer legislative power. *Brown v. Boston & Maine R.R.*, 233 Mass. 502, 510 (Public Service Commission); *Holcombe v. Creamer*, 231 Mass. 99, 111 (Minimum Wage Commission); *Commonwealth v. Hyde*, 230 Mass. 6 (State Board of Health); *Codman v. Crocker*, 203 Mass. 146, 154 (Boston Transit Commission); *Opinion of the Justices*, 138 Mass. 601, 603 (Civil Service Commission); *Martin v. Witherspoon*, 135 Mass. 175, 178 (Governor and Council); *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230 (moving picture censorship); *Red "C" Oil Mfg. Co. v. North Carolina Board of Agriculture*, 222 U. S. 380 (tests for illuminating oil). But it is equally well settled that such administrative rulings or regulations cannot alter or add to or detract from the law itself. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481; *Commonwealth v. Maletsky*, 203 Mass. 241, 246; *Goldstein v. Conner*, 212 Mass. 57, 59; *United States v. Standard Brewery, Inc.*, 251 U. S. 210, 220; *Waite v. Macy*, 246 U. S. 606; *United States v. George*,

228 U. S. 14, 20; *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. In *Field v. Clark*, 143 U. S. 649, 692, 693, the distinction between executive discretion and legislative power is clearly defined, as follows:—

“The true distinction,” as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, “is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” *Cincinnati, Wilmington, &c., Railroad v. Commissioners*, 1 Ohio St. 88.

A third seeming exception relates to contingent legislation. The General Court may enact a law to take effect upon the happening of a subsequent event. *Opinion of the Justices*, 160 Mass. 586, 591. A typical example is a general law which shall apply to those cities or towns which accept its provisions. *Wales v. Belcher*, 3 Pick. 508; *Stone v. Charlestown*, 114 Mass. 214; *Lynn v. County Commissioners*, 148 Mass. 148, 151; *Graham v. Roberts*, 200 Mass. 152, 156. In this class, also, fall statutes authorizing each locality to determine whether it will permit the sale of intoxicating liquor within its limits. *Commonwealth v. Bennett*, 108 Mass. 27, 29; *Commonwealth v. Blackington*, 24 Pick. 352; 7 Dane Abr. 43, 48. Another example is reciprocal legislation, which makes the terms upon which a privilege or exemption is granted to the corporations or inhabitants of another State depend upon the terms exacted by that State for the grant of a similar exemption to our own corporations or citizens. *Bliss v. Bliss*, 221 Mass. 201, 211; *People v. Fire Association*, 92 N. Y. 311. In such a case the effect accorded to the provisions of the foreign law is not in principle dissimilar from the effect accorded to executive regulations, made by some administrative body under a domestic law, which ascertain and make certain some contingency upon which the execution of the law depends. On the other hand, the principle that contingent legislation is permissible cannot be pressed too far. The Legislature, unless authorized by the Constitution, cannot make the enactment of a general law, drafted by it, depend upon the result

of a State-wide referendum. *Opinion of the Justices*, 160 Mass. 586; *Barto v. Himrod*, 8 N. Y. 483. Again, the distinction seems to lie between that which in effect enacts a law and that which pertains to the execution of a law already enacted.

Even though the Constitution of the United States contains no provision similar to article XXX of the Bill of Rights, similar principles apply. It is equally well settled that Congress cannot delegate its power to *enact general laws for the United States*. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 164; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 214; *Field v. Clark*, 143 U. S. 649, 692, 693; *In re Rahrer*, 140 U. S. 545, 560; *Wayman v. Southard*, 10 Wheat. 1, 42. But Congress may confer upon the territories, upon the District of Columbia, and upon the local government of the Philippines, power to enact local laws and regulations applicable within their respective territorial boundaries. *Maynard v. Hill*, 125 U. S. 190; *Stoutenburgh v. Henrick*, 129 U. S. 141; *Dorr v. United States*, 195 U. S. 138.

Upon the same principle Congress, *where uniform application of a general law is not required*, may make the local application of the Federal law depend upon the law of the State in question. Thus Congress may provide that the rules of practice in the several Federal courts shall conform as nearly as may be to the practice of the State in which the court sits (*Wayman v. Southard*, 10 Wheat. 1; *United States v. Jones*, 109 U. S. 513); that interstate shipments of liquor shall become subject to the police power of the receiving State to the same extent as if produced there (*In re Rahrer*, 140 U. S. 545); that liquor shall not be shipped into a State which prohibits its use and sale (*Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311); that mining claims may be located upon the public lands within a State in the manner prescribed by local law (*Butte City Water Co. v. Baker*, 196 U. S. 119; *Jackson v. Roby*, 109 U. S. 440, 441); that the provisions of local law as to exemptions, dower and priority of payment shall apply in bankruptcy proceedings (*Hanover National Bank v. Moyses*, 186 U. S. 181); that offences committed in dockyards and other places ceded to the United States, and not otherwise punishable by any law of the United States, shall be punished according to the

law in force, at the time the Federal act was passed, in the State where such place is situated (*Franklin v. United States*, 216 U. S. 559, 568; *United States v. Paul*, 6 Pet. 141); that offences against the local election law, committed at a Federal election within the State, shall be punished in the manner prescribed by the Federal act (*Ex parte Siebold*, 100 U. S. 371, 388); that local pilots shall be governed by the local law (*Cooley v. Board of Wardens*, 12 How. 299); and that national banks may be authorized to act as executor or trustee if local banks may be similarly authorized by local law (*First National Bank v. Fellows*, 244 U. S. 416, 428). But all these cases appear to rest upon the principle that while the power of Congress is paramount and may be so exerted as to supersede State law, Congress is not required so to exert it where a uniformity of application of the law is not required, but may, instead, give to the local law a local application not unlike the rules and regulations which a municipality may be authorized to make for the government of matters of local concern. On the other hand, if the subject be a matter which requires general and uniform regulation, it is beyond the power of Congress to give to the laws of the several States the effect of municipal ordinances applicable within their respective boundaries. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.

It is equally clearly settled that while Congress cannot delegate to the Executive any power to enact laws, it may confer a broad executive discretion as to the manner in which a law enacted by Congress shall be carried into effect, which executive discretion may include incidental power to make subsidiary regulations. *Buttfield v. Stranahan*, 192 U. S. 470; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *Houston, etc., Ry. Co. v. United States*, 234 U. S. 342; *First National Bank v. Fellows*, 244 U. S. 416; *United States v. Grimaud*, 220 U. S. 506; *Monongahela Bridge Co. v. United States*, 216 U. S. 177; *Re Kollock*, 165 U. S. 526; *Field v. Clark*, 143 U. S. 649. The distinction between a grant of incidental executive power to make regulations for the enforcement of an existing law and a delegation of power to make the law itself has been stated in the previous quotation from *Field v. Clark*, *supra*; see also *Buttfield v. Stranahan*, 192 U. S. 470,

496. It follows that whether the power to enact House Bill No. 1612 be rested upon the police power of the State, or upon the "concurrent power" conferred by the Eighteenth Amendment, or upon both together, the question as to what constitutes an unconstitutional delegation of the power to enact laws is tested by similar principles.

2. Section 1 of the proposed law in substance defines "intoxicating liquor" so as to include any liquids or compounds "containing one half of one per centum or more of alcohol by volume which are fit for use for beverages purposes"; excludes from that definition certain liquids which contain less than that percentage of alcohol if they "are made as prescribed by the laws of the United States and the regulations made thereunder"; and further provides by section 1 (b): —

(b) Notwithstanding the provisions of this section the word "liquor" or the phrase "intoxicating liquor," for the purpose of this chapter shall have the meaning defined from time to time by the congress of the United States for the purpose of enforcing the provisions of the eighteenth amendment to the constitution of the United States.

In my opinion, this makes the definition of intoxicating liquor which Congress may from time to time adopt paramount to the definition contained in the bill. If this be so, this section is in effect made subject to alteration, amendment or repeal by Congress at pleasure. Such a grant of power to Congress seems necessarily to include a grant of discretion to Congress to determine what the law of Massachusetts shall be. In my opinion, it cannot be brought within the seeming exception to the general rule which permits the Legislature to delegate to cities and towns power to make local rules or ordinances *subject to the law which confers the power*. Congress is not a municipal corporation; this law is of state-wide application, and Congress is invested with power to change the law which confers the power. In my opinion, it is not within the seeming exception which authorizes a grant to an executive or administrative body of incidental discretion to make regulations for the execution of the law which confers the power. The Congress of the United States is not an administrative body

of this Commonwealth, and, if it were, it could not be invested with power to alter, amend or repeal the law which confers an incidental power to make regulations for its own execution. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 481; *Waite v. Macy*, 246 U. S. 606. I cannot escape the belief that the Supreme Judicial Court would probably hold that such a provision is an unconstitutional delegation of the power of the General Court to enact laws. *Boston v. Chelsea*, 212 Mass. 127; *Opinion of the Justices*, 160 Mass. 586.

Section 3 permits liquor for non-beverage purposes and wine for sacramental purposes to be manufactured, purchased, delivered, possessed, etc., "but only as provided by the laws of the United States and the regulations made thereunder." This provision seems to be equally open to the objections already noted in respect to delegating legislative power to Congress, and to the further objection that in this case the delegation includes the Federal officials authorized by Congress to make regulations for the execution of the Federal laws upon this subject. If a delegation of legislative power to Congress cannot probably be supported, it seems even more difficult to support a similar grant to subordinate executive officials of another sovereignty. A change made by Congress has at least the sanction of legislative action, though probably not the sanction which our Constitution requires in order to make or alter our laws. But a regulation adopted by Federal executive officials has nothing of that character. It is not duly adopted by each house of our Legislature or subject to approval or disapproval by the Governor. It has no power to alter the law of the United States under which it is made. *Waite v. Macy*, 246 U. S. 606; *United States v. George*, 228 U. S. 14, 20; *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. I am constrained to believe that the Supreme Judicial Court would hold that the General Court cannot authorize Federal officials to alter our laws by regulations which cannot have that effect upon the Federal laws.

Section 19 provides, in substance, that a carrier shall not deliver liquor except to persons "who present a verified copy of a permit to purchase in the form required by the laws of the United States



and the regulations made thereunder. . . .” In my opinion, this imposes a condition upon such delivery, namely, the presentation of the required permit. Doubtless the condition cannot be satisfied except by one who has previously complied with the Federal law in this respect. But even though the Federal law may alter from time to time, compliance therewith by the consignee involves no change in the provisions of the law of Massachusetts. In my opinion, this provision is not open to objection upon the ground that it involves an unconstitutional delegation of legislative power.

Applying these principles to your questions specifically, my answer must necessarily be “yes” to questions 1, 2, 4, 6, 7, 9, 13 and 15, upon the ground that the provisions of the proposed law to which those questions refer change automatically to coincide with the future laws enacted from time to time by Congress, or with such laws and the regulations made thereunder. On the other hand, my answer is “no” to questions 5, 10, 11, 12 and 14, upon the ground that the provisions to which those questions refer simply impose a condition precedent to some act authorized by the proposed law, and are not provisions of law subject to change by the laws of the United States and the regulations made thereunder. The answer to questions 3 and 8 will, in my opinion, depend upon whether the court should construe the provisions in question as conditions precedent or as provisions of law subject to change by the laws of the United States and the regulations adopted thereunder.

The primary purpose of the present bill is to enforce the Eighteenth Amendment. That purpose could not, in my opinion, be attained by a law which automatically amends itself to conform to future Federal legislation, even if such a law were constitutional. Both the State and the Federal Constitution prohibit the enactment of *ex post facto* laws; that is, laws which punish an act done before the law takes effect or which increase the punishment prescribed for a crime already committed. Bill of Rights, art. XXIV; U. S. Const., art. I, § 9. When a law is amended the amendment replaces the prior enactment, which ceases to operate unless expressly continued in force with respect to acts done

while it was in effect. If the proposed bill were constitutional, it might well be that before the criminal act could be punished the law would have automatically amended itself, thus destroying the law under which that act could be punished, and replacing it with a law under which no punishment could be inflicted. Such a statute is, in my opinion, ill adapted to enforce the Eighteenth Amendment.

Thus far I have confined myself strictly to the questions propounded, namely, whether the bill *in its present form* would be unconstitutional *on the ground that it improperly delegates the power of the General Court to enact laws for this Commonwealth*. In my opinion, the objections to the present bill may readily be removed by amendment. There can be no doubt that the Legislature has power to enact appropriate legislation to enforce the Eighteenth Amendment. *Commonwealth v. Nickerson*, 236 Mass. 281. It may, if it sees fit, enact a law substantially similar to the Volstead Act. 41 Stat. 305. It might, if it sees fit, borrow the language of any regulations adopted thereunder, assuming of course that no provision of the State or the Federal Constitution is thereby violated. It may from time to time adopt such amendments of the Volstead Act as may hereafter be made by Congress, provided those amendments are themselves constitutional. What it cannot do, in my opinion, is to enact a law which, *without further action by the Legislature*, will *automatically amend itself* so as to conform to subsequent legislation of the United States. Such a law not only substitutes the discretion of Congress and of the President for the discretion of the Legislature and of the Governor, which the State Constitution requires, but also may well prove ineffective as *ex post facto* legislation. Both objections, in my opinion, would cease to apply if the provisions for automatic amendment be eliminated from the present bill.

AIRCRAFT — ESTABLISHMENT OF LANDING PLACES — GREAT  
PONDS.

The provisions of G. L., c. 90, § 40, relative to the establishment of landing places for aircraft, do not apply to the great ponds of the Commonwealth.

The provisions of the statute are limited to the landing of aircraft on the land and ground of the Commonwealth.

You have requested my opinion on the following facts: —

A request has been made to the Department of Public Works to approve the use of Pontoosuc Lake, a great pond situated in Pittsfield, as a landing place for a hydroplane. You inquire as to whether or not the Department of Public Works has authority under the statutes to pass upon this request, and if there is such authority, whether or not a public hearing should be given before the matter is decided.

To the Com-  
missioner of  
Public Works.  
1921  
May 23.

The statutory provisions relative to aircraft are found in G. L., c. 90. Section 39 reads as follows: —

Except in a case of emergency no person shall land aircraft in public ways or public parks or other public grounds without permission from the authorities in charge thereof.

Section 40 reads as follows: —

Landing places for aircraft may, from time to time, be designated, set apart and marked by the division of highways, or other public officials who are in charge of any land owned or controlled by the commonwealth, or by any town, or by the metropolitan park commission, and said officials may make reasonable rules and regulations governing the use of such landing places by aviators and other persons, and may change the same from time to time. All aviators and other persons using such landing places shall at all times comply with the rules and regulations made as aforesaid.

It is my opinion that the language used in these two sections, namely, in section 39, that “no person shall land aircraft, except in case of emergency, in public ways or public parks or other public grounds without permission from the authorities *in charge* thereof,” and in section 40, that “landing places for aircraft may, from time to time, be designated . . . by the division of highways, or

other public officials who are *in charge* of any land owned or controlled by the commonwealth," indicates that the Legislature did not intend the provisions of the sections to apply to great ponds.

The jurisdiction of great ponds is vested in different officials of the Commonwealth, depending in each case upon the matter that is the subject of regulation. For example, it is well known that the great ponds of the Commonwealth belong to the public, and that the rights of fishing, boating, bathing and other like rights which pertain to the public therein are regarded as valuable rights, entitled to the protection of the government. If any one is found to be doing acts without right, the necessary effect of which is to destroy or impair these public rights and privileges, it furnishes a proper case for an information by the Attorney-General to restrain and prevent the mischief. *Attorney-General v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361, 364. Then, again, the Department of Public Health has the general oversight and care of all inland waters, including great ponds, whether as sources of ice or water supply, and has supervision of the same relative to any possible pollution thereof. G. L., c. 111, § 159. And in the case of your own department, the Division of Waterways and Public Lands has jurisdiction so far as the erection of structures in the waters of any of the great ponds is involved. G. L., c. 91, § 13.

The language used in the statutory provisions quoted above is express and specific, and it must be presumed that the Legislature, in enacting the same, intended to limit the provisions to the landing of aircraft on the land and ground of the Commonwealth, and not to make provision as to the landing of hydroplanes in this Commonwealth. Accordingly, I am of the opinion that your department is without authority to pass upon the request made to you to approve the use of Pontoosuc Lake, in Pittsfield, as a landing place for hydroplanes.

FISHWAY — RED BROOK, WAREHAM — PASSAGEWAY FOR ALEWIVES — REGULATION OF OBSTRUCTIONS.

The Commissioner of Conservation, by G. L., c. 130, § 17, has authority to prescribe by written order that a suitable and sufficient passageway for alewives be maintained in Red Brook, so called, in the town of Wareham.

You have requested my opinion on the following facts: —

Red Brook, so called, located in the town of Wareham, has its headwaters in White Island Pond, a great pond, and flows in a southerly direction into the head of Buttermilk Bay. Its entire length is approximately  $4\frac{1}{2}$  to 5 miles. Its greatest breadth is about 20 feet. The first half mile from Buttermilk Bay north is affected by the rise and fall of the tide to an extent of a maximum of 3 feet. The alewives have run in this stream over a long period of years.

You inquire as to whether or not said Red Brook, so called, comes within the definition of G. L., c. 130, § 17, as being such a river as would give your department the right to regulate obstructions on said river with respect to the passage of migratory fish.

G. L., c. 130, § 17, reads as follows: —

The commissioner of conservation may examine all dams upon rivers where the law requires fishways to be maintained, or where in his judgment fishways are needed, and he shall determine whether the fishways, if any, are suitable and sufficient for the passage of the fish in such rivers, or whether a fishway is needed for the passage of fish over any dam; and shall prescribe by written order what changes or repairs, if any, shall be made therein, and where, how and when a new fishway must be built, and at what times the same shall be kept open, and shall serve a copy of such order upon the owners of the dams. A certificate of the commissioner that service has been so made shall be sufficient proof thereof. The supreme judicial or superior court shall, on petition of the director, have jurisdiction in equity or otherwise to enforce any such order and to restrain any violation thereof.

It is my opinion that the provisions of said section 17 are not restricted in their application to the navigable rivers of the Commonwealth. It has long since been the established law of this Commonwealth that every owner of a dam across a stream where

To the Director of Fisheries and Game.  
1921  
May 24.

migratory fish are accustomed to pass is obliged to provide a sufficient and reasonable way for the fish, unless he is exempt by express provision or obvious implication in his grant. The law is well stated by Mr. Justice Gray in the case of *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 450, as follows:—

The right to have migratory fish pass, in their accustomed course, up and down rivers and streams, though not technically navigable, is also a public right, and may be regulated and protected by the Legislature in such a manner, through such commissioners or other officers, and by means of such forms of judicial process, as it may deem appropriate; and every grant of a right to maintain a milldam across a stream where such fish are accustomed to pass is subject to the condition or limitation that a sufficient and reasonable way shall be allowed for the fish, unless cut off by express provision or obvious implication in the grant.

The court then cites the cases of *Stoughton v. Baker*, 4 Mass. 522; *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 87; *Commonwealth v. Alger*, 7 Cush. 53, and *Commonwealth v. Essex Co.*, 13 Gray, 239.

Under the facts it appears that Red Brook is a stream in which alewives, in their accustomed course, have for a long period of time ascended the stream to spawn, and therefore the Commissioner of Conservation is authorized to prescribe by written order that a suitable and sufficient passageway for alewives be maintained in said stream.

---

#### CONSTITUTIONAL LAW — ACTS MAKING UNENFORCEABLE PROVISIONS IN LEASES.

The provisions of St. 1920, c. 578, making unenforceable increases of rent so great as to be unjust, unreasonable and oppressive, and of a bill to amend said act by providing that stipulations or conditions which operate to raise the rents of lessees in case of the birth or adoption of children shall be deemed unreasonable and oppressive, are not unconstitutional, either because they impair the obligation of contracts or because they are not due process of law.

You have asked my opinion as to the constitutionality of Senate Bill No. 412, entitled "An Act to render unenforceable stipulations in leases providing for a raise in rent because of an increase in the tenant's family."

The bill amends St. 1920, c. 578, by inserting after section 1 the following new section: —

*Section 1A.* A stipulation or condition in a lease or contract of hiring of premises to which section one applies whereby the rent shall or may be raised because of an increase in the number of the lessee's family shall, in case such raise in rent is due to the birth or adoption of a child or children, be deemed unjust, unreasonable and oppressive within the meaning of said section.

St. 1920, c. 578, is entitled "An Act to provide that unjust, unreasonable and oppressive agreements shall be a defence in actions for rent," and provides as follows: —

*Whereas,* The deferred operation of this act would defeat its purpose to provide immediate relief from hardship incident to the present scarcity of houses and buildings available for habitation, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and convenience.

SECTION 1. Unjust, unreasonable and oppressive agreements for the payment of rent or for the use and occupation of premises occupied for dwelling purposes, other than a room or rooms in a hotel, lodging house or rooming house, shall be unenforceable by action. Where it appears that the rent has been increased more than twenty-five per cent over the rent as it existed one year prior to the time of the agreement under which rent is sought to be recovered, except in cases where unusual repairs and alterations have been made, the agreement shall be presumptively unjust, unreasonable and oppressive; but nothing herein contained shall prevent either party from pleading and proving in an action that a greater increase was a fair and reasonable rent or that a lesser increase was an unjust, unreasonable and oppressive rent for the premises in such action, or from instituting a separate action for the recovery thereof. In any action on such an agreement or in a separate action the landlord may recover the fair rental of his premises.

SECTION 2. The provisions of this act shall not apply to pending causes of action.

SECTION 3. The act shall become null and void on the first day of February in the year nineteen hundred and twenty-two.

Both the act and the amendment, it is clear, apply to and affect existing leases. St. 1920, c. 578, makes unenforceable increases of rent so great as to be unjust, unreasonable and oppressive. The amendment provides that stipulations or conditions

which operate to raise the rents of lessees in case of the birth or adoption of children shall be deemed unreasonable and oppressive.

If the act is unconstitutional the amendment cannot be sustained. It is therefore necessary to consider whether either fails to comply with constitutional requirements.

There are two possible objections to this legislation on the ground of unconstitutionality: first, that it is not due process of law, and second, that it impairs the obligation of contracts.

U. S. Const., art. I, § 10, provides, in part, as follows:—

No state shall . . . pass any . . . law impairing the obligation of contracts. . . .

The Fourteenth Amendment thereto provides, in part, as follows:—

. . . nor shall any state deprive any person of life, liberty or property, without due process of law. . . .

The Constitution of this Commonwealth contains no express provision which prohibits a law impairing the obligation of contracts. *Cf. Cary Library v. Bliss*, 151 Mass. 364, 380. It does contain provisions which secure to the people, in substance, the right not to be deprived of life, liberty or property without due process of law. For example, article XII of the Declaration of Rights contains the provision that “no subject shall be . . . deprived of his life, liberty, or estate, but by . . . the law of the land.” See *Jones v. Robbins*, 8 Gray, 329; *Forster v. Forster*, 129 Mass. 559; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474, 478. As contracts are property, this provision accords to contracts the same measure of protection accorded to other forms of property. See *Bogni v. Perotti*, 224 Mass. 152.

In interpreting the Constitution of the United States the decisions of the Supreme Court of the United States have a controlling authority. There are two recent decisions of the Supreme Court on questions so analogous to the question you have asked that they must be regarded as decisive. The cases are *Block v. Hirsh*, 256 U. S. 135, and *Marcus Brown Holding Co. Inc. v. Feldman*, 256 U. S. 170.



The former of the two cases involved the constitutionality of an act of Congress, applicable to the District of Columbia, giving to tenants of rented property the right to occupy such property at their option after the expiration of the term, so long as they continued to pay rent and perform the conditions of their leases, and subject to regulation by a commission created by the act. This act was declared to be emergency legislation, the need for which was due to conditions arising from the war, and was to end in two years unless sooner repealed.

In the latter case an act passed by the State of New York, similarly permitting tenants of rented property to hold over after the expiration of their leases, was under consideration. In that case it appeared that the parties had made a new lease for the payment of an increased rent at the end of the term in question.

A bare majority of the court held with respect to the former act that it was a proper exercise of the police power, and that it did not violate the "due process" clause of the Constitution; that "a public exigency will justify the Legislature in restricting property rights in land to a certain extent without compensation"; and that the act did not go beyond the limit of proper legislation. With respect to the latter act, they held also that it was not unconstitutional as impairing the obligation of contracts; that contracts are made subject to this exercise of the power of the State when otherwise justified. In each case there was a vigorous dissenting opinion by four of the justices.

The provisions of St. 1920, c. 578, and of the act which is before you seem to me to be less open to objection on the ground of unconstitutionality than the provisions of the acts considered in the opinions of the Supreme Court. It is true that they interfere directly with the express obligations of existing contracts, but the interference is certainly no greater and the justification is somewhat clearer than in the cases recently decided by the Supreme Court of the United States. In my opinion, these cases are decisive so far as the Federal Constitution is concerned.

The State court has frequently defended the rights of citizens against legislative encroachments which have seemed to it to be inconsistent with due process of law or "the law of the land."

*Commonwealth v. Alger*, 7 Cush. 53; *Sawyer v. Davis*, 136 Mass. 239; *Wyeth v. Cambridge Board of Health*, 200 Mass. 474; *Durgin v. Minot*, 203 Mass. 26; *Opinion of the Justices*, 207 Mass. 601.

But the phrase "law of the land" in the State Constitution is substantially equivalent to the phrase "due process of law" as used in the Fifth and Fourteenth Amendments to the Federal Constitution. On this aspect of the case the two decisions of the Supreme Court of the United States are persuasive, if not decisive.

---

#### STATUTE — TIME OF TAKING EFFECT.

St. 1921, c. 430, changing the names of the various "police" courts to "district" courts, under Mass. Const. Amend. XLVIII, The Referendum, pts. I and III, may not take effect earlier than ninety days after it became a law.

To the  
Secretary.  
1921  
May 27.

You ask me to advise whether St. 1921, c. 430, takes effect in ninety days or at once.

Said statute is entitled "An Act changing the names of the various 'police' courts to 'district' courts," and contains provisions to carry that object into effect. Section 4 of said act provides as follows:—

The change of name provided for in this act shall not affect the validity of any proceedings commenced in any of said courts under the name of "police" court prior to the day this act takes effect.

Mass. Const. Amend. XLVIII, The Referendum, pt. I, provides as follows:—

No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

Mass. Const. Amend. XLVIII, The Referendum, pt. III, §§ 1 and 2, provide as follows:—

SECTION 1. A referendum petition may ask for a referendum to the people upon any law enacted by the general court which is not herein expressly excluded.

SECTION 2. No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

A statute which merely changes the name of an existing court does not abolish that court and create a new one unless the statute clearly indicates a purpose so to do. *Worthington v. London Guarantee, etc., Co.*, 164 N. Y. 81; *Peace v. Wilson*, 186 N. Y. 403; *People v. Aurora*, 78 Ill. 218; *Mahoning Valley R. Co. v. Santoro*, 93 Ohio St. 53.

St. 1921, c. 430, in my opinion, does not relate to the powers, creation or abolition of courts, or to any matter expressly excluded by Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2. It follows, by Mass. Const. Amend. XLVIII, The Referendum, pt. I, that the statute does not come within the exception, and may not take effect earlier than ninety days after it has become a law.

---

TENURE OF OFFICE — PRESIDENT OF THE SENATE — SPEAKER OF THE HOUSE OF REPRESENTATIVES — BIENNIAL ELECTIONS.

Under the present system of biennial elections, the presiding officers of the Senate and House of Representatives hold office for the two-year term for which the members of the Senate and House were elected and until the General Court, as organized, shall be dissolved "on the day next preceding the first Wednesday in January in the third year following their election."

You have requested my opinion as to whether or not, under the present system of biennial elections, the presiding officers of the Senate and House of Representatives elected January, 1921, hold office for one year or for the two-year term for which the members of the Senate and House were elected.

Mass. Const. Amend. LXIV, which was submitted to and ratified by the people on Nov. 5, 1918, provides, so far as is pertinent

To the Senate  
and House of  
Representatives  
1921  
May 27.

to your question, that senators and representatives shall be elected biennially, and that the terms of senators and representatives shall begin with the first Wednesday in January succeeding their election, and shall extend to the first Wednesday in January in the third year following their election and until their successors are chosen and qualified.

The Constitution of Massachusetts has the following provisions relative to the choice of the presiding officers of the two branches of the General Court: —

Mass. Const., pt. 2d, c. I, § II, art. VII: —

The senate shall choose its own president, appoint its own officers, and determine its own rules of proceedings.

Mass. Const., pt. 2d, c. I, § III, art. X: —

The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution; shall choose their own speaker; appoint their own officers, and settle the rules and orders of proceeding in their own house.

The existence of the office of President of the Senate is recognized in the General Laws, but no special reference is made to the manner of his election, as is the case as to the election of the Speaker of the House of Representatives.

Article 47 of the Constitution of Massachusetts, as rearranged, provides: —

And that there may be a due convention of senators on the first Wednesday in January annually, the governor with five of the council, for the time being, shall, as soon as may be after each biennial election, examine the returned copies of such records; and after each biennial election fourteen days before such Wednesday he shall issue his summons to such persons as shall appear to be chosen by the highest number of votes to attend on that day, and take their seats accordingly.

See also Mass. Const., pt. 2d, c. I, § II, art. III, and amendments thereof.

The provisions relative to the House of Representatives are found in G. L., c. 3, §§ 1-3.

Section 1 provides: —

The state secretary shall receive and examine the certificates of the election of representatives to the general court returned into his office, and make a list of the persons therein named. On the Tuesday next preceding the first Wednesday of January *following a state election* he shall deliver to the sergeant-at-arms a list of the persons then returned, and upon receiving any further certificates before the house of representatives is called to order he shall immediately make and deliver to the sergeant-at-arms a list of the persons returned by such further certificates. He shall also transmit the certificates, with a list of all persons returned, to the house of representatives as soon as the members are called to order.

Section 3 provides: —

On said first Wednesday of January [that is, the first Wednesday of January *following the State election*] between the hours of ten in the forenoon and twelve at noon, the persons so returned and admitted as members into the representatives' chamber shall be called to order by the oldest senior member present, who shall be the presiding officer of the house *until a speaker is chosen* or the house otherwise determines.

Prior to the ratification of Mass. Const. Amend. LXIV, the provisions relative to the organization of the House of Representatives were found in R. L., c. 3, §§ 1-3.

Section 1, relative to the Secretary of the Commonwealth making and delivering lists of persons elected as representatives, provided, in part, that —

On the Tuesday next preceding the first Wednesday of January *in each year* he [the Secretary of the Commonwealth] shall deliver to the sergeant-at-arms a list of persons then returned.

It is significant that the words "following the state election" are not found in the Revised Laws, but the words "in each year" were used, and that after the adoption of the amendment providing for biennial elections the words "in each year" were stricken out, and the words "following the state election" were inserted.

Construing the provisions of the Constitution and of the General Laws set forth above, the law provides for the election of a Speaker

upon the convening of the representatives elect on the first Wednesday of January following the State election.

Article 41 of the Constitution of Massachusetts, as rearranged, provides, in part, that —

The political year shall begin on the first Wednesday in January, and the general court shall assemble every year on the first Wednesday in January, and at such other times as they shall judge necessary, or when called together by the governor; and shall dissolve and be dissolved on the day next preceding the first Wednesday in January in the third year following their election, without any proclamation or other act of the governor, and shall be styled, THE GENERAL COURT OF MASSACHUSETTS.

It is my opinion that when the Senate and the House of Representatives, following a State election, meet on the first Wednesday of January and organize and choose their President and Speaker, respectively, these presiding officers are elected to serve until the General Court which chose them to preside over the Senate and House of Representatives is dissolved, as provided for in the Constitution, to wit, on the day next preceding the first Wednesday in January in the third year following the State election at which the senators and representatives were elected. It is to be observed that under this article of the Constitution the General Court is not dissolved until the day next preceding the first Wednesday in January in the third year following their election. There is, therefore, a clear distinction between persons elected under the Constitution as officers of the General Court and such committees as, by the rules of the Senate and House, it is provided "shall be appointed at the beginning of the political year."

Accordingly, in answer to your inquiry I would state that the presiding officers of the Senate and House of Representatives elected January, 1921, hold office for the two-year term for which the members of the Senate and House were elected, and until the General Court now organized shall be dissolved "on the day next preceding the first Wednesday in January in the third year following their election."

LABOR AND INDUSTRIES — HOURS OF EMPLOYMENT OF WOMEN  
AND CHILDREN — MEANING OF THE WORD “WEEK.”

In the absence of express statutory declaration, the word “week,” as used in G. L., c. 149, § 56, does not mean any consecutive seven days, but should be given its usual meaning, and be considered equivalent to the phrase “calendar week.”

You request an opinion as to the meaning of the word “week,” as used in G. L., c. 149, § 56, relating to the hours of employment of women and children.

To the Commissioner of  
Labor and  
Industries.  
1921  
June 2.

As I understand it, the reason for your inquiry is because in a certain case under consideration a schedule of hours has been established which limits the employment of women in any calendar week to forty-eight hours, but does not limit the employment to forty-eight hours in certain seven-day periods. For example, beginning with a Sunday when a woman employee does not work, she is employed during the remainder of the week for eight hours a day, or a total of forty-eight hours. Beginning with the next Sunday she is employed for seven and one-half hours on that day and for six hours on each of the following six days, or a total of forty-three and one-half hours, but if the computation begins on the first Monday for a period of seven days, the actual hours of employment are fifty-five and one-half.

There appears to be no statutory definition of what constitutes a “week,” although the word “month” means a calendar month, and the word “year” means a calendar year unless otherwise expressed. G. L., c. 8, § 5, par. (11). The case of *Brewer v. City of Springfield*, 97 Mass. 152, would seem to indicate that the term “week” refers to a calendar week. See also *Dexter v. Shepard*, 117 Mass. 480; *Frothingham v. March*, 1 Mass. 247.

It is a general rule of law that all statutes in derogation of the common law are to be construed strictly, and that such statutes must not be deemed to extinguish or restrain private rights unless it appears by express words or plain implication that it was the intention of the Legislature so to do.

The purpose of this statute is to prevent injury to health by prohibiting women engaged in certain occupations from working

for unreasonable periods. The ground upon which the courts have sustained regulations limiting the hours of labor of women and children is that continuous strain tends to lower the vitality of such persons, and to make them more liable to physical or mental breakdown.

Under the schedule as outlined above, the hours of freedom from work would seem to prevent such evil effects, for during the period of two calendar weeks a woman thus employed works four and one-half hours less than the limitation imposed by statute. It is to be observed that in any event the hours of labor are limited to not more than nine hours in any one day, giving evidence of an intention on the part of the Legislature to permit some elasticity in the arrangement of schedules.

In the absence, therefore, of an express declaration that the term "week" in the statute shall mean any consecutive seven days, it must be given its usual meaning and be considered equivalent to the phrase "in any calendar week."

---

#### AGRICULTURAL SOCIETIES — FAIRS — LICENSES.

Under G. L., c. 140, §§ 181 and 182, an agricultural society, in order to hold a fair, must obtain a license from the mayor or selectmen.

It is not necessary for the society, or one holding a concession, to obtain a common victualer's license, under G. L., c. 140, §§ 2-21, in order to furnish food to patrons of a fair.

You ask my opinion on the following questions: —

1. Is it necessary for an agricultural society or other organization conducting a fair to take out any license, State or municipal, as a prerequisite to holding such fair?

2. Is it necessary for such a society to take out a license to act as victualers when it provides food as part of its accommodation to patrons?

3. Can the city or town in which a fair is held require any one holding a concession from a fair to take out a victualer's license before he can open a restaurant or sell food in connection with the fair?

Agricultural societies may be organized under general law or by special statute. The act authorizing the organization of such cor-



porations first appears in St. 1853, c. 312. The substance of the law has not been changed since that time. It now appears in G. L., c. 180, § 4, which is as follows:—

Ten or more persons, in any county, city or town may form a corporation under section three for the purpose of encouraging agriculture or horticulture, or for improving and ornamenting the streets and public squares of any city or town by planting and cultivating ornamental trees therein.

The power to hold fairs, if not expressly granted to an agricultural society, is generally implied as incidental to its purposes. *Dunn v. Agricultural Society*, 46 Ohio St. 93, 99, 100; 2 C. J. 992.

The statutes of this Commonwealth recognize the holding of fairs and exhibitions by agricultural societies as customary. G. L., c. 128, §§ 46-50. I am of opinion that agricultural societies organized either under general law or by a special statute have the power to hold fairs.

If any license is required as a prerequisite to holding such a fair, it must be by the express provisions of some statute providing for the taking out of such license. The only statute which may be applicable appears in G. L., c. 140, §§ 181 and 182. Section 181 is, in part, as follows:—

The mayor or selectmen may . . . grant, upon such terms and conditions as they deem reasonable, a license for theatrical exhibitions, public shows, public amusements and exhibitions of every description, to be held upon week days only, to which admission is obtained upon payment of money. . . .

Section 182 provides a penalty for maintaining any such exhibition, show or amusement without such license. It then continues as follows:—

This and the preceding section shall not apply to public entertainments by religious societies in their usual places of worship for a religious or charitable purpose, . . .

There are some cases which tend to indicate that activities which are instructive do not fall within the class of "public

amusements." *Commonwealth v. Gee*, 6 Cush. 174; *Commonwealth v. Bow*, 177 Mass. 347.

But agricultural fairs, in my judgment, fall within the description both of "public shows" and "exhibitions of every description." On the other hand, although they are organized for the purpose of encouraging agriculture, and thus have a recognized standing which vests them with a sort of public purpose, they are not public entertainments by religious societies in their usual places of worship for a religious or charitable purpose. It is my opinion, therefore, that they must be licensed by the mayor or selectmen, as required by G. L., c. 140, § 181.

Innholders and common victualers are required to procure licenses from the licensing authorities, and are subject to a penalty for assuming to be such without being licensed. G. L., c. 140, §§ 2-21. I know of no other provision of law requiring the taking out of a license, either by a restaurant keeper or other vendor of food or by one holding a concession for the supplying of food.

A common victualer is required at all times to be provided with "suitable food for strangers and travelers," and also to have "upon his premises the necessary implements and facilities for cooking, preparing and serving food for strangers and travelers." G. L., c. 140, §§ 5 and 6. A penalty is imposed if he refuses, upon request, to supply food to a stranger or traveler on any day but Sunday. G. L., c. 140, § 8. His license runs to April 30 of each year, and must be revoked if he ceases to do business. G. L., c. 140, §§ 4 and 9.

The words "common victualer," it is said, "in Massachusetts, by long usage, have come to mean the keeper of a restaurant or public eating house." *Commonwealth v. Meckel*, 221 Mass. 70, 72; *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 72.

It is my opinion that the holder of a concession who furnishes food for the accommodation of patrons of a fair, temporarily, during the days on which the fair is held, is not a common victualer, within the meaning of those words as ordinarily used. His purpose is not, and he cannot be required, to furnish food to all strangers and travelers, but merely to those attending the fair upon payment

of admission. His business is not permanent, but necessarily continues only while the fair is being held.

If the society itself provides food for the accommodation of its patrons during the fair, it is not for that reason engaged in the business of supplying food to strangers and travelers, and is not the keeper of a public eating house. Therefore, it is not a common victualer.

I advise you, therefore, in answer to your second and third questions that it will not be necessary to obtain any common victualer's license.

---

### REGISTRATION OF BIRTHS — ILLEGITIMATE CHILDREN.

Where a child is born in wedlock there is a presumption of legitimacy, which can be rebutted only by evidence showing beyond reasonable doubt that the husband was not the father; and the declarations of either parent are not competent to prove illegitimacy.

Under G. L., c. 46, § 1, in recording births the term "illegitimate" should not be used unless the illegitimacy has been legally determined, or has been admitted by a sworn statement of both father and mother.

A legitimate child bears the surname of the parents, and the name should be so recorded.

Illegitimate children have no family names, and take the names which they have gained by reputation.

Under G. L., c. 46, § 3, if a child is illegitimate the name of the father should not be recorded, except on the written request of both father and mother.

You ask me to pass upon "the following rulings relative to illegitimate children:" —

To the  
Secretary.  
1921  
June 10.

1. Child born to unmarried woman takes maiden name of woman. No information to be given relative to father except on written request of both parents, when data is given regarding father, and child may take his name. (G. L., c. 46, §§ 1 and 3.)

2. Child born to widow or divorcee same as No. 1, except child takes legal name of woman.

3. Child born to married woman takes name of woman's husband, regardless of whether he is the supposed father or not, and complete data should be given regarding husband.

Exceptions: Court decree that child is illegitimate.

When child takes legal name of mother and no information is given regarding father.

Signed statement of both the husband and the mother that the child is illegitimate, when no information is given relative to the husband, and child takes the legal name of mother.

I do not understand that there is any provision of statute authorizing the making of formal rulings in cases such as you refer to, but I am informed by the State registrar that cases of the kind mentioned have frequently arisen, where some interpretation of the law and the statutes has become necessary, and that you desire my advice as to the proper interpretation.

A child born out of wedlock is, of course, illegitimate. Where a child is born in wedlock there is a presumption of legitimacy which can be rebutted only by evidence which proves beyond all reasonable doubt that the husband could not have been the father. *Hemmenway v. Towner*, 1 Allen, 209; *Phillips v. Allen*, 2 Allen, 453; *Sullivan v. Kelly*, 3 Allen, 148. It has been held that the presumption cannot be rebutted by declarations of either parent that the child was illegitimate. *Hemmenway v. Towner, supra*; *Abington v. Duxbury*, 105 Mass. 287; *Koffman v. Koffman*, 193 Mass. 593.

The statute providing for registration of births provides that "the term 'illegitimate' shall not be used in the record of a birth unless the illegitimacy has been legally determined, or has been admitted by the sworn statement of both the father and mother." G. L., c. 46, § 1. In view of this statute, your department is bound to record a child born in wedlock as legitimate unless there is some court decision to the contrary, or unless the sworn statements referred to have been made.

A legitimate child bears the surname of its parents, and the name should be so recorded. *Snook's Petition*, 2 Hilt. (N. Y.) 566, 569; *Laflin, et., Co. v. Steytler*, 146 Pa. St. 434.

Illegitimate children have no family names, and take the names which they have gained by reputation. *Snook's Petition, supra*; *Rex v. Smith*, 6 C. & P. 151; *Rex v. Clark*, R. & R., C. C. 358. If a child goes by its mother's name it should be so recorded; otherwise not.

The recording of information is governed entirely by statute. G. L., c. 46, §§ 1 and 3. These sections provide that certain

information concerning the father of a child shall be recorded, which will apply to every case where a child is born in wedlock, with the exceptions above stated. These sections also provide that in the case of an illegitimate child "the name of, and other facts relating to, the father shall not be recorded except on the written request of both father and mother." Upon such request, by the express terms of the statute the name and other facts relating to the father should be recorded.

Any information voluntarily given out by your department should conform to the law as above stated.

---

#### STATUTE — CONSTRUCTION.

St. 1921, c. 502, § 3, authorizing the State Treasurer to transfer a balance of \$49,123.43 from one fund to another, where the actual balance is greater than the sum stated, should be construed to direct the transfer of the entire balance.

St. 1921, c. 502, § 3, provides as follows: —

To the  
Auditor.  
1921  
June 14.

The treasurer and receiver general is hereby authorized and directed to transfer the balance of forty-nine thousand one hundred twenty-three dollars and forty-three cents, remaining to the credit of a fund known as the Compensation Fund for Boston Harbor, to the Port of Boston Fund established by chapter six hundred and sixty-three of the acts of nineteen hundred and twelve.

You state that the balance on hand of the Compensation Fund for Boston Harbor is not \$49,123.43, the figure named in the act, but is in fact \$56,019.43.

You ask me to advise you whether you would be justified in transferring the actual balance of \$56,019.43 instead of \$49,123.43, the amount specified in the act.

It is the fundamental rule in statutory construction that the intention of the Legislature as shown by the language used, the object intended to be accomplished, and other circumstances should be determined and carried into effect. "The manifest intention of the Legislature, as gathered from its language, considered in connection with the existing situation and the object aimed at, is to be carried out." *Moore v. Stoddard*, 206 Mass. 395, 399.

In the case which you state, the intention of the Legislature is clearly shown by the use of the word "balance." Its general intention is also shown by another statute to which you have called attention, namely, G. L., c. 91, § 6, by which the Port of Boston Fund was established. That section, as amended by the special session of the Legislature last December, provides, with reference to the Port of Boston Fund, as follows: —

. . . The income from all wharfrage and storage rates, use of cranes, lighterage, dockage and other charges, and from the leases of lands, storage structures, wharves, piers, docks, sheds, warehouses and industrial sites, all moneys received by the commonwealth under section twenty-one for tide water displacements in Boston harbor, and all moneys hereafter received which on May twenty-eighth, nineteen hundred and twelve, were required to be paid into the Commonwealth's Flats Improvement Fund, shall be collected by the division and paid to the commonwealth, to the credit of the Port of Boston Fund. Said fund may be invested by the state treasurer at his discretion from time to time as provided for the investment of the commonwealth's funds; and all income from such investments shall be added to the fund. The division may expend the Port of Boston Fund to operate, maintain, repair and preserve the property in Boston harbor in the control of the division, and such sums as the legislature may appropriate annually for salaries, office expenses, and general engineering expenses in connection with the work of the division in Boston harbor shall be paid so far as possible from said fund; any balance remaining from said fund after the aforementioned expenses have been paid shall be applied to the payment of interest and to the annual payments on account of principal of any securities which may have been or may be issued to raise money to be expended by the division for the development of the port of Boston.

The words "all moneys received by the commonwealth under section twenty-one for tide water displacements in Boston harbor" were inserted by the amendment.

The case of *Shrewsbury v. Boylston*, 1 Pick. 105, is closely analogous to the case which you present. There a statute referred to a vote of a town relating to a particular subject in the following language: "according to the vote of the said town of Shrewsbury, passed the second day of January in the present year." No vote was passed on that date, but a vote on that subject was passed on

another date. The court construed the statute to refer to the vote which was actually passed. They said:—

The reference would have been good without mentioning any date, and the date of the second of January, 1786, may be rejected as surplusage.

See also *Moran v. Somes*, 154 Mass. 200.

It is my opinion, as I have previously said, that the intention of the Legislature is clearly shown to have been to direct the transfer of the entire balance to the Port of Boston Fund; and that, paraphrasing the language used in *Shrewsbury v. Boylston*, *supra*, the reference to the balance would have been good without mentioning any sum, and the sum may be rejected as surplusage.

---

LIEN — CONSTRUCTION OF STATE HIGHWAYS — SHOEING OF HORSES — SHARPENING PICKS — CARE OF TOOLS — LABOR PERFORMED OR FURNISHED.

The shoeing of horses, the sharpening of picks and the taking care of other tools by a subcontractor in connection with the construction of a State highway is not labor performed or furnished, "used in the construction or repair of public buildings or other public works," within the intendment of G. L., c. 30, § 39.

You have requested my opinion on the following facts:—

A subcontractor did certain work for a principal contractor who under contract constructed a State highway in the towns of Dalton and Windsor, the labor that said subcontractor performed being shoeing of horses, sharpening of picks and taking care of other tools used in the construction of the highway. Your inquiry is whether or not the subcontractor performed labor of such a character as to enable him to enforce a claim under G. L., c. 30, § 39.

To the Commissioner  
of Public  
Works.  
1921  
June 14.

G. L., c. 30, § 39, reads as follows:—

Officers or agents contracting in behalf of the commonwealth for the construction or repair of public buildings or other public works shall

obtain sufficient security, by bond or otherwise, for payment by the contractor and sub-contractors for labor performed or furnished and for materials used in such construction or repair; but in order to obtain the benefit of such security, the claimant shall file with such officers or agents a sworn statement of his claim, within sixty days after the completion of the work.

In the case of *Kennedy v. Commonwealth*, 182 Mass. 480, 481, the court said:—

We are of opinion that this statute gives security for payment for labor performed or furnished and for materials only when they are used in construction or repair in a way that would create a debt which might be a subject for a lien, under proper proceedings, if the structure belonged to a private person. There is nothing to indicate that security was intended to be given for every kind of labor and all kinds of materials that incidentally promote the construction of a building when they do not enter into the construction. Such an interpretation of the statute would give security to a dealer who had sold workmen tools which they used in working upon the building, or to a horse trader who sold the contractor horses which were used in drawing materials for the building, and it would give security upon the proceeds of every contract upon which the tools or horses were used, until they were paid for. In a sense the tools and the horses would be used in the construction of the building.

In *George H. Sampson Co. v. Commonwealth*, 202 Mass. 326, 334, the court, in citing the case of *Schaghticoke Powder Co. v. Greenwich & Johnsonville R.R.*, 183 N. Y. 306, quoted as follows:—

A steam shovel, an engine and boiler, picks, shovels, crowbars and the like, are tools and appliances which, while used in the doing of the work, survive its performance and remain the property of their owner.

In the case of *Thomas v. Commonwealth*, 215 Mass. 369, the court held that claims for “boards used for concrete forms and for conduits, for netting, cotton line, rules, road scraper, buggies used in transporting the help, use of scales, etc.,” were all properly disallowed upon the principle of *Kennedy v. Commonwealth*, *supra*.

In *Bay State Dredging Co. v. W. H. Ellis & Son*, 235 Mass. 263, a claim for the use of staging and falls was disallowed, the court saying:—



They were not incorporated in the building, and the mere use of an appliance, however necessary or useful it may be to the prosecution of a contract for "the construction or repair of public buildings or other public works," is not labor performed or furnished or material used in such construction or repair within the reasonable intendment of R. L., c. 6, § 77. The claim has no standing under R. L., c. 6, § 77;

In the case of *Schultz v. C. H. Quereau Co.*, 210 N. Y. 257, this language was used: —

Thus it might be argued that upon the same principle coal that is used in portable engines, oil that is used in the lubrication of building machinery, and even food which is eaten by laborers, are all consumed in the construction of the building, and hence lienable materials. But all these things seem quite plainly distinguishable. They are at least one step further removed from the actual work of construction. They have neither physical contact nor immediate connection with the structure at any time. They are used only to facilitate and make possible the operation of tools, machinery, or men, which in their turn act upon the structure. The authorities are unanimous in holding that no lien accrues for such materials.

Under the line of decisions quoted above, I am of the opinion that the labor under consideration does not come within the terms of the statute, that it was a step removed from the actual work of construction, and that it served only to facilitate and make possible the operation of tools and horses by workmen employed directly upon the public structure. The labor, in my judgment, was of too remote a character to enable the subcontractor to establish a lien therefor.

ELECTIONS — HOUSE OF REPRESENTATIVES — SPECIAL ELECTION  
— ORDER AND PRECEPT FOR SPECIAL ELECTION — DECISION  
OF THE HOUSE AS TO THE VALIDITY OF AN ELECTION.

Under G. L., c. 54, § 141, a special precept issued by the Speaker of the House of Representatives, pursuant to an order of said House fixing the time for a special election to fill a vacancy in said House, is essential to the validity of such special election.

An order of the House of Representatives fixing the time for a special election to fill a vacancy in said House is a condition precedent to the issue of a precept for such election by the Speaker of the House.

Although the decision of the House of Representatives as to the validity of an election to the House cannot be reviewed by any other tribunal, the House has been accustomed to follow the rules of law.

You ask my opinion upon the following case. G. L., c. 54, § 141, provides, in part: —

Upon a vacancy in the office of representative in the general court or upon failure to elect on the fourth Monday of November, the speaker of the house of representatives shall issue precepts to the aldermen of each city and the selectmen of each town comprising the district or any part thereof, appointing such time as the house of representatives may order for an election to fill such vacancy. Upon receipt of such precepts, the aldermen or the selectmen shall call an election, which shall be held in accordance with the precepts.

A member of the House of Representatives will shortly file his resignation. As this resignation comes in while the House is not in session, it will be impossible for the House to pass any order fixing a date for a special election. In default of such action by the House, has the Speaker the legal right to call the special election? If the legal question is not raised by the cities and towns, could the House accept the newly elected member, thereby establishing the validity of his election?

1. A precept is essential to the validity of a special election held to fill a vacancy in the House of Representatives. *Case of Joseph Downe, Jr.*, Mass. Election Cases, 1780-1852, p. 244. See also *Attorney-General v. Campbell*, 191 Mass. 497, 501. Under this section an order of the House appointing the time of the special election is a condition precedent to the issue of the precept which

calls the election at that time. The Fifteenth Amendment manifestly does not apply to the special elections for which this section provides. If an order is not made by the House no special election can be held. See Mass. Election Cases, 1780-1852, *Weston*, pp. 67, 70; *Milton*, pp. 146, 150; *Wilbraham*, pp. 399, 401; *Charlestown*, pp. 518, 521. In the case of the Senate, an order of the Senate for a special election to fill a vacancy is required by the Twenty-fourth Amendment. This constitutional requirement as to the Senate indicates that this statutory requirement as to the House is mandatory instead of directory. I find no statute which authorizes the Speaker of the House to act without the order in case the House is not in session. I am therefore constrained to advise you that in my opinion the Speaker cannot legally issue the precept for a special election until the House has appointed the time for the election, by an order duly adopted.

2. Mass. Const., pt. 2d, c. I, § III, art. X, provides, in part:—

The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution. . . .

The decision of the House as to the validity of an election to the House cannot be reviewed by any other tribunal. Indeed, the Legislature cannot constitutionally delegate to the judicial department power to hear and determine this question. *Dinan v. Swig*, 223 Mass. 516. But while the power of the House over the subject is absolute, it may be proper to add that the House of Representatives has been accustomed in such cases to follow the rules of law. I Op. Atty.-Gen., 3, 8.

## DISTRIBUTION OF PERSONAL PROPERTY — ILLEGITIMATE CHILD.

Under G. L., c. 190, §§ 5 and 6, where an illegitimate child dies intestate, leaving personal property, his illegitimate brothers and sisters cannot share in his estate, but only those can share who would be entitled by inheritance through his mother if he had been legitimate.

To the  
Bureau of  
War Risk  
Insurance.  
1921  
June 21.

I acknowledge receipt of your letter with reference to war risk insurance of a soldier who was a resident of Massachusetts, which you say must be distributed as the personal property of the soldier under the laws of distribution of Massachusetts in case of intestacy. The facts which you state are that the soldier was an illegitimate child and was survived by an uncle, who was a legitimate brother of the soldier's mother, and by four brothers and two sisters, who were all illegitimate children of the soldier's mother. You ask my opinion as to what distribution should be made of the insurance in this case.

With certain exceptions not now material, the personal property of a deceased person, who dies intestate, by the law of this Commonwealth is to be distributed according to the law governing the descent of real property. G. L., c. 190, § 2; *Parkman v. McCarthy*, 149 Mass. 502.

The statutes with reference to the descent of property of illegitimate children in G. L., c. 190, are as follows: —

SECTION 5. An illegitimate child shall be heir of his mother and of any maternal ancestor, and the lawful issue of an illegitimate person shall represent such person and take by descent any estate which such person would have taken if living.

SECTION 6. If an illegitimate child dies intestate and without issue who may lawfully inherit his estate, such estate shall descend to his mother or, if she is not living, to the persons who would have been entitled thereto by inheritance through his mother if he had been a legitimate child.

The soldier's brothers and sisters, who were illegitimate children of his mother, cannot claim through her any part of the soldier's estate, because by section 5 they can take only from their mother and her lineal ancestors. *Haraden v. Larrabee*, 113 Mass. 430, 432.

The soldier's uncle is a person who would have been entitled to

the soldier's estate by inheritance through his mother if he had been a legitimate child. The uncle, therefore, inherits the soldier's property by virtue of section 6. *Parkman v. McCarthy, supra.*

Since, as you state, the war risk insurance must be distributed as personal property of the soldier under the laws of distribution of Massachusetts in case of intestacy, my opinion is that the insurance should be paid to the uncle.

---

POLICE OFFICER — BOARD OF HEALTH — WORD "DETAIL."

A police officer detailed to the board of health, under St. 1889, c. 450, § 7, as amended by St. 1911, c. 287, is subject to the rules and regulations of the police department.

If a police officer so detailed is guilty of misconduct, he may be tried and punished by the police department, but not by the board of health.

You ask my opinion whether police officers detailed to the board of health by virtue of St. 1889, c. 450, § 7, as amended by St. 1911, c. 287, are subject to the rules and regulations of the police department so far as their personal conduct is concerned, and whether the health commissioner may properly try and penalize police officers so detailed.

To the Police  
Commissioner  
of Boston.  
1921  
June 27.

Said section 7, as amended, is as follows: —

The police commissioner for the city of Boston shall, upon requisition by the board of health of said city, detail to the exclusive service and direction of said board of health, for enforcing the laws and ordinances relating to the preservation of health and to tenement and lodging houses, such number, not exceeding ten, of police officers satisfactory to the board of health as the board of health may desire, and the services of the police officers so detailed shall be paid for by said board of health, and said officers so detailed shall continue subject to the direction of said board of health until exchanged for others at the request of said last-named board. Said police commissioner is hereby authorized and empowered to appoint patrolmen, in number not exceeding ten, to fill any vacancies in the police force in the city which may be caused by the detailing of officers as provided in this act.

The word "detail," used as a transitive verb, means, specifically, "to set apart for a particular service." It is a word used chiefly in military law. *Century Dictionary*; *Bouvier's Law Dictionary*;

*Upshur v. Baltimore City*, 94 Md. 743, 749; 18 C. J. 977. It has not the same meaning as the verb "transfer," and does not intend any change or relinquishment of ultimate authority over the person detailed.

The purpose of section 7 is to provide police officers to enforce the laws and ordinances described. If those detailed thereby lost their status as policemen they could not perform the duties which they are detailed to perform. They could not be "exchanged" as the act provides, since they could not be returned to the police force without a new examination and appointment under the civil service laws. To construe section 7 as providing for a transfer to a new and different service would bring that section into conflict with G. L., c. 31, §§ 43 and 44, which provide, in substance, that those in the classified civil service in general, and policemen in particular, cannot be transferred to any other office or employment without their consent, except for just cause specifically stated in writing. I cannot place upon section 7 a construction which not only defeats its purpose but also brings it into conflict with the civil service law. In my opinion, the officers detailed do not thereby cease to be members of the police department.

Although the officers detailed are for the time being in the exclusive service of the board of health, are paid by it, and are subject to its direction in respect to the duties to be performed, section 7 does not create a special police force of ten men appurtenant to the board of health. Such a construction of section 7 might meet the objection that the officers detailed would otherwise cease to be policemen. It does not meet the difficulty as to exchanges or reconcile section 7 with the civil service law. But if the officers detailed remain members of the regular police department, they also remain subject to its rules and discipline. If any of them are guilty of misconduct, they may, upon proper complaint, be tried and punished under the regulations of the police department. If their service be unsatisfactory, the board of health, under section 7, may request an exchange. But the power to try and punish is vested in the police department of which they are permanent members, and not in the board of health which they temporarily serve.

PILOT — APPOINTMENT — QUALIFICATION — RESIDENCE IN THE  
COMMONWEALTH.

Under G. L., c. 103, § 11, residence in this Commonwealth is not a necessary qualification for the office of pilot in the ports and places embraced by that section.

You have requested my opinion as to whether or not you can legally appoint a citizen of the United States and a resident of Newport, R. I., to the office of pilot of the port of Fall River, under the provisions of G. L., c. 103, § 11. The specific question raised by your inquiry is whether or not residence in this Commonwealth is a necessary qualification for the office of pilot.

To the  
Governor.  
1921  
June 29.

G. L., c. 103, § 11, reads as follows: —

In all ports and places not mentioned in this chapter, for which pilots have been commissioned, the governor, with the advice and consent of the council, may appoint pilots, who shall hold their commissions during the pleasure of, and may at any time be suspended or removed by, the governor and council.

I have examined the Constitution of this Commonwealth and the statutes, and it appears that there is no express provision which makes residence within this Commonwealth a necessary qualification for the office of pilot, and, in the absence of such an express provision, there seems to be no reason for holding that residence within this Commonwealth is necessary to eligibility to this office. Accordingly, I am of the opinion that you may, under the law, with the advice and consent of the Council, appoint a citizen of another State to the office of pilot for the port of Fall River.

REPRESENTATIVE TO THE GENERAL COURT — APPOINTMENT TO  
POSITION IN THE STATE SERVICE — SALARY.

An appointment of a representative to the General Court to a public office, where the appointment is made after the regular session of the General Court, is not in violation of G. L., c. 30, § 21, prohibiting the payment of two salaries to the same person.

To the  
Auditor,  
1921  
June 30.

You ask if a representative to the General Court, who has been appointed, since the close of the annual session, registrar of vital statistics under G. L., c. 9, § 10, can properly draw the salary pertaining to that position. I assume that he has not resigned his office as representative.

G. L., c. 30, § 21, provides: —

A person shall not at the same time receive more than one salary from the treasury of the commonwealth.

G. L., c. 3, § 9, is, in part, as follows: —

Each member of the general court shall receive fifteen hundred dollars for each regular annual session of the term for which he is elected. . . .

The position to which this man has been appointed is not one which the Constitution of this Commonwealth prohibits him from holding while a member of the Legislature. The regular annual session of the General Court for 1921 has ended, and the compensation which he has received is for services already rendered. He would not receive more than one salary from the Commonwealth if he is paid the salary pertaining to his new position. It is my opinion, therefore, that he is entitled to draw that salary.

Should the General Court convene in special session during the year, or should he continue as representative in the regular session of 1922, he would not be entitled to compensation for the two offices.

The question whether or not he would be entitled to sit in a special session during the current year, or in the regular session next year, is not before me, and I express no opinion upon it.



TRUST COMPANY IN POSSESSION OF COMMISSIONER OF BANKS —  
RIGHT OF INSPECTION OF BOOKS BY STOCKHOLDERS.

Stockholders of a trust company in the possession of the Commissioner of Banks have no right, without an order of court, to inspect the company's books.

G. L., c. 172, § 19, is inapplicable where a trust company is in the possession of the Commissioner of Banks.

You have asked my opinion whether stockholders in a trust company now in the possession of the Commissioner of Banks have a right to inspect the books of the company, under G. L., c. 172, § 19.

To the Commissioner  
of Banks.  
1921  
July 13.

Chapter 172 relates to trust companies. Section 19 is as follows:—

The books of such corporation shall at all reasonable times be open for inspection to the stockholders and to beneficiaries under any trust held by such corporation.

While the common-law right of a stockholder to inspect the books of a corporation is a qualified and not an absolute right, the right given by statute is absolute within the scope of the statute. *Powelson v. Tennessee Eastern Electric Co.*, 220 Mass. 380; *Shea v. Parker*, 234 Mass. 592. The inquiry, therefore, must be directed to the question whether the section quoted is applicable when the trust company is in the possession of the Commissioner of Banks.

The statute authorizing the Commissioner to take possession of a bank is a general statute applicable to all banks subject to the supervision of the Commissioner. The provisions of this statute appear in G. L., c. 167, §§ 22-36. These sections prescribe in detail the powers and duties of the Commissioner, and give to the Supreme Judicial Court jurisdiction in equity to act upon all applications and in all proceedings thereunder. They contain no provision that the Commissioner shall submit the books of the corporation in his control to the inspection of stockholders. On the other hand, section 2, relating to the examination of banks by the Commissioner, contains the following provision:—

Such records, and information contained in reports of such banks, other than information required by law to be published or to be open to the inspection of the public, shall be open only to the inspection of the commissioner, his deputy, examiners and assistants, and such other officers of the commonwealth as may have occasion and authority to inspect them in the performance of their official duties. . . .

The reason for giving stockholders a right to inspect the books of a going trust company does not apply where the trust company is in the hands of the Commissioner for the purpose of liquidation. This distinction is well expressed by Judge Lacombe in *Chable v. Nicaragua Canal Constr. Co.*, 59 Fed. Rep. 846: —

When a corporation has suffered financial shipwreck, and its property and assets, including its books, come into the possession of the court and the custody of the court's officer, the receiver, the question whether or not an inspection of those books shall be accorded to a stockholder in the shipwrecked concern is one resting in the discretion of the court, unhampered by any decisions touching such right of inspection while the corporation was still a going concern in the hands of its officers and directors.

It is my opinion that upon a sound construction of G. L., c. 172, § 19, in the light of G. L., c. 167, §§ 22-36, the former statute must be held to be inapplicable to cases of trust companies in the possession of the Commissioner of Banks, and that the Commissioner is not authorized by the provisions of said sections 22-36 to submit the books of a trust company in his possession to the inspection of stockholders without an order of court requiring him to do so.

TAXATION — DOMESTIC BUSINESS CORPORATION — RETURN TO  
FEDERAL GOVERNMENT — APPLICATION FOR ABATEMENT.

A domestic business corporation which began to do business on April 29, 1919, and whose first Federal return was due May 15, 1920, is not required, in its return made under Gen. St. 1919, c. 355, pt. I, § 4, as of April 1, 1920, to make any statement of net income, and is taxable on the value of its corporate excess alone.

It cannot be said as a matter of law that application for abatement of a tax illegally exacted, under G. L., c. 58, § 27, made within six months after payment of the tax, may not be amended, while still undecided, after the six months have run.

You state that a Massachusetts business corporation was assessed in 1920 an excise tax amounting to \$683.63, based upon income reported in its 1920 excise tax return; that the income reported was for the fiscal year ending Feb. 29, 1920; and that the corporation had never filed with the Federal government a return for a previous fiscal year. The return shows on its face that the income reported was for the fiscal year ending Feb. 29, 1920, that the corporation did not begin to do business until April 29, 1919, and that on the date of the return its Federal return had not been filed.

To the Com-  
missioner  
of Corporations  
and Taxation.  
1921  
July 13.

The return and assessment were made under Gen. St. 1919, c. 355, pt. I. Section 2 of that act imposes an excise tax on domestic business corporations, based on a percentage of the value of its "corporate excess" and a percentage of its "net income" derived from business carried on within the Commonwealth. Section 3 provides that "the term 'net income' shall mean the net income for the taxable year as required to be reported by the corporation in its last prior return to the federal government as defined in the federal revenue act of nineteen hundred and eighteen," with certain deductions. The term "taxable year" is defined by section 1 to mean the fiscal year of the corporation. Section 4 requires a return to be filed as of April 1, "giving (a) a copy of such parts of its last federal return *due prior thereto*, as he [the Tax Commissioner] may designate."

By the Federal Revenue Act of 1918 returns are required to be made on or before the fifteenth day of the third month following

the close of the fiscal year [§ 227 (a)]. The fifteenth day of the third month following February 29 is May 15, and the return made to the Commonwealth as of April 1, 1920, should not have been based on the Federal return for the fiscal year ending Feb. 29, 1920, due May 15, 1920, but on the Federal return, if any, due the previous year. But no Federal return was due in 1919, since the corporation did not commence business, and had no net income, prior to April 29, 1919. The tax, therefore, should have been assessed on the value of its corporate excess alone, and on that basis you say would have amounted to \$154.50.

You state that no application for abatement of the tax was made within thirty days of the date of notice of the assessment, but that within six months of the date of payment of the bill the corporation made application for a refund of a portion of the tax, under G. L., c. 58, § 27. That section provides as follows:—

If it shall appear that a legacy and succession tax or a tax or excise upon a corporation, foreign or domestic, which has been paid to the commonwealth, was in whole or in part illegally exacted, the commissioner may, with the approval of the attorney-general, issue a certificate that the party aggrieved by such exaction is entitled to an abatement, stating the amount thereof. The treasurer shall pay the amount thus certified to have been illegally exacted, with interest, without any appropriation therefor by the general court. No certificate for the abatement of any tax shall be issued under this section unless application therefor is made to the commissioner within the time prescribed by law for beginning legal proceedings to obtain a repayment of the tax. This section shall be in addition to and not in modification of any other remedies.

You state that the ground of this application was that only one-third of the income should have been allocated to Massachusetts, but that now the corporation requests refund of the entire difference between the amount assessed and the amount of the aforesaid minimum tax.

An inspection of the papers shows that within six months of payment of the tax, under date of March 19, 1921, the corporation made formal application for a refund of a portion of the tax so paid, under the provisions of G. L., c. 58, § 27, stating as grounds upon which the application was based a claim that the

sole property of the corporation was real estate in Brooklyn, New York; that the corporation conducted no business except collecting rentals on said real estate; and that one-third of the net income should have been allocated to Massachusetts and no more. By a subsequent letter, dated April 14, 1921, and also within the six months' period, counsel for the corporation stated their understanding that two questions were involved: first, whether the corporation in fact was doing business outside of Massachusetts; and second, whether, if so, the tax collected in 1920 should be regarded as an "illegal exaction," within the meaning of G. L., c. 58, § 27. It was suggested that the decision of the second question should be postponed until the first question should be settled in connection with the 1921 return. By a later letter, dated June 16, 1921, after the six months had run, attention was first called to the error in the return, apparent on its face, in that income was reported where none should have been returned, and the claim was made that for that reason the tax was illegally assessed. I am of opinion that the excise tax of \$683.63 assessed to the corporation was, except as to \$154.50, "illegally exacted," within the meaning of G. L., c. 58, § 27.

There is, however, a further question whether the application for an abatement was made in time. Application for an abatement was made within six months after the payment of the tax, but without clearly indicating the ground now urged. After the six months had run, but while the application still remained undecided, the ground now urged was expressly brought forward, apparently by way of amendment. So long as a case remains undisposed of by final judgment, a court, in the exercise of a sound discretion, may allow any amendment which will enable the plaintiff to sustain the action for the cause for which it was intended to be brought. *Strout v. United Shoe Machinery Co.*, 215 Mass. 116, 119; *Clark v. New England Tel. & Tel. Co.*, 229 Mass. 1, 6. On the other hand, the court has no power to allow an amendment which, as matter of law, introduces a new cause of action. *Knights v. Treasurer and Receiver General*, 236 Mass. 336, 341; *Church v. Boylston & Woodbury Cafe Co.*, 218 Mass. 231. I assume that within the six months' period any amendment may be permitted,

since a new application might still be made as of right. I cannot say, as matter of law, that the Commissioner has no discretion to permit an amendment after the six months' period has run, and I assume, without deciding, that this discretion is subject to the same limitations as the similar power of the court.

Consideration of the present application does not enable me to say that the ground of application now urged is, as matter of law, so foreign to the ground indicated within the six months' period by the applicant that the Commissioner could not entertain it while the original application was still open and pending, even though the six months' period had elapsed. A different question might well be presented if the application had finally been disposed of before the amendment was brought forward, or if the amendment were in effect a new and different application filed after the six months' period had run.

I therefore approve of the issuing of a certificate showing that the corporation is entitled to an abatement of the difference between the sum assessed and paid and \$154.50.

---

#### GREAT PONDS — FISHING — PUBLIC RIGHTS — AUTHORITY OF SELECTMEN OF TOWNS.

There is no authority in the selectmen of towns, in the absence of specific statutory authority, to restrict the right of the public to fish in any great pond of the Commonwealth.

You ask if the selectmen of a town have authority to close a great pond to fishing for any length of time.

Since the Colony Ordinances of 1641-1647 great ponds have been dedicated to the public and have been subject to the public rights of fishing, fowling, boating, etc., except as otherwise directed by the General Court. The selectmen of a town have no authority over a great pond except as specifically authorized by statute, and as I find no such authority, it is my opinion that the selectmen of a town have no right to forbid the taking of fish in any great pond of this Commonwealth.

SAVINGS BANK — TRUSTEE — ELIGIBILITY AFTER BANKRUPTCY  
OR POOR DEBTOR PROCEEDINGS.

A trustee in a savings bank, discharged from office by reason of having taken the benefit of the bankruptcy or poor debtor laws, under G. L., c. 168, § 23, is not barred from subsequent election.

You ask whether, under G. L., c. 168, § 23, a person who has once taken the benefit of any law of bankruptcy or insolvency, or of the oath for the relief of poor debtors, is forever ineligible for election to the office of a trustee in a savings bank or institution for savings; and if not, when is such a person again eligible after having been disqualified. That portion of section 23 to which you call attention, which first appears in St. 1908, c. 590, § 34, is as follows: —

To the Com-  
missioner  
of Banks.  
1921  
July 19.

The office of any trustee who takes the benefit of any law of bankruptcy or insolvency, or of the oath for the relief of poor debtors, shall thereby be vacated.

In my opinion, the effect of this provision is merely to remove from office a trustee who takes the benefit of any law of bankruptcy or insolvency, or of the oath for the relief of poor debtors, and does not disqualify a person who has done so, whether or not he was a trustee at the time, from being afterwards elected a trustee of any savings bank or an institution for savings.

---

PAUPER — SETTLEMENT — MARRIED WOMAN.

Under G. L., c. 116, §§ 1 and 5, a woman who marries acquires her husband's settlement although she is a minor, and does not lose the settlement so derived by reason of five years' absence, if during part of the time she was a minor.

You ask my opinion upon the following facts: A girl with a settlement in Pelham marries, when she is seventeen years old, a man with a settlement in Springfield. They moved to Northampton and are absent five years from Pelham and Springfield. When the woman is twenty-two years old the man dies. I understand that the man did not acquire a new settlement in Northampton

To the Com-  
missioner  
of Public  
Welfare.  
1921  
August 2.

or elsewhere. You ask whether the widow has a settlement, and if so, where.

G. L., c. 116, relating to the settlement of paupers, contains the following provisions: —

SECTION 1. Legal settlements may be acquired in any town in the following manner and not otherwise:

First, Except as provided in the following clause, each person who, after reaching the age of twenty-one has resided in any town within the commonwealth for five consecutive years, shall thereby acquire a settlement in such town.

Second, A married woman shall follow and have the settlement of her husband; but if he has no settlement within the commonwealth, she shall retain the settlement, if any, which she had at the time of her marriage and may acquire a settlement under the preceding clause.

SECTION 5. Each settlement existing on August twelfth, nineteen hundred and eleven, shall continue in force until changed or defeated under this chapter, but from and after said date absence for five consecutive years by a person from a town where he had a settlement shall defeat such settlement. . . .

By virtue of G. L., c. 116, § 1, cl. 2, the woman you refer to acquired a settlement in Springfield upon her marriage, although at the time she was a minor. *Dalton v. Bernardston*, 9 Mass. 201, 203. But although a woman upon marriage derives a settlement from her husband, she does not lose her settlement because he loses his by reason of absence. *Treasurer and Receiver-General v. Boston*, 229 Mass. 83. It follows, necessarily, that she can lose her settlement only by reason of her own absence, under the provisions of G. L., c. 116, § 5.

The woman in the case you state, as well as her husband, was absent from Springfield for five consecutive years after her marriage. During part of the time, however, she was a minor.

In my opinion to the Commissioner of State Aid and Pensions (V op. Atty-Gen. 471), to which you refer, I advised that a minor does not lose the local settlement which he had on his becoming of age, until five years thereafter. This opinion applies to the case under consideration. It follows that the widow has not lost the settlement derived from her husband, and that she now has a settlement in Springfield.



FIRE PREVENTION — RULES AND REGULATIONS — METROPOLITAN DISTRICT.

Statement of successive steps necessary to be taken under G. L., c. 148, §§ 30, 39, 40 and 11, and c. 30, § 37, for the establishment of rules and regulations relating to fire prevention in the metropolitan district.

You ask my opinion what are the successive steps necessary to be taken for the establishment of rules and regulations relating to fire prevention in the metropolitan district.

To the Commissioner of Public Safety. 1921 August 2.

These steps or conditions are defined in the following provisions of the General Laws: —

G. L., c. 148, § 30, gives to the State Fire Marshal power within the metropolitan district, among other things —

. . . to inspect or regulate, the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, fire-crackers, or any other explosives, and the use of engines and furnaces as described in section one hundred and fifteen of chapter one hundred and forty; . . .

G. L., c. 148, § 39, provides, in part, as follows: —

In addition to the powers given by sections thirty to thirty-eight, inclusive, the marshal may make orders and rules relating to fires, fire protection and fire hazard binding throughout the metropolitan district, or part thereof, or binding upon any person or class of persons within said district, limited, however, to the following subjects:

. . . . .

The subjects which follow are of particular application, and by no means cover the general subject of fires, fire protection and fire hazard or the subjects to which section 30 relates.

G. L., c. 148, § 40, is as follows: —

The marshal may provide that any rule shall apply generally throughout the metropolitan district or to any specified part thereof or to any class or description of premises. No such rules shall be established until after a public hearing, of which notice shall have been given by publi-

cation for at least two successive weeks in at least two daily newspapers published in Boston and in two newspapers published in the metropolitan district outside of Boston.

G. L., c. 148, § 11, is as follows: —

The marshal shall submit to the commissioner rules and regulations to carry out the provisions of sections ten and thirty-nine, which shall take effect subject to section thirty-seven of chapter thirty when approved by the commissioner and by the governor and council, and on such dates as they may fix.

Section 10, referred to in said section 11, does not apply to the metropolitan district. See G. L., c. 148, § 2.

G. L., c. 30, § 37, is as follows: —

Every department, commission, board or official vested by law with the power to make and issue rules or regulations general in scope, and to be observed or performed under penalty for the violation thereof, shall file attested copies thereof, together with a citation of the law by authority of which the same purport to have been issued, with the state secretary, and such rules or regulations, whether or not they require the approval of the governor and council, or other authority, before taking effect, shall not take effect until so filed. The foregoing provision shall not apply to rules or regulations issued by commissions, boards or officials of towns, or to municipal ordinances or by-laws, or to rules or regulations affecting solely the internal management or discipline of a department, commission, board or office, nor to orders or decrees made in specific cases within the jurisdiction of a department, commission, board or official. The state secretary shall file and index all rules and regulations filed with him hereunder, noting and keeping available such references to preceding rules and regulations as may be necessary for certification purposes.

G. L., c. 148, § 40, provides a requirement which, in my opinion, is applicable to all rules for the metropolitan district. It may be that section 11 is not applicable to rules prepared under section 30, but in view of G. L., c. 22, and G. L., c. 30, § 5, as well as of the general language of G. L., c. 148, § 11, in my opinion, it will be better practice to carry out the same steps in all cases. The steps to be followed for the establishment of rules and regulations governing the metropolitan district are, therefore, as follows: —

1. There must be a public hearing and notice, as provided in G. L., c. 148, § 40.
2. The rules and regulations must be submitted to the Commissioner of Public Safety and approved by him.
3. They must be submitted to the Governor and Council and approved by them.
4. Copies must be filed with the Secretary of the Commonwealth as required by G. L., c. 30, § 37.

---

COMMONWEALTH — LIABILITY ON NOTE — STATUTE OF  
LIMITATIONS.

The Commonwealth is not obligated to pay either principal or interest on a note issued under St. 1793, c. 29, subject to redemption by payment when provision should be made therefor, when provisions for part payments were made by successive acts until St. 1821, c. 69 and 87, which provided for payment of the remainder before July 1, 1821, after which date interest was to cease.

Under G. L., c. 258, § 5, the note, and interest thereon, was barred by the statute of limitations.

The Treasurer and Receiver-General has no power to waive the bar of this statute.

A request has recently been presented to you for payment of a note of the Commonwealth of Massachusetts, a copy of which is as follows:—

To the  
Treasurer and  
Receiver-  
General.  
1921  
August 4.

COMMONWEALTH OF MASSACHUSETTS.

No. 1251.

JUNE 10, 1794.

*Be it known* that there is due from the Commonwealth of Massachusetts unto Mr. Samuel Mather or bearer the sum of sixty-three dollars & sixty-two cents bearing interest at five per centum per annum from the first day of July, seventeen hundred and ninety four, inclusively; payable half yearly, and subject to redemption by payment of said sum or any part thereof whenever provision shall be made therefor by law.

THOMAS DAVIS,  
*Treasurer.*

You ask my opinion whether the Commonwealth is obligated to pay this note, with interest, and if so, the total amount involved in the payment, and also whether the bearer of the note is entitled to the proceeds.

The note was issued under the provisions of St. 1793, c. 29, entitled "An Act to provide for the debt of this Commonwealth," proposing a loan to the full amount of the debt, for which the subscribers were to receive certificates in the form above quoted.

By St. 1802, c. 37, provision was made for paying off one-fifth of said debt and the issuing of new notes for the balance. From time to time thereafter other statutes were passed providing for payment of further portions of the debt (St. 1803, c. 37; St. 1808, c. 132; St. 1810, c. 25; St. 1818, c. 41; St. 1819, c. 43; St. 1821, c. 68), until by St. 1821, cc. 69 and 87, provision was made for payment of the remainder of the debt before July 1, 1821, after which date interest was to cease.

The provision in the note, to the effect that it is "subject to redemption by payment of said sum or any part thereof whenever provision shall be made therefor by law," is to be interpreted as meaning that the note shall be payable when provision for payment is made by the Legislature. *United States v. North Carolina*, 136 U. S. 211, 220. Provision was made for payment of portions of the sum due from time to time prior to July 1, 1821, and for payment of the remainder at that time. Any claim which Samuel Mather or the bearer had on the note had therefore accrued on July 1, 1821, more than one hundred years ago.

G. L., c. 258, § 5, provides as follows: —

Laws relative to the limitation of actions shall apply to claims against the Commonwealth and to the remedy herein provided.

By virtue of this provision the claim against the Commonwealth on the note referred to is barred by the statute of limitations. *Cf. McRae v. Auditor General*, 146 Mich. 594; *State v. Ralston*, 182 Ind. 150.

In my opinion, you have no power to waive the bar of the statute of limitations. That statute raises a presumption of payment. It is the duty of executive and administrative officers of the Commonwealth to execute and administer the laws of the State as they are, and not in accordance with what may appear to the individual official to be just and fair. *Trowbridge v. Schmidt*, 82

Miss. 475. In line with this view is my opinion to you under date of May 13, 1921, that you have not power to compromise a claim due to the Commonwealth. If the presumption of payment should be rebutted in fact, the moral obligation to repay it is one to be fulfilled by the Legislature, which alone has the power to fulfill the moral obligations of the people. *Cf. United States v. Realty Co.*, 163 U. S. 427, 439, *et seq.*

St. 1821, c. 87, contains a provision that interest on said State debt should cease after July 1, 1821. In the absence of such a provision no interest on the note would be payable after the date on which it was redeemable. *United States v. North Carolina, supra.* The statute of limitations, therefore, applies equally to the claim of interest.

In my opinion, you should refuse to pay both the principal and the interest upon this note. If the presumption of payment arising from the long lapse of time should be rebutted in fact, the remedy is with the Legislature.

---

#### TAX RETURNS — VERIFICATION BY COMMISSIONER.

The authority given to the Commissioner of Corporations and Taxation by G. L., c. 62, §§ 28 and 30, to verify returns and to require supplementary returns, is limited to cases where, for some particular reason, the Commissioner believes the return filed to be fraudulent or incorrect.

You have asked me to advise you concerning the powers of the Commissioner of Corporations and Taxation in regard to the matter of verifying returns of taxable income, your request being accompanied by a letter to you on that subject.

To the  
Governor.  
1921  
August 12.

Pertinent provisions of the statutes appearing in G. L., c. 62, §§ 28 and 30, are as follows: —

SECTION 28. If the commissioner shall, from information derived from the return or otherwise, be of opinion that any person whose income is taxable under this chapter may have failed to file a return, or to include in a return filed, either intentionally or through error, all the sources of his taxable income, he may require from such person a return or a supplementary return on oath, in such form in each individual instance as the commissioner prescribes, of all the sources from which the

taxpayer received any income, whether or not taxable under this chapter in the year for which the return was made. . . .

SECTION 30. In order to verify any return made pursuant to this chapter the commissioner may, within two years after September first of the year in which such return was due, if he has reason to believe the return to be fraudulent or incorrect, direct by special authorization a deputy or other agent to verify the return; . . .

The letter states that recently the Income Tax Division has undertaken to verify all returns showing income above a certain amount, without any pretense that the Commissioner has reason in each case to believe that the return was fraudulent or incorrect, and has sent peremptory notices to taxpayers who have filed returns in full compliance with the law, demanding that they submit minute details as to their income, so that their returns may be verified; that with this demand is sent a blank form of supplementary income tax return, known as Form 301, which form requires the taxpayer to whom it is sent, pursuant to section 28, to list all the sources from which he has received any income, whether or not taxable, the information being required to be given in considerable detail.

The authority given the Commissioner by section 28 to require supplementary returns is confined to instances where the Commissioner is of opinion that the taxpayer has failed to include in his return, either intentionally or through error, all the sources of his taxable income. Similarly the authority given by section 30 to verify returns is confined to cases where the Commissioner has reason to believe the return filed to be fraudulent or incorrect.

I am of opinion that the authority thus granted is not a general authority to act in all or in any general class of cases, but that it is limited to cases where for some particular reason the Commissioner believes the return filed to be fraudulent or incorrect, and that if the Commissioner, acting through the Director of the Income Tax Division, has undertaken to verify all returns showing income above a certain amount, and has sent demands, accompanied by supplementary income tax return blanks to be filled

out, to all persons having income above that amount, he is acting in excess of his authority as to all cases not believed to be incorrect or fraudulent.

---

### TAXATION — CORRECTION OF TAX.

The remedies given by statute for correction of a tax are exclusive.

Where, after payment of a tax assessed to a corporation, no application for abatement is made or petition is filed in court within the time allowed by law, the taxpayer has no legal claim against the Commonwealth on account of error in the assessment.

The Legislature is the keeper of the conscience of the Commonwealth.

I have your letter relative to the 1920 tax of the Boston & Maine Railroad, in which you state that by error in the office of the Commissioner of Corporations and Taxation the amount of the tax was greater by \$15,303.17 than it should have been. You say that it seems fair that this amount should be returned to the Boston & Maine Railroad, and ask my permission to make payment accordingly.

To the Commissioner  
of Corporations  
and Taxation.  
1921  
August 16.

I infer from your letter that the tax in the sum assessed has been paid by the Boston & Maine Railroad, and that no application for an abatement was made or petition filed in court within the time allowed by law. As the court has several times stated, the remedies given by statute are exclusive. The burden is put upon the taxpayer to discover errors which may be made in the computation and assessment of his tax, and to apply for a correction thereof within a certain time. If he fails to avail himself of the exclusive remedy provided by law he has no legal claim against the Commonwealth.

If in a particular case it appears that if the remedy had been seasonably invoked the taxpayer would have been entitled to an abatement, such claim, after the remedy is lost, rises no higher than a moral claim. It is manifestly impossible to entrust the conscience of the Commonwealth to a large number of executive or administrative officers. Differences in point of view would in such a case result in a government of men, not a government of laws. The Legislature is the keeper of the conscience of the Com-

monwealth. See *United States v. Realty Co.*, 163 U. S. 427. It has power to right an injustice, if, on due consideration, it finds that through accident or mistake a moral claim has arisen. If the legal claim has ceased to exist, the only remedy, in my opinion, is an application to the Legislature. See opinion to the Treasurer and Receiver-General under date of Aug. 4, 1921.

---

MINIMUM WAGE COMMISSION — DECREE — PUBLICATION OF  
NAMES OF EMPLOYERS.

Under G. L., c. 151, §§ 4 and 11, the Minimum Wage Commission is required to publish the names of employers who it has ascertained are not obeying its decrees.

The members of the commission are not liable in an action for damages for publishing the names of such employers, if the publication is made in good faith.

You state that the Minimum Wage Commission, in 1920, entered a decree for the paper box occupation establishing minimum rates, which became effective July 1, 1920; that several employers in the occupation have failed to comply with this decree, and have notified the commission in writing that they would not accept its recommendations; and that the commission has not as yet exercised the authority given in G. L., c. 151, § 4, to publish the names of employers whom it finds to be following or refusing to follow such recommendations; nor has the commission yet complied with the provisions of section 11, which appear to require the commission to publish the names of employers found to be violating such decree.

You ask my opinion on the following questions:—

1. Under the provisions of section 11 of chapter 151 of the General Laws is it mandatory upon the commission, having ascertained that certain employers in this occupation are not obeying its decree, including employers who have refused to accept the same, to publish the names of all such employers in the manner therein provided; or is it optional with the commission whether or not such action shall be taken?

2. Are members of the commission liable in any action for damages for publishing the names of such employers, provided the publication is made in good faith in compliance with the provisions of said chapter 151?

To the Mini-  
mum Wage  
Commission.  
1921  
August 16.



G. L., c. 151, relates to the powers and duties of the Minimum Wage Commission. The commission was first established and its powers and duties provided in St. 1912, c. 706.

Sections 1, 2 and 3 of said chapter 151 provide for the investigation of wages paid to female employees in any particular occupation called in question, the establishment of a wage board to determine suitable minimum wages for female employees, learners, apprentices and minors, and the report of such determination to the commission. Section 4 requires the commission to review the report of the wage board, and, if it approves any or all of its determinations, to give a public hearing to employers paying less than the minimum wage approved, and if after such public hearing it finally approves the determination, to enter a decree of its findings.

I understand that the procedure which you have followed has been in compliance with these provisions, and that the minimum wages determined by the wage board and approved by the commission are minimum wages for female employees, beginners and minors, respectively.

Said section 4 continues as follows:—

The commission shall thereafter publish at such times and in such manner as it may deem advisable a summary of its findings and of its recommendations. It shall also at such times and in such manner as it shall deem advisable publish the facts, as it may find them to be, as to the acceptance of its recommendations by the employers engaged in the industry to which any of its recommendations relate, and may publish the names of employers whom it finds to be following or refusing to follow such recommendations.

In St. 1912, c. 706, § 6, the commission was *required* to publish the names of such employers. This provision was changed in the following year, by St. 1913, c. 673, § 2, making publication permissive.

Section 11 of said chapter 151 provides as follows:—

The commission shall from time to time determine whether employers in each occupation investigated are obeying its decrees, and shall publish in the manner provided in section four, the name of any employer whom it finds to be violating any such decree.

This section was originally enacted in St. 1912, c. 706, § 14, and has not been changed.

Section 4 appears to relate more specifically to the findings of the commission embodied in the "decree" therein referred to, while section 11 relates to subsequent findings to be made by the commission from time to time. While section 4 is permissive merely, section 11 is mandatory and requires the commission to publish the names of employers who are found not to be obeying its decrees.

The provisions of this chapter have been held to be constitutional, since they contain no words of compulsion either upon employer or employee. *Holcombe v. Creamer*, 231 Mass. 99. Section 11 (St. 1912, c. 706, § 14) is one of the sections specifically referred to in that case. It should be noted that in the decision it was pointed out that the word "decree," as used in the statute, is not used in its judicial sense but as meaning recommendation.

I understand that you have determined since the entry of your decree that the employers to whom you refer have not been complying with your decree. I advise you, therefore, that under G. L., c. 151, § 11, it is mandatory upon the commission to publish the names of all such employers, in the manner therein provided.

My answer to your second question, as to whether the members of the commission are liable in any action for damages for publishing the names of such employers, provided the publication is made in good faith, is that they are not liable.

G. L., c. 151, § 13, provides as follows: —

No member of the commission and no newspaper publisher, proprietor, editor or employee thereof, shall be liable to an action for damages for publishing the name of any employer as provided for in this chapter, unless such publication contains some wilful misrepresentation.

This section appears in similar language in St. 1912, c. 706, § 16.

In *Holcombe v. Creamer*, 231 Mass. 99, 111, the court says, with reference to said section 16, as follows: —

It is not necessary to consider the scope and validity of § 15 of St. 1912, c. 706, which purports to compel newspapers to publish notices and findings of the commission at its regular rates for space, and of § 16,

which purports to exonerate the commission and publishers and proprietors of newspapers from liability for damages for such publication, except for wilful misrepresentation. Those sections are not involved on this record and are left entirely open for future consideration. Even if they should be found to transcend in any respect the power of the Legislature under the Constitution, they are quite separable from the rest of the act. It cannot be thought that the rest of the statute would not have been enacted without them, and therefore the constitutionality of the sections here assailed would not be affected.

While the court has thus reserved the question of the constitutionality of that section for future consideration, I can find no constitutional right or privilege of an employer which is violated thereby. There is no interference with any of the natural and inalienable rights discussed in the opinion in *Holcombe v. Creamer*, nor is there any interference with any vested right of such employer. *Wilson v. Head*, 184 Mass. 515, 518.

Even if G. L., c. 151, § 13, were unconstitutional for any reason, it would, nevertheless, be the duty of the commission, under section 11, which has received the sanction of the court in *Holcombe v. Creamer*, to publish the names of employers found to be violating its decrees. Such publication in performance of the duty imposed upon them is a privileged communication which, if made in good faith, without malice and with reasonable cause to believe the statements contained therein to be true, cannot be the basis of any liability for libel. *Howland v. Flood*, 160 Mass. 509; *Smith v. Higgins*, 16 Gray, 251.

---

#### TRUST COMPANY — CHARTER — RIGHT OF PURCHASER AFTER LIQUIDATION.

The charter of a corporation is the right given by general law or special statute to organize and conduct its business in accordance with its purposes and powers. Until a corporation is dissolved, even after it has ceased to do business, it continues to be organized, with by-laws, stockholders and officers.

The charter or franchise of a corporation is not in its nature transferable.

G. L., c. 172, § 44, and c. 156, § 42, do not authorize the sale of the charter of a trust company, but only of its transferable assets.

You ask my opinion concerning the right of the purchasers of the charter of a trust company which has been liquidated and has ceased to do business, to organize and commence business as

To the Com-  
missioner  
of Banks.  
1921  
August 16

a trust company in any manner other than as provided in G. L., c. 172.

The charter of any corporation is the right given by general law or special statute to organize and conduct its business in accordance with its purposes and powers. It is its right to exist as a corporation. *Adams v. Yazoo & M. B. R. Co.*, 77 Miss. 194, 253; *Whittenton Mills v. Upton*, 10 Gray, 582, 585. So long as a corporation is not dissolved, it has that right except in so far as the enjoyment of the right may be restricted by law. A corporation may be dissolved either by legislative act or by judicial proceedings when authorized by statute, and in no other way. *Farrar v. Pillsbury*, 217 Mass. 330, 335; *Olds v. City Trust, etc., Co. of Philadelphia*, 185 Mass. 500, 505; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 276; *Rice v. National Bank of the Commonwealth*, 126 Mass. 300, 304; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230, 232. Cf. G. L., c. 155, § 50; c. 167, § 22. Ceasing to do business and liquidation of its affairs does not effect a dissolution. *Russell v. M'Lellan*, 14 Pick. 63; *Revere v. Boston Copper Co.*, 15 Pick. 351; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49, 52-54; *Heard v. Talbot*, 7 Gray, 113; *Packard v. Old Colony Railroad*, 168 Mass. 92, 99.

A corporation once organized continues to be organized until it is dissolved. Its members, the stockholders, change from time to time as shares of its stock are transferred. Its officers are elected by the stockholders or directors. Its by-laws and the statutes are the rules governing its conduct. Even after a corporation has ceased to do business, so long as it is not dissolved it continues to have stockholders, its by-laws continue in force, and its officers should continue to be elected conformably to law.

G. L., c. 172, contains specific provisions governing the election of officers and directors, the adoption of by-laws, and the issuing of stock by trust companies. While other provisions may be inapplicable to a trust company which has ceased to do business, in my opinion these are not.

The charter or franchise to be a corporation is not in its nature transferable. In many instances acts of the Legislature have purported to authorize such transfers. But the true nature of such

transactions is a surrender of its charter by the transferring corporation, thus working a dissolution, and a grant *de novo* of a similar charter to the transferee. This may be done by authority of the Legislature, but not otherwise. *Commonwealth v. Smith*, 10 Allen, 448, 455, 456; *Memphis, etc., R.R. Co. v. Railroad Commissioners*, 112 U. S. 609, 619-623; *State v. Sherman*, 22 Ohio St. 411, 428; Morawetz on Corporations, §§ 924, 928.

You ask specifically whether the owners of the charter of the Puritan Trust Company, which was purchased by the Tremont Trust Company and later sold, may now organize and commence business as a trust company without complying with G. L., c. 172, and especially sections 6, 7 and 8. My reply is that the trust company is already organized under an agreement of association now in existence; that it has a name and location; that it has stockholders, and should have officers; that any vacancies may be filled in the manner provided in the statute; and that it may at any time proceed to carry on the business of a trust company, subject, however, to the requirements of the law as to sufficiency of assets, *et cetera*. In this connection I refer you to G. L., c. 167, §§ 22, 23, and c. 172.

You call my attention to an opinion of my predecessor to the Bank Commissioner under date of Dec. 9, 1919. That opinion was that the purchase of the franchise of the Puritan Trust Company by the Tremont Trust Company did not work a merger of the two franchises. I assume that the conclusion is correct. But the opinion contains an assumption, apparently based upon the language of the inquiry, which in turn rested on the language of St. 1914, c. 504, § 2, and St. 1903, c. 437, § 40, that the franchise, or charter, of the Puritan Trust Company was acquired by the Tremont Trust Company, with which I do not agree.

St. 1914, c. 504, § 2, appears in G. L., c. 172, § 44, as follows:—

No trust company shall be merged in or consolidated with another trust company except under the provisions of sections forty-two and forty-six of chapter one hundred and fifty-six, which are hereby made applicable to the sale or exchange of all the property and assets, including the good will and corporate franchise, of a trust company.

G. L., c. 156, § 46, merely provides remedies for minority stockholders. G. L., c. 156, § 42, contains a portion of St. 1903, c. 437, § 40, in the following words: —

Every corporation may, at a meeting duly called for the purpose, by vote of two thirds of each class of stock outstanding and entitled to vote, or by a larger vote if the agreement of association or act of incorporation so requires, change its corporate name, the nature of its business, the classes of its capital stock subsequently to be issued and their preferences and voting power, or make any other lawful amendment or alteration in its agreement of association or articles or organization, or in the corresponding provisions of its act of incorporation, or authorize the sale, lease or exchange of all its property and assets, including its good will, upon such terms and conditions as it deems expedient.

St. 1903, c. 437, § 40, contains the words "and its corporate franchise" after the words "good will." These words are omitted in the General Laws, with no explanation of the reason for such omission, although they still appear in G. L., c. 172, § 44.

I am informed that these words were omitted in G. L., c. 156, § 42, because it was the view of the commissioners that a corporate franchise is not a transferable asset. With that view I am in accord. I am of the opinion that the sections quoted do not authorize the sale of the charter of a trust company in such a way as to nullify or render inapplicable the statutes and principles which I have referred to and defined.

---

#### ELECTIONS — EXPENDITURES BY OR ON BEHALF OF CANDIDATES FOR CITY OFFICES.

Under G. L., c. 55, § 1, the amount which a candidate may spend for a city office is determined by the number of registered voters qualified to vote at the next preceding election, whether State or city.

G. L., c. 55, § 1, enumerates the sums which may be spent by or on behalf of candidates for certain offices, and further provides, in part: —

A candidate for any other office may expend an amount not exceeding twenty dollars for each one thousand, or major portion thereof, of

the registered voters qualified to vote for candidates for the office in question at the next preceding election; but no such candidate shall expend more than fifteen hundred dollars for the expenses of a primary, nor more than three thousand dollars for the expenses of an election. Any candidate may, however, expend a sum not exceeding two hundred dollars for primary or election expenses. Contributions by a candidate to political committees shall be included in the foregoing sums.

You inquire whether the amount which may be spent by a candidate for a city office is based upon the number of registered voters at the next preceding city election or the next preceding election, whether State or city.

For many years the practice has been to count the number of voters registered at the time of each election, whether State or city, even though some of such voters were qualified to vote for candidates for particular offices only, and even though such offices were not in issue at such election. Each election, therefore, furnishes a definite measure of the election expenses permitted at the succeeding election. As all registered voters are now qualified to vote for all offices by reason of the adoption of the Nineteenth Amendment to the Federal Constitution and the passage of enabling legislation in conformity therewith, the provision that the voters to be counted must be qualified to vote for the office in question has ceased to have significance. I am therefore of opinion that the next preceding election, whether State or city, is the election designated by the act.

---

#### HOUSES OF CORRECTION — TRANSFER.

The Commissioner of Correction, under G. L., c. 127, § 105, is authorized to transfer all the prisoners from one house of correction to another for any purpose within his discretion.

You ask me to advise you whether, under existing statutes, your department has the power to transfer all of the inmates from one or more of the houses of correction, thereby leaving no prisoners therein, such action being taken against the objection of those charged with the maintenance thereof.

To the Com-  
missioner  
of Correction,  
1921  
August 17.

G. L., c. 127, § 105, is as follows: —

He [the commissioner] may remove a prisoner from one house of correction to another in the same or another county.

This statute, as originally enacted, St. 1870, c. 370, § 2, was as follows: —

The commissioners of prisons shall, as far as practicable, classify all prisoners held under sentence in all the jails and houses of correction in the state, or that may be committed thereto at any time hereafter, having reference to sex, age, character, condition and offences, and in such a manner as to promote the reformation, safe custody, and economy of support of the prisoners, and the separation of male and female prisoners; and for this purpose may remove prisoners from one jail to another jail in the same or in any other county, and from one house of correction to another in the same or in any other county, and the said prisoners shall serve the remainder of their terms of sentence in the prisons to which they shall be so removed from time to time.

Said provision appears in the Public Statutes (P. S., c. 219, § 4) in the following form: —

They shall, as far as practicable, classify all prisoners that have been or may be sentenced and committed to the jails and houses of correction, having reference to sex, age, character, condition, and offences, and in such a manner as to promote the reformation, safe custody, and economy of support of the prisoners, and the separation of male and female prisoners; and for this purpose they may remove prisoners from one jail to another and from one house of correction to another in the same or in any other county; and such prisoners shall serve the remainder of their terms of sentence in the prisons to which they are so removed from time to time.

No subsequent change was made until the Revised Laws were enacted, when the statute was changed to a form similar to that in which it now appears.

R. L., c. 225, § 91, is as follows: —

They may remove a prisoner from one house of correction to another in the same or another county.

No explanation appears in the report of the commissioners of the reason for the omission of the statement of purposes for which



prisoners may be removed. Certainly, the provision in the Revised Laws is not to be interpreted as having a narrower application than the provisions of the earlier statutes. *Cf. Bent v. Hubbardston*, 138 Mass. 99.

The natural inference to be drawn from the omission would seem to be that the Commissioner is authorized to transfer prisoners from one house of correction to another, not only for the purpose of classification, but for any other purpose within his discretion.

You refer also to other sections of said chapter 127 and to G. L., c. 126, § 8, requiring the county commissioner in each county, except Dukes County, to provide a house or houses of correction. I do not see that these provisions have any particular application.

It is my opinion that the Commissioner has the power to remove all the prisoners from one or more houses of correction to others, in accordance with the provisions of G. L., c. 127, § 105.

---

#### SALE OF SECURITIES — REGISTRATION.

Where a partnership is registered as a broker, under St. 1921, c. 499, the partners may sell securities on behalf of the firm without being personally registered as brokers or salesmen.

Where a corporation is registered as a broker, under St. 1921, c. 499, as a general rule an officer who regularly engages in the business of selling or acquiring for sale securities on behalf of the corporation should be registered as a salesman, but an officer need not be registered in order to make an occasional purchase or sale.

The commission of which you are chairman has requested my opinion upon the following points in connection with the operation of St. 1921, c. 499.

To the Department of  
Public Utilities  
1921  
August 17.

1. If a corporation registers as a broker under said act, does such registration include the officers of the corporation, or is it necessary that the officers of the corporation, if they desire to sell securities, take out registration as salesmen?

2. If a partnership registers as a broker under said act, does such registration include the partners, or is it necessary for each partner to take out registration as a salesman?

Said chapter 499 contains the following provisions: —

SECTION 2. The following words and phrases, as used in this chapter, shall have the following meanings, unless the context otherwise requires:—

(b) "Person" shall include a natural person, a corporation created under the laws of this commonwealth or of any other state, country or sovereignty, a partnership, an association, a joint stock company, a trust and a trustee or any beneficiary, agent or other person as herein defined acting under a trust, and any unincorporated organization.

(c) "Broker" shall include every person, other than a salesman, who in this commonwealth engages either for all or part of his time, directly or through an agent, in the business of selling any security issued by himself or another person, or of purchasing or otherwise acquiring such securities for another with the purpose of reselling them, or of offering them for sale to the public, for a commission or at a profit.

(f) "Salesman" shall include every person employed or appointed or authorized by a broker to sell in any manner within this commonwealth.

SECTION 8. No person shall sell securities within this commonwealth as broker or salesman unless he has been registered by the commission. Any person may become registered upon complying with the provisions of this section. . . .

I assume that by the questions propounded the commission means to inquire whether the officers of a corporation and the partners composing a partnership may act for the corporation and the partnership, respectively, in selling securities, without additional registration. Of course, neither officers nor partners may act as broker or salesman, on their own account, unless registered.

A corporation can act only through its officers and agents, and is bound by their action within the apparent scope of their authority. *Fay v. Noble*, 12 Cush. 1, 18; *Kennebec Co. v. Augusta Ins. etc., Co.*, 6 Gray, 204, 209; *In re Wm. S. Butler & Co. Inc.*, 207 Fed. Rep. 705, 713; *American Soda Fountain Co. v. Stolzenbach*, 75 N. J. L., 721, 726.

Similarly, a partnership must act through, and is represented by, the partners. *Kennebec Co. v. Augusta Ins. etc., Co.*, 6 Gray, 204, 207; *Craig v. Warner*, 216 Mass. 386, 393.

In my opinion, where a partnership is registered as a broker under the act, the partners may sell securities on behalf of the firm without being personally registered as brokers or salesmen.

In the case of a corporation, the question depends upon the circumstances of each particular case. Without in any way attempting to forecast the decision in particular cases which have not as yet arisen in concrete form, I may suggest the general principle which is to be applied in determining the question of registration. An officer who regularly engages, either for the whole or part of his time, in the business of selling or acquiring on behalf of the corporation securities for the purpose of selling or offering them for sale to the public for a commission or at a profit must, in my opinion, be registered as a salesman, no matter what his office may be. On the other hand, an officer who has authority to so acquire or sell, but who is regularly engaged in the duties appertaining to his office, which do not include the acquiring and selling of securities, need not register as a salesman in order to make an occasional purchase or sale. In the latter case the purchase or sale may well be deemed to be made by the corporation through the officer, rather than by a salesman acting on its behalf.

I may, however, point out that if the corporation takes the ground that the officer making the sale need not be registered because the corporation itself makes the sale, the corporation assumes the resulting responsibility, and may have its license as a broker revoked if the sale be fraudulent.

---

#### CONSTITUTIONAL LAW — JUSTICE OF THE PEACE — RIGHT OF WOMEN TO APPOINTMENT.

The office of justice of the peace, being a judicial office, is one from which women are excluded by the State Constitution.

St. 1921, c. 449, § 3, does not purport to make women eligible to hold the office of justice of the peace.

You have asked me to advise you relative to the request of a town clerk, who is a woman, for appointment as a justice of the peace for the purpose of solemnizing marriages while holding the office of town clerk.

To the  
Governor.  
1921  
August 18.

The following statutes are material to the question which you ask.

G. L., c. 207, § 38, is, in part, as follows: —

A marriage may be solemnized in any place within the commonwealth . . . by a justice of the peace if he is also clerk or assistant clerk of a town . . . in the town where he holds such office. . . .

G. L., c. 222, § 1, is as follows: —

Justices of the peace and notaries public shall be appointed, and their commissions shall be issued, for the commonwealth, and they shall have jurisdiction throughout the commonwealth except as provided in section thirty-six of chapter two hundred and eighteen. Unless otherwise expressly provided they may administer oaths or affirmations in all cases in which an oath or affirmation is required, and take acknowledgments of deeds and other instruments.

G. L., c. 222, § 2, is as follows: —

The governor, with the advice and consent of the council, may appoint as special commissioners for terms of seven years, women who are more than twenty-one years of age. Special commissioners shall have like power as justices of the peace to administer oaths, to take depositions, affidavits, acknowledgments of deeds and other instruments and to issue summonses for witnesses. They shall be entitled to like fees as justices of the peace for like services. A change in the name of a special commissioner shall terminate her commission, but she may be reappointed under her new name.

The office of justice of the peace is a judicial office, and is recognized as such by the State Constitution. It is, accordingly, an office which under the Constitution a woman is not eligible to hold. *Opinion of the Justices*, 107 Mass. 604; *Opinion of the Justices*, 150 Mass. 586; *Opinion of the Justices*, 165 Mass. 599; *Opinion of the Justices*, 237 Mass. 591; V Op. Atty.-Gen. 479.

In recognition of this principle, the Legislature has provided (G. L., c. 222, § 2, quoted above) for the appointment of women as special commissioners, with like power as justices of the peace in the respects enumerated in that section. The powers therein enumerated, however, do not include the power to solemnize

marriages. That power by G. L., c. 207, § 38, may be exercised by certain persons, including justices of the peace who are clerks or assistant clerks of towns, but not including special commissioners.

The Nineteenth Amendment to the Federal Constitution has not enlarged the right of women in respect to holding office, and therefore does not confer upon the applicant the right to appointment to the office of justice of the peace. See *Opinion of the Justices*, 237 Mass. 591.

St. 1921, c. 449, § 3, provides, in part:—

Chapter thirty of the General Laws is hereby amended by inserting after section seven the following new section:—*Section 7A.* Women shall be eligible to election or appointment to all state offices, positions, appointments and employments, except those from which they may be excluded by the constitution of the commonwealth. . . .

The office of justice of the peace is one from which, as I have stated, women are excluded by the State Constitution. It follows that this statute does not make a woman eligible to appointment as a justice of the peace, and furthermore, even if it purported to, it would not be effective to modify the law, which is derived from the Constitution itself.

I must therefore advise you that the applicant, being a woman, is not eligible to appointment as a justice of the peace.

---

#### TRUST COMPANY — INVESTMENTS — LIMIT OF LIABILITIES OF ANY ONE PERSON.

There is no limit to the amount to which a trust company may invest its funds in the stock of a single corporation.

There is no limit to the amount of bonds of a corporation which may be held by a trust company, unless they are acquired as a part of a transaction by which a loan is made contrary to G. L., c. 172, § 40.

You ask my opinion whether investments of a trust company, having a capital stock of \$200,000, in the stock of a corporation to the amount of over \$200,000 and in the bonds of another cor-

To the Com-  
missioner  
of Banks.  
1921  
August 23.

poration to the amount of over \$80,000 are a violation of G. L., c. 172, § 40.

Said section provides, in part, as follows:—

The total liabilities of a person, other than cities or towns, including in the liabilities of a firm the liabilities of its several members, for money borrowed from and drafts drawn on any such corporation having a capital stock of five hundred thousand dollars or more shall at no time exceed one fifth part of the surplus account and of such amount of the capital stock of such corporation as is actually paid up. Such total liabilities to any such corporation having a capital stock of less than five hundred thousand dollars shall at no time exceed one fifth of such amount of the capital stock of the corporation as is actually paid up; . . .

G. L., c. 172, § 33, is as follows:—

Such corporation may, subject to the limitations of the following section, advance money or credits, whether capital or general deposits, on real estate situated in the commonwealth and on personal security, on terms to be agreed upon, and also invest its money or credits, whether capital or general deposits, in the stocks, bonds or other evidences of indebtedness of corporations or of governments, both foreign and domestic.

It is clear that there is no limit to the amount to which a trust company may invest its funds in the stock of a single corporation. It remains to consider whether section 40 imposes a limit to the amount of authorized investment in the bonds of a corporation.

Section 40 limits the total liabilities to a trust company which a person may incur for money borrowed from and drafts drawn on such corporation. There is no limit to the amount of bonds of a corporation which may be held by a trust company if there is no violation of section 40, and there is no violation of that section unless there is a loan or acceptance of draft by the trust company.

A loan of money is the furnishing of money by one party to another on an agreement for repayment. *Payne v. Gardiner*, 29 N. Y. 146, 167. The purchase of a bond from a third person is an entirely different transaction. No doubt, however, a loan may be made as a part of a transaction by which a bond is given.

*Legal Tender Case*, 110 U. S. 421, 444. The statutes themselves indicate a distinction made by the Legislature between loans and other investments. G. L., c. 168, § 54; c. 172, §§ 51, 61; c. 173, §§ 2, 4.

My answer to your inquiry is that there has been no violation of section 40 in the case you state unless there has been a loan of money, as defined above, by the trust company to the corporation in excess of the limit imposed. See V Op. Atty.-Gen. 219.

---

SPECIAL COMMISSION ON NECESSARIES OF LIFE — AUTHORITY TO INVESTIGATE PRICES OF LAUNDRY WORK — COMMODITIES — NECESSARIES OF LIFE.

In St. 1921, c. 325, § 2, the word "commodities" means articles of merchandise, such as fuel, and does not include labor or other service.

Laundry work is not a necessary of life, within the meaning of St. 1921, c. 325, § 2. Laundry work does not relate to or affect the production, transportation or sale of commodities which are necessities of life, within the meaning of St. 1921, c. 325, § 2.

It follows that the commission is not authorized to investigate circumstances affecting the prices of laundry work.

You ask my opinion, in substance, whether the commission has authority, under St. 1921, c. 325, to investigate prices of laundry work.

To the Special  
Commission on  
the Necessaries  
of Life.  
1921  
August 26.

The subject-matters to which the authority of the commission extends are defined by St. 1921, c. 325, § 2. Said section is as follows: —

It shall be the duty of the commission to study and investigate the circumstances affecting the prices of fuel and other commodities which are necessities of life. The commission may inquire into all matters relating to the production, transportation, distribution and sale of the said commodities, and into all facts and circumstances relating to the cost of production, wholesale and retail prices and the method pursued in the conduct of the business of any persons, firms, or corporations engaged in the production, transportation, or sale of the said commodities, or of any business which relates to or affects the same. It shall also be the duty of the said commission to study and investigate the circumstances affecting the charges for rent of property used for living quarters, and in such investigation the commission may inquire into all matters relating to charges for rent. . . .

The question on which you ask my opinion depends primarily for its answer on the proper construction of the words "fuel and other commodities which are necessaries of life." If laundry work is a commodity which is a necessary of life, within the meaning of those words as used in said section, the commission is authorized to investigate the circumstances affecting the prices of laundry work, with all the powers granted by St. 1921, c. 325; otherwise not, unless authority is given by the inclusion of the clause "or of any business which relates to or affects the same."

The words "necessaries of life" first made their appearance in our statutes, so far as I can ascertain, in St. 1898, c. 548, § 1, popularly known as the "Dubuque law," providing equitable process after judgment in cases where the judgment is founded on a claim for necessaries of life. By St. 1901, c. 176, this statute was amended by including claims for work or labor performed by the creditor for the debtor. The words next occur in the "Commonwealth Defense Act of 1917," Gen. St. 1917, c. 342, after the United States had become engaged in the World War. By section 23 of that act the Governor was authorized to investigate circumstances relating to "food or other necessaries of life."

By Gen. St. 1919, c. 341, a Special Commission on the Necessaries of Life was established, the duties and powers of which were defined in section 1 substantially as in the first two sentences of St. 1921, c. 325, § 2. This act was amended by Gen. St. 1919, c. 365, by adding a clause substantially like the last sentence of said section 2.

The term of service of the commission was extended and certain provisions of Gen. St. 1917, c. 342, were continued by St. 1920, c. 628.

The words "necessaries of life" also appear in article XLVII of the amendments to the Constitution of Massachusetts, which is as follows: —

The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.



In an act of Congress "to provide further for the national security and defense" (act, Aug. 10, 1917, c. 53, as amended by act, Oct. 22, 1919, c. 80) measures are provided for conserving foods, feeds, wearing apparel, fuel, and articles required for the production thereof, which in the act are called "necessaries."

"Commodity" is a word of comprehensive signification. *S. S. White Dental Mfg. Co. v. Commonwealth*, 212 Mass. 35, 38. It is a general term "which signifies convenience, privilege, profit, and gains, as well as goods and wares." *Portland Bank v. Apthorp*, 12 Mass. 252, 256. But the word has also commonly a more restricted meaning as signifying an article of merchandise. *Century Dictionary*. It is to be determined in the present instance whether the word is to be given its general or its more restricted meaning.

In the statute under consideration the word "commodities" is used as applicable to things which are capable of "production, transportation, distribution and sale." It is used in conjunction with the word "fuel," and therefore, by the principle of *ejusdem generis*, its application should be confined to things of similar import. *Clark v. Gaskarth*, 8 Taunt. 431; *Renick v. Boyd*, 99 Pa. St. 555; *Matter of Hermance*, 71 N. Y. 481, 486, 487; *People v. N. Y., etc., Ry. Co.*, 84 N. Y. 565, 568, 569; *The J. Doherty*, 207 Fed. Rep. 997, 999, 1000; *Endlich, Interpretation of Statutes*, §§ 405, 406; cf. *Reed v. Tarbell*, 4 Met. 93, 101.

Laundry work is labor or service. Any materials used are incidental to the labor performed. It is not a subject of production or transportation, nor is it an article of merchandise. In my opinion, the Legislature, in using the word "commodities" in this statute, did not mean to extend the authority of the commission beyond articles of merchandise, such as fuel, which are necessities of life, or to include within its scope labor and other service, except in so far as they are included in the cost of the commodities.

In this connection it should be stated that Gen. St. 1919, c. 365, amending Gen. St. 1919, c. 341, by extending the authority of the commission to investigate charges for rent, was passed after a decision by a single justice of the Supreme Judicial Court (*Sherburne v. Sesen*, Suffolk County, No. 16854, Law) that such authority was not given by Gen. St. 1919, c. 341, since rent is not a

commodity which is the subject of "transportation, distribution and sale," within the meaning of the statute.

The words "necessaries of life," taken literally, must mean things necessary to sustain life. The word "necessaries" alone may have that restricted meaning. *International Text Book Co. v. Connelly*, 206 N. Y. 188. It was used in that sense in the Federal statute. *Cf. United States v. American Woolen Co.*, 265 Fed. Rep. 404; *C. A. Weed & Co. v. Lockwood*, 264 Fed. Rep. 453. The words "necessaries of life" naturally connote articles of prime importance, such as food, fuel, housing and clothing.

If laundry work is not a commodity it is needless to consider whether it is a necessary of life. It may be observed, however, that no labor or service is included within the category of State and Federal laws above enumerated; that in the so-called "Dubuque law" the Legislature evidently was of opinion that work and labor were not necessaries of life; and that it was necessary to include the claim for work and labor by amendment. It cannot be said as matter of law that the work of public laundries might not be performed at home, or how much, if not all, could be done at home. It is my opinion, therefore, that laundry work is not a necessary of life, within the meaning of those words as used by our Legislature.

It remains to consider the effect of the words "or any business which relates to or affects the same." They form a part of a provision to the following effect:—

The commission may inquire . . . into all facts and circumstances relating to the cost of production, wholesale and retail prices and the method pursued in the conduct . . . of any business which relates to or affects the same [production, transportation, or sale of commodities which are necessaries of life].

In my opinion, laundry work does not relate to or affect the production, transportation or sale of such commodities, and therefore the commission derives no authority from this clause.

I must therefore advise you that the commission is not authorized to investigate circumstances affecting the prices of laundry work.

PUBLIC HEALTH — MANUFACTURE AND SALE OF MATTRESSES,  
 PILLOWS AND SIMILAR ARTICLES HAVING A FILLING OF SECOND-  
 HAND MATERIAL — INVESTIGATION BY THE DEPARTMENT  
 OF PUBLIC HEALTH.

The general purpose of G. L., c. 94, §§ 270-277, is to prohibit (1) the sale or use of second-hand filling for mattresses, pillows and similar articles without a tag showing that it is second-hand; and (2) the use in such articles of any material which has been used in a hospital or about the person of any one having an infectious or contagious disease.

In case of violation of any provision of G. L., c. 94, §§ 270-277, it is the duty of the Department of Public Health to proceed by complaint to enforce the penalties provided.

You have asked my opinion with respect to the duties of your department in relation to the mattress industry, whether those duties are limited to the provisions of G. L., c. 94, § 273, or whether they extend to the enforcement of all the provisions of G. L., c. 94, §§ 270-277.

To the Com-  
 missioner  
 of Public  
 Health.  
 1921  
 August 26.

G. L., c. 94, § 273, is as follows: —

The department of public health, whenever there is reason to believe that any provision of sections two hundred and seventy to two hundred and seventy-seven, inclusive, is being violated in any factory, shop, warehouse, store or other place, shall cause an investigation to be made of any such place, and for this purpose any member or duly authorized employee of the said department may enter such building or other place at all reasonable times. If, upon investigation, mattresses, pillows, cushions, muff beds, quilts or similar articles, or materials for use in the manufacture of the same, shall there be found, which have been previously used in or about a hospital, or on or about the person of any one having an infectious or contagious disease, such materials or articles, whether manufactured or in process of manufacture, shall be marked by the said department with labels bearing the word "unclean" in conspicuous letters, and the said department, with or without notice to the owner or supposed owner, may order the removal and destruction of the said materials or articles or make such other order relating thereto as the circumstances of the case require.

Section 270, in brief, prohibits the manufacture for purposes of sale, and the sale, of mattresses, pillows and similar articles without a tag stating the kind of material used for filling, and also, if the material has previously been used, the word "second-hand."

Section 271 prohibits the use in such articles of material which has previously been used in a hospital or about the person of any one having an infectious or contagious disease.

Section 272 prohibits the sale of second-hand material commonly used for filling, with the representation that it is new material; and requires such material, when shipped, to be tagged with a statement of the contents and the name of the vendor. Violation of this provision is made punishable by a fine or imprisonment.

Section 274 authorizes the department to post on any building containing or having contained materials or articles mentioned in section 273 a notice warning of danger of contagion or infection.

Section 275 requires any police officer, member of a local board of health or other town official, having reason to believe that any provision of sections 270-277 has been or is being violated, to give notice thereof to the Department of Public Health.

Section 277 provides for a penalty of fine or imprisonment for the manufacture for purposes of sale, or sale, of any mattress, pillow or similar article, which is not marked in accordance with sections 270-277, and also for the use in the manufacture of such articles of materials previously used in a hospital or about the person of any one having an infectious or contagious disease.

The general purpose of these sections is to prohibit two things: (1) the manufacture and sale of mattresses, pillows and similar articles having a filling of material which has been previously used, and the sale of second-hand material, without a tag showing that it is second-hand (§§ 270 and 272); and (2), more specifically, the use in such articles of any material which has been previously used in a hospital or about the person of any one having an infectious or contagious disease (§ 271).

Section 273 makes it the duty of the department to make investigations in cases of violation of any provision of sections 270-277, and, if it finds a violation of section 271, to take particular action by labeling the materials or articles in question, and in such cases it may proceed further in its discretion. By section 274 the department is authorized to post notices on buildings in which such materials or articles are or have been kept, and section 275 provides for notice to be given by police officers and other officials to the

department of the violation of any provisions of sections 270-277. In a general way provision is made for notice to and investigation by the department in cases of all violations, and for particular action by the department against the goods and buildings containing them in cases of violation of section 271.

Ample provision is made for penalties for any violation of sections 270-277, but there is no express provision stating how they shall be enforced. An examination of G. L., c. 94, shows that with respect to some articles, as, for example, milk, butter, ice cream, apples, tainted meat, vinegar, adulterated food and drugs, narcotic drugs, feeding stuff, coal, fertilizers and turpentine, the statute expressly provides for enforcement of the law or making complaint for violation of it by the Department of Public Health or some board or officer. See §§ 30, 35, 60, 64, 111, 121, 122, 169, 189, 192, 217, 235, 248, 260, 290, 293. In other cases, as with respect to bakeries, cold storage, fish, eggs, sausages, canned goods, ice, grain, mattresses and slot machines, there is no such provision.

In all cases arising under G. L., c. 94, where there is no express provision governing the manner of enforcement, it would seem to be proper that prosecution should be undertaken by the department, board or officer to whose supervision the matter has been confided by the General Court. I find little authority on the point. In *Commonwealth v. Alden*, 143 Mass. 113, the court held that a complaint for not abating a nuisance after notice from a board of health might be made by an agent of the board, the statute expressly providing for the making of a complaint in that way. In *Commissioner of Health v. Bunzel*, 221 Mass. 31, an information was filed by the Attorney-General, at the relation of the Commissioner of Health, to enjoin the carrying on of a slaughtering business without a license, contrary to the provisions of R. L., c. 75, § 100, as amended by St. 1911, c. 297, § 2 (now G. L., c. 94, § 119). Subsequently the information was amended into a bill in equity brought by the Commissioner. There was a statutory provision for a penalty but none for its enforcement (R. L., c. 75, § 106, now G. L., c. 94, § 134). The court sustained the bill, without referring to any question whether the Commissioner was a proper party plaintiff.

With respect to the subject of mattresses, there is the additional consideration that the General Court has imposed the duty on your department to investigate all violations of the law, and has provided that the department shall be notified by police and other officials of violations suspected by them. These general provisions would not be of much avail if the department were powerless afterwards to act, except in cases of violation of section 271.

It is my opinion that your power is not so limited and that in cases of violation of any provision brought to your attention you may, and it is your duty to, proceed by complaint to enforce the penalties provided.

---

TAXATION — INCOME TAX — EXEMPTION — CHARITY — GIFT TO  
INDIVIDUAL IN TRUST FOR CHARITABLE PURPOSES.

G. L., c. 62, § 8, par. (c), exempts from taxation income of intangible personal property if such property is owned by or held in trust within the Commonwealth for religious organizations, whether or not incorporated, if the principal or income is used or appropriated for religious, benevolent or charitable purposes, within the meaning of G. L., c. 59, § 5, cl. 10.

The income of a bequest of intangible personal property to "His Eminence William O'Connell of Boston, Massachusetts, a Cardinal of the Holy Roman Catholic Church, . . . to be used by him . . . for such charitable purposes as he may deem best, in memory of my mother," is not exempt from taxation under G. L., c. 62, § 8, par. (c), since the bequest is to the Cardinal in his personal capacity and not to the Roman Catholic archbishop of Boston, who, by St. 1897, c. 506, § 1, is created a corporation sole, and the property is held in trust for a religious organization.

You direct my attention to the eleventh paragraph of the will of A. Paul Keith, in which paragraph a gift is made to Cardinal William O'Connell, and you request my opinion whether the income from this gift is exempt from taxation under G. L., c. 59, § 5, cl. 10, and G. L., c. 62, § 8, par. (c), which provide, respectively: —  
G. L., c. 59, § 5, cl. 10: —

The following property and polls shall be exempt from taxation:

. . . . .

Tenth. Personal property owned by or held in trust within the commonwealth for religious organizations, whether or not incorporated, if the principal or income is used or appropriated for religious, benevolent or charitable purposes.

G. L., c. 62, § 8, par. (e): —

The following income shall be exempt from the taxes imposed by this chapter:

(e) Income of intangible personal property exempt from taxation by section five of chapter fifty-nine, except under clauses seventeenth, eighteenth, twenty-second, twenty-third, twenty-seventh, twenty-ninth and thirty-third of said section.

The eleventh paragraph of the will provides: —

Eleventh: All the rest, residue and remainder of my property and estate, real, personal and mixed, of every name, nature and description, and wheresoever situated, I give, devise and bequeath unto His Eminence William O'Connell of Boston, Massachusetts, a Cardinal of the Holy Roman Catholic Church, and to the President and Fellows of Harvard College, a Massachusetts corporation, to be divided between him and that corporation in equal shares, share and share alike, and I direct that what is received by him shall be used by him in his discretion for such charitable purposes as he may deem best, in memory of my mother, Mary Catherine Keith, and that what is received by the President and Fellows of Harvard College shall be devoted by that corporation to the general purposes of Harvard University.

St. 1897, c. 506, § 1, made the then Roman Catholic archbishop of Boston and his successors in office a corporation sole under that name. Section 5 of the same act provides: —

All gifts, grants, deeds and conveyances, and also all devises and bequests heretofore made, of property within this commonwealth, to every person who held the office of Roman Catholic bishop of Boston, in which the addition of bishop of Boston, or Catholic bishop of Boston, or Roman Catholic bishop of Boston, or archbishop of Boston, or Catholic archbishop of Boston, or Roman Catholic archbishop of Boston, may have been used and made in the instrument giving or disposing of property to the grantee, devisee or legatee, shall be construed, unless the contrary clearly appears on the instrument, when the terms of it and the limitations thereof shall prevail, as conveying, giving, granting, devising or bequeathing the property in such instrument mentioned to such person as was Roman Catholic bishop of Boston, or Roman Catholic archbishop of Boston, and that the titles passing respectively by such instruments and now held by the present Roman Catholic arch-

bishop of Boston, shall be and the same are hereby vested in the corporation established by this act, subject to any trust expressed in any said instrument, and to any limitations governing said trust.

I assume that the corporation sole created by St. 1897, c. 506, is a "religious organization," within the meaning of G. L., c. 59, § 5, cl. 10, and G. L., c. 62, § 8, par. (e). The first question, therefore, is whether this devise and bequest is to the corporation sole created by and described in said St. 1897, c. 506, or to Cardinal O'Connell in his personal capacity. The distinction is vital, not only with respect to taxation but also with respect to the administration of the trust. If the gift be to the Cardinal as an individual trustee, he would remain trustee even though he might be transferred to another archbishopric. If the gift be to the corporation, the corporation remains the trustee no matter what person may from time to time hold the office of Catholic archbishop of Boston.

In my opinion, the bequest in this instance is to the Cardinal and not to the corporation. The language of the will, "His Eminence, William O'Connell of Boston, Massachusetts, a Cardinal of the Holy Roman Catholic Church," is an apt description of the Cardinal in his personal capacity as a prince of the church. The words "a Cardinal of the Holy Roman Catholic Church" are unambiguous, and identify him in reference to an office which he personally holds, and which in no sense pertains as matter of law to the Catholic archbishopric of Boston.

It does not appear that Mr. Keith knew that the corporation existed. If he did not, he could scarcely have intended to leave property to it. If he did know of it, he has chosen words which do not describe the corporation, and do describe the Cardinal. On either theory, the corporation cannot be substituted as legatee for the Cardinal in person because for the time being he happens to be the human embodiment of it.

This view is confirmed by the declared purpose of the gift. The will provides that "what is received *by him* shall be used *by him in his discretion* for such charitable purposes as *he may deem best*, in memory of my mother." In my opinion, these words confer a discretion which in the first instance is personal to the Cardinal,



rather than a discretion to be exercised by a corporation. The distinction is illustrated by the gift to Harvard College, made in the same clause, where the discretion conferred is plainly corporate rather than personal.

The next question is whether the Cardinal holds for the benefit of the said corporation or other religious organization. It seems plain that under the terms of the will he does not, whatever the intent may have been. He is to administer the gift for "such charitable purposes as he may deem best," in memory of the testator's mother. A charitable purpose is not necessarily a religious purpose, although it embraces and includes religious purposes. *Jackson v. Phillips*, 14 Allen, 539, 556. Moreover, indefiniteness as to beneficiaries is the very essence of a charitable trust. Noble: Law of Charity Trusts, §§ 21-24. For both reasons the Cardinal does not, under the terms of the will, hold the property "for religious organizations," within the meaning of the act. It is not material that in the exercise of the broad discretion conferred upon him he may elect to apply the property for the benefit of religious organizations. He still holds the property under the terms of the will, which does not impose any such obligation upon him.

In my opinion, the income of said trust is not exempt under the provisions of law to which you direct my attention.

---

SALE OF SECURITIES ACT — REGISTRATION — SALE BY CORPORATION OF ITS OWN SECURITIES — PROFIT.

St. 1921, c. 499, applies to the ordinary case of a corporation issuing and selling its own securities, unless they are in the classes exempted by the act, and the corporation should be registered as a broker, as required by the act.

You have requested my opinion upon the question whether a corporation engaged in business in Massachusetts, which sells its own securities to the public without commission or profit, should register as a broker, under the provisions of St. 1921, c. 499. Said statute, by section 2, clause (e), defines the word "broker" as follows:—

To the Department of  
Public Utilities.  
1921  
August 29.

"Broker" shall include every person, other than a salesman, who in this commonwealth engages either for all or part of his time, directly or through an agent, in the business of selling any security issued by himself or another person, or of purchasing or otherwise acquiring such securities for another with the purpose of reselling them, or of offering them for sale to the public, for a commission or at a profit.

Section 8 provides that "no person shall sell securities within this commonwealth as broker or salesman unless he has been registered by the commission."

I must assume that the clause "for a commission or at a profit," in section 2, clause (e), above quoted, qualifies the clause "in the business of selling any security issued by himself or another person" as well as the two following clauses. Unless, therefore, a corporation engaged in the business of selling its own securities sells them "at a profit," within the meaning of section 2, clause (e), it is not required to be registered.

The word "profit" commonly means gain or excess of receipts over expenditures. *Rubber Co. v. Goodyear*, 9 Wall. 788, 804; *Fechtler v. Palm Bros. & Co.*, 133 Fed. Rep. 462, 469; *Quinn v. Hayden*, 219 Mass. 343, 346. But it is also frequently used more broadly to denote any advantage or benefit acquired, and especially of a pecuniary sort. *Simcoke v. Sayre*, 148 Ia. 132, 134; *Coulombe v. Eastman*, 76 N. H. 248; cf. *Attorney-General v. Boston & Albany R.R.*, 233 Mass. 460, 464.

The word "profit," as applied to the selling by a corporation of securities issued by itself, can hardly be interpreted as meaning excess of selling price over cost, since the securities, in the ordinary case, have cost the corporation nothing beyond the expenses of promotion, and their value to the holders lies in the capital paid in as *quid pro quo* and the expected benefit from good management and other like factors. As applied to such transactions "profit" would seem naturally to mean pecuniary advantage. Adopting this construction, a corporation engaged in the business of selling securities issued by it ordinarily sells them at a profit, and thus falls within section 2, clause (e).

The purpose of the act as disclosed by its title and its provisions, in my opinion, strongly supports this construction. Any other

would emasculate the act by excluding from its scope a large mass of transactions which it was evidently meant to cover.

In *Staniels v. Raymond*, 4 Cush. 314, 316, the court said: —

Statutes are to be construed according to the intention of the makers, if this can be ascertained with reasonable certainty, although such construction may seem contrary to the ordinary meaning of the letter of the statute.

The act is entitled “An Act to control the sale of securities, to register persons selling the same, and to prevent the fraudulent promotion and sale of fraudulent securities.” It provides for the insertion in the General Laws of a new chapter, 110A, entitled “Promotion and sale of securities.” It contains provisions for the exemption from the operation of the act of sales by corporations of stock for delinquent assessments [§ 3 (*j*)], and of distributions by corporations of capital stock, bonds or other securities to its stockholders or other security holders by way of stock dividends or other distributions out of surplus or increase in capital or corporate reorganization [§ 3 (*h*)]. It provides with reference to securities not exempted and not previously sold in this Commonwealth, which a corporation proposes to issue, that a notice of intention to offer such securities for sale must be filed with the commission (§ 5). Manifestly, the act was intended to apply to the ordinary case of a corporation issuing and selling its stock, except in cases of sales of securities included in the exempted classes.

---

#### CORPORATIONS — ISSUE OF STOCK — CONSIDERATION.

Under G. L., c. 156, §§ 15 and 16, capital stock of a domestic business corporation may not be issued for executory contracts to convey or supply property or to render services to the corporation.

You ask my opinion whether you should approve an issue of capital stock in a domestic business corporation where the consideration for such issue is a contract to handle and sell articles manufactured by the corporation, and a contract to sell the stock of the corporation.

G. L., c. 156, §§ 15 and 16, are, in part, as follows: —

To the Commissioner of  
Corporations  
and Taxation.  
1921  
August 29.

SECTION 15. Capital stock may be issued for cash, at not less than par, if the shares have par value, for property, tangible or intangible, or for services or expenses. . . .

SECTION 16. . . . No stock shall be at any time issued unless the cash, so far as due, or the property, services or expenses for which it was authorized to be issued, has been actually received or incurred by, or conveyed or rendered to, the corporation, or is in its possession as surplus; . . .

A mere executory contract is in a broad sense intangible property. But section 16, as above quoted, provides that stock shall not be issued "unless the cash, so far as due, or the *property, services* or expenses for which it was authorized to be issued, *has been actually received* or incurred by, or conveyed or rendered to, the corporation, or is in its possession as surplus." In my opinion, this provision was clearly intended to exclude from the operation of section 15 all executory contracts to convey or supply property or to render services to a corporation, for nonperformance of which the corporation has merely an action for damages. The authorities in cases where there are similar statutory provisions are almost unanimously to this effect. *Stevens v. Episcopal Church History Co.*, 140 App. Div. [N. Y.] 570; *Shaw v. Ansaldo Co., Inc.*, 178 App. [N. Y.] Div. 589; 14 C. J. 438; *cf. Cooney Co. v. Arlington Hotel Co.*, 11 Del. Ch. 286, 306.

It is unnecessary, therefore, to consider whether services in selling the stock of the corporation are a legal consideration for the issue of stock.

---

#### BETTERMENTS — ASSESSMENT — COLLECTION — SALISBURY BEACH ROAD.

Assessments made under St. 1914, c. 659, § 1, authorizing the Massachusetts Highway Commission to lay out a highway and to assess a proportionate share of the cost upon the real estate especially benefited, are not collectable, since no method for collection is provided by statute.

You have recently called my attention to the matter of the collection of certain assessments against owners of property benefited by the construction of the Salisbury Beach Road, so called, in the town of Salisbury, under the provisions of St. 1914, c. 659, § 3.

This matter was referred to this department by the Treasurer and Receiver-General on Aug. 14, 1917. Since that date a number of the assessments have been collected, but there are still outstanding unpaid assessments amounting to approximately \$1,700.

St. 1914, c. 659, by section 1, authorizes and directs the Massachusetts Highway Commission to lay out a highway between the marshes and the beach at Salisbury Beach.

Section 2 requires the commission to estimate and determine the damages to property.

Section 3 authorizes the commission to determine the assessable cost of the improvement, and to assess a proportionate share thereof upon the parcels of real estate determined to be especially benefited. There is no further provision for the assessment or collection of such betterments or the imposition of any lien upon the real estate benefited. The section is as follows:—

The said commission is authorized to estimate and determine the value of the benefit or advantage to each parcel of real estate, whether situated on said highway or otherwise, and lying within one hundred feet thereof, from the whole or a part of the improvement by the laying out of said highway, and shall determine as the assessable cost of the improvement such part, not exceeding one half, as the commission shall deem just, of the expenses already incurred or hereafter to be incurred by the commonwealth for the whole or part of the improvement, including the expense of taking land and all other expenses in laying out and constructing said highway, and shall assess a proportionate share of said assessable cost upon the parcels of real estate determined to be especially benefited as aforesaid, but not exceeding the total amount of the benefit and advantage to every such parcel as estimated or determined as aforesaid. The said highway when laid out and constructed shall be a public way in the town of Salisbury.

Sections 4 and 5 provide for payment of the cost by the Commonwealth in the first instance, and an apportionment of the cost between the Commonwealth, the county of Essex and the town of Salisbury.

At the time this act was passed certain provisions of the Revised Laws were in force, appearing in chapter 50, entitled "Of betterments and other assessments on account of the cost of public improvements."

Section 1 of said chapter provides as follows: —

In a town which accepts the provisions of this and the eight following sections or has accepted the corresponding provisions of earlier laws, or in any city, *the board of city or town officers* which is authorized to lay out ways therein *may*, at any time within two years after the passage of an order laying out, relocating, altering, widening, grading or discontinuing a way and after the work has been completed or the way has been discontinued, if such order declares that such action has been taken under the provisions of law authorizing the assessments of betterments, and if in its opinion any land receives a benefit or advantage therefrom beyond the general advantage to all land in the city or town, determine the value of such benefit or advantage to such land and *assess* upon the same a proportional share of the cost of such laying out, relocation, alteration, widening, grading or discontinuance; but no such assessment shall exceed one-half of the amount of such adjudged benefit or advantage.

Section 10 of said chapter 50 is as follows: —

Assessments for betterments and other public improvements shall constitute a lien upon the land assessed and shall be enforced in the manner provided for the collection of taxes. They shall bear interest from the thirtieth day after the assessment until paid. If the validity or amount of such assessment is drawn in question in an action or other proceeding the lien shall continue for one year after final judgment and may be enforced in the same manner as the original assessment.

Section 15 requires “such board,” upon notice by the owner of land upon which an assessment for betterments has been laid, to apportion the assessment into a number of equal parts, not exceeding ten, and to certify said apportionment to the assessors, who, in turn, are required to add one of such parts to the annual tax upon such land each year until the tax has been paid.

Section 20 authorizes the county commissioners to proceed in certain cases under this chapter, and section 21 requires the board assessing the betterments in such cases to reimburse the county a proportion of the betterments received.

R. L., c. 13, § 35, provides, in part, as follows: —

Taxes assessed upon land, . . . shall . . . be a lien thereon from the first day of May in the year of assessment. Such lien shall terminate

at the expiration of two years from the first day of October in said year, if the estate has in the meantime been alienated; otherwise it shall continue until an alienation thereof.

Said chapter 13 contains provisions for the collection of taxes by distress, imprisonment, suit, and sale or taking of land. By section 2 every collector of taxes is required to collect the taxes set forth in the tax list and warrant from the assessors, and to pay over the same to the city or town treasurer according to the warrant.

R. L., c. 50, § 10, first appeared in St. 1866, c. 174, § 6. The act was entitled "An Act concerning the laying out, altering, widening and improving the streets of Boston." Section 6 provided, in part: —

All assessments made under this act shall constitute a lien upon the real estate so assessed, to be enforced in the same manner, with like charges for costs and interest, as is provided by law for the collection of taxes.

The remainder of the section provided for an apportionment of the assessment at the request of the owner of any estate so assessed.

By St. 1868, c. 75, the provisions of this act were extended and made applicable to any and all cities of the Commonwealth.

St. 1871, c. 382, entitled "An Act in relation to betterments," provided by section 1 that the board of city or town officers authorized to lay out streets or ways, respectively, therein might determine the value of the benefit and advantage to real estate therefrom, and assess upon the same a proportional share of the expense. Section 6 of said act provided, in part: —

All assessments made under this act shall constitute a lien upon the real estate so assessed, to be enforced in the same manner, with like charges for cost and interest, as provided by law for the collection of taxes; . . .

with a provision for apportionment of the assessment at the request of the owner of the estate.

P. S., c. 51, entitled "Of betterments and other assessments on account of the cost of public improvements," contains what are

substantially the provisions of St. 1871, c. 382. Section 6 of that act appears as section 5 in said chapter 51. It provides:—

Every *such* assessment shall constitute a lien upon the real estate assessed, to be enforced, with like charges for cost and interest, in the manner provided by law for the collection of taxes; . . .

No material change in this statute was made before the adoption of the Revised Laws, and no note appears in the report of the commissioners for consolidating the Public Statutes stating any reason for the change in phraseology by which the specific reference is omitted to such assessments only as are made under the chapter.

Gen. St. 1915, c. 227, in section 1, contained restrictions on the attachment of “municipal liens” to real estate in consequence of an order of a municipal board or other authority for the construction of a street, sewer or sidewalk.

Sections 2 and 3 were as follows:—

SECTION 2. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 3. This act shall not apply to the city of Boston.

A former Attorney-General ruled, with reference to the effect of this act (IV Op. Atty.-Gen. 547, 559), that—

The previous statutes in so far as they related to the creation of municipal liens for the construction of streets, sewers and sidewalks were repealed by the act of 1915, except as to the city of Boston.

By Gen. St. 1917, c. 344, pt. III, the law with reference to betterments was rewritten. By Gen. St. 1918, c. 257, § 219, the law was again rewritten by striking out part III and substituting a new part III. Section 4 of said new part III provides that “the board” shall, within a reasonable time after making the assessment, commit the list of assessments within each city or town, with their warrant, to the collector of taxes of the city or town in which the land assessed is situated, for collection. Section 11 provides that “assessments made under this part of this act shall constitute a lien upon the land assessed.” These provisions are continued substantially in G. L., c. 80.



It is a familiar principle of statutory construction that mere verbal changes in the revision of a statute do not alter its meaning, and are construed as a continuation of the previous law. *Main v. County of Plymouth*, 223 Mass. 66, 69; *Ollila v. Huikari*, 237 Mass. 54. It is my opinion that by the adoption of the Revised Laws it was not intended to widen the scope of the previous law, by which the provisions with respect to the creation of liens and the collection of assessments were confined to assessments made under the act; that is, assessments made by boards of city or town officers. This view is confirmed by the course of subsequent legislation on the subject.

Moreover, the method provided by section 10 for the collection of the assessments referred to in the section is not applicable to assessments made by State boards, the proceeds of which should go into the treasury of the Commonwealth. The collector of taxes, to whom assessments are committed by section 10, is required by R. L., c. 13, § 2, to pay over his collections to the city or town treasurer, and there, so far as there is any statutory provision, the proceeding stops.

There is no provision in St. 1914, c. 659, for the collection of assessments made by the Massachusetts Highway Commission nor for the imposition of any lien on the land determined to have been benefited by the improvement. Nor is there any other provision of statute, of which I am aware, which would operate to create a lien on such land or give a right to collect the assessments.

The right to levy and collect betterment assessments exists only by statute. *Stone v. Street Commissioners*, 192 Mass. 297. Since no method appears to be provided by statute for the collection of the assessments now remaining unpaid, I am constrained to hold that those assessments are not collectable.

SET-OFF — DEBT DUE FROM INSOLVENT TRUST COMPANY AGAINST  
 STOCKHOLDER'S LIABILITY — STOCKHOLDER'S LIABILITY  
 AGAINST DEBT DUE FROM INSOLVENT TRUST COMPANY.

A stockholder cannot set off a debt due from the commercial department of an insolvent trust company against the statutory liability imposed upon him by R. L., c. 116, § 30, as amended by St. 1905, c. 228, since the debt is owed by the corporation, and such liability is enforced for the benefit of its creditors. A receiver of an insolvent bank, or the commissioner in possession thereof, may set off the statutory liability imposed upon a stockholder by R. L., c. 116, § 30, as amended by St. 1905, c. 228, when such liability is duly fixed, against a debt due from the commercial department to said stockholder, since such set-off does not prejudice either stockholder or creditors.

To the Com-  
 missioner  
 of Banks.  
 1921  
 September 2.

You inquire whether an indebtedness owed by the commercial department of a trust company to a stockholder therein may be set off by the stockholder against the liability imposed upon stockholders in trust companies by R. L., c. 116, § 30, as amended by St. 1905, c. 228 (now G. L., c. 172, § 24); and, conversely, whether this liability, if duly fixed, may be set off by the receiver or the Commissioner of Banks against a suit by the stockholder to recover a debt from the corporation. You state that these questions arise in connection with an insolvent trust company, of which you have taken possession under St. 1910, c. 399 (now G. L., c. 167, §§ 22 to 36, inclusive), and which is now in process of liquidation by you.

R. L., c. 116, § 30, as amended by St. 1905, c. 228, provides as follows: —

The stockholders of such corporation shall be personally liable, equally and ratably and not one for another, for all contracts, debts and engagements of the corporation, to the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. The provisions of sections sixty to sixty-eight, inclusive, of chapter one hundred and ten shall apply to and regulate the enforcement of such liability, and receivers of insolvent trust companies may, with the approval of the supreme judicial court, enforce such liability.

Authority to enforce this liability is expressly conferred upon the Commissioner of Banks in possession of an insolvent trust company by St. 1910, c. 399, § 4 (now G. L., c. 167, § 24). Exami-

nation of the provisions for enforcing this liability makes it plain that this liability is to be enforced by a receiver or by the Commissioner of Banks or by one creditor on behalf of himself and all other creditors, as the case may be, and not by the creditors individually.

In *Everett v. Foster*, 223 Mass. 553, the Supreme Judicial Court, in deciding that a delinquent stockholder could not set off a debt due from an insolvent corporation against an unpaid subscription for stock which the assignee for the benefit of creditors was seeking to enforce against him, said, at page 555: —

The rule established by the great weight of authority in many jurisdictions is that, in the absence of a statute to that effect, a creditor of an insolvent corporation cannot set off his debt in an action brought against him to recover for the benefit of all the creditors the amount due upon an unpaid subscription for stock. The creditor must pay for his shares in full, and is entitled only to a ratable distribution of all the company's assets and to receive a dividend upon his claim against the corporation in common with other creditors. *Anglo-American Mortgage & Agency Co. v. Dyer*, 181 Mass. 593; *Pettibone v. Toledo, Cincinnati & St. Louis Railroad*, 148 Mass. 411; *Sawyer v. Hoag*, 17 Wall. 610, 622; *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Scammon v. Kimball*, 92 U. S. 362; *Scovill v. Thayer*, 105 U. S. 143, 152; *Handley v. Stutz*, 139 U. S. 417, 427; *See v. Heppenheimer*, 3 Rob. 36, 79; *Holcombe v. Trenton White City Co.*, 10 Buch. 122; *Ball Electric Light Co. v. Child*, 68 Conn. 522; *Appleton v. Turnbull*, 84 Me. 72; *Richardson v. Merritt*, 74 Minn. 354; *Utica Fire Alarm Telegraph Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 621; *Shickle v. Watts*, 94 Mo. 410; *Morawetz on Private Corp.* § 861; *Cook on Corp.* (7th ed.) § 193; *Grissell's Case*, L. R. 1, Ch. 528. The terms of the assignment by the debtor corporation to the plaintiff do not incorporate the provisions of our insolvent law except as to the kind of debts due from the assignor which can share in the distribution. R. L., c. 163, § 34, has no bearing on the question at issue.

This rule is in accord with the great weight of authority. 14 C. J. 1044, § 1628, note 17.

On the other hand, the receiver of an insolvent corporation, when sued by the executor of a deceased stockholder to enforce a debt due to the decedent, may set off against the executor the amount due upon shares of stock held by the decedent, even though

action is barred as against the executor by the special statute of limitations. *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 158, 163. This case is the converse of *Everett v. Foster*, *supra*. The set-off by the receiver does not diminish the assets applicable to the payment of creditors. On the contrary, it reduces the claims against the corporation without depleting the assets.

If a debt due to an insolvent corporation cannot be set off by the stockholder in an action to enforce payment of an unpaid stock subscription on behalf of the corporation, it is very clear that such debt cannot be set off against the additional liability imposed by statute upon stockholders in banks. The additional statutory liability is not an asset of the corporation, as the stock subscription was. It is available only if the corporation is insolvent, and may be used only to pay corporate debts. See G. L., c. 158, §§ 46 to 54, inclusive. It is a trust fund for the benefit of creditors, which may be collected for their benefit either by a receiver or by the Commissioner of Banks or by one creditor on behalf of himself and all other creditors, but not by the corporation itself. By the great weight of authority a stockholder who is also a creditor of an insolvent corporation cannot set off a debt which the corporation owes him against his statutory liability for the corporate debts. *Wingate v. Orchard*, 75 Fed. Rep. 241 (C. C. A.); *Robinson v. Brown*, 126 Fed. Rep. 429; *Williams v. Rose*, 218 Fed. Rep. 898; 14 C. J. 1046, § 1629, note 28; 7 C. J. 517, § 108. See also *Bachrach v. Allen*, 239 Mass. 272. The cases of *Broadway National Bank v. Baker*, 176 Mass. 294, and *Sargent v. Stetson*, 181 Mass. 371, do not apply to the form of statutory liability created by our statute; they both related to statutory liability created by the law of Kansas, which permitted individual creditors to enforce such liability severally, and, in consequence, permitted a stockholder to set off against the claim of an individual creditor any debt due from the corporation which he had paid in good faith. I therefore advise you that the stockholder may not set off a debt due from the corporation against this statutory liability, but that such liability, if duly fixed, is available as a set-off to the receiver or the Commissioner of Banks in an action by the stockholder to recover a debt due from the corporation.

I do not deem it expedient to answer certain other questions touching controversies with a particular individual, as to which you impliedly but did not directly inquire. Some if not all of these questions are or may be the subject of litigation, and should not be prejudiced by an advisory opinion of the Attorney-General delivered in advance. See *Opinion of the Justices*, 237 Mass. 613; *Opinion of the Justices*, 122 Mass. 600, 602. Therefore I do not decide, either expressly or by implication, whether a valid assessment could be made upon this individual as a stockholder.

---

STATE FINANCE—SINKING FUNDS—TEMPORARY USE OF OTHER FUNDS TO BUY BONDS FOR SINKING FUNDS.

Since, under Mass. Const., pt. 2d, c. II, § I, art. XI, funds cannot be issued out of the treasury save by a proper warrant "agreeably to the acts and resolves of the general court," the Treasurer and Receiver-General cannot, in the absence of statute, buy bonds for sinking funds with other moneys in the treasury, even though the temporary shortage in such other funds would probably be made good in the near future out of expected income.

You ask my opinion upon the following case:—

A favorable opportunity to buy bonds for the sinking fund has presented itself, but the funds available to purchase bonds for the sinking fund have already been invested. There are, however, other funds which, if temporarily employed to buy bonds for the sinking fund, would show a temporary shortage in cash and a corresponding surplus in bonds. You state that income would absorb this shortage in cash by the beginning of 1922. You inquire whether you may, with the approval of the Governor and Council, make the purchase under these circumstances.

Bonds cannot be purchased without issuing moneys out of the treasury and disposing of the same to pay therefor. Moneys cannot be issued out of the treasury and disposed of save by warrant under the hand of the Governor, with the advice and consent of the Council, "agreeably to the acts and resolves of the general court." Mass. Const., pt. 2d, c. II, § I, art. XI. *Opinion of the Justices*, 13 Allen, 593. I do not find any act or resolve of the General Court which authorizes the temporary employment of

To the  
Treasurer and  
Receiver-  
General.  
1921  
September 10.

funds on hand in the treasury for a purpose different from that to which such funds are ultimately devoted by law, even though it is expected that the shortage will be adjusted in the near future by receipt of income or otherwise. A laudable desire to purchase bonds for the Commonwealth at an attractive price cannot, in my opinion, justify a departure from the plain mandate of the Constitution. I am constrained to advise you that unless there is some act or resolve which authorizes the use of the funds in question to purchase bonds, they cannot be withdrawn from the treasury, either temporarily or permanently, for that purpose.

---

WAREHOUSEMAN — SURRENDER OF LICENSE — CANCELLATION OF BOND.

The surrender of a license by a warehouseman to the Secretary of the Commonwealth is not complete until after notice of discontinuance of such license by publication, in accordance with G. L., c. 105, § 6.

Power to cancel the bond of a warehouseman upon surrender of license would seem to be incidental to the power to accept surrender of the license, when and if it is determined by the Governor, with the advice and consent of the Council, that there is no liability outstanding or enforceable thereunder.

You ask my opinion upon the following case: —

A warehouseman duly licensed under G. L., c. 105, § 1, desires to surrender his license, pursuant to G. L., c. 105, § 6. You inquire, first, whether the surrender should be accepted unqualifiedly before notice has been published as required by said section 6; and second, when the bond required by section 1 shall be deemed to have been terminated.

G. L., c. 105, §§ 1, 3 and 6, provide as follows: —

SECTION 1. The governor, with the advice and consent of the council, may license suitable persons, or corporations established under the laws of, and having their places of business within, the commonwealth, to be public warehousemen. Such warehousemen may keep and maintain public warehouses for the storage of goods, wares and merchandise. They shall give bond to the state treasurer for the faithful performance of their duties in an amount and with sureties approved by the governor, and may appoint one or more deputies, for whose acts they shall be responsible. A railroad corporation licensed as a public warehouseman

shall not be required as such to receive any property except such as has been or is forthwith to be transported over its road or to give sureties on its bond.

SECTION 3. Whoever is injured by the failure of a licensed warehouseman to perform his duty or by his violation of any provision of this chapter may bring an action for his own benefit, in the name of the commonwealth, on the bond of such warehouseman. The writ shall be endorsed by the person in whose behalf such action is brought, or by some other person satisfactory to the court; and the endorser shall be liable to the defendant for any costs which he may recover in such action, but the commonwealth shall not be liable for any costs.

SECTION 6. The state secretary shall, at the expense of each warehouseman, give notice of his license and qualification, of the amount of the bond given by him and also of the discontinuance of his license by publishing the same for not less than ten days in one or more newspapers, if any, published in the county or town where the warehouse is located; otherwise, in one or more newspapers published in Boston.

These sections are re-enactments, without substantial change, of R. L., c. 69, §§ 1, 2 and 8, respectively.

On June 11, 1906, the Attorney-General, in advising His Excellency the Governor as to the mode in which a warehouseman should surrender his license under the above sections of the Revised Laws, said: —

I think the proper thing is for the company to return its license to the Secretary of the Commonwealth; the Secretary should then advertise the discontinuance, as provided by section 8. When this has been done it seems to me the surrender of the appointment will be complete, for all practical purposes, at least.

While the language of the act might be so construed as to make the publication of the required notice a record of a discontinuance already made, I concur in the opinion above referred to, that such publication is an essential step in making such discontinuance. I therefore advise you that the surrender should be deemed to be effective only upon completion of the required publication.

The statute contains no express provision for cancellation of the bond upon discontinuance of the license. Although it is

unlikely that any new liability will arise after the license has been discontinued, it does not follow that liability may not have accrued prior to discontinuance. The existence of such liability is not negatived, as matter of law, by failure to bring suit upon the bond before the surrender of the license becomes effective. To cancel the bond as soon as such surrender is completed might deprive the public of a portion of the security which the bond was intended to furnish. On the other hand, the failure of the Legislature expressly to prescribe a time for cancellation does not, in my opinion, require, as matter of law, that the bond remain in force until action thereon is barred by the statute of limitations. Power to cancel the bond would seem to be incidental to the power to accept surrender of the license. A measure of discretion is thus vested in Your Excellency, acting with the advice and consent of the Council. In my opinion, the bond may properly be cancelled when and if the Governor, with the advice and consent of the Council, shall determine that there is no liability outstanding and enforceable thereunder.

---

#### TAXATION — DEPOSITS IN SAVINGS DEPARTMENTS OF TRUST COMPANIES — RETURNS — INSPECTION OF BOOKS.

There is no provision in G. L., c. 63, for the assessment of an additional tax on deposits in savings banks and savings departments of trust companies upon discovery that the tax first assessed was incorrect.

G. L., c. 63, § 69, does not authorize the Commissioner of Corporations and Taxation to inspect the books of a savings bank or trust company for the purpose of verifying returns on which taxes have been assessed and paid.

You request my opinion as to your authority and duty in the matter of auditing the books of savings departments of trust companies for the purpose of taxation, where it appears that the Commonwealth has not received a correct return for the purpose of taxation, and where it further appears that the Commonwealth has failed to receive a considerable tax. In your letter requesting my opinion you refer to some communications between yourself and the Commissioner of Banks and his liquidating agent, relating to returns of a certain trust company for the six months' period ending April 30, 1920, and Oct. 31, 1920, respectively, and a



suggested examination of its books "in order to render a proper tax bill for the two 1920 taxes."

G. L., c. 63, contains provisions applicable to the taxation of savings banks and savings departments of trust companies. Section 11 provides for the taxation of deposits in savings banks and trust companies having savings departments. It is as follows:—

Every savings bank and every trust company having a savings department, as defined respectively in chapters one hundred and sixty-eight and one hundred and seventy-two, shall pay to the state treasurer, on account of its depositors, an annual tax of one half of one per cent, which shall be levied on the amount of the deposits in a savings bank, and on the amount of such of the deposits in the savings department of a trust company as do not exceed in amount the limits imposed upon deposits in savings banks by section thirty-one of chapter one hundred and sixty-eight, to be assessed and paid as follows: one fourth of one per cent shall be assessed by the commissioner upon the average amount of such deposits for the six months preceding May first, and paid on or before May twenty-fifth; and a like percentage shall be assessed upon the average amount of such deposits for the six months preceding November first, and paid on or before November twenty-fifth.

Section 13 contains provisions requiring semi-annual returns, and provisions for penalties for failure to make such returns and for false statements in such returns. It is as follows:—

Every savings bank and every trust company having a savings department shall semi-annually, on or before May tenth and November tenth, make a return to the commissioner, signed and sworn to by its president and treasurer, of the amount of its deposits if a savings bank, and if a trust company of the amount of deposits in its savings department, on the first day of each of said months, and of the average amount of such deposits for the six months preceding each of said last mentioned days. A corporation neglecting to make such return shall forfeit fifty dollars for each day during which such neglect continues. If it wilfully makes a false statement in such return it shall be punished by a fine of not less than five hundred nor more than five thousand dollars.

Section 69, relative to the inspection of books and examination of officers of certain corporations, including savings banks and trust companies having savings departments, provides as follows:—

Every corporation taxable under this chapter, except a foreign corporation taxable under section twenty-one, twenty-three or fifty-eight, shall, when required for the purposes of any tax except that imposed on its income by section thirty-two or thirty-nine, submit its books to the inspection of the commissioner, and its treasurer and directors to examination on oath relative to all matters affecting the determinations to be made by said commissioner.

Section 80 provides for the collection of penalties and forfeitures, as follows: —

Penalties and forfeitures imposed by this chapter may be collected by an action of contract under section seventy-three or by an information under section seventy-five.

Section 73 is as follows: —

If a corporation, company or association fails to pay a tax levied under this chapter, except the excise imposed by section sixty-two, the treasurer may recover the same in contract in the name of the commonwealth.

Section 75 provides that, in addition to other methods, "taxes under this chapter . . . may be collected by an information brought in the supreme judicial court by the attorney general at the relation of the state treasurer."

G. L., c. 63, § 69, first appears in St. 1864, c. 208, § 16, as follows: —

Every corporation taxed by this act shall, when required, submit its books to the inspection of the board of commissioners named in section five of this act.

This act applied to every "corporation or banking association not exempted from taxation, state and municipal, by the laws of the United States" (§ 5), and included savings banks.

This act was amended by St. 1865, c. 283, section 17 of which was as follows: —

Every corporation to be taxed by this act shall, when required, submit its books to the inspection of the tax commissioner, and its treasurer and directors to examination on oath in regard to all matters affecting the determinations which are to be made by said commissioner.

This provision was continued in practically identical form down to the General Laws, when in said section 69 the words "for the purposes of any tax except that imposed on its income by section thirty-two or thirty-nine" were inserted after the words "when required."

In *Commonwealth v. Cary Improvement Co.*, 98 Mass. 19, 22, the court, referring to St. 1864, c. 208, § 16, said: —

The provision of the sixteenth section of the act, that corporations shall, when required, submit their books to the inspection of the commissioners, does not imply an investigation and valuation of their property, unless such investigation becomes necessary by reason of the absence of other means of information by which to determine the value of the stock.

The two 1920 taxes were required by the statute (now G. L., c. 63, § 11) to be assessed and paid on or before May 25, 1920, and Nov. 25, 1920, respectively. I assume that taxes based on the returns which were made were assessed and paid accordingly. There is no provision, such as is found in the law relating to the assessment of local taxes (G. L., c. 59, § 75), the law relating to the taxation of incomes (G. L., c. 62, §§ 36, 37), and the law relating to the taxation of business corporations (G. L., c. 63, §§ 45, 46), for the subsequent assessment of an additional tax upon discovery that the tax first assessed was incorrect. The only provision covering the case where, by reason of an incorrect return, the proper tax has not been assessed and paid is in G. L., c. 63, § 13, for the punishment by fine of a corporation which wilfully makes a false statement in the required return.

Such a fine is a penalty which, by section 80, may be collected by an action of contract by the Treasurer and Receiver-General or by an information by the Attorney-General at the relation of the Treasurer and Receiver-General.

In my judgment, the Commissioner is not authorized by section 69 to inspect the books of a trust company for the purpose of verifying returns made to him on which taxes have already been assessed and paid. The Commissioner, having assessed the taxes in question, in my opinion, has no further duty relating to the matter of those taxes. Such authority and duty in the premises

as may exist are given by statute primarily to the Treasurer and Receiver-General and secondarily to the Attorney-General. Applying the language of section 69, the inspection is not required "for the purposes of any tax," nor does it relate to any matter "affecting the determinations to be made by the commissioner." The inspection, if made, would be for the purpose of determining whether liability to a penalty existed, and would relate to a matter to be determined by the Treasurer and Receiver-General.

The case of *Old Colony Trust Co. v. Commonwealth*, 220 Mass. 409, 413, holding that the Tax Commissioner in assessing such taxes is not restricted in the sources of information on which his assessments are based to the sworn returns, is not in point. The point is that the Commissioner, having assessed the taxes, has under the statute no further power or duty in the matter.

I do not intend in this opinion to determine the question whether, in view of the fact that the corporation to which you refer is in the hands of the Commissioner of Banks, it is now liable to pay a penalty which must come out of funds which would otherwise go to other depositors, or whether the Treasurer and Receiver-General has the power, or is under the obligation, to bring proceedings under G. L., c. 63, §§ 73 or 75.

See in this connection *Atlas Bank v. Nahant Bank*, 3 Met. 581, 582, 583; *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207, 210.

---

#### BOARDS OF HEALTH — REGULATIONS — APPROVAL OF ATTORNEY-GENERAL.

G. L., c. 111, § 31, is applicable to all regulations made by local boards of health. Under G. L., c. 111, § 31, the approval of the Attorney-General is required only when regulations made thereunder themselves provide a penalty, and not where the penalty is provided by statute.

In St. 1921, c. 303, a penalty is provided by the statute, and therefore regulations made thereunder need not be approved by the Attorney-General.

You ask my opinion whether regulations made by local boards of health under the provisions of St. 1921, c. 303, come under the provisions of G. L., c. 111, § 31, requiring approval by the Attorney-General before they become effective.

St. 1921, c. 303, is entitled "An Act regulating the manufacture or bottling of certain non-alcoholic beverages." It amends G. L., c. 94, by inserting after section 10 and under the heading "Non-Alcoholic Beverages" five new sections, 10A to 10E, inclusive.

Section 10A authorizes local boards of health to grant permits to engage in business. Section 10B requires them to examine the premises of persons having permits. Section 10C requires materials used to be uncontaminated and wholesome. The remaining sections are as follows:—

SECTION 10D. The department of public health and local boards of health may make rules and regulations to carry out the three preceding sections.

SECTION 10E. Any person who engages in the business of the manufacture or bottling of carbonated non-alcoholic beverages, soda waters, mineral or spring waters without the permit provided for in section ten A or who violates any provision of sections ten A to ten D, inclusive, or of any rule or regulation made thereunder, shall be punished for a first offence by a fine of not more than one hundred dollars and for a subsequent offence by a fine of not more than five hundred dollars.

G. L., c. 111, § 31, is as follows:—

Boards of health may make reasonable health regulations which shall be published once in a newspaper if one is published in the town, otherwise in a newspaper published in the county. All regulations made hereunder which provide a penalty for violation thereof shall, before taking effect, be approved by the attorney general. Such publication shall be notice to all persons.

Said chapter 111 relates to "Public Health," and sections 26 to 32, inclusive, of that chapter are under the heading "City and Town Boards of Health."

In the Revised Laws the corresponding chapter is chapter 75, entitled "Preservation of the Public Health," of which sections 9 to 15 are under the heading "City and Town Boards of Health." Section 14 of said chapter, as amended by St. 1914, c. 90, is as follows:—

The board of health of a town shall publish all regulations made by it in a newspaper of its town, or shall post them up in a public place in the town. Such publication or posting shall be notice to all persons.

The word "town," when used in any statute, includes city. G. L., c. 4, § 7, cl. 34.

There are many statutes now appearing in the General Laws which authorize local boards of health to make regulations on specific subjects. Many of these statutes are old and well established, and local boards of health have frequently acted under them in making regulations for the public health and safety. Among the subjects covered by such statutes are nuisances (G. L., c. 111, §§ 122, 127); cemeteries (G. L., c. 114, § 37); articles of food (G. L., c. 94, §§ 146, 148); milk stations (G. L., c. 94, § 32); sausage factories (G. L., c. 94, § 144); bakeries (G. L., c. 111, §§ 37, 38); dispensaries (G. L., c. 111, § 50); day nurseries (G. L., c. 111, §§ 60, 62); dangerous diseases (G. L., c. 111, §§ 92, 95, 105); noisome trades (G. L., c. 111, §§ 143, 146); stables (G. L., c. 111, §§ 155, 157); quarantine (G. L., c. 111, § 177); vaccination (G. L., c. 111, § 181); and manicuring (G. L., c. 140, § 51).

In the statute relating to articles of food (G. L., c. 94, § 146) the regulations are made subject to the approval of the Department of Public Health. This is the only provision of which I am aware, except that appearing in G. L., c. 111, § 31, for supervision of regulations of local boards of health before they become effective. In most of the statutes a penalty is provided for violation of such regulations, such penalty being generally a fine and sometimes a loss of license.

By G. L., c. 114, § 37, local boards of health are authorized to impose penalties not exceeding \$100 for breach of regulations concerning burial grounds and interments. I know of no other provision granting such authority prior to the passage of the statute of 1920, hereinafter referred to.

In G. L., c. 94, § 146, and c. 114, § 37, there are provisions requiring publication of regulations before they become effective. Such provisions do not occur in the other statutes cited. Prior to the enactment of the General Laws there was a general statutory requirement that all regulations made by local boards of health should be published. R. L., c. 75, § 14, as amended. Whether this requirement is continued in the General Laws is a question to be considered.

In 1920 the General Court passed an act (c. 591) entitled "An Act to make certain substantive changes in and additions to the laws relating to towns." That act contains a number of sections which are in the form of amendments to previous statutes, and some which are not. Among the latter is section 17, which is as follows: —

#### HEALTH REGULATIONS.

Town boards of health may make reasonable health regulations which shall be published once in a newspaper if one is published in the town, otherwise in a newspaper published in the county. All regulations made hereunder which provide a penalty for violation thereof shall, before taking effect, be approved by the attorney-general.

The proper construction of this statute is considerably affected by the disposition made of it in the General Laws. It is there combined with R. L., c. 75, § 14, as amended, and thus combined appears as G. L., c. 111, § 31. St. 1920, c. 591, § 17, standing by itself, might well be interpreted simply to authorize, under the conditions stated, the making of various kinds of reasonable health regulations not authorized by any other statute. But this statute has been combined in the General Laws with a general requirement for publication, which must have a broader application. It is my opinion that the requirement with respect to publication was intended by the General Court to be a general one, applicable to all cases where no specific provision is made. Doubtless, also, the section has the effect of giving power to boards of health to make reasonable health regulations in cases not covered by other statutes.

It remains to consider and determine the meaning of the words "all regulations made hereunder which provide a penalty for violation thereof shall, before taking effect, be approved by the attorney-general." I am not able to say that this provision was intended to apply only in cases where no other statute is applicable. Nor do I overlook the use of the word "hereunder," taken from the statute of 1920. In my judgment, the provision for publication in G. L., c. 111, § 31, makes that section applicable to all regulations made by local boards of health. But the provision for review by the Attorney-General does not apply to all such

regulations. By its terms it is confined to regulations which themselves provide a penalty for violation thereof, as distinguished from regulations for which a penalty is provided by statute. No doubt a board of health may fix a penalty for violation of its regulations when authorized so to do by the Legislature. *Carthage v. Colligan*, 216 N. Y. 217; *cf. Lowell v. Archambault*, 189 Mass. 70, 73. But where the Legislature has by statute fixed the penalty for such violation, the board of health has no jurisdiction in that matter. *Johuston v. Belmar*, 58 N. J. Eq. 354. The penalty in such a case is provided by the statute and not by the regulations.

In cases where the making of regulations is particularly provided for by statute the General Court has almost uniformly provided the penalty. In cases not thus covered, where boards of health may desire to make regulations, they may desire also to provide penalties for violation thereof. In such cases, and also in the case of regulations made under G. L., c. 114, § 37, and other statutes, if any there be, where the General Court has left the matter of providing penalties to the local boards of health, and in those cases only, such regulations must, in my opinion, be submitted to the Attorney-General.

In the statute to which you refer (St. 1920, c. 303) the General Court has provided a penalty. I am therefore of the opinion that regulations made under that statute need not be approved by the Attorney-General.

---

TREASURER AND RECEIVER-GENERAL — LEGACY AND SUCCESSION  
TAX — DETERMINATION OF LIABILITY OF AN ESTATE TO A  
TAX.

The Treasurer and Receiver-General cannot determine, and should not attempt to advise, whether real estate is charged with a lien for payment of a legacy and succession tax which may become due in the future.

You ask my opinion whether there is a lien to-day for a succession tax which might possibly, but not probably, become due hereafter under the terms of a will which, as stated by you, show a possibility of a future interest in the decedent's estate passing in such a way as to become liable to a collateral inheritance tax.



I am informed that this opinion is requested at the instance of a bank which is considering the advisability of making a loan on real estate which was part of the decedent's property.

In an opinion of a former Attorney-General to the Treasurer and Receiver-General it was stated 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." I Op. Atty.-Gen. 85.

Even more clearly the Treasurer and Receiver-General cannot determine, and should not attempt to advise, whether a lien now exists which cannot until some future time be enforced. The authority of the Treasurer and Receiver-General in such cases is limited to an application to the Probate Court to determine the amount of taxes which *have become payable*, and of interest thereon, for which the real estate is charged with a lien, and after such determination to collect said taxes and interest. St. 1910, c. 440; G. L., c. 65, § 31. Until a tax becomes payable, the Treasurer and Receiver-General has no authority or duty in the matter.

I think you should say, in substance, in answer to the inquiry made of you, that you cannot undertake to answer the inquiry or to give advice upon it, and that certainly you cannot now waive any claim of lien to which the Commonwealth may be entitled. See in this connection St. 1903, c. 276.

I should add that officers of the State government are entitled to the opinion of the Attorney-General only upon questions necessary or incidental to the discharge of the duties of their office. See I Op. Atty.-Gen. 565; II Op. Atty.-Gen. 100. The question which you ask seems to me not to fall within that class.

FISHERIES AND GAME — LOBSTERS — LICENSE — ALIEN — ACTUALLY ENGAGED IN LOBSTER FISHING FOR FIVE YEARS PRECEDING DATE OF LICENSE.

In the matter of granting a license to an alien to catch or take lobsters under St. 1921, c. 116, the determination as to whether or not the alien in question has actually been engaged in lobster fishing in the county for five years next preceding the date of the license is for the official upon whom the responsibility rests in a given case.

In determining the question, the intent of the applicant with respect to his occupation during the period as well as the facts respecting his employment are to be taken into consideration.

To the Commissioner of Conservation.  
1921  
September 22.

You have requested my opinion upon a question of law in connection with the interpretation of St. 1921, c. 116, which is an act relative to the granting of licenses for the catching of lobsters. Section 1 provides, in part, that the clerk of any town in certain counties therein enumerated, situated on the shores of the Commonwealth, may grant a license to catch or take lobsters "to any individual who is an alien and who resides in the county where the town lies; provided, that such alien has resided in said county, and has been actually engaged in lobster fishing therein, for five years next preceding the date of the license."

You have before you the case where an alien who is an applicant for such a license found it necessary, during a period of one year within the limit of the five years preceding the date of his application for a license, to refrain from lobster fishing and to go back from the coast on account of his physical condition and on the advice of his medical adviser. During his temporary absence he showed no intention of disposing of his gear used in the fishing, and subsequently returned to engage again in the business, and was engaged in no other business in the meantime. You ask whether this interim of one year during the period of five years deprives the applicant from having issued to him a lobster fisherman's license.

Your inquiry, of course, requires a construction of the proviso that an alien applicant "has been actually engaged in lobster fishing therein, for five years next preceding the date of the license."

In the case of *In re Strawbridge & Mays*, 39 Ala. 367, 375, a

statute of that State exempted from militia duty in the State persons engaged in certain occupations so long as they are "actually engaged" therein. The court, in that case, held that the words "so long as they are actually engaged" could not be construed to mean that all those persons who are exempted shall continually employ their own personal skill and labor in any and all pursuits or occupations on account of which they were exempted. In discussing the question the court said: —

When we say of a man that he is actually engaged in farming or planting, we mean that he is really or truly engaged, engaged in fact. The words "actually engaged," in common parlance, are the opposite or antithesis of "seemingly" or "pretendedly" or "feignedly engaged."

This line of reasoning, in my opinion, applies to the construction of the words "actually engaged" as found in the Massachusetts statute under consideration.

The statutory requirement does not mean that an individual must be in fact engaged in lobster fishing every day or every week or every month of the specified period of five years. Whether he has been "actually engaged" in lobster fishing during the period is, like the question of domicile, a mixed question of law and fact, and it is for the official upon whom the responsibility rests in a given case to determine whether the applicant for a license has been actually engaged in lobster fishing within the meaning of the statute. In determining the question, the intent of the applicant with respect to his occupation during the period, as well as the facts respecting his employment, are to be taken into consideration. Whether the applicant in a given case, when he was unable to engage in lobster fishing, in fact engaged in any other work, or whether he was incapacitated for any work, whether in the case cited the gear used by him in the fishery during his disability was used by another person in his stead, or whether he had any interest in the business if his gear was in use, and other facts relating to each particular case, are to be taken into consideration. The question must be determined by the official upon whom rests the responsibility of passing upon the qualification of the applicant.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — SEARCHES  
FOR GAME OR FISH — POWERS OF INSPECTOR OF FISH.

Under Mass. Const., pt. 1st, art. XIV, searches and seizures are not unreasonable if they relate to contraband, illicit or stolen property, and if they are conducted under a warrant which meets the constitutional requirements.

Under Mass. Const., pt. 1st, art. XIV, an arrest without a warrant may be made of a person in the act of committing a crime or upon reasonable suspicion of having committed a felony, and doors may be broken without a warrant where there is a breach of the peace or reasonable ground to believe a felony has been committed, to apprehend the felon; but a search of a dwelling for contraband, illicit or stolen property without a warrant cannot lawfully be made without the consent of the owner; and the constitutional protection extends as well to a man's person, his papers and all his possessions.

The prohibition against unreasonable searches includes all searches without a warrant, with the exceptions noted, whether or not the search is conducted in a dwelling house.

Right of search is to be distinguished from right of inspection, authorized by statutes in numerous cases and upheld as a valid exercise of the police power. G. L., c. 130, § 6, purporting to authorize searches without a warrant of suspected places, for game or fish unlawfully taken or held, is unconstitutional.

The State Inspector of Fish and his deputy inspectors, authorized by G. L., c. 94, § 1, to enforce the provisions of G. L., c. 94, §§ 74-80, are not authorized to make arrests or to serve warrants, and they are not authorized to exercise any of the powers conferred by G. L., cc. 130 and 131.

To the Com-  
missioner of  
Conservation.  
1921  
September 27.

You ask my opinion concerning the powers of the Inspector of Fish and his deputy inspectors, appointed under G. L., c. 21, § 8, to search in suspected places, seize unlawful goods and make arrests for violations. I assume that your question refers to violations of the statutes appearing in G. L., c. 94, §§ 74-82, and perhaps also in G. L., cc. 130 and 131.

Mass. Const., pt. 1st, art. XIV, provides:—

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

The purpose of this provision, which appears in similar form in the Fourth Amendment to the Constitution of the United States, may be learned from contemporary history of controversies on the subject in this country and in England, well known to the framers of our Constitution. In the colonies the practice had obtained of issuing writs of assistance to the revenue officers empowering them, in their discretion, to search suspected places for smuggled goods. This practice James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book," since it placed "the liberty of every man in the hands of every petty officer." Cooley's *Constitutional Limitations*, 7th ed., pp. 426-428. The illegality of proceedings under general warrants was established in the case of *Entick v. Carrington*, 19 Howell's State Trials, 1029.

Under this constitutional provision searches and seizures are not unreasonable if they relate to contraband, illicit or stolen property, and if they are conducted under a warrant which meets the constitutional requirements. *Commonwealth v. Dana*, 2 Met. 329, 334-336; *Fisher v. McGirr*, 1 Gray, 1, 27-31; *Robinson v. Richardson*, 13 Gray, 454; *Boyd v. United States*, 116 U. S. 616, 622-630; *Veeder v. United States*, 252 Fed. Rep. 414, 418; 24 Op. Atty.-Gen. (U. S.) 685, 688.

By statute in this Commonwealth search warrants may be issued to search for property stolen or fraudulently concealed, counterfeit coin, bank notes or trademarks, unwholesome meat or provisions, diseased animals, obscene literature, certain drugs and medicines, lottery tickets, gaming apparatus and furniture, pool tickets, and dangerous weapons, bombs and explosives, kept for an unlawful purpose. G. L., c. 276, § 1. Search warrants may also be issued for intoxicating liquors (G. L., c. 138, §§ 61-64), and for game or fish unlawfully taken and concealed (G. L., c. 130, § 7). Property of the kinds enumerated in these statutes is properly made subject to search and seizure. *Fisher v. McGirr*, 1 Gray, 1, 27, 28; *Boyd v. United States*, 116 U. S. 616, 623, 624; Cooley's *Constitutional Limitations*, 7th ed., pp. 432, 433.

Searches and arrests without warrant are authorized only in

particular classes of cases. An arrest without warrant may be made by a peace officer, generally speaking, of a person in the act of committing a crime (*Commonwealth v. Hastings*, 9 Met. 259; *Commonwealth v. Tobin*, 108 Mass. 426); or upon reasonable suspicion of having committed a felony (*Commonwealth v. Carey*, 12 Cush. 246, 252; *Commonwealth v. Phelps*, 209 Mass. 396, 404). A peace officer has the right to break open doors without a warrant where there is an affray, assault or breach of the peace, or where he has reasonable ground to believe that a felony has been committed, to apprehend the felon. *McLemmon v. Richardson*, 15 Gray, 74, 77; *Commonwealth v. Tobin*, 108 Mass. 426, 429; *Ford v. Breen*, 173 Mass. 52; *Commonwealth v. Phelps*, 209 Mass. 396, 407, 408; *Delafoile v. New Jersey*, 54 N. J. L. 381.

But a search of a dwelling for contraband, illicit or stolen property without a warrant cannot lawfully be made except with the consent of the owner. *Weeks v. United States*, 232 U. S. 383, 389-392; *McClurg v. Brenton*, 123 Ia. 368; *United States v. Rykowski*, 267 Fed. Rep. 866, 871; 35 Cyc. 1265. While every man's house is his castle, and therefore especially inviolable, the constitutional protection extends as well to a man's person, his papers and all his possessions. *Ex parte Jackson*, 96 U. S. 727, 733; *Gouled v. United States*, 255 U. S. 298; *Amos v. United States*, 255 U. S. 313; *cf. Dunn v. Lowe*, 203 Mass. 516, 518.

In *Gouled v. United States*, the court says: —

It would not be possible to add to the emphasis with which the framers of our Constitution and this court . . . have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments (4th and 5th). . . . It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.

I am of opinion that the prohibition against unreasonable searches includes all searches without warrant, with the exceptions noted, whether or not the search is conducted in a dwelling house.

A distinction should be noted between right of search and right of inspection. A "search" is a quest by an officer of the law. *Hale v. Henkel*, 201 U. S. 43, 76. As applied to searches and seizures, the term means an examination of a man's house, premises or possessions, or of his person, with a view to the discovery of some particular personal property. Black's Law Dict. The word "inspection," on the other hand, is derived from the Latin word *inspectio*, meaning the act or process of looking into. An inspection has been defined as "something which can be accomplished by looking at or weighing or measuring the thing to be inspected, or applying to it at once some crucial test." *People v. Compagnie Gén. Transatlantique*, 107 U. S. 59, 62. The term "inspection laws" appears in the Constitution of the United States, art. I, § 10, and is there used with reference to State laws regulating the quality of articles of commerce and the kind of packages containing them. *Gibbons v. Ogden*, 9 Wheat. 1, 203; *Turner v. Maryland*, 107 U. S. 38.

Laws authorizing inspection of articles of food, merchandise, machinery and buildings, and entry on a person's premises for that purpose, are common in every State. *State v. McGough*, 118 Ala. 159, 167; *People v. Harper*, 91 Ill. 357, 367; *Willis v. Standard Oil Co.*, 50 Minn. 290; *Cincinnati Gas Light and Coke Co. v. State*, 18 Oh. St. 237; Abbott's Law Dict. Such provisions in our statutes are too numerous to enumerate, but include the following objects: milk (G. L., c. 94, §§ 33, 35), cold-storage warehouses (G. L., c. 94, §§ 67, 68), slaughterhouses and carcasses (G. L., c. 94, §§ 121-124, 126), meat and provisions (G. L., c. 94, § 146), weights and measures (G. L., c. 98, §§ 32, 42), hospitals (G. L., c. 111, § 72), water supply (G. L., c. 111, § 165), intoxicating liquor (G. L., c. 138, § 47), lodging houses (G. L., c. 140, §§ 25, 37, 38), plumbing (G. L., c. 142, § 11), buildings (G. L., c. 143, §§ 6, 13, 28, 35, 48, 50), elevators (G. L., c. 143, §§ 62-64), tenement houses (G. L., c. 144, § 86; c. 145, § 51), boilers (G. L., c. 146, § 5), buildings for fire prevention (G. L., c. 148, §§ 5, 44) and places of employment (G. L., c. 149, §§ 10, 17). Many of these statutes expressly authorize entry on premises, and some provide for taking of samples. See also G. L., c. 94, § 304.

Questions concerning the constitutionality of such legislation seem rarely to have been considered, but there are a few decisions in this Commonwealth where laws of that sort have been upheld as a valid exercise of the police power; and the distinction between an entry on premises for inspection and for a search has been pointed out.

In *Commonwealth v. Ducey*, 126 Mass. 269, 273, the court had under consideration the constitutionality of an act relating to intoxicating liquors, which authorized certain officers to enter upon the premises of any person licensed to sell thereunder. The court sustained the act, stating their reasons as follows: —

The power conferred by this section upon the officers therein named, to "enter upon the premises of any person licensed to sell under this act, to ascertain the manner in which such person conducts his business, and to preserve order," does not authorize any search or seizure of person or property; and is therefore not open to the objection . . . of not providing for a previous oath or affirmation, and a special designation of the persons or objects of search, arrest or seizure, as required by the fourteenth article of the Declaration of Rights. It is but a reasonable exercise of the police power to preserve the public peace, and to see that the business carried on in the buildings described in the several licenses is conducted according to the conditions of the license, the provisions of the statute under which it is granted, and the stipulations of the bond executed by the licensee himself.

The court specifically stated that the evidence did not require them to consider the validity of another provision of the act authorizing the taking of samples of liquors, nor whether the officers would have the right, after demanding and being refused admittance, to break outer doors to make entry.

In *Commonwealth v. Carter*, 132 Mass. 12, 14, 15, the court held constitutional an act which authorized inspectors of milk to enter carriages used in the conveyance of milk, and when they had reason to believe any milk found therein was adulterated to take specimens for analysis. The reasons which the court gave were, in part, as follows: —

If the statute had required that all milk offered for sale should first be inspected, it would hardly be contended that the trifling injury to property occasioned by taking samples for inspection would be such a



taking of private property for public use as to require that compensation be made therefor. Such an injury to property is a necessary incident to the enforcement of reasonable regulations affecting trade in food. Private property is held subject to the exercise of such public rights, for the common benefit; and in the case of licensed dealers in merchandise, the injury suffered by inspection is accompanied by advantages which must be regarded as a sufficient compensation. . . . Instead of requiring all milk offered for sale to be first inspected, the Legislature for obvious reasons has permitted licensed dealers to sell milk without inspection, has imposed penalties for selling adulterated milk, has defined what shall be deemed adulterated milk, and has provided that when the inspector of milk has reason to believe that any milk has been adulterated he may take specimens thereof in order that by analysis or otherwise he may determine whether the milk has been adulterated. Such a seizure of milk for the purposes of examination is a reasonable method of inspection, and does not require a warrant. It is a supervision under the laws by a public officer of a trade which concerns the public health, and is within the police power of the Commonwealth.

In *Commonwealth v. Smith*, 141 Mass. 135, 138, the court, referring to the preceding case, said:—

The right given by the statutes to take specimens of milk was held to be a constitutional exercise of the police power of the Commonwealth, in *Commonwealth v. Carter*, 137 Mass. 12, on the ground that it was a reasonable method of inspecting an article of food.

In brief, these cases sustain the right of an officer, authorized by a statute which is justified as a legitimate exercise of the police power, to make peaceable entry for purposes of inspection, and also to take samples without compensation, as a reasonable method of inspection, in view of the trifling injury to property caused thereby. The cases do not hold that doors may be broken where entry is opposed. Whether that would be lawful is left in doubt.

With respect to the power to search for game or fish unlawfully taken or held, R. L., c. 91, § 91, provided as follows:—

For the purpose of enforcing the provisions of section eighty-eight, any one of the commissioners on fisheries and game or their deputy or any member of the district police may search in suspected places for, seize and remove lobsters which have been unlawfully taken, held or offered for sale.

In 1904 a statute was passed (St. 1904, c. 367) authorizing search to be made "with a warrant" for game or fish unlawfully taken or held in places other than dwelling houses.

In *Dunn v. Lowe*, 203 Mass. 516, the plaintiff brought suit against the defendant, a duly qualified deputy fish and game commissioner, for forcibly seizing and opening sacks containing lobsters in the manual possession of the plaintiff. The court held, with respect to R. L., c. 91, § 91, that it did not contemplate or authorize such a violation of personal rights, and ordered judgment for the plaintiff. Referring to St. 1904, c. 367, the court said:—

The St. 1904, c. 367, purports to cover the whole subject of searches by a commissioner or deputy commissioner on fisheries and game for game or fish believed to be taken or held in violation of law. Seemingly it was intended to relieve the subject of constitutional objections that might be made to searches under the R. L. c. 91, § 91. See Constitution of Massachusetts, Declaration of Rights, art. 14; *Fisher v. McGirr*, 1 Gray, 1. This later statute includes searches for lobsters, and supersedes and repeals by implication, so much of § 91, relied on by the defendant, as relates to searches. It is therefore unnecessary to consider the constitutional question discussed at the argument.

After this decision was rendered, the General Court, by St. 1910, c. 548, amended St. 1904, c. 367, § 1, in certain respects not here material and by inserting after the word "with" and before the words "a warrant" the significant words "or without." This statute now appears in G. L., c. 130, § 6, in the following form:—

The director, a warden, deputy or state police officer, may, without a warrant, search any boat, car, box, locker, crate or package, and any building, where he has reason to believe any game or fish unlawfully taken or held may be found, and may seize any game or fish so taken or held, which shall be disposed of in such manner as the director deems for the best interests of the commonwealth; provided, that this section shall not authorize entering a dwelling house, or apply to game or fish passing through this commonwealth under authority of the laws of the United States.

In the light of the previous discussion, and in accordance with what is apparently the view indicated in *Dunn v. Lowe*, *supra*,

it is my opinion that section 6, in purporting to authorize the director and other officers without a warrant to make searches for game or fish unlawfully taken or held, is in violation of Mass. Const., pt. 1st, art. XIV, quoted above. In my opinion to you under date of July 2, 1920 (V Op. Atty.-Gen. 589), where the application of the statute to a search of parts of a hotel not used for dwelling purposes was considered, this constitutional question was not referred to by the inquiry or discussed. I am stating my opinion on that question now for the protection of the officers in your department who might otherwise unwittingly be subjected to some civil or criminal liability. It should be added that the statute might be reframed as an inspection law in such form as to remove the constitutional objection. On that point I express no opinion.

Your letter asks as to the powers of the Inspector of Fish and deputy inspectors whose appointment is authorized by G. L., c. 21, § 8.

The Inspector of Fish is expressly authorized by G. L., c. 94, § 81, to enforce the provisions of sections 74 to 80, inclusive, of that chapter, and his deputy inspectors have the same authority. A deputy is one who by appointment exercises an office in another's right. *Carter v. Hornback*, 139 Mo. 238; *Willis v. Melvin*, 53 N. C. 62; *Bouvier's Law Dict.*; cf. *Attorney-General v. Tillinghast*, 203 Mass. 539, 544. In enforcing those provisions they have not, however, the powers of peace officers to make arrests or to serve warrants. G. L., c. 276, § 23; *Rohan v. Sawin*, 5 Cush. 281, 284; *Averill v. Chadwick*, 153 Mass. 171; *Beard v. Seavey*, 191 Mass. 503. Nor do I find any provision authorizing search warrants to be issued in cases of violations of said sections 74 to 80, inclusive.

I find no provision authorizing the Inspector of Fish or his deputy inspectors to exercise any of the powers described in chapters 130 and 131. The powers of enforcement therein given are confined to the director, the wardens and deputy wardens, State police, and officers qualified to serve criminal process. In this category the Inspector of Fish and his deputies are not included.

## INLAND WATERS — LICENSING OF FISHERMEN.

Unless the contrary appears by express provision or clear implication, the words "inland waters," as used in G. L., c. 131, § 3, apply to waters where the tide does not ebb and flow.

To the Com-  
missioner of  
Conservation.  
1921  
September 29.

You ask my opinion as to the meaning of the words "inland waters," as used in Gen. St. 1919, c. 296, § 1, incorporated in G. L., c. 131, § 3, the particular question at issue being whether Bass River, which lies between the towns of Yarmouth and Dennis, is an inland water, within the meaning of the statute.

The section referred to provides, in part, as follows: —

It shall be unlawful for any person to hunt, pursue, take or kill any bird or quadruped, or to fish, except as hereinafter provided, in any of the inland waters of the commonwealth which have been stocked by the board of commissioners on fisheries and game, hereinafter called the commissioners, since January first, nineteen hundred and ten, without having first obtained a certificate of registration as hereinafter provided.

Bass River was stocked with fish after Jan. 1, 1910, by the Board of Commissioners on Fisheries and Game. You state that the river is tidewater for practically, if not actually, its entire length. The question, then, resolves itself into this: Is a tidal river within the meaning of the term "inland waters" as used in the act?

The words "inland waters" are variously defined with respect to their use for special purposes, widely diverse, which have no special relation to each other.

For example, in cases arising under a Federal statute regarding the seizure of property in time of war, the United States Supreme Court has defined these waters to include rivers where the tide ebbs and flows. *Porter v. United States*, 106 U. S. 607, 611; see also *The Cotton Plant*, 10 Wall. 577.

In dealing with a policy of marine insurance, a New York court has held that inland waters include not only rivers but bays and arms of the sea between projections of land. *Cogswell v. Chubb*, 1 App. Div. (N. Y.) 93.

It is clear that definitions relating to navigation, insurance and the uses to be made of inland waters in time of war can have little application to fishing rights in such waters.

This Commonwealth has not hesitated to incur large expense in cultivating fish life in the fresh waters of the State. At the outset, the chief concern of the Department of Fisheries and Game was the protection and propagation of fresh-water fish. In recent years the department has extended its activities to the study of the shellfish industries and the protection and propagation of lobsters, clams and scallops, as well as smelts and alewives. I am informed that in tidal rivers there is a general mingling of fresh-water and salt-water fish, and that trout and herring, for example, may be caught in the same waters.

The activity of the department in the protection and propagation of salt-water fish raises the inquiry and makes necessary a determination as to the meaning and application of the statute in question. It is clear that the statute is not intended to apply to the coast fisheries nor to require the licensing of fishermen, except in so far as is necessary to protect the inland waters which have been stocked by the department. To require a license for fishing in a river where the tide ebbs and flows, because it may have been stocked with fish, would be but one step removed from requiring a license to fish in harbors and bays where trout or other fresh-water fish may at times be found.

In determining the purpose and intent of the statute, an examination of the statutes in other States having tidal rivers is of value. In Maine (R. S., c. 33, § 17) the application of the law defining the annual closed season on trout is limited to "brooks, streams and rivers of the state above tide waters." Similarly, in section 26 of the same chapter, the prohibition with respect to taking smelts with a dip-net is limited to "all the inland waters of the state above tide waters."

In New Hampshire the closed season on pike, perch or white perch and black bass originally extended to "any of the waters of this state" (P. S., c. 133, § 8), but in 1893, by an act of the Legislature (St. 1893, c. 20, § 2), the words "except tide waters" were inserted. Similarly, fishing through the ice is subject to

certain restrictions (St. 1897, c. 54, § 1) "except in tide waters within the state." The Supreme Court of that State has held, in *Scott v. Willson*, 3 N. H. 321, 325:—

The common law considers all rivers, where the tide does not ebb and flow, as inland rivers, not navigable, and as belonging to the owners of the adjacent soil. (Citing 4 Burr. 2162.)

In a Connecticut case the term "inland rivers" is used to designate rivers in which the tide does not ebb and flow. *Adams v. Pease*, 2 Conn. 481.

I am of the opinion that, in all laws providing for the licensing of fishermen and imposing limitations upon fishing in inland waters, unless the contrary appears by express provision or clear implication, the words "inland waters" are to be taken to apply to waters where the tide does not ebb and flow.

---

SALE OF SHARES OF CAPITAL STOCK — WORD "CERTIFICATE" —  
H. V. GREENE COMPANY.

The provisions of G. L., c. 174, do not apply to the sale of shares of the capital stock of corporations on the partial payment or instalment plan.

I am in receipt of your inquiry as to whether the H. V. Greene Company comes within the provisions of G. L., c. 174.

The facts, as I understand them, upon which your inquiry is based, are these:—

The H. V. Greene Company is a corporation organized under the laws of this Commonwealth, and among its purposes, as stated in its articles of organization, are to be found the following: "to draw, accept, indorse, acquire and sell all or any negotiable or transferable instruments or securities, including bonds, bills of exchange; . . . sell, exchange and deal in shares, stocks, bonds, obligations or securities of any private or public corporation, government or municipality; . . . to sell . . . shares of the capital stock, bonds, indentures or other evidence of indebtedness created by this or any other corporation or corporations of this or any other state or country. . . ."

To the Commissioner  
of Banks.  
1921  
September 29.

This company has, under its charter, been selling on the partial payment or instalment plan shares of the capital stock, common and preferred, of The Mutual Finance Corporation, The Commercial Finance Corporation and The First People's Trust, the first two corporations being organized under the laws of this Commonwealth, and the latter operated under a declaration of trust.

G. L., c. 174, § 1, provides as follows:—

The business of issuing, negotiating or selling any bonds, certificates or obligations of any kind on the partial payment or instalment plan, unless such bond, certificate or obligation shall at the time of issuance, negotiation or sale be secured by adequate property, real or personal, shall be transacted in the commonwealth only by corporations subject to the requirements of this chapter. Every such corporation before doing business in the commonwealth shall have at least one hundred thousand dollars of capital stock fully paid in, which, for the benefit and protection of all its investors equally shall be deposited in trust with the state treasurer or with the duly authorized officer of some other state, . . .

Section 3 provides:—

No corporation shall transact the business described in section one without receiving a certificate of authority from the commissioner of banks. Upon the making of the deposit with the state treasurer or the filing with the commissioner of the certificate required by section one and upon an examination or exhibition of the assets and liabilities of the corporation showing that it is in a sound financial condition, and if it is otherwise duly qualified under the laws of the commonwealth to transact business therein, the commissioner shall issue to it a certificate of authority to do business in the commonwealth.

The business referred to in section 1 of this act is that "of issuing, negotiating or selling any bonds, certificates or obligations of any kind." The particular business carried on by the H. V. Greene Company, with reference to which this inquiry is addressed, is that of selling shares of capital stock issued by a corporation other than its own. The question which presents itself, therefore, is whether the word "certificate," as used in said section, can be said to include and apply to shares of stock or certificates of stock.

Where words have a peculiar and appropriate meaning in the law they should be construed and understood according to such meaning. This is the rule of exposition laid down in G. L., c. 4, § 6, cl. 3. It is also well settled that statutes are to be construed according to the intention of the framers.

The word "certificate," in its broad sense, means a documentary declaration. There are any number of different kinds of certificates. When the word stands alone the particular kind of certificate that it has reference to is to be determined from the remainder of the text. The words used in section 1 of the act are "bonds, certificates or obligations of any kind." The words "obligations of any kind" modify the words "bonds" and "certificates," and clearly denote that the word "certificate," as used in said section, was intended to be used in the sense of an obligation or certificate of indebtedness.

A share or certificate of stock, though carried as a liability of the corporation or joint stock company issuing the same, is not an obligation in the sense of its being a promise to pay. It is an official voucher as to the ownership of a share in a corporation or a joint stock company.

A careful examination of the statutes dealing with corporations discloses but one instance where the Legislature used the word "certificate" as applying to shares or certificates of stock. (G. L., c. 155.) It manifested this intention by defining the word "certificate" under section 26 of said chapter. In all other instances the words used are "shares," "shares of stock" and "certificates of stock."

It is to be noted that just prior to the time that said chapter 174 was first enacted (St. 1904, c. 427) a number of corporations, foreign and domestic, organized as so-called bond and investment companies, engaged in the business of issuing and selling bonds on the partial payment or instalment plan, with promises of a maturity value far in excess of the aggregate of the instalments and any reasonable interest. These companies preyed upon the public and gave them nothing in return for their investment other than unguaranteed promises of large interest in the future. Finding that these companies were able to operate under the



then existing laws without proper supervision, the Legislature, on the recommendation of the Commissioner of Corporations, the Insurance Commissioner and the Savings Bank Commissioners, passed said act as "An Act to regulate bond and investment companies." It was unquestionably because of this desire to protect purchasers of such obligations, and not purchasers of shares of stock in business corporations, as appears in the communications addressed by the Attorney-General to the Insurance Commissioner and the Commissioner of Corporations, enclosing a draft of a bill providing for the licensing and examination of corporations doing this class of business, which were, in turn, submitted to the Legislature by His Excellency John L. Bates (see House Document No. 1295, 1904), that the Legislature passed the act.

To hold that said chapter was intended to apply to and to include shares of stock would mean that no person, partnership or association could engage in the business of selling stock on the partial payment or instalment plan in this Commonwealth as broker or selling agent, as under the provisions of section 1 of said chapter the business could be carried on only by corporations subject to the requirements of said chapter. This was clearly not the intention of the Legislature.

I am therefore of the opinion that, on the facts as stated, the H. V. Greene Company does not come within the provisions of G. L., c. 174, and that it was therefore unnecessary for it to receive a certificate of authority from you, as Commissioner of Banks, before it engaged in the business of selling certificates of stock on the partial payment or instalment plan.

The General Court at its last session, upon the report of a special commission which recommended legislation relating to the issue and sale of negotiable securities, enacted St. 1921, c. 499, which must be considered in relation to the question presented by your letter.

DEPARTMENT OF EDUCATION — CONTINUATION SCHOOLS — REFUSAL TO MAINTAIN — FORFEITURE OF FUNDS BY THE COMMONWEALTH.

It is the duty of the Department of Education to require the maintenance of a continuation school in those municipalities in which, in any year, 200 or more minors under sixteen are employed not less than six hours per day, by authority of employment certificates or home permits, exclusive of minors employed only during vacations.

A town which has accepted Gen. St. 1919, c. 311, and in which, during 1920, 308 minors of the class described were employed not less than six hours per day, by authority of employment certificates or home permits, exclusive of minors employed only during vacations, is required to maintain a continuation school during the ensuing school year.

If such town has refused or neglected to appropriate the money necessary for the maintenance of such a continuation school, in compliance with G. L., c. 71, § 26, it becomes the duty of the Department of Education to estimate the sum necessary properly to provide for the maintenance of the school, and to notify the Treasurer and Receiver-General that the said town has forfeited from funds due it from the Commonwealth a sum equal to twice that so estimated.

You have requested my opinion on certain questions of law involving the construction to be given G. L., c. 71, § 21. Said section 21 and the five following sections contain the statutory provisions relative to the establishment and maintenance of continuation schools. Section 21 reads as follows: —

Every town which has accepted chapter three hundred and eleven of the General Acts of nineteen hundred and nineteen, and in which, in any year, two hundred or more minors under sixteen are employed not less than six hours per day by authority of employment certificates or home permits described in section one of chapter seventy-six, exclusive of minors employed only during vacations, shall, and any other town which has accepted said chapter, may, through its school committee, local board of trustees for vocational education, or both, establish at the beginning of the next school year and maintain continuation schools or courses of instruction for the education of such minors, and for such others as may be required to attend under section twenty-five. The said schools or courses shall be in session the same number of weeks in each year as the local high schools, and the sessions shall be between the hours of eight in the morning and five in the afternoon of any working days except Saturday.

You state that the town of Braintree has accepted the provisions of Gen. St. 1919, c. 311, and that the official report from that

To the Commissioner  
of Education.  
1921  
October 4.

town and other towns having minors described in said section 21 employed in Braintree showed by count that there were 380 such minors employed there in the calendar year 1920. You further state that the school committee of Braintree has notified you in writing that the town refuses to continue the continuation school. You state that the town of Braintree contends that during some portion of the calendar year of 1920 less than 200 minors were in attendance at its continuation school, and that because of this fact there were not 200 or more minors employed in Braintree during the year 1920, and that therefore the town of Braintree is not obliged to maintain this continuation school during the present school year.

Your first question is as follows:—

Is it not incumbent upon the Department of Education to determine a procedure for securing the count of minors described in G. L., c. 71, § 21?

It is clearly the duty of the Department of Education to require the maintenance of a continuation school in those municipalities in which, in any year, 200 or more minors under sixteen are employed not less than six hours per day, by authority of employment certificates or home permits, exclusive of minors employed only during vacations. By the provisions of G. L., c. 69, § 1, it is the duty of the Commissioner of Education to collect information relative to the performance of their duties by school committees. Further, by the provisions of G. L., c. 149, § 89, records and statistics concerning the issuance of employment certificates, as may be prescribed by the Department of Education, shall be kept, and shall be open to the inspection of said department, its officers or agents. Clearly, it is your duty to collect the information, in order to ascertain whether or not 200 or more minors, in any year, are employed under the conditions set forth in said section 21.

Your second question is as follows:—

Does the count of minors, as secured and used by the Division of Vocational Education in the Department of Education, in determining

the obligations of towns under the provisions of G. L., c. 71, § 21, determine those obligations fairly and equitably as well as legally?

You have submitted to me Booklet No. 8, entitled "Compulsory Continuation Schools," issued under date of February, 1921, on pages 8 and 9 of which is printed a blank form for return as to minors between fourteen and sixteen years of age, who within the last calendar year were employed while the schools were in session. In my judgment, the form of return is a proper one, as a matter of law, and is within the authority of your department, under the statutory provisions for obtaining information as set forth above. The question as to whether the return secures the count fairly and equitably is not strictly within my province to answer, but an examination of the return does not indicate, in my opinion, anything of an unfair or inequitable nature.

My answer to your second question makes it unnecessary to take up your third question.

Your fourth question is as follows:—

Is the town of Braintree required by G. L., c. 71, § 21, to maintain continuation schools during the ensuing school year?

According to the facts submitted by you to me, the official report from the town of Braintree shows that during 1920, 380 minors of the class described in G. L., c. 71, § 21, were employed in 1920 not less than six hours per day, by authority of employment certificates or home permits, exclusive of minors employed only during vacations. On the facts given, the town of Braintree having accepted Gen. St. 1919, c. 311, it becomes, by the provisions of said section 21, mandatory upon the town of Braintree to maintain a continuation school for the present school year.

Your fifth question is as follows:—

What responsibilities devolve upon the Commissioner of Education in administering the provisions of G. L., c. 71, § 26?

Said section 26 reads as follows:—

A town required by section twenty-one to establish and to maintain continuation schools or courses which refuses or neglects to appropri-

ate money necessary therefor, shall forfeit from funds due it from the commonwealth a sum equal to twice that estimated by the department as necessary properly to provide for the same. A sum equal to three fifths of such forfeiture shall be paid by the state treasurer to the school committee of the delinquent town, and the committee shall expend the same for such establishment and maintenance to the same extent as if it had been regularly appropriated by the town therefor.

The first duty of your department is to ascertain whether or not the town of Braintree has appropriated the money necessary for the maintenance of the continuation school at Braintree for the present school year. If the town of Braintree has refused or neglected to appropriate the said money, your department should then estimate the sum necessary properly to provide for the maintenance of the school, and forthwith notify the Treasurer and Receiver-General that the town of Braintree has forfeited from funds due it from the Commonwealth a sum equal to twice that estimated by your department as necessary properly to provide for the maintenance of the school. I am informed that a general payment is to be made to the town of Braintree on Nov. 15, 1921. Consequently, if the town of Braintree has refused or neglected to appropriate the necessary money for the continuation school, steps should be taken to bring about the forfeiture of the funds at the time of the coming payment.

Your sixth question is as follows:—

In the case of Braintree, has the town at this time, within the provisions of the law, refused or neglected to raise and appropriate money for the maintenance of continuation schools, as provided by G. L., c. 71?

Whether or not the town has appropriated the said money is a question of fact, and not properly before me for determination.

Your seventh question is answered by the answer to question 6.

Your eighth question is as follows:—

May minors described in G. L., c. 71 (those liable to attend continuation schools and employed in a town which had more than 200 employed in the last calendar year), legally work or legally be certified for employment in a town which is violating the provisions of said chapter 71?

In my judgment, this question is collateral to those asked by you above, which directly concern the obligation of the town of Braintree to maintain its continuation school this school year, and concerning which your department has authority in the situation. The questions involved in your eighth inquiry, in my opinion, do not concern the duties of your department but those of the Department of Labor and Industries. I must therefore be excused from answering the same.

Finally, you will note that by the provisions of G. L., c. 71, § 26, a sum equal to three fifths of the amount forfeited under that section shall be paid by the Treasurer and Receiver-General to the school committee of the delinquent town, and the committee shall expend the same for such establishment and maintenance to the same extent as if it had been regularly appropriated by the town therefor. If, after such sum shall be paid to the school committee of Braintree, that committee should then refuse to maintain the continuation school, the law may be enforced by appropriate proceedings.

---

#### WOMEN AND CHILDREN — EMPLOYMENT IN CERTAIN KINDS OF BUSINESS — "IN LABORING."

The inquiry whether a woman or child employed in one of the businesses enumerated in G. L., c. 149, § 56, is engaged "in laboring," within the meaning of that section, presents a mixed question of law and fact, to be determined under the circumstances of each case.

If the duties discharged by a woman or child employed in one of the businesses enumerated in G. L., c. 149, § 56, are discharged during regular hours, are of routine character, are of a grade similar to those ordinarily performed by women or children in the businesses enumerated, and do not involve judgment or discretion, a finding that such woman or child is engaged "in laboring," within the meaning of G. L., c. 149, § 56, would ordinarily be warranted, even though the labor performed be largely mental and only incidentally manual; but such a finding might in some instances be negated by proof that similar duties are discharged by women and children in other businesses than those enumerated in said section.

G. L., c. 149, § 56, provides, in part: —

No child and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company more than nine hours in any one day; . . .

You request me to define the scope of the words "in laboring," as used in this act, with respect to the kind of employment covered.

The quoted portion of this section fixes the maximum number of hours in any one day during which women and children may be employed "in laboring" in certain designated establishments and businesses. The uncertainty as to the meaning of the words "in laboring" arises in large measure from the extension of the act, from time to time, to include new kinds of establishments and businesses.

G. S., c. 42, § 3, forbade the employment of any child under twelve years of age for more than ten hours in any one day "in any manufacturing establishment." P. S., c. 74, § 4, prohibited the employment of minors under eighteen and of women for more than ten hours in any one day "in laboring in any manufacturing establishment." Under this act the words "in laboring" naturally apply to manual labor as distinguished from work primarily mental.

R. L., c. 106, §§ 23 and 24, extended the prohibitions contained in those sections to minors under eighteen and to women "employed in laboring" in mercantile, manufacturing and mechanical establishments. A large number of women, perhaps the majority of women who work in "mercantile" establishments, are engaged in selling goods over the counter. Although such work involves mental exertion coupled with physical exertion in greater or less degree, I cannot suppose that the words "in laboring" would exclude such women from the scope of the act as matter of law. So to construe it would, to a considerable extent, defeat extension of it to mercantile establishments. On the other hand, it cannot be held to extend to all women who work in such establishments, irrespective of the duties discharged. One of my predecessors has ruled that St. 1909, c. 514, § 47, which provided that "no child and no woman shall be employed in laboring in a mercantile establishment" more than fifty-eight hours in a week, did not apply to the female manager of a large department in such an establishment, whose duties required judgment and discretion and did not necessarily involve either manual labor or fixed and definite hours. III Op. Atty.-Gen. 269. In *Com-*

*monwealth v. Riley*, 210 Mass. 387, 392; S. C., 232 U. S. 671, which upheld the constitutionality of the latter act, it was pointed out that the act did not apply to women who do not labor for full working days or who are temporarily or intermittently hired for casual tasks, such as sweeping floors or washing windows. See also *Commonwealth v. Osborn Mill*, 130 Mass. 33.

A considerable extension was made by St. 1913, c. 758, which provides, in part: —

No child under eighteen years of age and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company, more than ten hours in any one day; . . .

This act, with respect to the question which you raise, is substantially similar to G. L., c. 149, § 56. It brings within the scope of the prohibition telegraph offices, telephone exchanges and express and transportation companies. In *Commonwealth v. John T. Connor Co.*, 222 Mass. 299 (to which you call my attention), it was held that it could not be said as matter of law that a female cashier employed to make change in a mercantile establishment was not engaged "in laboring," within the meaning of the act, and that the question whether she was so engaged was properly submitted to the jury upon all the evidence. In that case the duties discharged by the cashier involved mental and, in a minor degree, manual exertion, did not involve judgment or discretion, were of routine character and were performed during regular hours. They did not differ sensibly in degree from those discharged by telephone and telegraph operators, and, presumably, from those discharged by female employees of transportation and express companies. While it could not be said, as matter of law, either that she was or was not engaged "in laboring," a finding of fact that she was so engaged could not be disturbed.

In my opinion, that decision establishes that each case must rest upon its own facts, which are to be tested by the standard therein laid down. If the duties discharged by a woman employed in one of the enumerated industries are discharged during



regular hours, are of routine character, are of a grade substantially similar to those ordinarily performed by female employees in the businesses enumerated, and do not involve judgment and discretion, a finding that the female employee is engaged "in laboring," within the meaning of the act, would probably be warranted even though the labor performed was largely mental and only incidentally manual. If, however, the position and duties be common to businesses not included in the act as well as to businesses within it, a finding that such female employee is not engaged "in laboring" may well be made, since it is not to be presumed that the Legislature intended to include some members of the class because they work in selected industries, while excluding other members of the same class simply because they work in other industries. On the latter ground a finding that female accounting clerks, bookkeepers and stenographers are not employed "in laboring" might be supported. IV Op. Atty.-Gen. 118.

---

TAXATION — TRUST COMPANIES — LIABILITY TO TAX WHERE  
COMPANY IS IN THE HANDS OF THE COMMISSIONER OF BANKS  
OR HAS VOLUNTARILY CEASED TO DO BUSINESS.

Trust companies in the hands of the Commissioner of Banks on April 1 are not subject to tax under G. L., c. 63, § 58.

Trust companies having ceased to do business on April 1 are, nevertheless, subject to tax under G. L., c. 63, § 58.

You ask my opinion whether you are to assess a tax upon certain trust companies, of which five are now and have been since various dates prior to April 1, 1921, in the hands of the Commissioner of Banks, and two others voluntarily ceased doing business on various dates prior to April 1, 1921.

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
October 20.

Trust companies are taxable under G. L., c. 63, §§ 53, 55 and 58, which are, in part, as follows: —

SECTION 53. Every corporation organized under general or special laws of the commonwealth for purposes of business or profit, having a capital stock divided into shares, except banks whose shares are otherwise taxable under this chapter, except insurance companies with capital stock and mutual insurance companies with a guaranty capital or permanent fund whose premiums are otherwise taxable under this chapter,

and except corporations taxable under sections thirty to fifty-one, inclusive, in addition to all returns required by its charter, and in addition to all returns otherwise required under this chapter, shall annually, between April first and tenth, make a return to the commissioner, on oath of its treasurer, stating the name and place of business of the corporation, and setting forth as of April first of the year in which the return is made:

SECTION 55. The commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation required to make a return under section fifty-three or fifty-four, and shall estimate therefrom the fair cash value of all the shares constituting its capital stock on April first preceding, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this chapter, be taken as the true value of its corporate franchise. From such value there shall be made the following deductions:

SECTION 58. Every corporation subject to sections fifty-three or fifty-four shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section fifty-five, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, . . . but the total amount of the tax to be paid by a trust company in any year upon the value of its corporate franchise shall amount to not less than two fifths of one per cent of the total amount of its capital stock, surplus and undivided profits at the time of said assessment, as found by the commissioner.

The tax imposed by those sections is an excise tax upon the value of the corporate franchise on the first day of April. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428, 438; *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493, 496; *Farr Alpaca Co. v. Commonwealth*, 212 Mass. 156, 162.

On the first day of April, 1921, five of the seven trust companies to which you refer were in the hands of the Commissioner of Banks. These corporations, then, were not subject to the franchise tax for the year 1921 imposed by G. L., c. 63, § 58. *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207. It was held by this decision that a savings bank of which the Commissioner had taken possession was not subject to an excise tax, and the principle applied is equally applicable to the case of a trust company.

G. L., c. 63, § 16, provides for an apportionment of the tax imposed upon certain banks which have become incapacitated from doing business, by reducing the amount of the tax to correspond with the period of incapacity. This provision was first passed in 1911 (St. 1911, c. 618, § 1), after the tax was assessed which was held to be illegally exacted in *Greenfield Savings Bank v. Commonwealth, supra*. This statute is, however, expressly made applicable only to taxes imposed on deposits in savings banks and savings departments of trust companies by G. L., c. 63, § 11, and is not applicable to the tax imposed by G. L., c. 63, § 58.

It is therefore my opinion that the five trust companies in the hands of the Commissioner of Banks should not be assessed.

The remaining two trust companies on the first day of April, 1921, had ceased to do business. They were, nevertheless, liable to pay the franchise tax imposed by G. L., c. 63, § 58. The rule is stated by Knowlton, J., in *Attorney-General v. Massachusetts Pipe Line Gas Co.*, 179 Mass. 15, 19, in the following words:—

The franchise which subjects the corporation to taxation is the right to do business legally by complying with the laws. A corporation having this right under legislative action cannot relieve itself from liability to taxation by neglecting to do business, or ceasing to do business. Its franchise remains, and it may do business when it chooses.

See also the opinion rendered to you under date of March 21, 1921 (VI Op. Atty.-Gen. 93). In that opinion the distinction was pointed out between a franchise tax imposed upon the *privilege* of doing business (such as the tax here in question) and a tax imposed "*with respect to the carrying on or doing of business*" by a corporation, such as the tax on domestic business corporations. G. L., c. 63, § 32. The opinion held that a corporation which had carried on no business whatever during the preceding calendar year was not liable to a tax of the latter sort, distinguishing such a tax from the ordinary franchise tax, as to which the rule as laid down in *Attorney-General v. Massachusetts Pipe Line Gas Co., supra*, is applicable.

Accordingly, it is my opinion that said two trust companies should be assessed under G. L., c. 63, § 58.

COMMISSIONER OF BANKS — POSSESSION OF TRUST COMPANY —  
PUBLIC OFFICER — ADVICE BY ATTORNEY-GENERAL OR  
SPECIAL COUNSEL.

When the Commissioner of Banks takes possession of a trust company under the authority conferred by St. 1910, c. 399 (now G. L., c. 167, §§ 22 to 36), he acts as a public officer, and may request advice of the Attorney-General as to the discharge of duties imposed upon him by law.

Under St. 1910, c. 399, §§ 6 and 10 (now G. L., c. 167, §§ 26 and 30), the Commissioner of Banks may procure expert assistance and advice in the liquidation of the assets of such bank, including the advice and assistance of counsel, the compensation for such service to be fixed by the Commissioner, subject to the approval of the Supreme Judicial Court for the proper county, and paid out of the assets of the bank in his hands.

It is not expedient to attempt to define in advance under what circumstances the Commissioner should rely upon the Attorney-General, and under what circumstances he may properly retain counsel; each case must rest upon its own facts.

You state that, acting under the authority of St. 1910, c. 399 (now G. L., c. 167, §§ 22 to 36, inclusive), you have taken possession of certain trust companies and have appointed liquidating agents for the same. In connection with the liquidation of said trust companies numerous legal questions have arisen. You inquire how far the need for legal assistance should be met by the Attorney-General and how far you can properly retain counsel, to be paid out of the assets of the trust companies in process of liquidation.

G. L., c. 12, § 3, provides: —

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except from criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for the harbor of Boston in matters relating to their official

duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

It seems clear that you act as a public officer in exerting the powers and discharging the duties imposed upon you by St. 1910, c. 399, now G. L., c. 167, §§ 22 to 36. *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207; *Tile Guaranty & Surety Co. v. Idaho*, 240 U. S. 136. As to them, it is the duty of the Attorney-General to appear for you and to advise you. Such has been and is now the practice. From time to time your department has requested and received a number of opinions upon such matters. V Op. Atty.-Gen. 460, 563, 680, 688, 691 and 726.

On the other hand, St. 1910, c. 399, authorizes the Commissioner to procure assistance in liquidating a bank of which he has taken possession, the cost of such assistance to be borne by the bank. Thus, sections 6 and 10 (now G. L., c. 167, §§ 26 and 30), provide: —

SECTION 6. The bank commissioner may, under his hand and official seal, appoint an agent or agents to assist him in the duty of liquidation and distribution. The certificate of the appointment of such agent or agents shall be filed in the office of the bank commissioner, and a certified copy thereof shall be filed in the office of the clerk of the supreme judicial court for the county in which the principal office of such bank is located. The bank commissioner may from time to time authorize such agent or agents to perform such duties connected with said liquidation and distribution as he may deem proper. The bank commissioner may procure such expert assistance and advice as he may consider necessary in the liquidation and distribution of the assets of such bank, and he may retain such of the officers or employees of the bank as he may deem necessary. The bank commissioner shall require from a special agent and from such assistants such security for the faithful discharge of their duty as he may deem proper.

SECTION 10. The compensation of the special agents, counsel, employees and assistants, and all expenses of supervision and liquidation shall be fixed by the bank commissioner, subject to the approval of the supreme judicial court for the county in which the principal office of such bank is located, on notice to such bank and, upon the certificate of the bank commissioner, shall be paid out of the funds of the bank in his hands.

Although section 6 does not in terms authorize the Commissioner to retain counsel — unless the authority to “procure . . . expert assistance and advice” be held to include counsel — the express reference to payment of counsel in section 10 indicates that he has such power.

Taking these provisions together, it seems plain that no cast-iron rule can be laid down in advance as to the point where the duties of the Attorney-General end and the power to retain private counsel begins. The powers and duties of the Commissioner of Banks engaged in liquidating a bank of which he has taken possession are of dual character. The entire liquidation proceeding may be viewed as the exercise of statutory powers by a public officer. On the other hand, many of the services performed by him closely resemble those rendered by a chancery receiver engaged in liquidating a corporation under the direction of the court. In many instances both attributes will coexist in the same duty or service.

Under these circumstances, it seems inexpedient to attempt to define in advance under what circumstances the Commissioner should rely upon the Attorney-General, and under what circumstances he may properly retain counsel to assist him or his liquidating agents. Each case must rest upon its own facts. But practical considerations reinforced by existing practice suggest that the maximum efficiency at the least cost to both bank and Commonwealth may be best secured by consultation with the Attorney-General as to the propriety of retaining counsel and with respect to the counsel to be employed for any particular duties.

The employment of different general counsel by the several agents for the purpose of obtaining legal advice with respect to legal questions involved in the liquidation of these companies, as well as the employment of special counsel in particular cases, may result in needless expenditure of the depositors' money when these counsel are acting independently and without co-operation with the Attorney-General. As I think that this course may at any time bring criticism upon your department, I am writing you to confirm the position which I took upon this matter when it first came to my attention in May of the current year.

COUNTY ACCOUNTS — ADDITIONAL COMPENSATION TO PERSONS  
RECEIVING SALARIES FROM COUNTIES.

Under G. L., c. 262, §§ 50 and 53, a police officer is not entitled to a fee for testifying as a witness in a criminal case during the time for which he receives a salary or allowance; but if he is employed and paid for night work, and is called into court during the day, he should be paid his fees; and if he attends as a witness at a place other than his residence, he may be allowed a witness fee instead of his expenses.

Whether a regular police officer is entitled to additional compensation for services in bringing to land a human body found in any of the harbors, rivers or waters of the Commonwealth, under G. L., c. 38, § 17, depends upon whether he is acting within the scope of his duties, on the one hand, or in violation of duty, on the other hand.

Where a probation officer is appointed by the court to act as temporary clerk, or a clerk of court is appointed by the court to act as probation officer, additional salaries are properly paid.

You have asked my opinion with respect to certain questions arising upon the examination of county accounts. These questions relate to the payment of additional compensation to persons receiving salaries from counties. Therefore, the statute which prohibits a person from receiving at the same time more than one salary from the treasury of the Commonwealth (G. L., c. 30, § 21) has no application. The question in each case will depend for its answer upon some statute or upon general considerations involving incompatibility of office or employment. The questions are as follows:—

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
October 29.

1. You ask whether a regular or special police officer who happens to be on patrol duty at night and is called upon to attend court as a witness for the Commonwealth is entitled to a witness fee.

The answer to this question depends upon a construction of G. L., c. 262, §§ 50 and 53 (St. 1890, c. 440, §§ 1, 6). Section 50 provides, in part, as follows:—

No officer in attendance on any court, 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 a county, city or town shall, except as otherwise hereinafter provided, be paid any fee or extra compensation for official services performed by him in any criminal case; or for aid rendered to another officer; or for

testifying as a witness in a criminal case during the time for which he receives such salary or allowance; or for services or as a witness at an autopsy or inquest; or in proceedings for commitment of insane persons; but his expenses, necessarily and actually incurred, and actually disbursed by him in a criminal case tried in the superior court, shall, except as provided in section fifty-two, be paid by the county where the trial is held, or in a criminal case tried in a district court or before a trial justice, by the town where the crime was committed.

Section 53 is, in part, as follows: —

Any officer named in section fifty who attends as a witness at a place other than his residence shall, instead of his expenses, be allowed the witness fee in the court or before the trial justice where he testifies. A police officer on duty at night who attends the superior court as a witness for the commonwealth shall be paid the same fees as any other witness. A police officer who is a witness for the commonwealth, and who under the direction of the district attorney aids in securing the attendance of other witnesses, may receive, instead of his expenses, witness fees for one day's attendance.

In *Sackett v. Sanborn*, 205 Mass. 110, 112, the application of corresponding provisions in the Revised Laws (R. L., c. 204, §§ 42, 44) was considered. The plaintiff, who was chief of police of Norwood, sued to recover witness fees and travel for attendance as a witness at the court in Dedham in various criminal cases. It appeared that by the town by-laws it was the plaintiff's duty to be prosecuting officer and have charge of all complaints. The court held that inasmuch as the plaintiff was attending court in the performance of his official duties he came under the provisions of the former section, and that the latter section was not applicable. The opinion contains the following general statement of the object of the statute: —

The object of the statute is to provide that officers who receive compensation for their services by salary or otherwise, and attend court in the discharge of duties which they are thus paid to perform, shall not receive further compensation by way of witness fees, but that any expenses necessarily and actually incurred or disbursed by them in the performance of such duties in attending court in criminal cases shall be reimbursed to them. If they attend court, but not in the performance of the duties for which they are paid, at a place other than their resi-



dence, then, according to the provision quoted above . . . , instead of their expenses they are to be allowed witness fees.

The same provisions were also considered by a former Attorney-General. In two opinions (I Op. Atty.-Gen. 594 and 603) he held that testifying in court as a witness is not an official service, but that by the provisions of the statute constables and police officers are prohibited from receiving fees for testifying if, during the time of such attendance, they are on duty as officers. He said (I Op. Atty.-Gen. 594, 595): —

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.

With respect to witness fees, the rule is stated clearly enough by the sections above quoted. An officer such as is described is not to be paid a fee for testifying as a witness in a criminal case during the time for which he receives a salary or allowance. If he is employed and paid for night work, and is called into court during the day, according to the opinion referred to he should be paid his fees, such service being no part of his official duties and not being performed during the time of his employment. If any such officer attends as a witness at a place other than his residence, he may be allowed a witness fee instead of his expenses, by the express provisions of G. L., c. 262, § 53.

2. You ask whether regular police officers are entitled to additional compensation for services in bringing to land a human body found in any of the harbors, rivers or waters of the Commonwealth, under G. L., c. 38, § 17.

The rule is clearly settled that a peace officer is not entitled to extra compensation, such as a reward, for services performed in the course of his duties. *Pool v. Boston*, 5 Cush. 219; *Davies v. Burns*, 5 Allen, 349; *Hartley v. Granville*, 216 Mass. 38, 40. It would seem that this rule should apply where a reward is au-

thorized by an act of the Legislature, in the absence of an express provision that the reward should be payable to peace officers as well as others, although in *United States v. Matthews*, 173 U. S. 381, a majority of the court appear to have held the contrary. But a contract or reward for services rendered by a public officer outside and not inconsistent with his official duties is enforceable. *Studley v. Ballard*, 169 Mass. 295, 296; *Hartley v. Granville*, 216 Mass. 38, 41.

The duties of police officers are largely defined by ordinance or town by-law. Their general duties, like those of constables, are to be vigilant to preserve the peace, to prevent the commission of crime, to make arrests and to procure warrants. *Hartley v. Granville*, 216 Mass. 38, 39. In the case just cited a distinction is said to exist between the duties of constables in country communities and those of members of an organized police force, in that the former are not expected to devote a considerable portion of their time to the work of their office, while the latter have regular hours during which they are on duty.

The right of a regular police officer to claim the compensation provided by G. L., c. 38, § 17, depends entirely upon the scope of his duties and the strictness of the requirement with respect to the time to be devoted to such duties. If the duty of a police officer includes the rescuing of human bodies from the water, clearly he cannot receive extra compensation for such service. If such an act is outside the scope of his duties, and if it is a violation of his duty to perform such an act while on duty, the two services are inconsistent, and again, in my opinion, he cannot recover extra compensation. If, however, the performing of such an act is outside the scope of his duty, and is properly performed by him at the time of performance, then, in my opinion, he may recover. It is for you to determine in any particular case, under the principle which I have stated, whether the service rendered was or was not one for which the officer was entitled to have extra compensation. *Cf. V Op. Atty.-Gen. 697.*

3. You ask whether a probation officer receiving a stated annual salary may be designated, in case of the illness or vacation of the clerk, to act as clerk *pro tem* and be paid as both probation officer and clerk;

and also whether a clerk of court may be appointed to act as probation officer, in case of the illness or vacation of the probation officer, and receive an additional salary as probation officer.

Temporary clerks and assistant clerks are appointed by the courts. G. L., c. 221, §§ 8-10. The compensation of a temporary clerk is fixed by the court appointing him, and the compensation of each temporary assistant clerk is the same as the assistant clerk for whom he is acting. G. L., c. 221, § 100.

Appointments of probation officers, both permanent and temporary, also are made by the courts, who to a large extent define their duties and fix their compensation, subject, however, except in the case of appointments by the Superior Court, to approval by the county commissioners. G. L., c. 276, §§ 83, 85, 89. *Catherton v. County of Suffolk*, 227 Mass. 598.

Where an officer occupies two offices which are not incompatible, he is entitled to the compensation attached to both offices. *United States v. Saunders*, 120 U. S. 126.

Any question as to the propriety of an appointment to either office would involve a consideration of the action of the judicial branch of the government, which it is improper for me to attempt. The fact that the appointment is made by the court in accordance with statutory provisions is a sufficient determination of the fact that in that particular case, at least, the duties to be performed are not inconsistent and may be performed by one person. The compensation to be paid is also fixed either by statute or by the court, with or without the approval of the county commissioners, in such a manner that it is not open to revision. V Op. Atty.-Gen. 186. I advise you, therefore, that in such cases the additional salaries are properly paid.

PILGRIM TERCENTENARY COMMISSION — SURPLUS MATERIAL —  
SALE — DISPOSITION OF PROCEEDS.

Under Spec. St. 1919, c. 187, the Pilgrim Tercentenary Commission has the power by sale to dispose of such property and equipment as cannot be utilized, but the money received by the commission through the sale of such surplus property must be paid into the treasury of the Commonwealth, where it becomes part of the general fund or ordinary revenue of the Commonwealth, and as such can be expended only in the manner provided by G. L., c. 29, § 18.

To the Pilgrim  
Tercenary  
Commission.  
1921  
November 3.

My opinion is requested on a question arising out of the following situation: —

The commission will receive a certain sum as payment for buildings demolished on the water front at Plymouth, and will also receive other sums for the sale of surplus curbing and other material. You state that it is desired to use this money as an addition to the money already appropriated by the Legislature to do the work at Plymouth. You ask as to whether or not the commission may legally and properly utilize such receipts for its work.

The general powers of the commission in relation to work to be done at Plymouth are found in Spec. St. 1919, c. 187, and while in that act there is no special provision authorizing the sale of property by the commission, there can be no question but that, under its general powers, the commission has the right to dispose of such property and equipment as cannot be utilized by it. Such a right is incidental to and is an essential part of the general duties of the commission. This right to sell surplus property, however, does not confer upon the commission the right to expend the money received from the sale of such property.

Mass. Const. Amend., art. LXIII, § 1, provides as follows: —

*Collection of Revenue.* — All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof.

The money received by the commission through sales is subject, in my opinion, to this constitutional provision, and when paid into the treasury of the Commonwealth it becomes part of the

general fund or ordinary revenue of the Commonwealth, and as such can be expended only in the manner provided by G. L., c. 29, § 18, to wit, by "a warrant from the governor drawn in accordance with an appropriation then in effect, and after the demand or account to be paid has been certified by the state auditor."

The provisions of Spec. St. 1919, c. 187, clearly indicate that it was intended by the Legislature that the money to be expended for the purposes of the act was to be made up by the amount available by appropriation by the General Court and by the sums received by gift, grant or devise under the provisions of section 2 of said chapter 187. The language found in section 10 of said chapter 187, to the effect that "it is the purpose and understanding of the general court that the sum of two hundred and fifty thousand dollars is the sum total of all appropriations which the commonwealth shall make for the purposes of this act," is a strong indication, in my judgment, that it was not intended that any money received incidentally by the commission, through the sale of surplus property, was to be available in addition to the money appropriated, but that such receipts from sales should be paid into the treasury of the Commonwealth under the constitutional requirement set forth above.

---

LEGAL HOLIDAY — GOVERNOR — PROCLAMATION — LEGISLATIVE  
POWER.

The establishment of a legal holiday calls for the exercise of legislative power, and the Governor has no power to establish a legal holiday by proclamation.

You ask my opinion whether the Governor of Massachusetts has the right to establish a legal holiday by proclamation, with particular reference to making November 11 a legal holiday.

To the  
Governor.  
1921  
November 4.

Under the Constitution of Massachusetts the Governor has authority, with the Council, to "hold and keep a council, for the ordering and directing the affairs of the commonwealth, agreeably to the constitution and the laws of the land." Const. pt. 2d, c. II, § I, art. IV.

Legislative power is conferred upon the General Court "from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof." Const. pt. 2d, c. 1, § II, art. IV.

In the Public Statutes there was no definition of the term "legal holiday." There was a provision enumerating certain days on which the General Court should hold no session and the public offices should be closed (P. S., c. 2, § 34); and another provision which referred to a "Fast or Thanksgiving day appointed or recommended by the Governor of the Commonwealth or by the President of the United States." That provision is P. S., c. 77, § 8, and is, in part, as follows: —

Bills of exchange, drafts, promissory notes, and contracts, due and payable or to be performed on a Sunday, on a Fast or Thanksgiving day appointed or recommended by the governor of the commonwealth or by the President of the United States, on Christmas day, on the twenty-second day of February, on the thirtieth day of May, on the fourth day of July, or on the following day when either of the three days last mentioned occurs on a Sunday, shall be payable or performable upon the business day next preceding said days; . . .

This provision was held by a former Attorney-General to contain a sufficient implication of authority in the Governor to appoint a day of fasting or thanksgiving at his discretion. 1 Op. Atty.-Gen. 66. The statute was, however, superseded by the statutes hereinafter mentioned.

In 1887 the Legislature passed an act making the first Monday of September a legal public holiday "in the same manner as Thanksgiving, Fast and Christmas days, the twenty-second of February, the thirtieth day of May and the fourth day of July, are now by law made public holidays" (St. 1887, c. 263); and in

1894 Fast Day was abolished and the nineteenth day of April in each year was made a legal public holiday. St. 1894, c. 130.

In the same year and in the following year statutes were passed, the effect of which was to repeal those provisions of P. S., c. 77, § 8, which gave any discretion to the Governor of the Commonwealth or the President of the United States to declare a holiday which should affect the time of payment or performance of negotiable instruments and contracts. St. 1894, c. 333, § 427; St. 1895, c. 201.

In the year 1919 the General Court by statute authorized the Governor to designate a holiday for proper observance of the return of Massachusetts soldiers, sailors and marines, providing that the day so designated should be a holiday for the year only in which it occurred. Said statute (Gen. St. 1919, c. 126, § 1) is as follows:—

The governor is hereby authorized to designate by proclamation a day which in his judgment may appropriately be set apart for the general observance and celebration throughout the commonwealth of the home-coming of Massachusetts soldiers, sailors and marines, and the day so designated shall, for the year only in which it occurs, be a holiday within the meaning of the ninth clause of section five of chapter eight of the Revised Laws and the amendments thereof, and all the public offices shall be closed on that day.

In G. L., c. 4, § 7, cl. 18, the General Court has now defined the term "legal holiday" as follows:—

"Legal holiday" shall include January first, February twenty-second, April nineteenth, May thirtieth, July fourth, the first Monday of September, October twelfth, Thanksgiving day and Christmas day, or the day following when any of the five days first mentioned, October twelfth or Christmas day occurs on Sunday, and the public offices shall be closed on all of said days.

There are other provisions in the statutes for the closing of the courts and offices of the State government and regulating the effect of holidays on various transactions; but there is nothing providing for the proclamation of other holidays by the executive branch of the government.

It is my opinion that the establishment of a legal holiday, affecting in any respect legal rights, is an act calling for the exercise of legislative power, that this power has been exercised by the General Court in a way which now gives no power over the subject to the executive branch of the government, and that the General Court, by the statute of 1919, authorizing the Governor to designate a holiday to celebrate the home-coming of Massachusetts soldiers, sailors and marines for one year only, has indicated the intention that there should be no holiday for such an occasion in other years, or any holiday without legislative enactment.

I must advise you, therefore, that, in my opinion, the Governor or the Governor and Council have no power to establish a legal holiday by proclamation. I do not intend to suggest that the Governor may not by proclamation request the people to observe any particular day in a particular manner. The question whether the Congress or the President of the United States may establish a legal holiday effective throughout the United States, and whether Your Excellency may join with the Governors of other States in proclaiming such a holiday at the request of Congress or of the President, is not before me; and on that matter I express no opinion.

---

#### TEACHERS' RETIREMENT SYSTEM — TEACHERS' PENSIONS — BASIS OF REIMBURSEMENT PAID TO CITIES AND TOWNS.

In view of St. 1921, c. 460, the reimbursement paid to cities and towns on account of pensions paid to teachers retired by cities and towns under G. L., c. 32, § 16, should be based upon the pension factors established by G. L., c. 32, § 10, from and after Aug. 26, 1921, the date when said St. 1921, c. 460, became effective.

You have requested my opinion as to whether or not the reimbursement paid to cities and towns in respect of pensions paid by them to teachers retired prior to May 12, 1920, should be based upon the new pension factors established by St. 1920, c. 335 (now G. L., c. 32, § 10), from and after Aug. 26, 1921, the date when St. 1921, c. 460, became effective.

St. 1908, c. 498, authorized cities and towns which should accept the act to establish a non-contributory system of pen-



sions for the retirement of teachers in its public schools. St. 1908, c. 589, as amended by St. 1910, c. 617, imposed upon Boston a non-contributory system of pensions for teachers in its public schools. St. 1913, c. 832 (now, as amended, G. L., c. 32), established a State-wide retirement association, effective July 1, 1914, for all teachers employed by a board of trustees or school committee in a public day school within the Commonwealth. Under St. 1913, c. 832, § 6, cl. 4 (now, as amended, G. L., c. 32, § 10, cl. 4), payment to a teacher retired thereunder consisted of (1) an annuity based upon contributions by said teacher; and (2) a non-contributory pension of equal amount paid out of the treasury of the Commonwealth. St. 1913, c. 832, § 13 (now G. L., c. 32, § 16), provided, in part: —

(1) Whenever, after the first day of July, nineteen hundred and fourteen, a town or city retires a teacher who is not eligible to a pension under the provisions of section six, paragraph (4) of this act, and pays to such teacher a pension in accordance with chapter four hundred and ninety-eight of the acts of the year nineteen hundred and eight, or chapter five hundred and eighty-nine of the acts of the year nineteen hundred and eight, as amended by chapter six hundred and seventeen of the acts of the year nineteen hundred and ten, and the school committee of said town or city certifies under oath to the retirement board to the amount of said pension, said town or city shall be reimbursed therefor annually by the commonwealth: *provided*, that no such reimbursement shall be in excess of the amount, as determined by the retirement board, to which said teacher would have been entitled as a pension, had he become a member of the retirement association under the provisions of section three, paragraph (2) of this act.

It will be noted that under this section the reimbursement is confined to teachers retired *after* July 1, 1914, under the city or town system, who are *ineligible* to retirement under the State system, and must not exceed the amount of the *pension* (excluding the annuity) which said teacher would have received if he had been retired under the State system. The amount of such pension is equal to the *annuity* which such teacher would have received if he had joined the State Retirement Association and had made the required contribution.

St. 1920, c. 335, which took effect May 12, 1920, and is now

continued in G. L., c. 32, § 10, modified the manner in which the annuity payable upon retirement under the State system should be determined, and therefore affected the amount of the equal pension paid out of the treasury of the Commonwealth. But this act applied only to teachers retired under the State system after the date when it took effect. It did not affect the amount of annuity, and so the amount of pension paid to teachers previously retired under that system, and therefore did not affect the amount of reimbursement payable to cities and towns on account of pensions paid by them to teachers previously retired under the city or town system. St. 1921, c. 460, which took effect on Aug. 26, 1921, provides:—

The provisions of section ten of chapter thirty-two of the General Laws, shall hereafter apply to all members of the state teachers' retirement association irrespective of the date of retirement; provided, that in no case shall the present pension of a retired teacher be reduced.

This act extended the benefits of St. 1920, c. 335, now G. L., c. 32, § 10, to teachers retired by the State association previous to May 12, 1920. On and after Aug. 26, 1921, their annuities, and consequently their pensions, are determined according to the new plan, subject, of course, to the proviso that no annuity or pension shall be thereby diminished. A like benefit would have accrued to teachers retired by the cities and towns since July 1, 1914, under the acts specified in St. 1913, c. 832, § 13, now G. L., c. 32, § 16, if such teachers had been members of the State Retirement Association. I am therefore of opinion that the limit of reimbursement to cities and towns in respect of teachers so retired is correspondingly increased, and that on and after Aug. 26, 1921, such reimbursement is to be calculated in accordance with the factors established by St. 1920, c. 335, now G. L., c. 32, § 10.

## HARVARD COLLEGE — POWER TO CONFER ACADEMIC DEGREES.

Mass. Const., pt. 2d, c. V, § I, art. I, ratified and confirmed the power of the President and Fellows of Harvard College to grant academic degrees of every kind.

You state that there is no record in your department of any express grant of power to the President and Fellows of Harvard College to confer academic degrees, and inquire whether they possess this power.

To the  
Secretary.  
1921  
November 10.

There can be no doubt that Harvard College granted academic degrees long prior to the adoption of the Constitution in 1780. I Quincy, *History of Harvard*, pp. 71, 589. Indeed, the degree of doctor of laws was conferred on George Washington in 1776. Mass. Const., pt. 2d, c. V, § I, art. I, provides as follows: —

Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty-six, laid the foundation of Harvard College, in which university many persons of great eminence have, by the blessing of God, been initiated in those arts and sciences which qualified them for public employments, both in church and state; and whereas the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America, — it is declared, that the PRESIDENT AND FELLOWS OF HARVARD COLLEGE, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy, all the powers, authorities, rights, liberties, privileges, immunities, and franchises, which they now have, or are entitled to have, hold, use, exercise, and enjoy and the same are hereby ratified and confirmed unto them, the said president and fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever.

This provision ratified, confirmed and continued in force the power to grant degrees theretofore exercised and possessed. It has been exercised ever since publicly and notoriously, without question from any public authority. I therefore advise you that, in my opinion, the President and Fellows of Harvard College, in their corporate capacity, are authorized by law to confer all academic degrees.

RECORDS AND PAPERS — CERTIFICATION — WHAT MAY BE CERTIFIED BY THE SECRETARY OF THE COMMONWEALTH.

A written opinion given by the Attorney-General to the Secretary of the Commonwealth is a "paper in his department," within the meaning of G. L., c. 9, § 11, copies of which may be certified and furnished by the Secretary in the manner prescribed by law.

Where an officer is authorized by law to furnish a certified copy of a record or paper in his custody, his certificate that a fact is established by such record or paper cannot be substituted for the copy so authorized.

You inquire whether you can properly certify that the President and Fellows of Harvard College are authorized by law to confer academic degrees, including that of bachelor of laws.

G. L., c. 9, § 11, provides as follows: —

The state secretary shall have the custody of the great seal of the commonwealth; and copies of records and papers in his department, certified by him and authenticated by said seal, shall be evidence like the originals.

Under date of Nov. 10, 1921, I advised you that, in my opinion, the President and Fellows of Harvard College, in their corporate capacity, are authorized by law to confer academic degrees of every kind. This opinion is a "paper" in your department, within the meaning of the above section. A copy thereof, certified by you and authenticated with the great seal, would be evidence of such authority to the same extent as the original. In my opinion, you are authorized to furnish such copies under the conditions prescribed by law.

You are not, however, authorized to certify to the fact, as distinguished from furnishing a copy in the manner prescribed by G. L., c. 9, § 11. *Commonwealth v. Richardson*, 142 Mass. 71, 74; *Commonwealth v. Kozlowsky*, 238 Mass. 379. Where a public officer is authorized by law to furnish a certified copy of a record or document in his custody, his certificate that a fact is established by such record or document cannot be substituted for the copy so authorized. *Oakes v. Hill*, 14 Pick. 442, 448; *Robbins v. Townsend*, 20 Pick. 345, 350; *Wayland v. Ware*, 109 Mass. 248, 250; *Hanson v. South Scituate*, 115 Mass. 336, 342; *Franklin Savings*

To the  
Secretary.  
1921  
November 12.

*Bank v. Framingham*, 212 Mass. 92, 94. The reason is that the record or document speaks for itself through the certified copy, while the officer may be mistaken as to the proper conclusion to be drawn from it. *Hanson v. South Scituate*, 115 Mass. 336, 342. Hence a certificate that it appears by the records in your department that the President and Fellows of Harvard College are authorized by law to confer academic degrees of every kind would not be competent as a substitute for a certified copy of the paper which establishes that authority. *Commonwealth v. Richardson*, 142 Mass. 71.

---

GARAGES — GASOLINE — PERMITS — CITY OF BOSTON — FIRE  
MARSHAL.

Under St. 1913, c. 577, as amended by St. 1914, c. 119, authority to issue permits for the erection of garages in the city of Boston is vested exclusively in the street commissioners of said city, whose action in granting or refusing a permit is not subject to review by the Department of Public Safety of the Commonwealth.

Under G. L., c. 148, § 30, authority to issue permits for the storage of gasoline within the metropolitan district is vested in the State Fire Marshal.

Under G. L., c. 148, § 31, the State Fire Marshal may delegate the power vested in him by section 30 to any designated officer in any city or town in the said district, but subject to the appeals provided for in section 45.

Even though the State Fire Marshal, acting under G. L., c. 148, § 31, delegates to an appropriate officer the powers vested in him by section 30, he may, in his discretion, take original jurisdiction of any question arising under section 30, and, if he does so, the validity of the delegation, the action of the officer thereunder, and the propriety of any appeal therefrom become immaterial.

You ask my opinion upon the following question: —

On Aug. 3, 1921, the — company petitioned the street commissioners of Boston for a license to erect, maintain and conduct a garage, and also a license for the keeping and storage of gasoline, not exceeding 1,000 gallons in tank underground, in a building in the Charlestown district of the city of Boston.

After due notice and hearing held on Aug. 24, 1921, the licenses were granted Sept. 13, 1921.

The mayor, while he had up to that time signed all licenses of this nature granted by said street commissioners, requested the opinion of the law department of the city of Boston upon the question whether it is his duty to approve or disapprove the granting of a permit by the board of street commissioners for the erection and maintenance of a garage within the limits of the city of Boston.

To the Com-  
missioner of  
Public Safety.  
1921  
November 16.

The law department of the city of Boston gave an opinion to the mayor as follows:—

I am of the opinion that the power to grant permits for such purposes is solely and exclusively within the jurisdiction of the street commissioners, and is not subject to your control.

Basing his action on this opinion, as I understand, the mayor declined to approve the permit to erect said garage and the license to keep or store 1,000 gallons of gasoline, as granted by the board of street commissioners to said company.

A designation was made by the Fire Prevention Commissioner, in accordance with St. 1914, c. 795, §§ 3 and 4, in the following words:—

I, John A. O'Keefe, duly appointed and qualified Fire Prevention Commissioner for the metropolitan district of Massachusetts, by virtue of the authority vested in me by section four of chapter seven hundred and ninety-five of the acts of the year nineteen hundred and fourteen, do hereby delegate to the honorable mayor and board of street commissioners of the city of Boston the following powers, conferred on me by said chapter, to be exercised by them within the city of Boston, in accordance with the rules and regulations now established or hereafter to be established by the Fire Prevention Commissioner in reference severally to said powers. This delegation of power shall continue in force until a revocation thereof shall have been filed with the city clerk of said city of Boston.

1. The right to issue licenses for all garages in the city of Boston in which one or more automobiles using gasoline are kept, stored or repaired.
2. The right to license the manufacture, keeping or sale of volatile inflammable fluids in quantity exceeding one hundred and thirty gallons, or for other than private use.

An appeal was made to the State Fire Marshal from the decision of the street commissioners, and on Oct. 28, 1921, a hearing was given by the State Fire Marshal at the State House on this appeal. Exceptions were made to the Fire Marshal's proceeding with the hearing, on the claim that the permit and license did not have the approval of the mayor, and therefore the action of the street commissioners was not subject to an appeal; and it is upon this question that I respectfully request the opinion of the Attorney-General.

Was the permit and license as issued by the street commissioners to the — company valid without the approval of the mayor in writing?

The permit to erect the garage in question and the permit to store gasoline therein are wholly distinct from each other, and are governed by different statutes. V Op. Atty.-Gen. 718. I therefore proceed to consider each separately.

1. *The Permit to erect the Garage.*—Permits for the erection of

garages in the city of Boston are governed by St. 1913, c. 577, as amended by St. 1914, c. 119, which provides, in part, as follows:—

In the city of Boston no building shall be erected for, or maintained as a garage for the storage, keeping or care of automobiles until the issue of a permit therefor by the board of street commissioners of the city after notice and a public hearing upon an application filed with said board. . . .

The city law department, in an opinion which you furnish me, has advised the mayor that under said statutes authority to issue permits for the erection of garages in the city of Boston is vested exclusively in the street commissioners, and that the mayor has no duty in respect to or power over such issue. I concur in this conclusion. But if this power be vested exclusively in the street commissioners, it follows that the issue or refusal of such a permit is not a matter which is subject to review by the Department of Public Safety. Practical considerations may render it advisable for your department to ascertain, before issuing a license to store gasoline, whether such a permit to erect the garage has been issued. But these considerations confer no authority to review or reverse the action of the street commissioners in granting or withholding such a permit. No question of the power of the Department of Public Safety to regulate such garage or the construction thereof as a fire risk is before me, and upon that point I express no opinion.

2. *The Permit to store Gasoline.* — St. 1914, c. 795, created a Fire Prevention Commissioner for the metropolitan district. Sections 3 and 5, as amended and now codified in G. L., c. 148, § 30, provide: —

The marshal shall have within the metropolitan district the powers given by sections ten, thirteen, fourteen, twenty, twenty-one and twenty-two to license persons or premises, or to grant permits for, or to inspect or regulate, the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, nitroglycerine, camphine or any similar fluids or compounds, crude petroleum or any of its products, or any explosive or inflammable fluids or compounds, tablets, torpedoes, rockets, toy pistols, fireworks, fire-crackers, or any other explosives, and the use of engines and furnaces as described in section one hundred and fifteen of chapter one hundred

and forty; provided, that the city council of a city or the selectmen of a town may disapprove the granting of such a license or permit, and upon such disapproval the permit or license shall be refused. In Boston certificates of renewal of licenses as provided in section fourteen shall be filed annually for registration with the fire commissioner, accompanied by a fee of one dollar.

Section 4, as now codified in G. L., c. 148, § 31, provides:—

The marshal may delegate the granting and issuing of any licenses or permits authorized by sections thirty to fifty-one, inclusive, or the carrying out of any lawful rule, order or regulation of the department, or any inspection required under said sections, to the head of the fire department or to any other designated officer in any city or town in the metropolitan district.

Section 18, now G. L., c. 148, § 45, provides:—

The marshal shall hear and determine all appeals from the acts and decisions of the heads of fire departments and other persons acting or purporting to act under his authority, done or made or purporting to be done or made under the provisions of sections thirty to fifty-one, inclusive, and shall make all necessary and proper orders thereon. Any person aggrieved by any such action of the head of a fire department or other person may appeal to the marshal.

Gen. St. 1919, c. 350, §§ 99, 101, 104, abolished the said office of Fire Prevention Commissioner and vested his powers in the State Fire Marshal, who is an official of the Department of Public Safety created by that act. See G. L., cc. 22 and 48.

Taking these sections together, it is plain that power to grant permits to keep and store gasoline is vested in the first instance in the Fire Marshal, but subject to review by the Commissioner. V Op. Atty.-Gen. 454. He may, however, delegate this power, subject to the provisions of G. L., c. 148, § 30. If he does so delegate, section 45 confers a right of appeal to the Fire Marshal. V Op. Atty.-Gen. 718. But such delegation does not deprive the Fire Marshal of power, if he sees fit, to pass on the question as if no delegation had been made. He may, of course, insist that the question be passed on in the first instance by the officer or board to whom he has made such delegation, and may



decline to consider a premature appeal taken before such officer or board has fully passed on the matter. But when the question comes before him, either upon an appeal duly taken or because he sees fit to take jurisdiction without a sufficient appeal, he exercises an original jurisdiction vested in him by the statute, and not simply an appellate jurisdiction. In either case, the order made by him has the same force and effect as if he had determined the question in the first instance, and renders immaterial any question as to the propriety of the delegation or the sufficiency of the appeal. I therefore advise you that, in the instant case, an order of the Fire Marshal would not be invalid either because the mayor failed to act with the street commissioners upon this permit or because of any insufficiency in the appeal.

While this view renders it unnecessary to determine whether Commissioner O'Keefe delegated the power in question to the mayor and the street commissioners as a single board, in which a majority of such board would control, or to each independently, so that no effective action could be taken without the concurrence of both the mayor and a majority of the street commissioners, it is evident that such a question might be presented if the Fire Marshal should decline to take jurisdiction of an appeal to him, prosecuted as of right, under circumstances similar to the instant case. In my opinion, this question should be eliminated by a new delegation of power. The terms of that new delegation are for the Fire Marshal to determine, subject to your approval.

CIVIL SERVICE — ASSISTANT REGISTERS OF PROBATE — CLERKS  
IN THE REGISTRIES OF PROBATE FOR SUFFOLK AND MIDDLE-  
SEX COUNTIES — STENOGRAPHERS — CLERICAL ASSISTANTS.

Appointments to the positions of assistant registers in the several registries of probate are not to be made under the regulations of the Department of Civil Service.

The position of clerk of the Suffolk registry of probate, under the provisions of G. L., c. 217, § 28, is not to be filled under civil service regulations.

The position of clerk of the Middlesex registry of probate, under G. L., c. 217, § 29, is to be filled under civil service regulations.

The Commonwealth, under St. 1921, c. 42, having assumed the payment of the salaries of certain stenographers and other clerical assistants in the several registries of probate, appointments to these positions, in the future, must be made in accordance with civil service rules and regulations.

To the Com-  
missioner of  
Civil Service.  
1921  
November 21.

You have requested my opinion as to whether any appointments that may be made to the positions of assistant registers, clerks and stenographers in the several registries of probate are to be filled under the regulations of the Department of Civil Service, in those cases where the holders of said positions are paid by the Commonwealth under the terms of St. 1921, c. 42.

So far as is pertinent to the present inquiry, St. 1921, c. 42, allows annually to the registers of probate for the several counties such sums, to be paid by the Commonwealth, as shall annually be appropriated by the General Court, and further provides that all clerical employees in the various registries of probate shall be subject to the statutory provisions relative to the classification of State offices and positions.

Considering, first, the position of assistant register, it is to be noted that the statutory provisions concerning assistant registers are found in G. L., c. 217, §§ 23 to 27. By section 23, the judges of probate for each county, except Dukes County and Nantucket, may appoint an assistant register, who shall hold office for three years unless sooner removed by the judge. Before entering upon the performance of his duties, an assistant register is required to take the oath prescribed by the Constitution, and to give bond to the Treasurer and Receiver-General for the faithful performance of his official duties. Section 24 provides for the appointment of a second assistant register in the

counties therein specified, who shall hold office for three years unless sooner removed by the judge. Section 25 provides for the appointment by the judges of probate in Middlesex County of a third assistant register, who shall hold office for three years unless sooner removed by the judge. Section 27 provides:—

An assistant register shall perform his duties under the direction of the register, and shall pay over to him all fees and amounts received as such assistant. He may authenticate papers and perform such other duties as are not performed by the register. In case of the absence, neglect, removal, resignation or death of the register, the assistant may complete and attest any records remaining unfinished and may act as register until a new register is qualified or the disability removed.

A former Attorney-General stated that civil service rules look to the character of the service rather than to the designation of the office, and that he could not believe that it was intended by the statutes relating to civil service that an officer holding an important, confidential and responsible position must be selected by competitive examination. Referring to the secretary of the overseers of the poor of Lowell, he stated that "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." See I Op. Atty.-Gen. 216, 218. This line of reasoning applies, in my opinion, even more strongly to an assistant register of probate and insolvency.

An equally strong indication that the position of assistant register is not within the civil service rules is contained in the provision that, after being appointed by the judges of probate, an assistant register shall hold office for three years unless sooner removed by the judges. If assistant registers were under civil service, they could not be removed at any time during tenure of office by the appointing power, but would be subject to removal only in compliance with the provisions of G. L., c. 31, § 43, which is the section containing the provisions as to the removal of persons in the classified public service of the Commonwealth.

The above considerations make it unnecessary for me to consider and determine the question as to whether or not assistant

registers of probate are "judicial officers," within the meaning of G. L., c. 31, § 5, because they are appointed by the judges of probate, and also because of the nature of their duties.

I assume that your inquiry relative to clerks has to do with the clerks appointed in Suffolk County under the provisions of G. L., c. 217, § 28, and in Middlesex County under section 29, as distinguished from those employees designated as clerical assistants.

Section 28 reads as follows: —

The register for Suffolk county may, subject to the approval of the judges of probate for said county, appoint a clerk and may remove him at pleasure.

Section 29 provides: —

The register of Middlesex county may, with the approval of the judges of probate for said county, appoint a clerk who may administer such oaths required in probate proceedings, as are not prescribed by law to be administered by the judge or register, and shall perform such clerical and other duties as may be required by the register, with the approval of the judges, and he may be removed by the register with the consent and approval of the judges in the manner provided by section forty-three of chapter thirty-one.

In the case of the Suffolk clerk, he may be removed at pleasure, and this, in my opinion, takes him out of the civil service classification.

On the other hand, the Middlesex clerk may be removed only in the manner provided for those under civil service, to wit, G. L., c. 31, § 43. This requirement as to method of removal, in my opinion, indicates that the Legislature intended that the Middlesex clerk should be subject to civil service rules and regulations.

Taking up for consideration the positions of stenographers and other clerical assistants in the several registries of probate who are paid by the Commonwealth, under the provisions of St. 1921, c. 42, I would point out that G. L., c. 31, § 3, provides that the Civil Service Commission shall, subject to the approval of the Governor and Council, from time to time make rules and

regulations which shall regulate the selection of persons to fill appointive positions in the government of the Commonwealth, and the classification of offices and employments to be filled and the rules made by the commissioners, with the approval of the Governor and Council, have the force of laws and are binding upon the appointing officers. *Opinion of the Justices*, 145 Mass. 587, 590.

Clause 5 of Rule 1 of the Civil Service Rules provides:—

Persons paid by the Commonwealth or any city, whether carried on the regular payroll, on special payroll or by presenting a bill personally or by some other person, company or corporation, shall be deemed to be “in the service of the Commonwealth or the city” within the meaning of these rules.

Under “Classification of the Service. First Division.—The Official Service,” in class 3 you have grouped clerks, copyists, private secretaries, recorders, messengers, office boys and persons doing similar work, and under class 9, stenographers, typewriters, telegraphers and telephone operators. Within these groups, in my judgment, fall the clerical assistants and stenographers in the several registries of probate who are paid by the Commonwealth. It is to be noted that by the provisions of St. 1921, c. 42, clerical employees in the registries of probate are subject to the provisions of G. L., c. 30, §§ 45 to 50, which have to do with the classification of certain State offices and positions.

Consequently, it is my opinion that your department has classified the positions of clerical assistants and stenographers as among those to be filled under the provisions of the civil service statute, and has required that whenever there is a vacancy to be filled in such offices the appointing officer or power shall make requisition upon the department for names of eligible persons. The Commonwealth having assumed the payment of the salaries of certain clerical employees in the several registries of probate, these positions are brought within the civil service rules and regulations, and future appointments must be made in accordance with such rules and regulations.

## DENTISTS — RECIPROcity CERTIFICATES.

G. L., c. 112, § 48, providing for registration, without examination, of dentists who have been lawfully in practice in another State, applies only to dentists registered in the individual States of the United States of America, and does not include dentists registered in a foreign country.

You request an interpretation of G. L., c. 112, § 48, as to whether or not the privilege therein extended to a practitioner coming from another State can be interpreted to include dentists coming from a foreign country.

Said statute provides: —

The board may, without examination, upon the payment of twenty dollars, register, and issue a certificate to, a dentist who has been lawfully in practice for at least five years in another state, or a dentist registered therein, if he presents to the board his certificate of registration from the board of dental examiners or other like board where he last practiced; provided, that such other state shall require a degree of competency equal to that required of applicants in this commonwealth.

While it is true that the word "state," in its broadest sense, signifies a political community organized under a distinct government, and hence may include foreign countries, nevertheless, as the expression is used in the Federal Constitution and the constitutions and statutes of the several States of the United States, it is almost universally held to mean "other States of the United States," and does not embrace foreign countries. See to this effect *Warren v. Pim*, 66 N. J. Eq., 353; *Eidman v. Martinez*, 184 U. S. 578; *Employers Liability Insurance Co. v. Insurance Commissioners*, 64 Mich. 614; *People v. Black*, 122 Calif. 73; G. L., c. 4, § 7, cl. 31.

There can be no doubt that the intent of the Legislature in enacting said section 48 was to limit the expression "another State" to the individual States of the United States of America and to exclude all foreign countries, inasmuch as said statute as originally passed by the Legislature (see Gen. St. 1915, c. 301, § 8) expressly provided that —

Said board in its discretion may, without examination, upon the payment of a fee of twenty dollars, register and issue a certificate to a

dentist who has been lawfully in practice for at least five years in another state or territory, or in the District of Columbia; or to any dentist registered in another state, territory or the District of Columbia: . . .

In my opinion, therefore, the provisions of G. L., c. 112, § 48, do not apply to dentists coming from a foreign country.

---

### BANKS AND BANKING — STATE BANKS — INTEREST ON DEPOSITS — SAVINGS DEPARTMENTS.

State banks may not pay interest on deposits except in the instances enumerated in R. L., c. 115, § 40.

Under G. L., c. 167, § 12, it is not lawful for State banks to maintain savings departments and to solicit accounts in the manner of savings banks.

You ask my opinion on the following questions relative to the operation of State banks under R. L., c. 115: —

To the Com-  
missioner  
of Banks.  
1921  
December 5.

1. Is it permissible for State banks to pay interest on deposits except as provided for in section 40?

2. Is it lawful for such banks to maintain savings departments and solicit accounts in the manner of savings banks, in view of G. L., c. 167, § 12?

I reply to your two questions as follows: —

1. State banks are authorized to receive deposits by R. L., c. 115, § 30, which defines in a general way the powers of such banks to carry on the business of banking. R. L., c. 115, § 40, contains limitations upon those general powers. The section is as follows: —

No bank shall make or issue a note, bill, check, draft, acceptance, certificate or contract for the payment of money at a future day certain or with interest, except for money borrowed of the commonwealth or of a domestic institution for savings or money deposited by an assignee as provided in section sixty-two of chapter one hundred and sixty-three; and except also that debts due to one bank from another, including bills of the bank indebted, may draw interest; and banks may contract with cities and towns in this commonwealth for the payment or receipt of interest upon an account current of money deposited with and drawn from them by said cities and towns.

Under this statute it has been held that a contract with a depositor to pay the amount of the deposit on a day certain is illegal and void. *White v. Franklin Bank*, 22 Pick. 181. The same rule was applied not only to contracts for the payment of deposits at a future day certain, but apparently also to contracts for the payment of interest on such deposits, in *Atlas Bank v. Nahant Bank*, 3 Met. 581, 585. On the authority of these two cases, as well as on what seems to be a plain construction of the statute, I must advise you that it is not permissible for State banks to pay interest on deposits except in the instances enumerated in said section 40.

2. G. L., c. 167, § 12, prohibits the transacting of business in the manner of a savings bank except by savings banks and trust companies incorporated under the laws of this Commonwealth and certain foreign banking corporations. Said section 12 is, in part, as follows:—

No corporation, domestic or foreign, and no person, partnership or association except savings banks and trust companies incorporated under the laws of this commonwealth, or such foreign banking corporations as were doing business in this commonwealth, and were subject to examination or supervision of the commissioner on June first, nineteen hundred and six, shall hereafter make use of any sign at the place where its business is transacted having thereon any name, or other words indicating that such place or office is the place or office of a savings bank; . . . nor shall any such corporation, person, partnership or association, or any agent of a foreign corporation not having an established place of business in this commonwealth, solicit or receive deposits or transact business in the way or manner of a savings bank, or in such a way or manner as to lead the public to believe, or as in the opinion of the commissioner might lead the public to believe, that its business is that of a savings bank; . . .

The Attorney-General has ruled that the provisions of this statute are applicable to a corporation organized prior to its passage. III Op. Atty.-Gen. 250. State banks are neither savings banks nor trust companies. In the Revised Laws provisions relative to savings banks are incorporated in chapter 113, and provisions relative to trust companies are incorporated in chapter 116, while the organization and powers of State banks



are provided for by chapter 115, which by Gen. St. 1918, c. 12, has been discontinued except as to banks already incorporated therein. A State bank, being a domestic corporation which is not a savings bank or a trust company, is a corporation which is clearly prohibited from soliciting or receiving deposits or transacting business in the way or manner of a savings bank by the express provisions of G. L., c. 167, § 12. I must advise you, therefore, in answer to your second question, that it is not lawful for such banks to maintain savings departments and to solicit accounts in the manner of savings banks.

---

FISHING AND HUNTING LICENSES — LICENSE TO REAR WILD BIRDS OR GAME FOR SALE AS FOOD — SURRENDER OF LICENSE BY PERSON CONVICTED OF VIOLATION OF FISH AND GAME LAWS.

Licenses to hunt and fish, or to rear wild birds or game for sale as food, become *ipso facto* void upon the conviction of the licensee of a violation of the fish and game laws of the Commonwealth, and a refusal to surrender such license upon such conviction constitutes a misdemeanor, subjecting the licensee to the penalty imposed by G. L., c. 131, §§ 84 and 88, respectively.

You ask my opinion and advice as to what procedure your department should take to enforce the fish and game laws in regard to obtaining the surrender of fishing and hunting licenses by persons convicted thereunder who refuse to give them up, as required by the provisions of G. L., c. 131, §§ 14 or 84. Said sections provide as follows: —

To the Commissioner of Conservation.  
1921  
December 5.

SECTION 14. Whoever makes a false representation as to birthplace, requirements for identification, or of facts relative to property qualifications, or naturalization, or otherwise violates any provision of sections three to fourteen, inclusive, or is in any way directly or indirectly a party thereto, shall be punished by a fine of not less than ten nor more than fifty dollars or by imprisonment for not more than one month, or both. The certificate of any person convicted of a violation of the fish and game laws or of any provision of sections three to fourteen, inclusive, shall be void, and shall immediately be surrendered to the officer securing such conviction. The officer shall forthwith forward the certificate to the director, who shall cancel the same and notify the clerk

issuing the certificate of the cancellation thereof, and no person shall be given a certificate during the period of one year from the date of conviction. Any certificate issued to such person within one year of his conviction as aforesaid shall be void, and shall be surrendered on demand of any officer authorized to enforce the fish and game laws. No fee received for a certificate cancelled under this section shall be returned.

SECTION 84. Any person holding a license under section eighty-two, eighty-three or eighty-six, convicted of any violation of the fish and game laws, shall forfeit such license and be debarred from securing a new license for a period of one year from the date of conviction, in addition to being subject to the penalties provided in section eighty-eight. No person and no corporation of which he is a member shall be eligible to hold a license under said section if he has been convicted of any violation of the fish and game laws within one year prior to application therefor.

It is evident that the certificate of any person, upon conviction of a violation of the fish and game laws, becomes *ipso facto* void, so that, as a matter of law, there is no certificate outstanding, the original certificate becoming in law but a blank piece of paper, and thereafter the status of such convicted party, as to his right to hunt or fish, is the same as if he had never received a certificate, its mere retention and possession conferring no rights.

It would seem, however, that the provisions of section 14 are comprehensive enough to provide for a separate punishment for a person who refuses to surrender his certificate upon conviction, inasmuch as it is therein provided that "whoever makes a false representation . . . or otherwise violates any provision of sections three to fourteen, inclusive, or is in any way directly or indirectly a party thereto, shall be punished by a fine of not less than ten nor more than fifty dollars or by imprisonment for not more than one month, or both." One of the provisions of said section 14 is that "the certificate of any person convicted of a violation of the fish and game laws or of any provision of sections three to fourteen, inclusive, shall be void, and shall immediately be surrendered to the officer securing such conviction."

In my opinion, therefore, refusal to surrender such certificate immediately upon conviction to the officer securing such conviction constitutes a distinct offence, for which the party is liable to the punishment provided in said statute.

As to the provisions of section 84, above quoted, it is apparent that the license therein referred to (to rear wild birds or game for sale as food) is likewise forfeited upon conviction of the holder thereof of any violation of the fish and game laws, and it would seem that refusal to surrender such license constitutes a distinct misdemeanor, for which the penalty imposed by section 88 of said chapter 131 may be imposed.

I might suggest another method of securing the surrender of such certificates or licenses, which may prove to be even more efficacious, namely, that the officer of your department, upon securing a conviction, could request the court to continue the case for sentence for a definite period of time, as, for example, one week, and if in the meantime the defendant refuses to surrender said certificates or licenses, this fact could be brought to the attention of the court as bearing on the matter of sentence.

CONSTITUTIONAL LAW — APPORTIONMENT OF SENATORS AND REPRESENTATIVES — CENSUS OF LEGAL VOTERS — SUBSTITUTION OF APPORTIONMENT BASED ON LOCAL ENUMERATION FOR CONSTITUTIONAL CENSUS — DATE OF CENSUS — EXECUTIVE CONSTRUCTION OF CONSTITUTION — “LEGAL VOTER.”

Under Mass. Const. Amend. XXI and XXII, a statute which provides that an enumeration of legal voters made by local authorities shall be substituted for the enumeration required by those amendments would be unconstitutional. A statute which provides that the State census shall be taken in the same year as the Federal census would be unconstitutional because in conflict with the requirement of Mass. Const. Amend. XXI and XXII, that the State census be taken in 1865 and “of every tenth year thereafter.”

The constitutional apportionment of senators and representatives cannot be based upon those persons who have complied with the registration statute.

The words “legal voter” embrace all who possess the constitutional qualifications for the ballot, whether registered or not.

While an executive construction of a constitution or statute cannot control the plain meaning of the words employed, it is of weight in determining the meaning of a doubtful phrase if long continued and acquiesced in.

You have made the following inquiries in regard to the decennial State census:—

1. Would a statute which substitutes an enumeration of legal voters made by local officers for the enumeration now made in connection with the State census be constitutional?

2. Would it be constitutional to provide by statute that the State census shall be taken at the same time as the Federal census?

3. Does the term “legal voter” mean a registered voter or one who possesses all the qualifications for the ballot required by the Constitution although he is in fact unregistered?

1. Mass. Const. Amend. XXI provides, in part:—

A census of the legal voters of each city and town, on the first day of May, shall be taken and returned into the office of the secretary of the commonwealth, on or before the last day of June, in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid, a special enumeration shall be made of the legal voters; and in each city, said enumeration shall specify the number of such legal voters aforesaid, residing in each ward of such city. The enumeration afore-

said shall determine the apportionment of representatives for the periods between the taking of the census.

The house of representatives shall consist of two hundred and forty members, which shall be apportioned by the legislature, at its first session after the return of each enumeration as aforesaid, to the several counties of the commonwealth, equally, as nearly as may be, according to their relative numbers of legal voters, as ascertained by the next preceding special enumeration; . . .

It further prescribes how representative districts shall be determined. Amendment XXII contains similar provisions for the census and enumeration of legal voters, provides that such enumeration shall determine the apportionment of senators for the periods between the taking of the census, and prescribes the manner in which senatorial districts shall be determined. These articles superseded Amendment XIII, which provided for a census of "inhabitants" of each city and town in 1840 and in every tenth year thereafter, and made such census the basis of apportionment of both senators and representatives. *Opinion of the Justices*, 122 Mass. 594.

Nothing can more deeply concern the freedom and stability, the harmony and success of a representative government, nothing more directly affects the political and civil rights of its members and subjects, than the manner in which its legislative department is constituted. *Opinion of the Justices*, 10 Gray, 613, 615; *Attorney-General v. Apportionment Commissioners*, 224 Mass. 598, 601. A representative legislative department is based upon the constitutional right to vote and upon the due apportionment of representation among the voters. It is not now necessary to consider the constitutional qualifications for the ballot further than to point out that they cannot be increased or diminished by statute. *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 226 Mass. 607; see also *Capen v. Foster*, 12 Pick. 485. Amendment XIII formerly prescribed, and Amendments XXI and XXII now prescribe, the mode in which representation in the House and Senate shall be apportioned. Due compliance with the mandates of Amendments XXI and XXII is a constitutional right which may be enforced not only by the

Attorney-General, as the representative of all the people (*Attorney-General v. Apportionment Commissioners*, 224 Mass. 598), but also by any voter who is aggrieved by failure to obey them. *Douveau v. Apportionment Commissioners*, 225 Mass. 55; *McGlue v. County Commissioners*, 225 Mass. 59; *Brophy v. Apportionment Commissioners*, 225 Mass. 124.

The census for which Amendments XXI and XXII provide is the basis of the apportionment prescribed by those amendments. *Opinion of the Justices*, 142 Mass. 601; *Opinion of the Justices*, 157 Mass. 594. While the census taken in 1857 was a special census of "legal voters" only (see *Opinion of the Justices*, 220 Mass. 608), the census to be taken in 1865 and in every tenth year thereafter was and is a census of "inhabitants" (see *Opinion of the Justices*, 122 Mass. 594), in which "a special enumeration of the legal voters" must be made. As the Constitution expressly requires that such enumeration shall be made "in the census aforesaid," and further provides that "the enumeration aforesaid" shall determine the apportionment of both senators and representatives, such apportionment cannot constitutionally be based upon an enumeration made in a different manner. The Supreme Judicial Court has so advised on two occasions. In *Opinion of the Justices*, 142 Mass. 601, the justices said, at page 604: —

We have no doubt that the amendment imposes upon the General Court, in each tenth year, the duty of providing by suitable legislation that a census and enumeration of legal voters shall be taken and returned into the office of the Secretary of the Commonwealth. The great object of the amendment was to establish the Senate upon the basis of legal voters, and to provide for a method of ascertaining the number of legal voters, so as to furnish a guide to the General Court in dividing the State into senatorial districts. The fundamental idea is, that an enumeration shall be made under the authority and direction of the Commonwealth, and that this enumeration alone shall guide the General Court in making the division. Such enumeration must "determine the apportionment of senators," and the division must be made "according to the enumeration aforesaid." The General Court is to be governed entirely by this enumeration, and is not at liberty to look to any other source for information as to the number of legal voters in any territory which it proposes to erect into a senatorial district. It

must act upon the enumeration returned to the office of the Secretary of the Commonwealth, and by him laid before the Legislature.

So also in *Opinion of the Justices*, 157 Mass. 594, 595, the justices said: —

The clause that “The enumeration aforesaid shall determine the apportionment of representatives (or senators) for the periods between the taking of the census,” must mean that the apportionment is to be made upon the enumeration, and that the apportionment, after it is made, must determine the representative and senatorial districts and the number of representatives appropriate to each representative district until a new enumeration and an apportionment have been made. The enumeration and the apportionment are parts of one proceeding for distributing among the cities and towns of the Commonwealth in just proportion, every ten years, the senators and representatives to be elected during that period.

I am therefore of opinion that an enumeration of legal voters made by local officers cannot constitutionally be substituted for the enumeration prescribed by Amendments XXI and XXII.

2. The requirement that the census be taken in May and June applied only to the census of legal voters to be taken in 1857. *Opinion of the Justices*, 220 Mass. 608. But both Amendments XXI and XXII require that a census of inhabitants shall be taken in 1865 and “of every tenth year thereafter.” The Federal Act of July 2, 1909, c. 2, § 1, 36 Stat. 1, provides for a Federal census in the year 1910, and every ten years thereafter. The gap between the State census period and the Federal census period is therefore five years. The year in which the State census is taken fixes the recurring dates of reapportioning representation in both the House and Senate. I am therefore of opinion that the constitutional provision which requires the State census to be taken in 1865 and in every tenth year thereafter is mandatory, and that it cannot be altered by statute to coincide with the year prescribed for the Federal census. I may further point out that for the reasons already set forth the apportionment of representatives and senators in our State Legislature could not properly be based upon the Federal census.

3. The Constitution contains no definition of “legal voter.”

V Op. Atty.-Gen. 502. But as Amendments XXI and XXII required a census of "legal voters" in 1857, and still require an enumeration of "legal voters" in the census of 1865 and of every tenth year thereafter, compliance with that mandate made necessary an executive construction of the term. I am informed that the executive construction adopted in 1857 and since adhered to does not confine the term to those voters who have registered, but, on the contrary, embraces all those who possess the constitutional qualifications for the ballot, whether registered or not. While an executive construction of a constitution or statute cannot control the plain meaning of the words employed, it is of weight in determining the meaning of a doubtful phrase if long continued and acquiesced in. *Pierce v. Drew*, 136 Mass. 75, 79; *Costley v. Commonwealth*, 118 Mass. 1, 36; *Opinion of the Justices*, 214 Mass. 602, 606.

The Constitution neither requires nor provides for registration of those qualified to vote. The first registration law was enacted in 1821 and was upheld in *Capen v. Foster*, 12 Pick. 485, which was decided in 1831. Amendments XXI and XXII were adopted on May 1, 1857. At that time the statutes requiring registration as a condition precedent to voting had been in force for over thirty-five years. It cannot be supposed that the persons who drafted these amendments of the people who ratified them were ignorant of the practice. If the intention was to base the apportionment of both House and Senate upon the number of registered voters, that intention could have been easily expressed in clear and unambiguous words. Moreover, if that had been the intention, no census would have been required. An enumeration of the registration lists would have sufficed. Instead, the amendments avoid the use of the term "registered voter," use the phrase "legal voter," and provide for a census of "legal voters" in 1857 and for an enumeration of "legal voters" in the census of "inhabitants" to be taken in 1865 and in every tenth year thereafter.

To found the constitutional apportionment of senators and representatives upon registered voters would introduce a serious defect into the legislative structure. Registration now depends upon statute only. If apportionment were based upon those who



had complied with the statute, the repeal of the registration law would destroy the whole basis of apportionment. A construction of Amendments XXI and XXII which would make the continued existence of the Legislature itself dependent upon a law, as distinguished from the Constitution, is not to be adopted unless clearly required. The phrase "legal voter," taken in connection with the constitutional qualifications for the vote, naturally refers to those who possess those qualifications, rather than to those who have complied with the registration act. I am therefore of opinion that the words "legal voter" embrace all who possess the constitutional qualifications, whether registered or not.

---

CONSTITUTIONAL LAW — CIVIL SERVICE — VETERANS' PREFERENCE — CREATION OF OFFICE OF CONTROLLER — DELEGATION OF DELEGATED POWER — CONTINUATION SCHOOLS.

G. L., c. 31, §§ 21-28, providing for veterans' preference in the civil service, are constitutional.

The Legislature has power to create a new administrative office, such as that of controller, to which certain of the duties of the Auditor and the Treasurer and Receiver-General may be transferred.

The commission appointed by the Legislature to care for the welfare of soldiers cannot delegate their powers and duties to the American Legion.

G. L., c. 71, § 24, providing for State reimbursement for continuation schools, is constitutional.

You have put to me a number of inquiries, the first of which I have answered in a separate communication. The remaining questions, numbered as in your letter, I answer as follows: —

To the Commission on  
State Administration and  
Expenditures.  
1921  
December 5.

2. You ask whether the provisions for veterans' preference in the civil service are constitutional.

The question of the constitutionality of veterans' preference acts has been considered by our court.

St. 1895, c. 501, §§ 2 and 6 provided, in substance, that veterans who had made application for employment in the public service, in the manner therein provided, should be preferred for certification and appointment in preference to all other applicants not veterans, except women, with a proviso as to age limit.

These sections were held in *Brown v. Russell*, 166 Mass. 14, to be unconstitutional, on the ground that their purpose was to make the appointment of veterans compulsory, whether or not they were found or thought to be qualified to perform the duties of the office or employment which they sought.

Thereupon St. 1896, c. 517, was passed, which made some changes in the previous law.

Section 2 provides that veterans might apply for examination for any position in the qualified public service, and that if they passed the examination they should be preferred in appointment to all male persons not veterans.

Section 3 gave a discretion to the appointing power to appoint veterans to certain offices and employments without an examination, if in its opinion the needs of the public service required that to be done.

Section 6 provided that the Civil Service Commissioners should establish rules to secure the employment of veterans in the labor service of the Commonwealth, and of the cities and towns thereof, in the class for which they made application, in preference to all other persons except women, giving the commissioners authority to recognize an age limit in certain instances.

These sections were held to be constitutional by a majority of the justices in *Opinion of the Justices*, 166 Mass. 589. This opinion has been cited in later decisions and has not been overruled. *Ransom v. Boston*, 192 Mass. 299, 304; *Phillips v. Metropolitan Park Commission*, 215 Mass. 502, 506; cf. I Op. Atty.-Gen. 340.

The present law appears in G. L., c. 31, §§ 21 to 28. By section 21 the meaning of the word "veteran," previously confined to persons who had served in the War of the Rebellion or who had received a medal of honor from the President of the United States for distinguished service in the army or navy of the United States, was enlarged to include persons who had served in the army, navy or marine corps of the United States in time of war or insurrection and had been honorably discharged from service or released from active duty therein.

Sections 22, 23 and 24 are as follows:—

SECTION 22. A veteran of the civil war, or a person who has received a medal of honor as provided in the preceding section, may apply to the commissioner for appointment or employment in the classified civil service without examination. In such application, he shall state on oath the facts required by the rules. Age, loss of limb or other disability which does not in fact incapacitate shall not disqualify him for appointment or employment under this section. Appointing officers may make requisition for the names of any or all such veterans and appoint or employ any of them.

SECTION 23. The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the respective eligible lists in the order of their respective standing, above the names of all other applicants, and upon receipt of a requisition not especially calling for women, names shall be certified from such lists according to the method of certification prescribed by the civil service rules applying to civilians.

SECTION 24. A veteran who registers for employment in the labor service of the commonwealth and of the cities and towns thereof, if found qualified, shall be placed on the eligible list for the class for which he registers ahead of all other applicants. The names of eligible veterans shall be certified for labor service in preference to other persons eligible according to the method of certification prescribed by the civil service rules applying to civilians. If, however, the appointing officer certifies in the requisition for laborers that the work to be performed requires young and vigorous men, and, on investigation, the commissioner is satisfied that such certificate is true, he may fix a limit of age and certify only those whose age falls within such limit.

These sections correspond to St. 1896, c. 517, §§ 3, 2 and 6, respectively. While the language of the provisions has been changed, the substance of these sections remains as it was in the earlier acts, except for the enlargement of the meaning of the word "veteran" in sections 23 and 24.

The decisions of our court and of the New York court upon the constitutionality of statutes providing for the payment of bonuses to veterans [*Opinion of the Justices*, 211 Mass. 608; *People v. Westchester County National Bank*, 132 N. E. Rep. [N. Y.] 241] would seem to have little bearing.

The Attorney-General does not advise upon the constitutionality of existing laws except under unusual circumstances; but for the purpose of aiding your commission in its deliberations

I do not deem it improper to call your attention to the authorities above cited.

3. You ask whether an administrative head, such as a controller, can be created, with certain legislative powers to be taken from the office of the Auditor or of the Treasurer and Receiver-General.

The office of Treasurer and Receiver-General was recognized in the original Constitution, of which chapter II, section IV, article I, provided as follows: —

The secretary, treasurer and receiver-general, and the commissary-general, notaries public, and naval officers, shall be chosen annually, by joint ballot of the senators and representatives in one room. And, that the citizens of this commonwealth may be assured, from time to time, that the moneys remaining in the public treasury, upon the settlement and liquidation of the public accounts, are their property, no man shall be eligible as treasurer and receiver-general more than five years successively.

The office of Auditor was created by the Legislature by St. 1849, c. 56, entitled "An Act to establish the office of auditor of accounts." The duties of the Auditor, as provided generally by this statute, were to examine accounts and demands against the Commonwealth, to approve and countersign receipts given by the Treasurer, to keep a distinct account of all public receipts and expenditures under appropriate heads, to examine the books and accounts of the Treasurer, with the vouchers, to submit to the Legislature a complete statement of the public property of the Commonwealth, its debts and obligations, revenue and expenses during the preceding year and the balance left in the treasury, and to submit also an estimate of expenses for the current year and of the ordinary income of the Commonwealth. Many of these duties are continued in G. L., c. 11, while some of them are placed with the heads of departments.

The office of Auditor was recognized by the Constitution in article XVII of the Amendments, which provides for the election of the Secretary, Treasurer and Receiver-General, Auditor and Attorney-General as follows: —

The secretary, treasurer and receiver-general, auditor, and attorney-general, shall be chosen annually, on the day in November prescribed for the choice of governor; and each person then chosen as such, duly qualified in other respects, shall hold his office for the term of one year from the third Wednesday in January next thereafter, and until another is chosen and qualified in his stead.

Mass. Const. pt. 2d, c. I, § I, art. IV, gives power to the General Court "to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth."

It is a well-recognized principle that where an office is established by the Constitution without provision as to the term or duties thereof, the latter may be altered, enlarged or modified in such manner as the Legislature may deem for the public interest. *Wales v. Belcher*, 3 Pick. 508, 509, 510; *Dearborn v. Ames*, 8 Gray, 1; *Commonwealth v. Intoxicating Liquors*, 110 Mass. 172; *Opinion of the Justices*, 117 Mass. 603; *Opinion of the Justices*, 216 Mass. 605, 606; *Attorney-General v. Tufts*, 239 Mass. 458; III Op. Atty.-Gen. 546, 549.

It is my opinion, therefore, that the Legislature clearly has power to create a new administrative office to which certain of the duties of the Auditor and of the Treasurer and Receiver-General may be transferred. As a matter of nomenclature I make the suggestion that the title "controller," which you have suggested, means the same thing as "auditor."

4. You ask whether the commission appointed to care for the welfare of soldiers can turn over their work to the American Legion, allowing the American Legion to send vouchers to the commission in regard to expenditures.

The commission you refer to was established by Gen. St. 1919, c. 125, entitled "An Act to establish the Soldiers' and Sailors, Commission." Section 1 of that act states the duties of the commission as follows:—

There is hereby established the Soldiers' and Sailors' Commission whose object shall be to investigate the economic or other conditions which have resulted in the nonemployment of many soldiers, sailors and marines who have been honorably discharged or have been released from the service of the United States; to procure employment for them; to take such measures as may be legal and proper to induce former employers of soldiers and sailors to reinstate them in the positions which they held before entering the service; to provide means of support for them and their dependents if they are unable to procure employment, or if they are unable to work on account of disability or illness; and, in general, to befriend, protect and encourage those citizens of the commonwealth who have received or shall hereafter receive an honorable discharge or release from the military or naval service of the United States.

Section 2 provides that the commission shall consist of the persons designated under Spec. St. 1919, c. 112, section 1 of which is as follows:—

To provide for aiding returned soldiers, sailors and marines to find employment, the sum of ten thousand dollars is hereby appropriated out of the general fund or ordinary revenue of the commonwealth, to be expended under the direction and with the approval of a commission, to consist of the commissioner of labor, the commissioner of state aid and pensions, the adjutant general and six other citizens of the commonwealth, to be appointed by the governor with the advice and consent of the council, for the purpose of investigating the economic and other conditions which have resulted in the non-employment of soldiers, sailors and marines, and of procuring employment for them.

Sections 3 and 4 of Gen. St. 1919, c. 125, contain further provisions as to the powers and duties of the commission, and section 5 provides that the commission shall continue in existence until it is dissolved by proclamation made by the Governor.

Appropriations for the purpose of securing employment for returned soldiers, sailors and marines, under the direction of this commission, were made by St. 1920, c. 621, and by St. 1921, c. 203, § 2, item 139.

By the express terms of Gen. St. 1919, c. 125, the work of investigating conditions and procuring employment was made a duty of the commission. The subsequent appropriations were made to be

expended under the direction of the commission and for the purpose of continuing its work. It is a general principle that a delegated power cannot be delegated. *Stoughton v. Baker*, 4 Mass. 522, 530, 531; *Sanborn v. Carleton*, 15 Gray, 399, 403. In my judgment, it is clear that a committee appointed by the Legislature, with certain powers and duties, cannot delegate those powers and duties to be performed by some other body. I must therefore answer this question in the negative.

5. Your last question, as I understand it, is whether G. L., c. 71, § 24, providing for State reimbursement for continuation schools, is constitutional.

Mass. Const., pt. 2d, c. I, § I, art. IV, gives to the General Court full power and authority "from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof."

In the recent case of *Knights v. Treasurer and Receiver-General*, 237 Mass. 493, the court says: —

The distribution of public moneys in way of expenditures either directly by State officers or indirectly through county, city, town, or district officers need not be according to any principle of apportionment or equality other than such as commends itself to the wisdom of the General Court. *Lowell v. Oliver*, 8 Allen, 247, 255; *Duffy v. Treasurer and Receiver-General*, 234 Mass. 42.

I cannot advise you that the provision in question is in any respect unconstitutional. In my opinion, it is within the legislative discretion.

CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT — APPROPRIATION OF PUBLIC FUNDS — STATE VOCATIONAL EDUCATION — CONTRACTS WITH PRIVATE TEACHING AGENCIES.

Mass. Const. Amend. XLVI, the so-called “anti-aid” amendment, acts as a bar to the State Board of Vocational Education contracting with private institutions and persons for the furnishing of vocational instruction, if thereby there is involved the payment of any of the moneys appropriated by the Legislature for the use of said board.

To the Commissioner of  
Education.  
1921  
December 14.

On behalf of the State Board for Vocational Education you have submitted to me for approval as to matters of form a draft of agreement to be entered into by that board with certain private institutions and individuals for vocational instruction to be given persons injured in industry or otherwise, said board acting in the matter pursuant to the provisions of St. 1921, c. 462.

In your communication you also inquire as to whether Mass. Const. Amend. XLVI, the so-called “anti-aid” amendment, is a bar to said board contracting with private institutions and persons for the furnishing of vocational instruction.

On June 2, 1920, the 66th Congress passed an act entitled “An Act to provide for the promotion of vocational rehabilitation of persons disabled in industry and otherwise and their return to civil employment.” By this act of Congress there was appropriated for the use of the States which accepted the provisions of the act certain Federal moneys for vocational rehabilitation, and all moneys expended under the provisions of the act are to be expended upon certain conditions, one of which is that “for each dollar of Federal money expended there shall be expended in the State under the supervision and control of the State board at least an equal amount for the same purpose.” By St. 1921, c. 462, the Commonwealth of Massachusetts accepted the provisions of this act of Congress, and the Legislature, by St. 1921, c. 502, item 334a, appropriated \$10,000 for the purpose of carrying out the provisions of the act.

So far as is pertinent to the present inquiry, Mass. Const. Amend. XLVI, § 2, provides that “no grant, appropriation or use of public money or property or loan of public credit shall be



made or authorized by the commonwealth . . . for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, . . . institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both."

These provisions, in my opinion, act as a bar to the execution of a contract, as proposed by you, which involves the payment to a private institution or individual of any of the moneys appropriated by the Commonwealth.

The funds, however, which are allotted to this Commonwealth from appropriations made under the act of Congress, and of which the Treasurer and Receiver-General is custodian, may, in my opinion, be expended pursuant to the terms of an agreement for instruction entered into with private institutions and persons by the State Board for Vocational Education.

The distinction between moneys appropriated by the Commonwealth and those allotted by the Federal government to the Commonwealth should be kept clearly in mind, and only the latter funds should be paid out to private institutions or individuals which are not publicly owned and which are not under the exclusive control, order or superintendence of public officers or public agents authorized by the Commonwealth.

CONSTITUTIONAL LAW — HOUSE OF REPRESENTATIVES —  
 INCOMPATIBLE OFFICES — EFFECT OF ACCEPTING IN-  
 COMPATIBLE OFFICE — POWER TO DETERMINE DISQUALIFI-  
 CATION — RIGHT OF DE FACTO MEMBER TO SALARY.

Under Mass. Const. Amend. VIII, the office of Deputy Collector of Internal Revenue of the United States is incompatible with the office of representative to the General Court.

Where a member of the House of Representatives of Massachusetts accepts the incompatible office of Deputy Collector of Internal Revenue of the United States, he ceases to be a *de jure* member of the House, but remains a *de facto* member until the House either accepts the resignation or declares the seat vacant.

While the House of Representatives is the exclusive judge of the qualifications of the members thereof, it has been accustomed in such cases to follow the rules of law.

A *de facto* officer is not entitled to salary or compensation.

You inquire whether a member of the House of Representatives of this Commonwealth, who was appointed a Deputy Collector of Internal Revenue of the United States, and who took the oath of office on October 10, 1921, has vacated his seat as representative.

Mass. Const. Amend. VIII provides: —

No judge of any court of this commonwealth, (except the court of sessions,) and no person holding any office under the authority of the United States, (postmasters excepted,) shall, at the same time, hold the office of governor, lieutenant-governor, or councillor, or have a seat in the senate or house of representatives of this commonwealth; and no judge of any court in this commonwealth, (except the court of sessions,) nor the attorney-general, solicitor-general, county attorney, clerk of any court, sheriff, treasurer and receiver-general, register of probate, nor register of deeds, shall continue to hold his said office after being elected a member of the Congress of the United States, and accepting that trust; but the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office; and judges of the courts of common pleas shall hold no other office under the government of this commonwealth, the office of justice of the peace and militia offices excepted.

In my opinion, one who is appointed a Deputy Collector of Internal Revenue of the United States and takes the oath of

office is a "person holding an office under the authority of the United States," within the meaning of this amendment. Such office is manifestly not within the exception as to postmasters. I am therefore of opinion that the two offices are incompatible.

It seems that the acceptance of this Federal office does not in and of itself vacate the office of representative. The amendment provides that "the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office." There is serious doubt as to whether a member of the House or Senate can divest himself of that office by resignation until action is taken thereon by the House or Senate, as the case may be. In *Fitchburg Railroad Co. v. Grand Junction, etc., Co.*, 1 Allen, 552, Chief Justice Shaw, sitting at *nisi prius*, ruled that a senator, by simply tendering his resignation, did not divest himself of the office, but this point was left undecided by the full bench. See also *Badger v. United States ex rel. Bolles*, 93 U. S. 599; III Op. Atty.-Gen. 1. A judicial officer who accepts an incompatible office is liable to removal in a direct proceeding by the Commonwealth. *Commonwealth v. Hawkes*, 123 Mass. 525. But until removed he remains an officer *de facto* though not *de jure*. *Sheehan's Case*, 122 Mass. 445. In my opinion, some action by the House is required to render the resignation effective. As no precept for a special election to fill a vacancy can issue without an order of the House, this view produces no sensible inconvenience. Opinion of the Attorney-General to the Speaker of the House of Representatives, June 15, 1921 (VI Op. Atty.-Gen. 214).

Mass. Const., pt. 2d, c. I, § III, art. X, provides, in part: —

The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution; . . .

No court possesses jurisdiction to determine whether a member of the House is disqualified, or to remove him for a disqualification if such exists. That power is vested exclusively in the House. *Dinan v. Swig*, 223 Mass. 516. But while the power of the House over the subject is absolute, and is subject to no

review, it may be proper to add that the House has been accustomed in such cases to follow the rules of law. Opinion of the Attorney-General to the Speaker of the House of Representatives, June 15, 1921 (VI Op. Atty.-Gen. 214); I Op. Atty.-Gen. 3, 8.

In view of Amendment VIII I am of opinion that in the present case the House may properly accept the "resignation" or declare the seat vacant. As the member became only a *de facto* member on Oct. 10, 1921, he is not entitled to any salary or compensation subsequent to that date. *Phelon v. Granville*, 140 Mass. 386; *Doliver v. Parks*, 136 Mass. 499.

---

STATE OFFICERS — JUDGES OF CERTAIN COURTS — DISTRICT ATTORNEYS — DUTY TO FURNISH INFORMATION TO THE SUPERVISOR OF ADMINISTRATION.

The words "every state officer, department or head thereof," as used in G. L., c. 30, § 38, when construed in connection with Mass. Const. Amend. LXVI, and G. L., c. 30, § 1, are confined to officers of the executive branch and do not include officers of the judicial branch.

G. L., c. 30, § 38, does not require the Supreme Judicial Court, the Superior Court, the Land Court and courts of probate and insolvency to furnish information to the Supervisor of Administration.

Although district attorneys are not "officers of the commonwealth," within the meaning of Mass. Const., pt. 2d, c. I, § II, art. VIII, they are "state officers," within the meaning of G. L., c. 30, § 38, and must furnish information prescribed by that section to the Supervisor of Administration.

You inquire whether the Supreme Judicial Court, the Superior Court, the courts of probate and insolvency, the Land Court and the district attorneys are within the meaning of the phrase "every state officer, department or head thereof," as employed in G. L., c. 30, § 38, which provides as follows:—

Every state officer, department or head thereof shall, whenever required by the supervisor, furnish him with such information as he prescribes concerning all officials and employees of the commonwealth employed in or by such office or department for whose services money has been paid by the commonwealth.

Gen. St. 1916, c. 296, abolished the Commission on Economy and Efficiency and the State Board of Publication and vested

their powers in the Supervisor of Administration, to whom the word "him" in the above section refers. See now G. L., c. 7. On Nov. 5, 1918, the people adopted Amendment LXVI, which provided, in part, that on or before Jan. 1, 1921, "the executive and administrative work of the commonwealth shall be organized in not more than twenty departments." This was done by Gen. St. 1919, c. 350. G. L., c. 30, contains general provisions relative to State departments, commissions, officers and employees. Section 1 reads as follows:—

The following words, as used in this chapter, shall have the following meanings, unless the context otherwise requires:

"Departments," except in section two, all the departments of the commonwealth, except the departments of banking and insurance and of civil service and registration but including in lieu thereof the divisions of banks and loan agencies, of insurance, of savings bank life insurance and of civil service and the several boards serving in the division of registration of the department of civil service and registration, and also including the metropolitan district commission.

"Supervisor," supervisor of administration.

Section 38 must be read with and is restrained by Amendment LXVI, Gen. St. 1919, c. 350, and the definition of "departments" contained in the above section. When so construed, it is plain that the words "every state officer, department or head thereof" are confined to the executive branch of the government and do not include the judicial branch. This construction is confirmed by G. L., c. 30, § 45, which provides that the Supervisor shall classify "all appointive offices and positions in the government of the commonwealth, except those in the judicial branch and those in the legislative branch," with an exception in the latter branch not here material. I am therefore of opinion that section 38 does not apply to the courts named in your inquiry.

Mass. Const. Amend. XIX provides, in substance, that district attorneys shall be chosen by the people of the several districts for such term of office as the Legislature shall prescribe. Although they are paid by the Commonwealth and may interchange official duties, their duties are ordinarily of local character. G. L., c. 12, § 27; *Commonwealth v. Beaman*, 8 Gray, 497; *Parker v. May*,

5 Cush. 336, 339-340; *Attorney-General v. Tufts*, 239 Mass. 458. They are not "officers of the commonwealth" who can be removed only by impeachment. G. L., c. 211, § 4; *Attorney-General v. Tufts*, *supra*. On the other hand, the powers and duties of district attorneys are prescribed by G. L., c. 12, which also defines and declares certain of the powers and duties of the Attorney-General. To him, as the chief law officer of the Commonwealth, they are in many respects subject. *Commonwealth v. Kozlowsky*, 238 Mass. 379. The Department of the Attorney-General is one of the administrative departments provided for and classified by Gen. St. 1919, c. 350, § 33. In an opinion rendered to you on Dec. 27, 1920, I advised you that until G. L., c. 12, § 2, took effect on Dec. 31, 1920, an increase in the salary of an Assistant Attorney-General required the approval of the Supervisor. Under these circumstances, I am of opinion that even though a district attorney is not "an officer of the Commonwealth," within the meaning of Mass. Const., pt. 2d, c. I, § II, art. VIII, he is within the words "state officer" as employed in G. L., c. 30, § 38.

---

CONSTITUTIONAL LAW — APPROPRIATION OF PUBLIC FUNDS —  
PUBLIC PURPOSE — STATE HOUSE — ASSIGNMENT OF LO-  
CATION — VETERANS OF FOREIGN WARS — FURNISHINGS.

The temporary locations for the Massachusetts Department of the Veterans of Foreign Wars assigned, under G. L., c. 8, § 17, as amended by St. 1921, c. 459, by the Superintendent of Buildings, are to be furnished by the Superintendent.

The statute providing for the assignment of a location in the State House for the free use of the Veterans of Foreign Wars is constitutional, for the assignment of the space for the preservation of relics and records of war is for a public purpose.

To the Superin-  
tendent of  
Buildings,  
1921  
December 21.

You have requested my opinion as to whether or not the quarters to be assigned to the Massachusetts Department of the Veterans of Foreign Wars under the provisions of G. L., c. 8, § 17, as amended by St. 1921, c. 459, are to be furnished by your department.

The essential provisions of the statute referred to are as follows: —

There shall be set apart suitably furnished rooms in the state house for the use of the Grand Army of the Republic of the department of Massachusetts and the Massachusetts department of The American Legion, respectively, and there may be assigned by the superintendent, with the approval of the governor and council, certain spaces in the state house, suitably furnished, for the use of the Massachusetts department of the United Spanish War Veterans, and temporary locations for the Massachusetts department of the Veterans of Foreign Wars shall be assigned by the superintendent within the rooms or spaces set apart for the Massachusetts department of The American Legion, such rooms or spaces to be under the charge of the state commanders of the respective departments, subject to this chapter.

As it was provided that the locations for the Veterans of Foreign Wars are to be assigned by you within the rooms or spaces set apart for The American Legion, and it has been provided that the rooms set apart for The American Legion are to be suitably furnished, it necessarily follows that the space allotted to the Veterans of Foreign Wars is to be furnished.

Your inquiry necessarily draws in question your authority to expend public money to furnish these quarters. This question cannot be answered without considering the constitutionality of the act. This statute contains provisions as to preservation of relics and records, similar to those of House Bill No. 1445, which related to quarters in the State House for the use of the United Spanish War Veterans. This department advised that House Bill No. 1445 was constitutional. V Op. Atty.-Gen. 526. For the reasons there stated, the present act is not, in my opinion, open to constitutional objection.

APPROPRIATION — NEPONSET VALLEY IMPROVEMENT — PAYMENT  
FOR CONSTRUCTION WORK IN LIEU OF DAMAGES.

The balance of an appropriation made by the Legislature in 1911 for damages caused by the taking of land, easements or rights in land, in connection with the protection of the public health in the valley of the Neponset River, can be paid out of the treasury only as money for such damages, and cannot be used for certain construction work in favor of landowners in lieu of the payment of money for damages.

To the Com-  
missioner  
of Public  
Health.  
1921  
December 22.

You have requested my opinion upon a question of law arising out of an opinion given to you under date of Sept. 20, 1921, relative to the disposition of a balance remaining from an appropriation for land damages under St. 1911, c. 655, § 10, which had to do with the protection of the public health in the valley of the Neponset River. You state that "when the new appropriation of \$3,000 was made by the Legislature of 1921, it was with the understanding that the balance of the 1911 appropriation was to be used in addition to the appropriation of this year in the construction of bridges as payment or compensation for damages arising under the 1911 act." Your specific question is as to whether or not the balance of the 1911 appropriation can be used for work to be constructed as payment or compensation for, or in lieu of, land damages arising under the 1911 act.

Under the authority of the 1911 statute you made takings of certain parcels of land bordering on the Neponset River.

The fee in such lands thus having passed to the Commonwealth, the owners of property rights in the lands became possessed of a vested right. This vested right consisted of the constitutional right to reasonable compensation and of the statutory right to have it assessed and paid in money. *Hellen v. Medford*, 188 Mass. 42.

In the case of *Commonwealth v. Peters*, 2 Mass. 125, it was decided that the Commonwealth had no power to award a landowner anything but money in compensation for his damages in laying out a highway over his land. The court, in that decision, pointed out that the statute explicitly provided that damages were to be paid in money, and, that being the case, the Com-



monwealth could not compensate the owner by giving him title to other land, because it would not be the satisfaction which the law had determined should be given.

The same situation exists in the present case. The Legislature, by St. 1911, c. 655, § 10, provided that damages shall be paid in money, the section reading as follows:—

The sum of five thousand dollars is hereby appropriated for damages arising under this act, caused by the taking of land, easements or rights in lands.

As stated above, a landowner can insist upon the payment of money as compensation, but in answering your question it is necessary to consider the situation where a landowner is willing to waive the constitutional protection of his property rights, and consents to the payment of his land damages in service or in kind. These facts make it necessary to determine what powers, if any, the Department of Public Health has to compromise a landowner's claim by making compensation in service or in kind.

It has been decided that an executive officer has no inherent power to compromise a contested right for a valuable consideration. *William Cramp & Sons Co. v. United States*, 216 U. S. 494; *United States v. Beebe*, 180 U. S. 343.

For your department to compromise upon any basis, there must be valid statutory authority to that effect. An examination of your powers under the Neponset Valley act, so called, discloses no authority conferred upon your department to compromise with landowners upon the basis of payment in service or in kind. In fact, the sole medium made available to the department by the Legislature in settling damages with landowners is that of money.

Accordingly, it is my opinion that the balance of the 1911 appropriation can be paid out of the treasury only as money for damages caused by takings by eminent domain, and that said balance cannot be used for certain construction work in favor of landowners in lieu of the payment of money for damages.

PATENTS — RIGHT OF THE MASSACHUSETTS AGRICULTURAL COLLEGE TO USE A PATENTED FORMULA FOR EXPERIMENTAL PURPOSES.

Use of a patented article, formula or process for experimental purposes, without the consent of the patentee or his assigns, would be unjustifiable, constituting an infringement of the patent, even though there be no sale or profit derived from such use.

To the Commissioner of Education.  
1921  
December 22.

You inquire whether or not the Massachusetts Agricultural College has a right to use for experimental purposes the formula for the treatment of butter and ice cream with carbon dioxid, as patented by the persons named in your letter.

It appears that the ice-cream freezing process in question was patented on Jan. 27, 1920, and the process of making butter on July 12, 1921. You do not state whether or not the patentees are or have been employed by or connected with said college, and this opinion is accordingly rendered on the assumption that they have not been so connected. I also assume that the use of said formula is purely for experimental purposes, and the products thereof are not to be sold or put into actual use.

The Constitution of the United States, article I, section 8, gives Congress power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The patent act provides that every patent shall contain a grant to the patentee, his heirs and assigns, for a certain term of years, of "the exclusive right to make, use and vend the invention or discovery throughout the United States."

It has, accordingly, been repeatedly declared by the Supreme Court of the United States that neither the United States nor any State has any more right than a private person to use a patented invention without license of the patentee or making compensation to him. *United States v. Burns*, 12 Wall, 246; *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U. S. 59; *United States v. Palmer*, 128 U. S. 262; *Belknap v. Schild*, 161 U. S. 10; *McCornick Harvesting Machine Co. v. Aultman Co.*, 169 U. S. 606; *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 607.

It is well settled that the exclusive privilege of a patentee is to be protected to the full extent of his invention and grant, equally against an improver and the general public. See *Kokomo Steel & Wire Co. v. Columbia Wire Co.*, 200 U. S. 621.

There is perhaps no exact definition of the term "infringement," but speaking broadly it relates to a condition which arises out of the combination of events, the creation of the monopoly by the government and the invasion of that monopoly by the person. Thus, infringement may consist either in making, using or selling the invention, or in all three. See *Birdsell v. Shaliol*, 112 U. S. 485. Accordingly, it is held that use of a patented article or process for personal benefit or convenience is an infringement, even though there be no sale or profit derived from such use. See *Beedle v. Bennett*, 122 U. S. 71.

There is some authority for the proposition that "the making of a patented invention for amusement or scientific investigation, with no intent of using it practically, is not an actionable infringement; but it is otherwise where the thing made is sold or put into actual use." 30 Cyc. 972, and cases cited. In view of what appears to be the great weight of authority, however, I am of the opinion that the Massachusetts Agricultural College would not be justified in using, even for experimental purposes, the formula referred to, unless it first procures the consent of said patentees or their assignees.

TAXATION — LEGACIES AND SUCCESSIONS — EXEMPTIONS — GIFT  
TO BE USED FOR SUCH CHARITABLE PURPOSES AS THE DONEE  
MAY DEEM BEST.

Exemptions from taxation are not to be lightly inferred even in the case of a charity.

A gift by will to an individual "to be used by him for such charitable purposes as he may deem best" is not exempt from an inheritance tax, under Gen. St. 1916, c. 268, § 1 (now G. L., c. 59, § 1), since the gift is neither "to or for the use of charitable . . . societies or institutions, the property of which is by law exempt from taxation," nor "for or upon trust for any charitable purpose to be carried out within this commonwealth."

To the Com-  
missioner of  
Corporations  
and Taxation.  
1921  
December 23.

You direct my attention to the eleventh paragraph of the will of A. Paul Keith, who died domiciled in this Commonwealth in October, 1918, and inquire whether the bequest made by said paragraph to Cardinal William O'Connell is subject to an inheritance tax.

The eleventh paragraph of the will provides: —

Eleventh: All the rest, residue and remainder of my property and estate, real, personal and mixed, of every name, nature and description, and wheresoever situated, I give, devise and bequeath unto His Eminence William O'Connell of Boston, Massachusetts, a Cardinal of the Holy Roman Catholic Church, and to the President and Fellows of Harvard College, a Massachusetts corporation, to be divided between him and that corporation in equal shares, share and share alike, and I direct that what is received by him shall be used by him in his discretion for such charitable purposes as he may deem best, in memory of my mother, Mary Catherine Keith, and that what is received by the President and Fellows of Harvard College shall be devoted by that corporation to the general purposes of Harvard University.

As the testator died in 1918 the statute applicable is Gen. St. 1916, c. 268, § 1, which excepts from the inheritance tax gifts —

to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of this commonwealth exempt from taxation or for or upon trust for any charitable purposes, to be carried out within this commonwealth, or to or for the use of the commonwealth or any city or town within this commonwealth for public purposes.

Exemptions from taxation are not to be lightly inferred, but must appear plainly either from the express words or necessary intendment of the statute. *Wheelwright v. Tax Commissioner*, 235 Mass. 584, 586. The rule applies to exemptions in favor of charity. *Milford v. County Commissioners*, 213 Mass. 162, 165; *Hooper v. Shaw*, 176 Mass. 190. The present statute exempts three classes of charitable gifts, each class being subject to definite and express limitations. As was said in *Pierce v. Stevens*, 205 Mass. 219, 221:—

The question is whether this gift is within either of the exemptions created by the statute. These are three in number. The first is of gifts “to or for the use of charitable, educational or religious societies or institutions, the property of which is by law exempt from taxation”; the second is of property given “to a trustee or trustees for public charitable purposes within the Commonwealth”; and the third is of property given “to or for the use of a city or town for public purposes.” R. L., c. 15, § 1.

The common ground for all three exemptions is the benefit which accrues to the public of this Commonwealth from the use of that which is exempted. See *Davis v. Treasurer and Receiver-General*, 208 Mass. 343, 345. Hence, each exemption is subject to a limitation which attaches the exempted gift in some way to the Commonwealth.

A bequest to or for the use of a charitable, educational or religious society or institution is not exempt under the first clause unless the property of such society or institution is “by the laws of *this commonwealth* exempt from taxation.” *First Universalist Society v. Bradford*, 185 Mass. 310. This clause does not exempt testamentary gifts to charitable societies or institutions in other States. *Minot v. Winthrop*, 162 Mass. 113; *Rice v. Bradford*, 180 Mass. 545; *Batt v. Treasurer and Receiver-General*, 209 Mass. 319, 320. Nevertheless, a bequest to or for the use of a Massachusetts charitable society or institution of the proper character is exempt, because within the precise words of the exemption, even though such society or institution carries on activities outside the Commonwealth. *Balch v. Shaw*, 174 Mass. 144; *Parkhurst v. Treasurer and Receiver-General*, 228 Mass. 196. To restrict this exemption

to those charitable societies and institutions which are both organized under the laws of this Commonwealth and also restrict their activities wholly within its borders would superadd a limitation which the Legislature has not made.

The exemption of gifts "to or for the use of the commonwealth or any city or town within this commonwealth for public purposes" is restricted by the express words of the statute to Massachusetts cities and towns. Even before this restriction was declared in express words, by St. 1909, c. 527, § 1, the earlier act had the same meaning. *Davis v. Treasurer and Receiver-General*, 208 Mass. 343.

*Hooper v. Shaw*, 176 Mass. 190, decided in 1900, held that a testamentary gift in trust for public charitable purposes to be carried out within this Commonwealth was not within the exemption conferred by the first clause, because neither donee nor beneficiary was a "society or institution." St. 1906, c. 436, § 1, added a further exemption of gifts "to a trustee or trustees for charitable purposes within the commonwealth." This exemption was extended by St. 1907, c. 563, § 1, to include gifts "for or upon trust for any charitable purposes," but the restriction to purposes "to be carried out within this commonwealth" was restored by St. 1909, c. 527, § 1, and has been preserved ever since. G. L., c. 59, § 1. The distinction between this exemption and the exemption made by the first clause is vital. Under the first clause the donee or beneficiary must be a Massachusetts society or institution of the proper character. *Hooper v. Shaw*, 176 Mass. 190. Under the second clause the charitable purpose must be carried out within the Commonwealth. *Pierce v. Stevens*, 205 Mass. 219.

The exemption which embraces gifts to or for the use of cities or towns manifestly does not apply to the present case. In an opinion rendered to you on Aug. 26, 1921, I advised you that this bequest is to Cardinal O'Connell in his personal capacity, and not to the Roman Catholic Archbishop of Boston, who is created a corporation sole by St. 1896, c. 506, § 1. I further advised you that as the will provides that "what is received by him Cardinal O'Connell shall be used by him in his discretion for such charitable purposes as he shall deem best," the trust is for charitable

purposes generally, to be selected by the Cardinal, and not for any specific institution, society or corporation. Such a bequest is plainly not within the provision which exempts gifts to or for the use of charitable "societies or institutions the property of which is by the laws of this commonwealth exempt from taxation." *Hooper v. Shaw*, 176 Mass. 190. There is nothing in the will which constrains the Cardinal to carry out this charity within this Commonwealth. The testator may or may not have anticipated that the Cardinal would probably apply the fund to Massachusetts charities. But an unexpressed anticipation of the testator, if he had it, cannot restrain or control the broad power of selection which he has conferred by express words. The taxability of this bequest is determined at the moment of death. *Hooper v. Bradford*, 178 Mass. 95; *Pierce v. Stevens*, 205 Mass. 219. A taxable gift for a foreign charitable purpose cannot be brought within the exemption by subsequently creating a Massachusetts charitable corporation to execute it. *Pierce v. Stevens*, 205 Mass. 219. In my opinion, this bequest is not and cannot be brought within the exemption conferred by the second clause upon gifts "for or upon trust for any charitable purposes to be carried out within this commonwealth." I therefore advise you that the bequest to Cardinal O'Connell is subject to an inheritance tax under Gen. St. 1916, c. 268.

---

JUSTICE OF THE PEACE — NOTARY PUBLIC — TIME OF RESIDENCE  
IN MASSACHUSETTS.

There is no legal requirement as to time of residence in Massachusetts before a person may become a justice of the peace or notary public.

You request my opinion as to the time of residence in Massachusetts required before one may become a justice of the peace or notary public.

To the  
Governor.  
1921  
December 27.

Mass. Const., pt. 2d, c. II, § I, art. IX, provides as follows: —

All judicial officers, (the attorney-general, the solicitor-general, (all sheriffs,) coroners, (and registers of probate,) shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment.

Mass. Const. Amend. IV, provides:—

Notaries public shall be appointed by the governor in the same manner as judicial officers are appointed. . . .

Although the Constitution expressly provides that residence for a certain fixed period of time within the Commonwealth is a prerequisite to the election or appointment of many officers (for example, Governor, Mass. Const., pt. 2d, c. II, § I, art. II; Lieutenant-Governor, Mass. Const., pt. 2d, c. II, § II, art. I; Councilors, Mass. Const. Amend. XVI; Senators, Mass. Const. Amend. XXII; Representatives, Mass. Const. Amend. XXI; Secretary, Treasurer and Receiver-General, Auditor and Attorney-General, Mass. Const. Amend. XVII), nevertheless, nowhere in the Constitution or in the General Laws is there to be found any requirement as to time of residence in Massachusetts before a person may become a justice of the peace or notary public.

---

#### MEDICAL REGISTRATION — PATHOLOGIST.

A person acting as a pathologist should be registered under G. L., c. 112, §§ 2-12, providing for medical registration.

You request an opinion on the following question:—

Should a person employed by the Department of Mental Diseases, for the purpose of making autopsies, reporting on findings and acting as a pathologist, be registered under the law providing for medical registration?

G. L., c. 112, §§ 2-12, provide for the registration of physicians and surgeons. Section 6 provides, in part, as follows:—

Whoever, not being lawfully authorized to practice medicine within the commonwealth and registered under section two, . . . holds himself out as a practitioner of medicine or practices or attempts to practice medicine in any of its branches, . . . shall be punished by a fine of not less than one hundred nor more than five hundred dollars or by imprisonment for three months, or both.



The Standard Dictionary defines a pathologist as "one who is learned or skilled in pathology." Pathology is therein defined as "the branch of medical science that treats of morbid conditions, their causes, symptoms, nature, physiology and anatomy. . . . It embraces also as special departments morbid anatomy, etiology, nosology, and therapeutics."

In the case of *Commonwealth v. Zimmerman*, 221 Mass. 184, the court said: —

Medicine relates to the prevention, cure and alleviation of disease, the repair of injury, or treatment of abnormal or unusual states of the body and their restoration to a healthful condition. It includes a broad field. It is not confined to the administering of medicinal substances or the use of surgical or other instruments. It comprehends "a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject, and of the laws of health and the modes of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are most effective in promoting cures." . . . In order to practice medicine one need not cover the entire field of the science. If he devotes himself to a very restricted part of it, he still may be found to practice medicine. It is matter of common knowledge that there has been great specialization in that profession in recent years. To that effect are the decisions.

To the same effect see *Commonwealth v. Jewelle*, 199 Mass. 558; *Commonwealth v. Porn*, 196 Mass. 326; *People v. Gordon*, 194 Ill. 560; *People v. Allcutt*, 189 N. Y. 517.

It is therefore my opinion that a person "acting as a pathologist" should be registered under the law providing for medical registration.

---

ARMORIES — OFFICE FURNITURE AND EQUIPMENT — CHIEF  
QUARTERMASTER — SUPERINTENDENT OF BUILDINGS.

Under G. L., c. 33, § 44, the care and maintenance of all armories belonging to the Commonwealth, including the purchase of furniture and equipment therefor, devolves upon the chief quartermaster.

On behalf of the Armory Commission you request my opinion as to whom authority has been given to purchase certain furniture and equipment for State armories.

To the Adjutant General.  
1922  
January 5.

In your letter you point out that G. L., c. 33, § 45, provides that the Armory Commission shall erect, furnish and equip armories, and that, under G. L., c. 8, § 6, it is provided that the Superintendent of Buildings "shall have charge of purchasing all office furniture, fixtures, equipment, stationery and office supplies for all executive and administrative departments and officers. . . ."

At the outset, let me call to your attention that by G. L., c. 33, § 45, it is provided that the Armory Commissioners "shall rebuild, remodel or repair armories of the first class injured or destroyed by fire, and may reconstruct, remodel, enlarge or otherwise improve existing state armories, if they deem the needs of the service so require, and shall construct additional armories until the volunteer militia shall be provided with adequate quarters. They shall designate the location of armories so to be constructed and shall thereupon, on behalf of the commonwealth, . . . acquire . . . suitable lots of land . . . , and shall erect, furnish and equip thereon armories sufficient for one or more companies of militia. . . ." You will note, however, that by the preceding section (§ 44) it is provided that, on the completion and acceptance of all armories erected by the Commonwealth, the care and maintenance thereof, as well as the care and maintenance of all armories belonging to the Commonwealth, shall devolve upon the chief quartermaster.

Previously the provision as to the care and maintenance of armories devolving upon the chief quartermaster was found in Gen. St. 1917, c. 327, § 40, and the provision as to the Superintendent of Buildings having charge of purchasing supplies was found in Gen. St. 1919, c. 350, § 19.

When the statutes of the Commonwealth were revised by the commissioners and consolidated into the General Laws, both these statutory provisions were brought forward and made a part of the General Laws, as above stated. Both, therefore, must be taken as independent and co-existing statutes: the one, G. L., c. 33, § 44, relating to a particular field of purchasing office supplies, to wit, for the armories belonging to the Commonwealth, the other, G. L., c. 8, § 6, relating to the purchasing of office supplies in general. This being so, the rule of construction, that when the provisions of a particular statute conflict with those of

a general statute they are in force as to the particular matters with reference to which they are enacted, should be applied.

Accordingly, in my judgment, the chief quartermaster has charge of purchasing the furniture and equipment in question for the State armory, the care and maintenance of which have been placed upon him by a particular statute.

---

BILLBOARD ADVERTISING — RULES AND REGULATIONS OF THE  
DIVISION OF HIGHWAYS — PUBLIC WAYS — PERMITS.

Where outdoor advertising signs and devices project into or over public ways in any city or town, the duty of granting permits for the placing and maintenance of such signs rests with the municipal board or officer having charge of the laying out of public ways.

You request my opinion upon a question of law based on the following facts: —

Your department is in receipt of two applications for permission to erect advertising signs which will be located inside the highway location of the streets of the city of Boston. One of these signs is to be located at the corner of Hollis and Tremont streets, the other is to be located on the second story of a building at the corner of Tremont and Eliot streets.

You ask whether or not the signs in question can be placed within highway locations, contrary to your rules and regulations concerning outdoor advertising.

G. L., c. 93, §§ 29 to 33, provide, so far as is pertinent to your question, that the Division of Highways shall make rules and regulations for the proper control and restriction of billboards, signs and other advertising devices on public ways or on private property within public view of any highway, public park or reservation, and that no one shall post, erect, display or maintain on any public way or on private property within public view from any highway, public park or reservation any billboard or other advertising device, unless such billboards or device conforms to the rules and regulations. Your rules for the erection of advertising signs and devices, under date of June 29, 1921,

To the Com-  
missioner of  
Public Works.  
1922  
January 11.

provide, by section 5, clause A, that "no outdoor advertising shall be permitted within the bounds of any highway."

G. L., c. 85, § 8, provides as follows:—

The municipal board or officer having charge of the laying out of public ways may grant permits for the placing and maintaining of signs, advertising devices, clocks, marquees, permanent awnings and other like structures projecting into or placed on or over public ways in its town, and may fix the fees therefor, not exceeding one dollar for any one permit, and may make rules and regulations relating thereto, and prescribe the penalties for a breach of any such rules and regulations, not exceeding five dollars for each day during which any such structure is placed or maintained contrary to the rules and regulations so made, after five days' notice to remove the same has been given by such board or officer, or by a police officer of the town. All such structures shall be constructed, and, when attached to a building, shall be connected therewith, in accordance with the requirements of the inspector of buildings, building commissioner or other board or officer having like authority in the town.

Previously the statutory provisions as to permits for signs and other structures projecting into ways were found in Gen. St. 1915, c. 176, and the provisions for the regulation of advertising signs and devices within the public view were found in St. 1920, c. 545. When the statutes of the Commonwealth were revised by the commissioners and consolidated into the General Laws both these statutory provisions were brought forward and made a part of the General Laws, as above stated. Both, therefore, must be taken as independent and co-existing statutes: the one (G. L., c. 85, § 8) relating to particular signs, advertising devices and other structures projecting into or placed on or over public ways in a city or town, and the granting of permits therefor by the local authorities; the other (G. L., c. 93, §§ 29 to 33) relating to the control and restriction of billboards, signs, and other advertising devices on public ways or on private property within public view in general. This being so, the rule of construction, that where a matter is within the language of a general statute and also within that of a special enactment the presumption is that the special enactment shall control, is to be applied.

The signs in question, when erected, will project into or over public ways in the city of Boston, and the duty of granting permits for the placing and maintaining of the same is placed upon the municipal board or officer of the city of Boston having charge of the laying out of public ways.

---

CONSTITUTIONAL LAW — VACANCY IN THE EXECUTIVE COUNCIL  
— SELECTION OF SUCCESSOR.

Where a member of the Executive Council dies upon the day that the General Court convenes, but some hours before the General Court does in fact convene, and such vacancy is not filled by the Governor and Council before the Legislature comes into session, such vacancy is to be filled by concurrent vote of the Senate and House of Representatives in the manner prescribed by Mass. Const. Amend. XXV.

I have the honor to acknowledge receipt of the following order: —

*Ordered*, That the Senate request the opinion of the Attorney-General as to whether the vacancy existing in the Executive Council shall, under the Constitution, be filled by appointment by the Governor or by concurrent vote of the Senate and House of Representatives.

To the Senate,  
1922  
January 11.

Your question is answered by Mass. Const. Amend. XXV, which provides: —

In case of a vacancy in the council, from a failure of election, or other cause, the senate and house of representatives shall, by concurrent vote, choose some eligible person from the people of the district wherein such vacancy occurs, to fill that office. If such vacancy shall happen when the legislature is not in session, the governor, with the advice and consent of the council, may fill the same by appointment of some eligible person.

I am informed that the vacancy is due to the death of a councillor at or about 9 o'clock in the morning of the day when the General Court convened. It is unnecessary to determine whether, during the interim between the death and the meeting of the General Court, the Governor might have filled the vacancy, with the advice and consent of the Council. It is sufficient that he did not do so, and that the vacancy still existed at the time when

the General Court convened. Under these circumstances, I am of opinion that the vacancy existing in the Executive Council should be filled by concurrent vote of the Senate and House of Representatives.

DIVISION OF FISHERIES AND GAME — EMPLOYEE — COMPENSA-  
TION — FEDERAL BOARD OF VOCATIONAL EDUCATION.

Under G. L., c. 29, § 27, the Commissioner of Conservation has no right to employ in the Division of Fisheries and Game a deputy inspector of fish when there are no funds available for the salary thereof, although the Federal Board of Vocational Education agrees to pay such salary and necessary traveling expenses until such time as a sufficient appropriation is made by the State.

To the Com-  
missioner of  
Conservation.  
1922  
January 13.

You request my opinion as to whether or not you have authority to employ in the Division of Fisheries and Game, as a deputy inspector of fish, a World War veteran who is a citizen of Massachusetts and first on the civil service eligible list for this position, when a vacancy may occur or more deputy inspectors of fish are added to the force, although there are no funds available in your division for the salary of another deputy inspector of fish. You state that the Federal Board of Vocational Education agrees to pay such salary and necessary traveling expenses until such time as sufficient appropriation may be made by the State allowing the inspector of fish to increase his force of deputies or put on a temporary deputy. Your question resolves itself to this: Can a person be appointed to such position in the Commonwealth's employ while his compensation will be paid entirely by the United States government?

G. L., c. 29, § 27, provides as follows:—

No public officer or board shall incur a new or unusual expense, make a permanent contract, increase a salary or employ a new clerk, assistant or other subordinate unless a sufficient appropriation to cover the expense thereof has been made by the general court.

This provision of law would seem to answer your question, and it would seem that reasons of public policy as well would forbid a situation where an official or employee of the Commonwealth would thus be serving in a dual capacity.

I am aware that instances have arisen in the past where an employee of the Commonwealth has been permitted to receive from the Federal government pay for overtime work performed for the latter. Such permission was based upon the fact that the overtime did not in any way interfere with the efficiency of the regular work of said employee for the Commonwealth, being done outside the hours of duty belonging to the Commonwealth. The decision in such cases, however, rests upon different facts from those presented in your communication, and I am consequently of the opinion that the statutory provision above quoted should be strictly construed and adhered to.

---

RETIREMENT ASSOCIATION — EMPLOYEES OF THE NORFOLK COUNTY TUBERCULAR HOSPITAL AND NORFOLK COUNTY AGRICULTURAL SCHOOL — CONTRIBUTIONS BY EMPLOYEES.

Employees of the Norfolk County Tubercular Hospital and the Norfolk County Agricultural School are employees of the county and members of the Retirement Association under the provisions of G. L., c. 32, §§ 20 and 22. Contributions to the association should be paid by said employees from the date upon which they became members, as defined in § 22.

You request my opinion upon the following questions: —

1. Are employees of the Norfolk County Tubercular Hospital and the Norfolk County Agricultural School employees of the county, within the meaning of G. L., c. 32, § 20?
2. If the preceding question is answered in the affirmative, have such employees become members of the Retirement Association, under the provisions of section 22 of said chapter?
3. If the foregoing question is answered in the affirmative, should contributions to the association be paid by said employees from the date upon which they became members under the provisions of said section 22, or is it permissible for the association to begin to accept their contributions running from the present date?

To the Commissioner of Insurance.  
1922  
January 19.

From data submitted by you it appears that the aforesaid institutions were established after the retirement act became effective in Norfolk County, July 1, 1912.

It is assumed that both the Norfolk County Tubercular Hospital

and the Norfolk County Agricultural School are purely county institutions, since each is controlled by a board of public trustees, of which boards the county commissioners form a part. The employees in question are paid entirely from county funds raised by taxation.

G. L., c. 32, § 20, defines "employees" (within the meaning of the retirement systems and pensions) as follows:—

Permanent and regular employees in the direct service of the county whose sole or principal employment is in such service.

Section 22 of said chapter provides:—

Whenever a county shall have voted to establish a retirement system under section twenty-one, or corresponding provisions of earlier laws, a retirement association shall be organized as follows:

(1) All employees of the county on the date when the retirement system is declared established by the issue of the certificate under section twenty-one may become members of the association. On the expiration of thirty days after said date, every such employee shall thereby become a member unless he shall have, within that period, sent notice in writing to the county commissioners or officers performing like duties that he does not wish to join the association.

(2) All employees who enter the service of the county after the date when the system is declared established, except persons who have already passed the age of fifty-five, shall, upon completing ninety days of service, thereby become members. . . .

I therefore answer questions 1 and 2 in the affirmative, and in answer to question 3 it is my opinion that it is not permissible for the association to begin to accept contributions of employees running from the present date, but that contributions to the association should be paid by said employees from the date upon which they became members under the provisions of section 22.



HUNTING OR FISHING LICENSE — UNNATURALIZED FOREIGN-BORN  
RESIDENT — CITIZENS.

A native of the Philippine Islands, resident in this Commonwealth, who has not been naturalized and who does not own real estate assessed for taxation at not less than \$500, is not entitled to a hunting or fishing license.

Territory acquired by conquest or purchase does not, *ipso facto*, become a part of the United States, within the meaning of the Constitution.

The Fourteenth Amendment is limited, with respect to citizenship, to persons born or naturalized in the United States.

Natives of the Philippine Islands did not become, and are not, citizens of the United States.

You have requested my opinion as to whether a native of the Philippine Islands, resident in this Commonwealth, who has never been naturalized and who does not own real estate in this Commonwealth, is entitled to a hunting or fishing license. The question is whether such a person is an unnaturalized foreign-born resident, within the meaning of G. L., c. 131, § 7, which reads as follows: —

To the Com-  
missioner of  
Conservation.  
1922  
January 20.

An unnaturalized foreign born resident owning real estate in the commonwealth assessed for taxation at not less than five hundred dollars may be granted a certificate of registration. He shall pay for such registration a fee of fifteen dollars to the clerk of the town where he resides, or for a certificate to fish only a fee of one dollar to the clerk or a deputy registrar.

Article IX of the Treaty of Peace with Spain, concluded at Paris, provides, in part, that —

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

The act of July 1, 1902 (32 U. S. Stat. 691), reads, in part, as follows: —

SEC. 1. . . . The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands. . . .

SEC. 4. That all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the eleventh day of

April, eighteen hundred and ninety-nine, and then resided in said Islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain signed at Paris December tenth, eighteen hundred and ninety-eight.

See also act of Aug. 29, 1916, c. 416, § 2 (U. S. Comp. Stat., 1916, § 3809).

U. S. Rev. Sts. of 1878, § 1891, referred to above, provides as follows:—

The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Territory acquired by conquest or purchase does not, *ipso facto*, become a part of the United States, within the meaning of the Constitution. The Fourteenth Amendment is limited, with respect to citizenship, to persons born or naturalized *in the United States*, and is not extended to persons born in any place subject to the jurisdiction of the United States. *Downes v. Bidwell*, 182 U. S. 244, 251; *Dorr v. United States*, 195 U. S. 138; *Gonzales v. Williams*, 192 U. S. 1. It is thus clear that natives of the Philippine Islands did not become and are not citizens of the United States.

I am therefore of the opinion that such persons residing in the Commonwealth, who have not been naturalized and who do not own real estate in the Commonwealth assessed for taxation at not less than \$500, are not entitled to hunting or fishing licenses.

CONSTITUTIONAL LAW — ELIGIBILITY OF WOMEN TO BE ELECTED TO CONGRESS.

Under U. S. Const., art. I, §§ 2 and 5, a woman is eligible to be elected as a representative to Congress.

You inquire whether women are eligible to be elected as representatives in Congress. The answer to your question depends upon the Constitution of the United States. U. S. Const., art. I, § 2, provides, in part: —

To the  
Secretary.  
1922  
January 27.

The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

Section 5 provides, in part: —

Each house shall be the judge of the elections, returns and qualifications of its own members. . . .

The Nineteenth Amendment to the Constitution of the United States further provides:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Women are included among the electorate of this Commonwealth by the terms of our Constitution, as modified by the terms of the Nineteenth Amendment to the Constitution of the United States. *Opinion of the Justices*, 237 Mass. 591. Under U. S. Const., art. I, § 2, they are entitled to vote for members of the national House of Representatives. Art. I, § 2, prescribes the express qualifications for membership in that body. Under art. I, § 5, that house is the judge of the qualifications of its own

members. *In re Loney*, 134 U. S. 372, 373. See also *Dinan v. Swig*, 223 Mass. 516.

Women have been elected to the national House of Representatives and have been permitted to take their seats as members. In my opinion, this constitutes a decision by that house, as the judge of the qualifications of its own members, that women are not impliedly excluded. The fact that, under the Constitution of this Commonwealth, construed in the light of decisions and advisory opinions of the Supreme Judicial Court, women are not eligible to election to the state House of Representatives has no bearing upon the construction placed by the national House of Representatives upon the Constitution of the United States. In my opinion, the decision of the national House admitting women to membership establishes that they are eligible to membership.

---

STATE FINANCE — PUBLIC MONEYS — AMOUNT DEPOSITED IN  
ANY ONE BANK — HOW DETERMINED.

Under G. L., c. 29, § 34, the "amount deposited" by the Treasurer and Receiver General in any one bank or trust company is determined either by the books of the bank, or by adding to the balance shown by the books of the Treasurer and Receiver-General all outstanding checks not known to have been certified at the instance of the holder or paid.

G. L., c. 29, § 34, provides, in part: —

The state treasurer may deposit any portion of the public moneys in his possession in such national banks, or trust companies, lawfully doing business in the commonwealth, as shall be approved at least once in three months by the governor and council; but the amount deposited in any one bank or trust company shall not at any one time exceed forty per cent of its paid up capital. . . .

You inquire whether the "amount deposited" shall be ascertained by deducting from the amount on deposit, as shown by your check book, the amount of checks drawn and issued against such deposit, or from the bank ledger which shows the actual balance on hand after deducting such checks as have been presented and certified or paid. You state that in actual practice

the bank ledger balance will generally show a larger sum on deposit than the check book balance, since the bank ledger does not show outstanding checks which have not been presented for certification or payment, and that the two balances are reconciled by adding to the check book balance the amount of the unrepresented checks.

G. L., c. 29, § 34, limits the amount of public money which may be subjected to the risk that a particular bank may fail to 40 per cent of the paid-up capital of such bank. G. L., c. 107, § 212, provides:—

A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.

This section declares the law as it previously existed in this Commonwealth. *Carr v. National Security Bank*, 107 Mass. 45, 49; *Dana v. Third National Bank*, 13 Allen, 445.

Since the mere issue of a check does not operate as an assignment of any part of the deposit, it cannot reduce the amount of public money which stands upon the books of the bank to the credit of the Commonwealth subject to the risk that the bank may fail. It follows that outstanding checks which have not been paid by the bank or certified at the instance of the holder (which, under G. L., c. 107, § 211, would discharge the Commonwealth as drawer) cannot be considered in determining the maximum amount which the Treasurer and Receiver-General may deposit in the bank without violating G. L., c. 29, § 34.

On the other hand, G. L., c. 29, § 34, must receive a practical construction. Zeal for mathematical accuracy at every instant of time must not be permitted to deprive the Commonwealth of the banking facilities which, as a practical matter, are essential to the discharge of public business. Neither deposits in nor payments by a bank automatically record themselves upon the books of the bank at the instant that the transaction is completed. The physical limitations incident to all human endeavor necessarily prevent the record from keeping pace, at every instant, with the actual transactions. In spite of this necessary dis-

crepancy, practical considerations require that both the Treasurer and Receiver-General and the bank must be permitted to rely upon the records of the bank.

The law does not ordinarily take cognizance of fractions of a day. *Portland Bank v. Maine Bank*, 11 Mass. 204; *Clark v. Flagg*, 11 Cush. 539, 540. So, also, the law will so arrange acts performed in one day and relating to one subject-matter as to render them conformable to the intentions of the parties, without regarding which was, in fact, first produced or executed. *Taunton & South Boston Turnpike Corpn. v. Whiting*, 10 Mass. 326, 336; *Clark v. Brown*, 3 Allen, 509, 511. I am therefore of opinion that, if the record of any particular day should, when extended, appear to show that at some time during that day the permitted maximum was exceeded, but should further show that subsequent transactions upon that day corrected the excess, neither the bank nor the Treasurer and Receiver-General should be deemed to have violated the statute.

Answering your precise question, I therefore advise you that, in my opinion, you may determine the maximum balance upon deposit at any given time either by inquiry of the bank as to what the books show at that time, or by taking the balance upon your own books and adding thereto any outstanding checks not known to have been paid.

-----

TAXATION — ABATEMENT — WHETHER TAX CORRECTLY ASSESSED  
UPON THE BASIS OF AN ERRONEOUS RETURN IS ILLEGALLY  
EXACTED.

A tax correctly assessed upon the facts stated in an erroneous return is not "illegally exacted," within the meaning of G. L., c. 58, § 27, and cannot be abated under that section.

Referring to your inquiry in which my approval was requested, under G. L., c. 58, § 27, for the issuance of a certificate to the effect that a tax has been illegally exacted from the — Bank, the facts appear to be as follows: —

The bank, in the return filed by it on May 7, 1921, reported as the deduction allowed under G. L., c. 63, § 12, par. (f), the sum

of \$52,251.34 instead of \$694,053.16. This error was not discovered by the bank until November. The bank, within the period prescribed by law for beginning legal proceedings to obtain a repayment of a tax illegally exacted, made application for an abatement of the tax. The Commissioner made an assessment of the tax upon the face of the return, and there was nothing in the return to indicate that an error had been made by the bank with respect to any item.

G. L., c. 58, § 27, provides:—

If it shall appear that a legacy and succession tax or a tax or excise upon a corporation, foreign or domestic, which has been paid to the commonwealth, was in whole or in part illegally exacted, the commissioner may, with the approval of the attorney general, issue a certificate that the party aggrieved by such exaction is entitled to an abatement stating the amount thereof. The treasurer shall pay the amount thus certified to have been illegally exacted, with interest, without any appropriation therefor by the general court. No certificate for the abatement of any tax shall be issued under this section unless application therefor is made to the commissioner within the time prescribed by law for beginning legal proceedings to obtain a repayment of the tax. This section shall be in addition to and not in modification of any other remedies.

The precise question is whether a tax correctly assessed upon the facts which appear in the return is "illegally exacted," within the meaning of section 27.

G. L., c. 63, § 13, prescribes the return which must be made. The tax is assessed upon the basis of this return.

It may be urged that any tax which exceeds the amount which the defendant ought to pay upon the facts as they actually exist is a tax illegally exacted. In my opinion, so broad an interpretation cannot be put upon the words "illegally exacted" as employed in this section.

G. L., c. 58, § 27, makes no provision for correcting errors in the tax return at the instance of the taxpayer. In this respect it differs from G. L., c. 63, § 51, which provides:—

Application for the abatement or correction of any tax assessed under sections thirty to fifty, inclusive, may be made within thirty days after

the date upon which the notice of assessment is sent, and from the decision of the commissioner thereon any corporation may appeal in the manner provided by section seventy-one.

Chapter 63, section 51, does not apply to the present tax, since it is not assessed under sections 30 to 50. The omission from G. L., c. 58, § 27, of any provision for correction similar to that contained in chapter 63, section 51, is a significant indication that the provision for abatement in section 27 extends only to error in the mode of assessment, and does not extend to correction of the return upon which that assessment rests. It follows as a necessary consequence that a tax correctly assessed upon the facts appearing in the return is not illegally exacted, within the meaning of that statute. The taxpayer cannot successfully attack the legality of the assessment by showing that he himself stated the facts erroneously in his return.

I am therefore of the opinion that, since chapter 58, section 27, contains no provision for correction of the return at the instance of the taxpayer, it confers no power to abate a tax correctly assessed upon the facts disclosed by the return.

---

TAXATION — ABATEMENT — EFFECT OF FAILURE TO APPLY FOR  
ABATEMENT WITHIN THIRTY DAYS AFTER NOTICE OF ASSESS-  
MENT IS SENT:

Where a corporation failed to file a proper return, and the Commissioner of Corporations and Taxation assessed a tax under G. L., c. 63, § 45, upon double the amount of income as determined by him, and gave notice of such assessment, a failure by the corporation to apply for abatement within thirty days, as required by G. L., c. 63, § 51, terminates the power of the Commissioner to correct or abate such assessment.

Failure to receive a notice to file a proper return does not excuse a failure to apply for abatement within thirty days after the date of the notice of assessment of the tax.

You state the following case: —

A domestic business corporation filed a return adjudged insufficient by the Commissioner under G. L., c. 63, § 46. The Commissioner mailed a notice to the corporation to file a proper return. This notice was not received by the corporation, which continued in default. The



Commissioner, acting under said section 46, determined the income of the corporation according to his best information and belief, and assessed a tax upon double the amount so determined, and gave notice of such assessment. The corporation failed to apply for an abatement within thirty days of the date upon which notice of such assessment was sent, but did apply therefor within six months of said date. You inquire whether the Commissioner has any power to grant an abatement.

In my opinion, the failure of the corporation to receive the notice that its return was insufficient is immaterial upon the question of an abatement. G. L., c. 63, § 51, provides as follows:—

Application for the abatement or correction of any tax assessed under sections thirty to fifty, inclusive, may be made within thirty days after the date upon which the notice of assessment is sent, and from the decision of the commissioner thereon any corporation may appeal in the manner provided by section seventy-one.

It does not appear that the corporation did not receive the notice of the tax. It failed to apply for correction or abatement within the thirty days prescribed by section 51. It has lost that remedy by its own default in failing to apply within said thirty days. I am therefore of opinion that you have no power to make a correction or grant an abatement of the tax assessed by you.

---

#### TOWNS — STATE TAX — INTEREST — ABATEMENT.

Where, owing to a controversy as to the amount of reimbursement from the proceeds of the income tax due to a town, under G. L., c. 70, § 1, the amount of the State tax assessed to the town, under St. 1921, cc. 399 and 492, was not paid within the time required, interest assessed as provided by the statute cannot be abated.

It appears that on Nov. 15, 1921, a town in this Commonwealth owed to the Treasurer and Receiver-General, for taxes, a balance of \$26,325.08, and that on the same day there was due to the town from the Treasurer and Receiver-General, as reimbursement from the income tax for certain school salaries, the sum of \$14,416; that there had been a controversy between the Department of Education and the school department of the

To the  
Treasurer.  
1922  
February 7.

town as to the amount of the reimbursement due to the town, which had been settled on or about November 4, but that the amount due had not been certified to the Auditor of the Commonwealth until November 14; that consequently the Treasurer and Receiver-General did not receive the necessary certificate from the Auditor of the Commonwealth in time to include said amount in the annual settlement sheet on November 15; and that on November 17 the town treasurer sent to the Treasurer and Receiver-General a check for \$26,325.08, and on the same day the Treasurer and Receiver-General sent to the town treasurer a check for \$14,416. The town treasurer states that the town, like other towns, depends upon the approximate amount coming from the Treasurer and Receiver-General to the town treasurer in order to meet the State tax. Interest at the rate of 1 per cent per month from Nov. 15, 1921, to the date of payment, amounting to \$26.33, was demanded by the Treasurer and Receiver-General of the town treasurer, and the town treasurer requests that the claim for interest be abated. You ask me to advise you whether, in my opinion, this interest should be abated.

I assume that the balance due from the town to the Treasurer and Receiver-General was a balance of the amount of the State tax assessed to the town by St. 1921, cc. 399 and 492. Both these acts contain a provision, in substance, that if the amount due from any city or town as provided therein is not paid to the Treasurer and Receiver-General on or before November 15, the Treasurer and Receiver-General shall notify the treasurer of such delinquent city or town, "who shall pay into the treasury of the commonwealth, in addition to the tax, such further sum as would be equal to one per cent per month during the delinquency from and after November fifteenth."

G. L., c. 70, § 1, provides as follows: —

The state treasurer shall annually, on or before November fifteenth, pay to the several towns from the proceeds of the tax on incomes, which shall be available therefor without appropriation, the sums required for the purposes of Part I of this chapter, as part reimbursement for salaries paid to teachers, supervisors, principals, assistant superintendents and superintendents for services in the public day schools rendered during the year ending the preceding June thirtieth.

There is no provision in the acts assessing the State tax authorizing an abatement of the assessment of interest if the tax is not paid on or before November 15, and there is nothing in those statutes making the obligation of payment dependent upon receipt of the reimbursement under G. L., c. 70, § 1. On the other hand, there is no requirement in that section that the Treasurer and Receiver-General shall pay interest if the reimbursement is not paid on or before November 15. In fact, as the correspondence shows, the Treasurer and Receiver-General was not at fault in failing to pay the reimbursement in time, but the fault, if any, lay with the Department of Education. It must be recognized that there is a large measure of equity in the complaint of the town treasurer that the claim for interest imposes a hardship upon the town. Answering your question specifically, however, I do not see that there is any way in which the interest imposed by the statutes, without any discretion in the Treasurer and Receiver-General as to its collection, may be abated.

---

CONSTITUTIONAL LAW — COMMISSIONER OF PUBLIC HEALTH —  
REGULATIONS AND STANDARDS FOR THE MANUFACTURE, SALE  
OR TRANSPORTATION OF FOODS, DRUGS, MEDICINES AND  
LIQUORS — EIGHTEENTH AMENDMENT.

Under G. L., c. 94, § 192, the Legislature has imposed upon the Department of Public Health the power and duty of making certain rules and regulations which shall conform to certain standards set forth in the statute, which standards may be changed from time to time, in which event the rules and regulations must be changed to conform therewith.

You request my opinion as to the constitutionality of regulations and standards made by your department under the provisions of G. L., c. 94, § 192, in view of the recent opinion of the Supreme Judicial Court of Massachusetts regarding proposed legislation (*Opinion of the Justices*, 239 Mass. 606), which was rendered in answer to certain questions propounded by the Senate of the Commonwealth of Massachusetts relative to House Bill No. 1612, entitled "An Act to carry into effect, so far as the Commonwealth of Massachusetts is concerned, the Eighteenth Amendment to the Constitution of the United States."

To the Com-  
missioner of  
Public Health  
1922  
February 7.

The distinguishing characteristic of that bill is that "in several sections it incorporates by reference laws made and to be made by the Congress of the United States, and regulations made and to be made thereunder, for the purpose of establishing offences to be punished by fine or imprisonment or both, by prosecutions to be instituted in the courts of this Commonwealth." It was thereby attempted "to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by Congress." The *Opinion of the Justices, supra*, holds that legislation of that nature would be contrary to the Constitution of this Commonwealth, and uses the following language: —

Legislative power is vested exclusively in the General Court except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency. The enactment of laws is one of the high prerogatives of a sovereign power. It would be destructive of fundamental conceptions of government through republican institutions for the representatives of the people to abdicate their exclusive privilege and obligation to enact laws.

No discussion is required to demonstrate that the Congress of the United States cannot be treated as a subsidiary board or commission by the General Court.

But the question presented by you plainly does not come within the principle of said opinion, and the facts involved in your question are different from those therein considered. Your department is charged with the duty of adopting certain rules and regulations in accordance with the provisions of G. L., c. 94, § 192, which reads as follows: —

The department of public health and local boards of health shall enforce sections one hundred and eighty-six to one hundred and ninety-five, inclusive, and, except as to standards fixed by law, the said department shall adopt rules and regulations, consistent with said sections, standards, tolerances and definitions of purity or quality, conforming to the rules and regulations, standards, tolerances and definitions of purity or quality adopted or that may hereafter be adopted for the enforcement of the act of congress approved June thirtieth, nineteen

hundred and six, and the amendments thereof, the said act being entitled, "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein and for other purposes," or now or hereafter adopted by the United States department of agriculture under any other federal law.

Failure to comply with such rules and regulations is punishable under the provisions of G. L., c. 94, § 191.

It cannot be claimed that these sections of the General Laws are contrary to the Constitution of this Commonwealth. The rules and regulations enacted by your department thereunder are not enactments of the Legislature, but are adopted by your department under authority derived from the Legislature. The Legislature, in imposing upon your department the power and duty of making such rules and regulations, specifies that they shall conform to certain standards set forth in the statute, which standards may be changed from time to time, in which event the rules and regulations of your department must be changed to conform therewith.

I am consequently of the opinion that the *Opinion of the Justices, supra*, has no application to the question raised by your communication.

---

#### DOMICIL — HIGH SCHOOL PUPIL — TUITION — TRANSPORTATION.

G. L., c. 76, § 6, does not apply where a minor is a legal resident of one town but goes to another for purposes of employment only, inasmuch as said minor is not residing temporarily in a town other than the legal residence of his parent or guardian "for the special purpose of there attending school."

You request my opinion on the following case: —

The town of Orleans maintains a high school. The town of Eastham does not maintain a high school, but pays tuition and transportation of its pupils to the Orleans high school. A boy who is a resident of Orleans and is attending the Orleans high school in his junior year, whose father is dead and whose mother is poor and has several other children, has an opportunity to go to Eastham and live with a family on an asparagus farm, at least until he graduates from high school. If he does go to Eastham, and works on the asparagus farm, will he

To the Commissioner of  
Education.  
1922  
February 8.

thereby gain a residence in Eastham? If so, the town of Eastham would have to pay his tuition and transportation to the Orleans high school. If he does not gain a residence in Eastham, but is still a legal resident of Orleans, should the town of Orleans charge Eastham for his tuition, and would the town of Eastham be required to furnish transportation to the Orleans high school? If it does furnish such transportation should it render a bill to the parent, who resides in Orleans?

G. L., c. 76, §§ 5 and 6, provide as follows:—

SECTION 5. Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. No child shall be excluded from a public school of any town on account of race, color or religion.

SECTION 6. If a child described in section one resides temporarily in a town other than the legal residence of his parent or guardian for the special purpose of there attending school, the said town may recover tuition from the parent or guardian, unless under section twelve of chapter seventy-one, such tuition is payable by a town. Tuition payable by the parent or guardian shall, for the period of attendance, be computed at the regular rate established by the school committee for non-resident pupils, but in no case exceeding the average expense per pupil in such school for said period.

In rendering this opinion it is assumed that the boy in question is under the age of twenty-one years, although you do not so state in your communication.

It is a well-settled rule of law that the domicile of the parent of a minor is the domicile of the minor. Where the father is living, the domicile of a minor follows that of the father, but, as in the present case, where the father is dead, the domicile of the minor follows that of the mother. An infant, being *non sui juris*, is incapable of fixing his domicile, which, therefore, during his minority follows that of the parent. See IV Op. Atty.-Gen. 340.

It is therefore my opinion that the boy in question is still a legal resident of Orleans, even though he may leave that town to go to Eastham for purposes of employment only, in which event G. L., c. 76, § 6, above quoted, would have no application, inas-

much as he is not residing temporarily in a town other than the legal residence of his parent or guardian "for the special purpose of there attending school."

St. 1921, c. 296, provides: —

. . . If a town of less than five hundred families or householders, according to such census, does not maintain a public high school offering four years of instruction, it shall pay the tuition of any pupil who resides therein and obtains from its school committee a certificate to attend a high school of another town included in the list of high schools approved for this purpose by the department. Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at a cost up to forty cents for each day of actual attendance. . . .

I am of the opinion that the present case does not come within this statute, inasmuch as the town of Orleans and not Eastham is the residence of the boy in question. It follows, therefore, that the town of Eastham is not required to furnish him with transportation to the Orleans high school, nor can it be charged with his tuition thereat.

---

#### INCOME TAX — COLLECTION FROM NON-RESIDENT DELINQUENT.

Taxes are not debts or contracts, but mere local statutory obligations.

Where the delinquent is a non-resident and has no property within the jurisdiction, the Commonwealth is without power either to collect a tax in its own courts or to invoke the aid of a sister State for that purpose.

You have asked my opinion in relation to the collection of certain income taxes.

In most of the cases the delinquent taxpayer now apparently resides outside the Commonwealth. In all these cases, in my opinion, any attempt to collect the taxes due would be fruitless. Taxes, it has been frequently held, are not debts or contracts, but mere statutory obligations. There is no personal liability to pay a tax except under the statute imposing it, and that liability is purely local and statutory. Where the delinquent is outside the jurisdiction and has no property inside the jurisdiction, the State is powerless to collect a tax in its own courts and is powerless to

To the Commissioner of  
Corporations  
and Taxation.  
1922  
February 8.

invoke the aid of a sister State for that purpose. *State of Colorado v. Harbeck*, 232 N. Y. 71; *Kessler v. Kedzie*, 106 Ill. App. 1; *cf. Walker v. Treasurer and Receiver-General*, 221 Mass. 600; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT — BOSTON  
ELEVATED RAILWAY COMPANY — EASTERN MASSACHUSETTS  
STREET RAILWAY COMPANY.

Spec. St. 1918, cc. 159 and 188, providing for the public operation of the street railway systems of the Boston Elevated Railway Company and the Eastern Massachusetts Street Railway Company, respectively, for a term of years by trustees to be appointed by the Governor, with exclusive authority to fix fares and to determine the character of the service, having been accepted by the companies, constitute contracts between the Commonwealth and said companies with respect to the management and operation thereof.

Certain proposed bills, if enacted, would be unconstitutional, for the reason that they would impair one or more of the provisions in Spec. St. 1918, cc. 159 and 188, giving the trustees the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished.

A bill repealing Spec. St. 1918, c. 159, but providing that the act should take effect on its acceptance by the directors of the Boston Elevated Railway Company before a certain date, if enacted, would be unconstitutional, since the directors of the company cannot exercise the power attempted to be conferred upon them to abrogate the contractual obligations contained in said statute.

To the House  
of Repre-  
sentatives.  
1922  
February 11.

You have asked my opinion concerning fourteen bills referred to the House committee on rules, the question in each case being, — "Would this bill, if enacted into law, be constitutional?" These bills all relate directly or indirectly to the service or management of the Eastern Massachusetts Street Railway Company or the Boston Elevated Railway Company, and involve a consideration of the application and effect of Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188, being, respectively, "An Act to provide for the public operation of the Boston Elevated Railway Company" and "An Act relative to the Bay State Street Railway Company." Each of these statutes provides for the public operation of the respective street railway systems for a term of years by trustees to be appointed by the Governor, with exclusive authority to fix fares and determine the character of the service, and each contains provisions for the acceptance of the act by a vote of the stockholders of the company concerned.



With reference to Spec. St. 1918, c. 159, the court has recently held, in *Boston v. Treasurer and Receiver-General*, 237 Mass. 403, 413, 414, that that statute, "having been accepted by the railway companies (the Boston Elevated Railway Company and the West End Street Railway Company), constitutes an agreement between the Boston Elevated Railway Company and the Commonwealth that the latter shall take over the management and operation of the railway company and shall pay therefor the amount specified in way of compensation for the use thereof," and that the act is constitutional.

In an opinion to the House committee on street railways, dated April 22, 1921 (VI Op. Atty.-Gen. 147), I had occasion to consider the effect of Spec. St. 1918, c. 188, and ruled that the provisions in sections 11 and 12 of that act, relating to the right of the trustees to regulate and fix fares, and to determine the character and extent of the service and the facilities to be furnished, and the right of the directors to pass upon contracts for the construction or operation of additional lines, constituted a contract between the Commonwealth and the Eastern Massachusetts Street Railway Company which could not be impaired without violating U. S. Const., art. I, § 10; that St. 1920, c. 613, as amended by St. 1920, c. 637, was an impairment of the contract contained in said Spec. St. 1918, c. 188, and was therefore unconstitutional, and that the proposed legislation concerning which my opinion was asked would also be unconstitutional.

I. In my judgment, the bills submitted with the petitions numbered in your letter 1, 3, 4, 5, 7, 8, 9, 11, 12, 13 and 14 would, if enacted into law, be unconstitutional for the reasons stated in my former opinion, which I now restate as applicable to each of said petitions and bills as follows:—

1. *Petition for the establishment of a 5-cent fare on the lines of the Eastern Massachusetts Street Railway Company in the city of Chelsea and from said city to Scollay Square in the city of Boston.*

To establish a 5-cent fare on the lines named would be a direct impairment of the provision in Spec. St. 1918, c. 188, giving the trustees the right to regulate and fix fares.

3. *Petition that the service of the Boston Elevated Railway Company in Medford be extended.*

To require the Boston Elevated Railway Company to construct and extend its tracks in Medford, and to require the Eastern Massachusetts Street Railway Company to permit the Boston Elevated Railway Company to make joint use of its tracks in Medford, or to make arrangements for transfers, subject to the approval of the Department of Public Utilities, substantially as provided by the bill accompanying the petition, would be a direct impairment of the provisions of Spec. St. 1918, c. 159, and of Spec. St. 1918, c. 188, giving to the trustees of the two street railway systems the exclusive right to determine the character and extent of the service and facilities to be furnished.

4. *Petition for the payment of a 5-cent fare on all lines of the Boston Elevated Railway Company.*

The bill submitted with this petition would be a direct impairment of the contract contained in Spec. St. 1918, c. 159, for the reasons stated with respect to petition No. 1, above.

5. *Petition that the legal rate of fare on all lines of the Boston Elevated Railway Company be established at 5 cents.*

The bill proposed by this petition would be a direct impairment of the contract contained in Spec. St. 1918, c. 159, for the reasons stated with respect to petition No. 1, above.

6. *Petition of the mayor of the city of Chelsea that the board of trustees of the Boston Elevated Railway Company be authorized to operate lines of the Eastern Massachusetts Street Railway Company in said city.*

The bill proposed by this petition would be a direct impairment of the contracts contained in Spec. St. 1918, c. 159, and Spec. St. 1918, c. 188, for the reasons stated with respect to petition No. 3, above.

8. *Petition relative to the operation by public authority of street railway lines in the Hyde Park district of the city of Boston.*

This petition and bill is submitted to amend St. 1920, c. 613, § 7. Since in my opinion of April 22, 1921, said chapter 613 was found to be unconstitutional, the proposed amendment thereof would also be unconstitutional.

9. *Petition relative to amounts set aside for rehabilitation, repair and reconstruction by the trustees of the Boston Elevated Railway Company and of the Eastern Massachusetts Street Railway Company.*

The bill accompanying this petition, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

11. *Petition relative to street railway transportation in the city of Revere.*

The bill accompanying this petition directs the Boston Elevated Railway Company to extend its transportation system in the city of Revere. This bill, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

12. *Petition of the mayor of Revere that the board of trustees of the Boston Elevated Railway Company be authorized to operate the lines of the Eastern Massachusetts Street Railway Company in Chelsea, Revere, Malden and Everett.*

The bill accompanying this petition, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

13. *Petition of the mayor of Revere and others relative to the orders and rulings of the trustees of the Eastern Massachusetts Street Railway Company.*

The bill accompanying this petition purports to amend Spec. St. 1918, c. 188, by adding a new section limiting the powers of the trustees to fix fares and to determine the character and extent of the service and facilities to be furnished. This bill, in my opinion, would be unconstitutional for the reasons stated with respect to petitions Nos. 1 and 3, above.

14. *Petition relative to the operation of certain lines of the Boston & Albany and New York, New Haven & Hartford Railroad companies by the board of trustees of the Boston Elevated Railway Company, and to the electrification thereof.*

The bill accompanying this petition, in my opinion, would be unconstitutional for the reasons stated with respect to petition No. 3, above.

II. 2. *Petition for the termination of the public management and operation of the Boston Elevated Railway.*

The bill accompanying this petition repeals Spec. St. 1918, c. 159, but contains a provision that the act shall take effect "upon its acceptance by the board of directors or a majority of the stockholders of the Boston Elevated Railway Company, providing such acceptance occurs prior to the                    day of nineteen hundred and                    ."

Spec. St. 1918, c. 159, in section 2, gives to the trustees, for the purposes of the act, except as otherwise provided, the authority to have and exercise all the rights and powers of the company and its directors, and in section 4 provides that the duties of the board of directors "shall be confined to maintaining the corporate organization, protecting the interests of the corporation so far as necessary, and taking such action from time to time as may be deemed expedient in cases, if any, where the trustees cannot act in its place." There are provisions in said chapter requiring the consent of the directors to certain contracts made by the trustees involving the payment of rental or other compensation by the company beyond the period of public operation, and other provisions requiring the approval of the stockholders to the issuing of new preferred stock.

It is my opinion that the directors cannot exercise the power attempted by the proposed act to be conferred upon them to impair the obligation of Spec. St. 1918, c. 159, by repealing that statute, which by acceptance of the stockholders of the Boston Elevated Railway Company and the stockholders of the West End Street Railway Company became a binding contract. For this reason I am of opinion that the proposed act would be unconstitutional.

Whether, if the bill provided simply that the act should take effect upon its acceptance by a majority of the stockholders of the Boston Elevated Railway Company, it would be constitutional, I do not need to consider. Ordinarily, the stockholders of a corporation by a majority vote may assent to an amendment or repeal of a statute constituting a contract between the State and their corporation. *Pennsylvania College Cases*, 13 Wall. 190; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574; *cf. Durfee v. Old Colony, etc., R.R. Co.*, 5 Allen, 230. Clearly, the company would not be

bound except by the acceptance of the holders of a majority of its stock. Whether the words "a majority of the stockholders" mean "the holders of a majority of the stock" or merely "a majority of the persons holding the stock," whether the stockholders of the West End Street Railway should be included, and whether the holders of the preferred stock authorized to be issued under section 5 have any special rights, may be doubtful questions. On these matters I do not attempt to pass.

III. 6. *Petition relative to establishing a 5-cent fare on the lines of the Boston Elevated Railway Company and subsidizing said company from the public treasury for any resulting deficiency.*

The provisions of the bill accompanying this petition would plainly impair the contract contained in Spec. St. 1918, c. 159, if it were not for the following provision contained in section 6 of the bill:—

This act shall not take effect unless it is accepted by the holders of not less than a majority of all the stock of the Boston Elevated Railway Company, not including the preferred stock issued under section five of said chapter one hundred and fifty-nine, and by the holders of not less than a majority of all the stock of the West End Street Railway Company, given at meetings called for the purpose, and the filing with the secretary of a certificate to that effect signed by a majority of the directors of the Boston Elevated Railway Company.

I am informed that the preferred stock issued under section 5 of said act has the same voting power as the other stock of the Boston Elevated Railway Company. It is therefore my opinion that this bill would be unconstitutional because, by excluding the holders of that stock from the right to vote, it would in effect authorize the acceptance of the proposed act by the holders of less than a majority of the stock of the Boston Elevated Railway Company entitled to vote. Whether the holders of this preferred stock have any special rights which would be impaired by such a bill without their unanimous consent, I do not attempt to decide.

IV. 10. *Petition relative to the taking of certain interests in land in the city of Boston by the Boston Elevated Railway Company.*

This petition involves entirely different considerations and will be dealt with in a separate opinion.

CONSTITUTIONAL LAW — UNREGISTERED CO-PARTNERS AND  
STOCKHOLDERS IN RETAIL DRUG CORPORATIONS.

The classification made by House Bill No. 124, forbidding unregistered co-partners or unregistered stockholders in a corporation doing a retail drug business from actively engaging in the drug business, with the exceptions noted, is arbitrary and unreasonable, and would render the bill unconstitutional, if enacted.

To the House  
Committee on  
Bills in the  
Third Reading.  
1922  
February 24.

You request my opinion on the constitutionality of House Bill No. 124, relative to unregistered co-partners and stockholders in retail drug corporations. Said bill is as follows: —

Section thirty of chapter one hundred and twelve of the General Laws is hereby amended . . . so as to read as follows:—*Section 30.* Except as provided in section sixty-five, whoever, not being registered under section twenty-four or corresponding provisions of earlier laws, sells or offers for sale at retail, compounds for sale or dispenses for medicinal purposes drugs, medicines, chemicals or poisons, except as provided in sections thirty-five and thirty-six, shall be punished by a fine of not more than fifty dollars. This section shall not prohibit the employment of apprentices or assistants and the sale by them of any drugs, medicines, chemicals or poisons, provided, a registered pharmacist is in charge of the store and present therein. No unregistered co-partner or unregistered stockholder in a corporation doing a retail drug business shall be actively engaged in the drug business except those who were engaged in the drug business on or before May twenty-eighth, nineteen hundred and thirteen. The term “actively engaged” as used in this section shall mean the doing of any work in the store.

Unquestionably there is no vested right to engage in the drug business free from supervision and regulation by the State in the proper exercise of its police power. Hence, in construing the bill in question due consideration must be given to the legislative purpose and to the mischief intended to be guarded against. Whether it is a fair, reasonable and valid exercise of the police power, or arbitrary and capricious, must be determined in the light of the object sought to be attained by the act.

The bill in question selects for regulation a limited class of unregistered persons, namely, co-partners and stockholders in retail drug corporations. It does not prohibit every unregistered person from working in a drug store. The holding of stock in a

drug corporation has no reasonable relation to the evil intended to be guarded against, namely, the dispensing of drugs by unregistered persons. Any unregistered person may be employed at the soda fountain, cigar stand, candy counter or other departments which commonly form a material part of practically every modern drug store. Under the terms of this bill, however, if such unregistered person purchased or acquired even one share of stock in the corporation, he must immediately be discharged.

In my opinion, the classification made by the bill is arbitrary and unreasonable, and would render the bill unconstitutional, if enacted. See *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206, 208; *Bogni v. Perotti*, 224 Mass. 152, 156.

---

DEPARTMENT OF PUBLIC HEALTH — LOCAL BOARDS OF HEALTH  
— LICENSE TO ENGAGE IN THE BUSINESS OF THE MANUFACTURE OR BOTTLING OF NON-ALCOHOLIC BEVERAGES — PERMIT.

Under St. 1921, c. 303, the power to grant and revoke permits for the manufacture and bottling of non-alcoholic beverages is vested exclusively in boards of health of cities and towns, although the Department of Public Health, under G. L., c. 94, §§ 186 to 196, has certain duties to perform relative to adulteration and misbranding of food and drugs.

The Department of Public Health has no authority to order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties.

You request my opinion upon the following questions: —

1. Has the Massachusetts Department of Public Health, under the provisions of St. 1921, c. 303, the power to revoke, for cause, any license issued under the provisions of the act by a local board of health?

2. Has the Massachusetts Department of Public Health any power under the act to grant licenses to places properly constructed and maintained, if a local board of health refuses or neglects to do so?

3. Has the Massachusetts Department of Public Health any duties to perform under the provisions of the act, other than making regulations?

4. Has the Massachusetts Department of Public Health the right and power to enforce its rules and regulations?

5. Has the Massachusetts Department of Public Health any author-

To the House  
Committee on  
Public Health,  
1922  
February 28.

ity under any other statute to order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties?

St. 1921, c. 303, provides as follows:—

Chapter ninety-four of the General Laws is hereby amended by inserting after section ten and under the heading, Non-Alcoholic Beverages, the five following sections:— *Section 10A.* Boards of health of cities and towns may annually grant permits to engage in the business of the manufacture or bottling of carbonated non-alcoholic beverages, soda waters, mineral or spring waters and may fix fees for said permits not to exceed ten dollars. The provisions of this section and the following four sections shall not apply to persons registered under sections thirty-seven to forty, inclusive, of chapter one hundred and twelve. *Section 10B.* The board of health shall, from time to time, examine the premises of any person granted a permit under the preceding section, and if such premises or the equipment used therein in connection with the business of such person is found to be in an unsanitary condition, the board may revoke such permit after a hearing, ten days' notice of which shall be given such person. *Section 10C.* All materials used in the manufacture of beverages specified in section ten A shall be stored, handled, transported and kept in such a manner as to protect them from spoilage, contamination and unwholesomeness. No ingredient or material, including water, shall be used in the manufacture or bottling of any such beverage which is spoiled or contaminated, or which may render the product unwholesome, unfit for food, or injurious to health. Persons granted permits under section ten A, shall comply with sections one hundred and eighty-six to one hundred and ninety-six, inclusive. *Section 10D.* The department of public health and local boards of health may make rules and regulations to carry out the three preceding sections. *Section 10E.* Any person who engages in the business of the manufacture or bottling of carbonated non-alcoholic beverages, soda waters, mineral or spring waters without the permit provided for in section ten A or who violates any provision of sections ten A to ten D, inclusive, or of any rule or regulation made thereunder, shall be punished for a first offence by a fine of not more than one hundred dollars and for a subsequent offence by a fine of not more than five hundred dollars.

1. The subject-matter of this act pertains to non-alcoholic beverages, and requires a permit for the business of the manufacture or bottling thereof. The power to grant such permit, and



also to fix the fee therefor (not to exceed \$10), is expressly vested in boards of health of cities and towns. So, also, the power to revoke such a permit is vested solely in such local boards of health, for the cause stated in the act.

While it is required that persons granted such permits shall comply with G. L., c. 94, §§ 186-196, there is nothing therein or in St. 1921, c. 303, which gives the Department of Public Health the power to revoke any license issued by a local board of health under the provisions of said chapter 303. I accordingly answer your first question in the negative.

2. Inasmuch as St. 1921, c. 303, expressly vests the licensing power in the boards of health of cities and towns, the Massachusetts Department of Public Health has no power to grant such licenses "even if a local board of health refuses or neglects to do so." The Legislature has expressly vested the entire discretion in this matter in such local boards, and the Massachusetts Department of Public Health, in my opinion, would have no right to substitute its own discretion therefor.

3. Said St. 1921, c. 303, § 10D, provides that "the department of public health and local boards of health may make rules and regulations to carry out the three preceding sections." But it is also provided in said act that the licensee shall comply with G. L., c. 94, §§ 186-196 (relative to adulteration and misbranding of food and drugs).

G. L., c. 94, § 192, provides: —

The department of public health and local boards of health shall enforce sections one hundred and eighty-six to one hundred and ninety-five, inclusive, and, except as to standards fixed by law, the said department shall adopt rules and regulations, consistent with said sections, standards, tolerances and definitions of purity or quality, conforming to the rules and regulations, standards, tolerances and definitions of purity or quality adopted or that may hereafter be adopted for the enforcement of the act of congress approved June thirtieth, nineteen hundred and six, and the amendments thereof, the said act being entitled, "An Act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein and for other purposes," or now or hereafter adopted by the United States department of agriculture under any other federal law.

In addition, G. L., c. 94, § 193, provides that —

. . . Under the authority given by section one hundred and ninety-two the department of public health shall adopt rules and regulations which shall be observed by the said department and by local boards of health in ascertaining whether there is such a guaranty which may be relied upon by the dealer.

Violation of such rules, regulations and standards is punishable as provided in G. L., c. 94, § 190. The collection of samples under said sections 186 to 195 and section 304 may be made either "by authorized agents of the department of public health or of boards of health of towns" (see G. L., c. 94, § 188). The examination of such samples "shall be made under the direction and supervision of the department or board taking such samples" (G. L., c. 94, § 189). So, also, G. L., c. 94, § 194, imposes a duty upon the Department of Public Health or local board "which took the sample" to present the facts, warn the offender, warn dealers, etc., as therein provided.

It is thus plainly evident that the Massachusetts Department of Public Health has other duties to perform in addition to making regulations as provided in the act under consideration. Such additional duties relate to adulteration and misbranding of food and drugs under G. L., c. 94, §§ 186-196.

4. St. 1921, c. 303, § 10E, provides the penalty for violation of any provision of sections 10A to 10D. This plainly gives the Massachusetts Department of Public Health the right of enforcement of its rules and regulations made under authority of said act, and to institute prosecutions for violations thereof.

5. G. L., c. 111, §§ 2-25, outline the duties and powers of the Department of Public Health, while §§ 26-32, outline the duties of city and town boards of health. The duties thus respectively outlined are separate and distinct, and there is no intimation in the statutes, under authority of which these departments are created, of any right or power possessed by the Department of Public Health "to order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties." See *Sawyer v. State Board of Health*, 125 Mass. 182, 192.

In an opinion of the Attorney-General, dated Feb. 7, 1917 (V Op. Atty.-Gen. 12), appears the following statement:—

To a large extent the powers of local boards of health are conferred by general statutes of the Commonwealth, and the duties of such boards of health are therein prescribed. When acting under such powers and performing such duties, the members of the board of health act as public officers, that is, as agents of the State and not of the city. *Attorney General v. Stratton*, 914 Mass. 51; *Hathaway v. Everett*, 205 Mass. 246; *Haley v. Boston*, 191 Mass. 291.

---

DOMICIL — SETTLEMENT — REIMBURSEMENT OF CITIES AND TOWNS UNDER THE RELIEF LAWS — SOLDIER — PHILIPPINE INSURRECTION.

A settlement is defeated under the provisions of G. L., c. 116, § 5, by an absence of five consecutive years, during which a person resides and intends to make his domicile away from his former place of settlement, although during said period such person makes visits to relatives or friends in his former place of settlement, and during a portion thereof is employed in the place of his former settlement without living there.

A soldier who served in the Philippine insurrection is not to be regarded as having been engaged in a war against a foreign power, within the meaning of G. L., c. 116, § 1, par. 5.

You request my opinion upon the following questions, which affect claims of cities and towns for reimbursement under the relief laws:—

To the Commissioner of Public Welfare.  
1922  
February 28.

1. Is a settlement defeated under the provisions of G. L., c. 116, § 5, by an absence of five consecutive years, during which time a person resides and intends to make his domicile away from his former place of settlement, if (a) during the said five-year period the person in question makes visits to relatives or friends in his former place of settlement, and (b) during a portion of the said five-year period the person in question is employed in the place of his former settlement without living there. In both kinds of cases the persons in question received no public support in the town where they had formerly been settled.

2. Does a person who enlisted or was mustered into the military or naval service of the United States as part of the quota of a town in the Commonwealth, who served not less than one year in the Philippine insurrection, gain a settlement under the provisions of G. L., c. 116, § 1, par. 5?

1 (a). G. L., c. 116, § 5, provides as follows: —

Each settlement existing on August twelfth, nineteen hundred and eleven, shall continue in force until changed or defeated under this chapter, but from and after said date absence for five consecutive years by a person from a town where he had a settlement shall defeat such settlement. The time during which a person shall be an inmate of any almshouse, jail, prison, or other public or state institution, within the commonwealth, or in any manner under its care and direction or that of an officer thereof, or of a soldiers' or sailors' home whether within or without the commonwealth, shall not be counted in computing the time either for acquiring or for losing a settlement, except as provided in section two. The settlement, existing on August twelfth, nineteen hundred and sixteen, of a soldier and his dependent eligible to receive military aid and soldiers' relief under existing laws shall be and continue in force while said soldier or dependent actually resides in the commonwealth and until a new settlement is gained in another town in the manner heretofore prescribed.

Your inquiry largely involves questions of fact.

What constitutes domicile is mainly a question of fact, and the element of intention enters into it. *Oliverieri v. Atkinson*, 168 Mass. 28. Mere intention, without proof of other facts with which such intention can be connected, is not enough. *Holmes v. Greene*, 7 Gray, 299. "So to acquire a new domicile it is not necessary for a person to reside in a place with the purpose of making it his permanent home and residence. It is enough if he resides there with the intention to remain for an indefinite period of time, without any fixed or certain purpose to return to his former place of abode." *Palmer v. Hampden*, 182 Mass. 511; *Whitney v. Sherborn*, 12 Allen, 111; *Wilbraham v. Ludlow*, 99 Mass. 587. "Absence, within the meaning of the statute relating to the laws of settlement of paupers, in my opinion, must be of such a character and with such intent as to constitute a change of domicile." V Op. Atty.-Gen. 380.

It is therefore my opinion that question 1 (a) should be answered in the affirmative.

1 (b). While there is some authority for the proposition that under the law relating to paupers domicile and residence are identical, and that a pauper should be regarded as having a home wherever he finds work (*Needham v. City of Fitchburg*, 237 Mass.

354; *Palmer v. Hampden*, 182 Mass. 511), yet, in the case under consideration, you state that "the person in question is employed in the place of his former settlement without living there." Consequently, the same conclusion is to be reached as in my answer to question 1 (a), *supra*.

2. G. L., c. 116, § 1, par. 5, provides: —

A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the United States during the war of the rebellion or any war between the United States and any foreign power, or who was assigned as a part of the quota thereof after having enlisted and been mustered into said service, and his wife or widow and minor children, shall be deemed thereby to have acquired a settlement in such town, provided that he served for not less than one year, or died or became disabled from wounds or disease received or contracted while engaged in such service, or while a prisoner of the enemy; and any person who would otherwise be entitled to a settlement under this clause, but who was not a part of the quota of any town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement, for himself, his wife or widow and minor children, in the place where he actually resided at the time of his enlistment. Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted in said forces in time of war between the United States and any foreign power, whether he served as a part of the quota of the commonwealth or not, and his wife or widow and minor children shall, subject to the same proviso, be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment. But these provisions shall not apply to any person who enlisted and received a bounty for such enlistment in more than one place unless the second enlistment was made after an honorable discharge from the first term of service, nor to any person who has been proved guilty of wilful desertion, or who left the service otherwise than by reason of disability or an honorable discharge.

This statute has recently been interpreted in an opinion rendered by this department to Mr. Richard R. Flynn, Commissioner of State Aid and Pensions, dated Feb. 9, 1922, wherein it is decided that "a soldier who served in the Philippine insurrection is not to be regarded as having been engaged in a war against a foreign power." I therefore answer your second question in the negative.

CONSTITUTIONAL LAW — IMPAIRMENT OF CONTRACT — CHANGE  
OF REMEDY.

The Legislature can impose conditions on which a particular use of property will be authorized.

Where an obligation or liability exists, the Legislature can change the remedy by which it is to be enforced.

St. 1921, c. 386, § 5, providing for compensation for diminution of value of property suffered by reason of the use of a tract of land taken by eminent domain by the Boston Elevated Railway Company, to be determined by the court without a jury, may be amended by substituting the word "with" for the word "without," since a valid obligation was thereby imposed, and the proposed amendment merely changes the remedy for its enforcement.

To the House  
Committee  
on Rules.  
1922  
March 1.

As chairman of the House committee on rules, you have transmitted to me a petition relative to the taking of certain interests in land in the city of Boston by the Boston Elevated Railway Company, with its accompanying bill, and have asked my opinion whether this bill, if enacted into law, would be constitutional. The bill is as follows: —

AN ACT RELATIVE TO THE TAKING OF CERTAIN INTERESTS IN LAND  
IN THE CITY OF BOSTON BY THE BOSTON ELEVATED RAILWAY  
COMPANY.

SECTION 1. Section five of chapter three hundred and eighty-six of the Acts of nineteen hundred and twenty-one is hereby amended by striking out, in the twenty-fifth line thereof, the word "without" and substituting therefor the word: — with, — so that said sentence in the twenty-fourth and twenty-fifth lines will read: — Such petitions shall be heard by the court with a jury.

St. 1921, c. 386, section 5 of which the bill proposes to amend, is entitled "An Act authorizing the Boston Elevated Railway Company to take certain interests in land in the city of Boston."

By section 1 the Boston Elevated Railway Company is authorized and empowered to take by eminent domain for railway purposes certain rights and interests, therein specified, in and to a certain parcel of land in the city of Boston on Hyde Park Avenue and Walk Hill Street, containing about 4,404 square feet, said rights and interests being an easement to locate, construct, maintain and operate an elevated railway, and the right to construct,

maintain and operate surface car tracks, sewer and drain connections and retaining walls in, upon and across the premises described.

Sections 3 and 5 of said act are as follows: —

SECTION 3. If said company and said city, or any person having any right or interest in said property which is injured by such taking, are unable to agree as to the damages sustained by the city or any such person on account of such taking, such damages may be determined by a jury in the superior court for the county of Suffolk, on the petition therefor of said city or of said person filed in the clerk's office of said court within one year after such taking, and judgment shall be entered upon the determination of such jury, with interest from the date of taking, and costs shall be taxed and execution issued in favor of the prevailing party as in civil cases.

SECTION 5. The owners, lessees, mortgagees and other persons having an estate in lands abutting on Walk Hill street or Hyde Park avenue opposite a tract of land bounded by Washington street, Walk Hill street, Hyde Park Avenue, Toll Gate way and land of the Old Colony Railroad Company which the Boston Elevated Railway Company has heretofore acquired or may hereafter acquire, shall be entitled to reasonable compensation from the Boston Elevated Railway Company for any diminution in the fair market value of their said property suffered by them by reason of the use of said tract of land for an elevated railway, terminal, repair shop or other railway purposes, and the construction of an elevated railway connecting said terminal with the elevated railway system of the Boston Elevated Railway Company under plans heretofore approved by the department of public utilities which said company is hereby authorized to construct. Any such person may at any time within three years after the beginning of use of any part of said land for any of said purposes, file in the clerk's office of the superior court for the county of Suffolk, a petition setting forth his claim against the corporation. He shall give said corporation fourteen days' notice of the filing of such petition and an answer thereto shall be filed by the corporation within thirty days from the return day of such notice. Such petition shall be heard by the court without a jury. Judgment shall be entered upon the finding together with interest from the date of the filing of the petition and execution shall issue as in other civil cases. The provisions of chapter seventy-nine of the General Laws relative to cases where damages are claimed to estates in which two or more persons have different, separate or several interests shall apply to all such proceedings. Such taking shall constitute a covenant and agreement by the company with said owners, lessees, mortgagees and

other persons that they shall be entitled to recover such compensation in the manner hereinabove provided.

You do not state what action, if any, has been taken by the Boston Elevated Railway Company under this act; but I understand that the taking has been made and that construction of a terminal on the tract of land described in section 5 has been begun.

There can be no doubt that, in this State, where land or an easement in land is taken by eminent domain, any interference with light, air and prospect caused by such taking and resulting in damage to the property interfered with is a proper element of damage, for which compensation may be awarded. *McKeon v. New England R.R. Co.*, 199 Mass. 292, 295; *Opinion of the Justices*, 208 Mass. 603, 605; *Story v. New York El. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan El. Ry. Co.*, 104 N. Y. 268.

I assume that where a taking by eminent domain is authorized by statute, with a provision fixing the method by which the damages of those entitled thereto shall be determined, the Legislature may subsequently, even after the taking has been made, change that method by an amendment. See *Danforth v. Groton Water Co.*, 178 Mass. 472; 20 C. J. 878.

But in St. 1921, c. 386, it is section 3 and not section 5 which provides for the determination of all damages caused by the taking. The right to light, air and prospect is a right in the property taken, interference with which will entitle the owner of abutting land to compensation under section 3. *McKeon v. New England R.R. Co.*, *supra*; *Opinion of the Justices*, *supra*. Section 5 gives a further right to persons not entitled to compensation under section 3. The right given by section 5 is not to compensation for damages caused by the taking. It is a right given to all those having an estate in lands abutting on the tract of land described in section 5, of which, I am informed, the premises taken are a small part, to recover reasonable compensation "for any diminution in the fair market value of their said property suffered by them by reason of the use of said tract of land for an elevated railway, terminal, repair shop or other railway purposes, and the construction of an elevated railway connecting said terminal with



the elevated railway system of the Boston Elevated Railway Company." An obligation to pay this compensation, to be recovered *in the manner provided*, became valid and binding on the company, when the taking was made, by virtue of the provision of the last clause in section 5, that "such taking shall constitute a covenant and agreement by the company with said owners, lessees, mortgagees and other persons that they shall be entitled to recover such compensation in the manner hereinabove provided." The proposed amendment changes the manner in which compensation is to be recovered. Hence the company cannot be bound by its agreement to pay compensation determined as provided by the amendment.

But there is a further question to be considered, whether, aside from the operation of the last clause of section 5, the obligation created by section 5 was within the constitutional power of the General Court to create. The Legislature cannot create an obligation of one person to another without his consent. *Hampshire County v. Franklin County*, 16 Mass. 76; *Medford v. Learned*, 16 Mass. 215; *Camp v. Rogers*, 44 Conn. 291; *New York & Oswego Midland R.R. Co. v. Van Horn*, 57 N. Y. 473. But it can impose conditions on which a particular use of property will be authorized. *Commonwealth v. Parks*, 155 Mass. 531; *Kilgour v. Gratto*, 224 Mass. 78; *Transportation Co. v. Chicago*, 99 U. S. 635, 640. The obligation imposed by section 5 not only was a condition sanctioned by this principle, but was a condition of the taking, which the company could have declined. Clearly, therefore, the obligation was valid.

Where an obligation or liability exists, the Legislature can change the remedy by which it is to be enforced. *Commonwealth v. Cochituate Bank*, 3 Allen, 42; *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276; *Henley v. Myers*, 215 U. S. 373. The proposed amendment is a mere change of remedy. The General Court has not agreed that the amount of compensation is to be determined in the manner provided by section 5. It is within its power to change the method of determination. I am therefore of opinion that the bill, if enacted into law, would be constitutional.

## NARCOTIC DRUGS — CONFISCATION — DISPOSITION.

Under G. L., c. 94, § 215, the Department of Public Health is vested with discretion relative to the disposition of the articles or drugs enumerated, and they may be destroyed or disposed of in any way not prohibited by law. Said department may deliver such articles or drugs to the United States Department of Justice, to be used in evidence, in exchange for such form of receipt and upon such conditions as to custody, use and return as the Commissioner of Public Health shall deem advisable.

To the Com-  
missioner of  
Public Health,  
1922  
March 2.

You state that certain narcotic drugs were seized by the Boston police department, samples were examined by your department as provided by statute, and certain persons involved in the illegal possession of said drugs have been convicted; whereupon the drugs were confiscated by the court and were delivered to your department on Jan. 27, 1922, in accordance with an order from the Municipal Court of the Roxbury District of the city of Boston, dated Dec. 24, 1921. You also state that you have received a written request from the United States Attorney for the District of Massachusetts, requesting that said drugs be turned over to Erwin C. Ruth, narcotic inspector in charge, Room 452, Little Building, Boston, Mass., as they are alleged to constitute very important evidence in certain investigations which are being made by that office. You now request my opinion as to your right to surrender said articles to Dr. Ruth for said purpose.

G. L., c. 94, § 215, provides: —

If after such notice as the court or trial justice orders it appears that any drug seized under the preceding section was, at the time of the making of the complaint, unlawfully in the possession of the person alleged therein, the court or trial justice shall order that such article or drug so seized be forfeited to the commonwealth and shall order such article or drug sent to the department of public health. Possession of such drug shall be prima facie evidence that such possession was in violation of law. Said department may destroy such article or drug or cause it to be destroyed or to be disposed of in any way not prohibited by law, and, after paying the cost of the transportation and disposition of the same, it shall pay over the net proceeds to the commonwealth. Section eight of chapter two hundred and seventy-six shall apply to all judgments rendered and orders made under this and the preceding section.

It appears from this statute that considerable discretion is vested in the Department of Public Health relative to the disposition of such articles or drugs. It is clear that the drugs in question are now under the control of the Department of Public Health, and may be destroyed or disposed of in any way not prohibited by law. I am aware of no legal prohibition which would prevent your delivering them for the purpose designated, in exchange for such form of receipt and upon such conditions as to custody, use and return as in your discretion shall be deemed most advisable.

---

CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT — PAYMENT TO PRIVATELY CONTROLLED HOSPITAL FOR DEAF, DUMB OR BLIND OF REASONABLE COMPENSATION FOR SUPPORT RENDERED TO SUCH PERSONS.

Mass. Const. Amend. XLVI, § 2, forbids the use of public credit, public property or public funds “for the purpose of founding, maintaining or aiding” any privately controlled institution as defined in that section.

A bill which authorizes payment out of public funds to privately controlled hospitals or infirmaries for the treatment of the eye and ear, of not more than reasonable compensation for care rendered to persons suffering from diseases of the eye or ear, who are in whole or in part unable to care for themselves, to the extent that such persons are unable to care for themselves, is within the exception made by Mass. Const. Amend. XLVI, § 3, and would not be unconstitutional.

The committee has under consideration Senate Bill No. 293, and requests that I advise it whether or not such proposed legislation would be constitutional. Said bill reads as follows: —

To the Committee on  
Public Health.  
1922  
March 13.

AN ACT FOR THE RELIEF OF CERTAIN PERSONS THREATENED WITH BLINDNESS OR DEAFNESS.

Chapter one hundred and twenty-one of the General Laws is hereby amended by adding at the end thereof the following new section: — *Section 42.* The department may also, under such regulations as it may from time to time establish, for the purpose of preventing blindness or deafness or for conserving sight or hearing, authorize persons suffering from diseases of the eye or ear to go for care or support during treatment to such hospital or infirmaries for the treatment of the eye or ear as may be approved by the commissioner of public health, and the ordinary and reasonable compensation for such care or support

actually rendered by said infirmary or other hospitals or infirmaries to such persons as may be in whole or in part unable to support or care for themselves shall be paid by the commonwealth. In so far as such persons, or the parents or guardians of any children among them, are able in whole or in part to provide for care or support received they shall, to the extent of their ability, reimburse the commonwealth therefor.

The answer to your question depends upon Mass. Const. Amend. XLVI. The second section of that amendment forbids, among other things, a grant of public money for the purpose of founding, maintaining or aiding "any . . . infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . ." Under this section the question whether an institution may receive State aid depends upon the character of the institution. Opinion of the Attorney General to the committee on bills in the third reading, April 1, 1921 (VI Op. Atty.-Gen. 117). As the proposed bill is designed to provide aid to persons suffering from diseases of the eye and ear, rather than aid to particular institutions, it is not obnoxious to the prohibitions of the second section of the amendment.

Section 3 of the amendment provides:—

Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

This section introduces an exception to the broad prohibitions contained in section 2. Although the Commonwealth cannot directly aid a privately controlled hospital, infirmary or institution for the deaf, dumb or blind, it may send deaf, dumb or blind persons to a privately controlled hospital, infirmary or institution for treatment, and pay not more than reasonable compensation

for the service rendered by such hospital, infirmary or institution, provided that the persons so treated are in whole or in part unable to support or care for themselves.

In this aspect of the matter the test is whether the person aided comes within the provisions of section 3, while under section 2 the nature of the institution determines whether State aid may be directly afforded to it. For the purpose of this bill it is not material to determine whether the words "for the deaf, dumb or blind" qualify the words "hospitals, infirmaries, or institutions," or only the word "institutions."

The present bill appears to have been drawn with the third section of the amendment in view. It employs the same language in defining the class who may receive aid, namely, "such persons as may be in whole or in part unable to support or care for themselves." As it further provides that in so far as such persons are able in whole or in part to pay for the care or support received, they shall, to the extent of their ability, reimburse the Commonwealth, it avoids any constitutional question which might arise from an expenditure of public funds for the benefit of persons able to care for themselves. I need not, therefore, consider whether an expenditure of public funds to care for a person in part able to care for himself would encounter constitutional objection upon the ground that such expenditure was not for a public purpose. Under these circumstances I perceive no constitutional defect in the bill.

---

TAXATION — DISTRIBUTION OF NATIONAL BANK STOCK TAX —  
PLACE OF ASSESSMENT OF PERSONAL PROPERTY OF DECEASED  
PERSONS.

It is a general principle that taxes on personal property of deceased persons should be assessed in the place where the deceased last dwelt.

Under G. L., c. 63, § 5, distribution of a tax assessed under G. L., c. 63, § 1, to the executors of a deceased person should be credited to the town where he last dwelt.

You ask my opinion as to how the Board of Appeal should decide the matter of the appeal of the town of Orleans from the determination of the Commissioner of Corporations and Taxation

To the Board  
of Appeal in  
Tax Cases.  
1922  
March 14.

regarding the distribution of the national bank stock tax, as provided by G. L., c. 63, §§ 1-10. You state that the facts appear not to be disputed, but that there appears to be a question of law involved which the Board does not feel qualified to answer.

From the information furnished me by the Commissioner it appears that a resident of the town of Orleans died on June 18, 1917, the owner of shares of stock in the First National Bank of Boston. During his life the tax on these shares, imposed by the statutes providing for taxation of bank shares (St. 1909, c. 490, pt. III, § 11; G. L., c. 63, § 1), and assessed to the owner in, and collected by, the city of Boston, had been credited to Orleans under statutory provisions (St. 1909, c. 490, pt. III, § 15; G. L., c. 63, § 5). For the two years next succeeding the death of the decedent, viz., 1918 and 1919, the tax on those shares held by and in the name of his executors was similarly credited. At some time certain of the shares were transferred by the executors to trustees under the will, and no question arises as to the tax on those shares. In 1920 the tax on the balance of the shares was credited to Beverly and Boston as the domicils of the beneficiaries under the decedent's will. The town of Orleans appealed from the decision of the Commissioner in so crediting the tax, and the Board of Appeal decided the appeal in favor of Orleans.

Certain shares of the stock of the First National Bank formerly owned by the decedent are now in the hands of his executors, and stand in their names. For the year 1921 the Commissioner has credited half the amount of the tax assessed upon those shares to Beverly, that being the city where one of the two executors was an inhabitant on April 1, 1921. As to the other half of the tax no credit was given, because the other executor is the Old Colony Trust Company, and the statutory provision for credit does not apply. The town of Orleans has appealed from such determination to the Board of Appeal, claiming that a credit for the total amount of said tax should be given to that town.

G. L., c. 63, § 1, provides that "all shares of stock in banks, whether of issue or not, existing by authority of the United States . . . and located in the commonwealth, shall be assessed to the owner thereof in the town where such bank is located, and not

elsewhere, in the assessment of state, county, city and town taxes, whether such owner is a resident of said town or not. . . ." Section 5 of said chapter is as follows: —

Said commissioner shall thereupon determine the amount of the tax assessed upon shares in each of said banks which would not be liable to taxation in said town according to chapter fifty-nine; and such amount shall be a charge against said town. He shall, in like manner, determine the amount of tax so assessed upon shares which would be so liable to taxation in each town other than that where the bank is located; and such amount shall be a credit to such town. He shall forthwith give written notice by mail or at their office to the assessors of each town thereby affected of the aggregate amount so charged against and credited to it; and they may within ten days after notice of such determination appeal therefrom to the board of appeal from decisions of the commissioner.

In brief, these sections provide for the assessment of taxes on shares of stock in national banks at the places where the banks are located, and the distribution of taxes so assessed among the towns which would have had the benefit if the shares had been taxable as other personal property. The distribution of the present tax is therefore determined by ascertaining where the shares in question would have been assessed had they been taxed in the same manner as other personal property.

G. L., c. 59, § 18, provides that —

All taxable personal estate within or without the commonwealth shall be assessed to the owner in the town where he is an inhabitant on April first, except as provided in chapter sixty-three and in the following clauses of this section: . . .

Clause 3d of said section provides as follows: —

Personal property of deceased persons, before the appointment of an executor or administrator, shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed as though assessed to him.

This clause is in the form of an amendment made by Gen. St. 1918, c. 129. Prior to that amendment the clause was as it appears in St. 1909, c. 490, pt. I, § 23, cl. 7th, as follows: —

Personal property of deceased persons shall be assessed in the city or town in which the deceased last dwelt. Before the appointment of an executor or administrator it shall be assessed in general terms to the estate of the deceased, and the executor or administrator subsequently appointed shall be liable for the tax so assessed as though assessed to him. After such appointment it shall be assessed to such executor or administrator for three years or until it has been distributed and notice of such distribution has been given to the assessors stating the name and residence of the several parties interested in the estate who are inhabitants of the commonwealth and the amount paid to each. After three years from the date of such appointment it shall be assessed according to the provisions of clause Fifth of this section.

Clause 5th provided for assessment of property held in trust by an executor, administrator or trustee, to such person, in the city or town where the beneficiary resided.

These provisions contained clear directions which would determine the duty of the Commissioner under the present circumstances. The tax would be assessable to the executors in the city or town in which the deceased last dwelt until the end of three years from their appointment, or until it had been distributed and notice given, and after that time would be assessable to them in the places of residence of the beneficiaries.

It seems to be agreed that the reason for the change made by the act of 1918, in the clause last above quoted, was because it was thought that the provisions which were eliminated had been rendered unnecessary by the income tax law, which altered the mode of taxation of intangible personal property. It was thought that a consistent system had been established for the taxation of tangible personal property at its situs, and intangible personal property merely through the income tax. The application of these provisions to the distribution of the tax on national bank shares was overlooked.

The question which I have to determine is the proper method of crediting the tax collected on shares of stock in national banks in the estate of a deceased person and in the hands of that person's executor or administrator. It must be conceded that the question is a difficult one and cannot be answered with entire certainty.

Some argument is made by the Commissioner that the executors



here should be treated as trustees, but the cases are clear that until the executor has made an actual transfer to the trustee, even where the executor and the trustee are the same person, and such transfer is shown by his account and approved by decree of court, the property of a deceased person must be regarded as remaining in the hands of his executor. *Hardy v. Yarmouth*, 6 Allen, 277; *Williams v. Acton*, 219 Mass. 520, 524.

All the personal property of a testator vests in his executor by the probate of the will, but the ownership of the executor is a qualified one. He is said to hold title to his testator's goods in *autre droit*, and not in his own right. *Weeks v. Gibbs*, 9 Mass. 74, 75, 76; *Hutchins v. State Bank*, 12 Met. 421, 425; *Lathrop v. Merrill*, 207 Mass. 6, 10.

Statutory provisions in our Commonwealth for assessing personal estates of deceased persons first appear in the Revised Statutes (R. S., c. 7, § 10, cl. 7th), which provided as follows:—

The personal estate of deceased persons, which shall be in the hands of their executors or administrators and not distributed, shall be assessed to the executors and administrators, in the town where the deceased person last dwelt, until they shall give notice to the assessors, that the estate has been distributed and paid over to the parties interested therein.

Prior to the enactment of the Revised Statutes the court had held such property to be assessable, not upon the deceased person, but upon his estate in the hands of his representatives. *Cook v. Leland*, 5 Pick. 236.

With respect to R. S., c. 7, § 10, cl. 7th, the commissioners on the Revised Statutes said in their report:—

After the decease of a person, all taxes must be assessed to his heirs, executors, or administrators, or whomever may be in possession of it, 5 Pick. Rep. 236 (*Cook v. Leland*); and the provision of this section is intended as a practical rule for assessors, who, whatever diligence and care they may exercise, often find that they have assessed property to executors or administrators after it has gone from their hands and been distributed among the heirs and legatees. It is respectfully suggested that some provision is necessary on this subject, to point out the respective duties of the assessors and the representatives of deceased persons.

In *Vaughan v. Street Commissioners*, 154 Mass. 143, 145, the court, after referring to this note, said: —

It is evident that the statute thus passed provided for two things: the place where and the person to whom the personal estate of a deceased person should be assessed.

The amendment made by Gen. St. 1918, c. 129, has left the law as it was before the enactment of R. S., c. 7, § 10, cl. 7th. There is no statute now covering the subject of that provision.

In the case of *Smith v. Northampton Bank*, 4 Cush. 1, 12, Chief Justice Shaw says as follows: —

It may be well admitted, that the liability of property to taxation in this commonwealth depends upon the provisions of statutes; but the statutes upon this subject, like all others, must be construed with a reference to the reasons and principles of the common law, and with a just regard to the subject matter to which they apply.

While the decisions in Massachusetts have not established any common law principle as to the place where the personal property of a deceased person in the hands of an executor or administrator should be assessed, there are decisions in other States, where the subject is not covered by statute, which hold, in accordance with the rule defined by the Revised Statutes, that taxes on such property should be assessed in the place where the deceased last dwelt. They rest on the principle that the situs of personal property, for taxation purposes, does not change upon the death of the owner. *San Francisco v. Lux*, 64 Cal. 481; *Cornwall v. Todd*, 38 Conn. 443; *Millsaps v. City of Jackson*, 78 Miss. 537; *Stephens v. Mayor of Boonville*, 34 Mo. 323; *City of Staunton v. Stout's Executor*, 86 Va. 321; *Rixey's Executors v. Commonwealth*, 125 Va. 337; *Commonwealth v. Peebles*, 134 Ky. 121; *Alexander's Executor v. City of Versailles*, 152 Ky. 357; *State v. Beardsley*, 77 Fla. 803; *City of Blakely v. Hilton*, 150 Ga. 27; *Burroughs on Taxation*, § 98; *Desty on Taxation*, vol. I, p. 333.

The case of *Dallinger v. Rupello*, 14 Fed. 32, should be mentioned. It holds that personal property of a deceased inhabitant of Massachusetts is not taxable after the appointment of an executor and

before distribution, when the property is not within the Commonwealth, and neither the executor nor any person having an interest in or right to receive the property has a domicile or residence there. This case seems not to be inconsistent with the other cases cited.

In view of the fact that an executor or administrator is not an absolute but a qualified owner of the decedent's estate, that G. L., c. 59, § 18, cl. 3d, provides for the assessment of personal property of deceased persons before the appointment of an executor or administrator to the estate, apparently assuming that such assessment shall be at the place where the deceased last dwelt, and that the omission of the following provisions in the clause as it read before the amendment of 1918 was, so far as it affects the crediting of the tax from national bank shares, admittedly due to an oversight and not to an intention to change the existing rule; and in view of what seems to be the general principle that the personal property of deceased persons in the process of administration, while it should be assessed to their personal representatives, should be so assessed at the place where the deceased last dwelt, on the theory or fiction that the situs of the property is not changed by the death — it is my opinion that that procedure should be followed in the present instance, and that the town of Orleans should be credited with the tax in question.

---

#### DISTRICT ATTORNEYS — MEMBERS OF THE BAR — CONSTITUTIONAL LAW.

An act requiring that district attorneys shall be members of the bar is constitutional.

A district attorney is not an officer created by or provided for in the Constitution. The Legislature may constitutionally require that such officers shall possess certain qualifications, provided that the qualifications required bear a reasonable relation to the duties of the office and may be acquired by any person.

You have requested my opinion as to the constitutionality of House Bill No. 1034, entitled "An Act providing that district attorneys shall be members of the bar," which reads as follows: —

To the Joint  
Committee on  
the Judiciary.  
1922  
March 14.

Section twelve of chapter twelve of the General Laws is hereby amended by inserting after the word "therein," in the second line, the words: — and a member of the bar of the commonwealth, — so as to

read as follows:— *Section 12.* There shall be a district attorney for each district set forth in the following section, who shall be a resident therein and a member of the bar of the commonwealth and shall be elected as provided by section one hundred and fifty-four of chapter fifty-four. He shall serve for four years beginning with the first Wednesday of January after his election and until his successor is qualified.

In *Attorney General v. Tufts*, 239 Mass. 458, the Supreme Judicial Court said:—

The district attorney is not an officer created by or provided for in the Constitution. . . . These provisions (Articles of Amendment VIII, XIX) merely recognize an existing office. They do not secure its tenure nor confer any rights in the office superior to the control of the Legislature. The Constitution ordains how the officer shall be elected and a single act of one so elected which shall vacate the office. It does nothing more. It is within the constitutional power of the Legislature by general law to change the term of office or abolish the office itself and transfer the powers and duties to another.

See also *Attorney General v. Pelletier*, 240 Mass. 264.

A district attorney not being an officer created by or provided for in the Constitution, the Legislature may constitutionally require that such an officer shall possess certain qualifications, provided that the qualifications required bear such a relation to the duties imposed that they tend to secure that kind and degree of knowledge, experience and impartiality which are requisite for the satisfactory performance of the duties, and provided further, that it is open to any person to acquire the qualifications required. *Brown v. Russell*, 166 Mass. 14, 16, 17; *Taft v. Adams*, 3 Gray, 126, 130; *Graham v. Roberts*, 200 Mass. 152, 156; *Lee v. Lynn*, 223 Mass. 109, 112; *Attorney General v. Tufts*, 239 Mass. 458; *Attorney General v. Pelletier*, *supra*.

In *Attorney General v. Tufts*, *supra*, the court said:—

Where an office is created by law and one not contemplated nor its tenure declared by the Constitution but created by law solely for public benefit, it may be regulated, limited, enlarged or terminated as the public exigency or policy may require.

In *Graham v. Roberts*, 200 Mass. 152, the court said (page 156):—

It is not unreasonable to require that only persons believed to be of good moral character and *qualified to perform the duties of the office* shall be accepted as candidates whose names are to go upon the official ballot.

The proposed bill requires that district attorneys shall be members of the bar. A knowledge of law is essential to the satisfactory performance of the duties of a district attorney. The qualification required may be acquired by any person. It is therefore a reasonable requirement and one which the Legislature may impose. Accordingly, I am of opinion that House Bill No. 1034, providing that district attorneys shall be members of the bar, if enacted, would be constitutional.

---

#### DISTRICT COURTS — DOUBLE TRIALS — STATUTE.

If a criminal case has been tried upon the merits in a district court or before a trial justice, G. L., c. 263, § 8A, prohibits a retrial of said case in said court or before said justice, even though the case is disposed of upon appeal otherwise than upon the merits.

You have submitted for my consideration Senate Bill No. 327, entitled "An Act to prevent double trials in district courts and before trial justices," which provides: —

To the  
Governor.  
1922  
March 14.

Chapter two hundred and sixty-three of the General Laws is hereby amended by inserting after section eight the following new section: —  
*Section 8A.* A person shall not be held to answer in a district court or before a trial justice to a second complaint for an offense for which he has already been tried upon the facts and merits in said court or before such justice.

The bill does not appear to be objectionable upon constitutional grounds, but there are certain other legal aspects of the bill which may require your consideration, bearing upon the practical effect which this measure, if it becomes law, might have upon the administration of criminal justice in the district courts.

Ordinarily, an acquittal by the district court disposes of the crime charged in the complaint. In most cases such acquittal could be pleaded in bar at a subsequent trial either before the

district court or before the Superior Court. The bill is therefore unnecessary as a protection to the innocent.

If a person is found guilty in the district court, he has an unlimited and absolute right of appeal. Such appeal vacates the judgment of guilt and removes the case to the Superior Court for a new trial upon the merits. If upon that trial the defendant is either acquitted or found guilty, that judgment, when it becomes final, is an absolute bar to further prosecution for the same offence. It therefore appears that the act is unnecessary if the case is disposed of by final judgment in the Superior Court.

If, on the other hand, the appeal is disposed of without trial, by the entry of a *nolle prosequi* or otherwise, the present bill would preclude a retrial in the district court upon the same complaint, although such entry of *nolle prosequi* was made by mistake or even in bad faith. In other words, this bill would give immunity from further prosecution in the district court to one convicted in the district court, whose conviction has been vacated by an appeal, and who then has procured a disposition of his case otherwise than by trial.

With respect to the form of the proposed bill, I suggest that the phrase "for which he has already been tried upon the facts and merits in said court or before such justice," would be improved as to form if the words "the facts" were omitted therefrom. A trial upon the merits necessarily involves a trial upon the facts.

---

#### DRAINAGE LAW — MEANING OF THE WORDS "THE DETERMINATION OF THE BOARD THEREON."

The words "the determination of the board thereon," in G. L., c. 252, § 7, refer to the action of the Drainage Board pursuant to the provisions of G. L., c. 252, § 5.

The Attorney General cannot be required to discharge his duty to advise a department within any fixed time.

You ask me to give you an explanation of the words "the determination of the board thereon" as used in G. L., c. 252, § 7, line 5. These words seem to me to contain no ambiguity of meaning. Section 7 authorizes the commissioners, after the certificate of

organization of the drainage district has been issued by the Secretary of the Commonwealth, to petition the county commissioners of the county where the greater part of the land lies, "annexing a certified copy of the petition under section five and of the determination of the board thereon." Section 5 provides for the filing of a petition with the Board by the proprietors of the land, setting forth their desire to form a drainage district for the improvement of low land, and continues as follows: —

Upon the receipt of said petition the board shall proceed, at the expense of the commonwealth, to make such surveys of the land proposed to be drained as it shall deem necessary, and shall further ascertain by such surveys or other investigations the need of any drainage required for the benefit of the public health, agricultural and other uses to which the land can be put after drainage, and its value for such uses after drainage, and in general the advisability of undertaking the proposed drainage or maintenance, and shall make recommendations in relation thereto, including a statement of what portion, if any, of the expense should be borne by the commonwealth on account of the cost of that part of the improvement relating to the public health; and if the board approves of the undertaking, it shall issue a certificate appointing three, five or seven district drainage commissioners.

The words "the determination of the board thereon," appearing in section 7, refer to the action of the Board as shown by its minutes, indicating their ascertainment of the need of any drainage required, of the value of the land after drainage, and, in general, the advisability of the undertaking and the recommendations of the Board in relation thereto.

In submitting your inquiry you requested an opinion "if possible by Tuesday afternoon, March 14." Requests for opinions from the Governor and from the General Court, by established custom, are given precedence in the work of the department. The Attorney General cannot be required to discharge his duty to advise a department of the government within any fixed time. As to what is a due performance of his duty, he must be the judge. II Op. Atty.-Gen. 125, 405; III Op. Atty.-Gen. 424, 471.

VOLUNTEER MILITIA — ARMORY — CITIES AND TOWNS —  
 GROUNDS FOR PARADE, DRILL AND SMALL ARMS PRACTICE.

Under our statutes the quartering of troops and their training are distinct functions.

A city or town is not relieved from its obligation to furnish suitable grounds for parade, drill and small arms practice merely because an armory of the first or second class has been furnished by the Commonwealth in the city or town in question.

To the Adjutant General.  
 1922  
 March 16.

You have asked my opinion as to whether the requirement placed on cities and towns, under G. L., c. 33, § 42, ceases when an armory of the first or second class is furnished by the Commonwealth in the city or town in question but no grounds for parade, drill or small arms practice are furnished.

Section 42 provides: —

The aldermen or the selectmen shall provide and maintain for each command of the volunteer militia or detachment thereof permanently stationed within the limits of their respective towns suitable grounds for parade, drill and small arms practice, unless such grounds have been furnished for such command by the commonwealth. Any town failing to comply with this provision shall forfeit to the commonwealth a sum not exceeding five thousand dollars for each year during which such failure continues, to be recovered upon an information in equity brought in the supreme judicial court by the attorney general at the relation of the adjutant general. Any amount so forfeited shall be credited to the appropriation for small arms practice for the fiscal year in which the forfeiture occurs. When two or more commands of the volunteer militia are permanently stationed in the same town, the aldermen or the selectmen may, if practicable, provide for such commands suitable grounds for parade, drill and small arms practice, to be used by them in common. Land for drill and parade grounds and for ranges for small arms practice may be acquired by purchase or lease, or under chapter seventy-nine. Towns where headquarters, commands or detachments of the volunteer militia are permanently stationed may raise money by taxation or otherwise for the acquisition of land for drill and parade grounds or ranges for small arms practice or for complying with sections thirty-nine and forty-three.

The above section is included in that group of sections of the law on the volunteer militia which relate to the furnishing of accommodations for, and the training of, the militia.



A review of our statutes relating to these matters shows that the housing and the training of troops have always been regarded as distinct functions; that is, it has never been provided that a city or town shall furnish, for example, an armory with a target range, but there have been provisions with respect to the furnishing of armories or quarters, and subsequent provisions with respect to the facilities for the training of the troops. In this connection it seems to me that the last two sentences of the foregoing section are particularly relevant in establishing the proposition that quarters and parade grounds or target ranges are distinct matters. It is sections 39 and 43 which make mandatory upon cities and towns the furnishing of armories or quarters unless the same have been furnished by the Commonwealth. The same distinction appears in section 45, which recites how land may be acquired, by the Armory Commissioners for armories, and how it may be acquired for parade and drill grounds and ranges. So, too, in section 46, where it is provided how the Armory Commissioners may acquire title to armories already built or furnished by the cities and towns, and how it may acquire title to drill and parade grounds or target ranges. There is nothing in the statutes which compels the Commonwealth to furnish parade and drill grounds to any city or town where a unit may be stationed, or where there may be an armory, or when an armory is completed, but the obligation is mandatory on each city or town to "provide for each command of the volunteer militia, or detachment thereof, not provided with an armory of the first class, and permanently stationed within the limits of their respective towns, an armory . . ." (§ 39), and to "provide and maintain for each command of the volunteer militia or detachment thereof permanently stationed within the limits of their respective towns suitable grounds for parade, drill and small arms practice, unless such grounds have been furnished for such command by the commonwealth" (§ 42). The policy of the act seems to be to make the local accommodation of the militia a local charge. See I Op. Atty.-Gen. 63. The act clearly seems to recognize the differentiation between quartering and training troops.

I am consequently of the opinion that a city or town is not re-

lieved from its obligation to furnish parade and drill grounds or ranges for target practice merely because and if an armory of the first or second class has been furnished in the city or town in question. I believe that section 49 should properly be interpreted as meaning that if any armory of the first or second class is furnished by the Commonwealth the obligation of a town, under sections 39 and 40, to furnish quarters ceases; and that if the Commonwealth furnishes parade and drill grounds or ranges for target practice, the obligation of such city or town shall cease, under section 42.

---

FISH AND GAME — TAKING PICKEREL “FROM THE WATERS OF THE COMMONWEALTH” — DECISION OF DISTRICT COURT — EFFECT.

The term “waters of the commonwealth,” as used in G. L., c. 130, § 59, applies to all waters within the jurisdiction of the Commonwealth, and is not confined to waters owned by the Commonwealth.

While it is not the function of the Attorney General to review a decision of the district court, and such decision will be accorded due consideration and respect, it does not conclude him in advising State officers in regard to their official duties.

You request my opinion as to whether or not the term “waters of the commonwealth,” as used in G. L., c. 130, § 59, applies to all waters or merely to State-owned waters in the Commonwealth.

Section 59 provides as follows: —

Whoever takes from the waters of the commonwealth a pickerel less than ten inches in length, or sells or offers for sale, or has in possession any such pickerel, shall be punished by a fine of one dollar for each pickerel so taken, held in possession, sold or offered for sale; and in prosecutions under this section the possession of pickerel less than ten inches in length shall be prima facie evidence of such unlawful taking.

G. L., c. 130, defines the powers and duties of the Division of Fisheries and Game and regulates various fisheries. The power to regulate fisheries is of broad scope, resting, as it does, upon the constitutional grant of authority to enact “all manner of wholesome and reasonable orders, laws, statutes and ordinances.” *Commonwealth v. Feeney*, 221 Mass. 323, 325. Such authority

may be invoked not only to preserve the public health (*Commonwealth v. Feeney, supra*), but also to preserve the natural resources of the Commonwealth from undue depletion. *Plumley v. Massachusetts*, 155 U. S. 461; *Geer v. Connecticut*, 161 U. S. 519; *Silz v. Hesterberg*, 211 U. S. 31; *Patsone v. Pennsylvania*, 232 U. S. 138; see also *Walls v. Midland Carbon Co.*, 254 U. S. 300. It is by no means confined to natural resources owned by the Commonwealth in its proprietary capacity as distinguished from resources held upon a *quasi* trust for the benefit of all the citizens. *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61; *Walls v. Midland Carbon Co., supra*. No limitation upon the scope of the power requires that the exercise thereof be restrained by construction to resources of the former class.

Examination of sections 58 and 60 of chapter 130 throws light upon the meaning of "the waters of the Commonwealth" as used in section 59. Section 58 provides that no person shall take pickerel between March 1 and May 1 in any year, or during said period shall sell, offer or expose for sale or have in possession "a pickerel taken in this commonwealth." Section 60 authorizes any town to forbid, under penalty, the taking of pickerel "in any river, stream or pond therein" in any other manner than by angling. In both these sections the prohibition is not confined to waters owned by the Commonwealth. The limitation is geographical. Section 58 applies throughout the Commonwealth. Section 60 applies to any river, stream or pond within the town which adopts the by-law against angling. Under these circumstances, in my opinion, the words "waters of the commonwealth," as used in section 59, mean waters within the Commonwealth and not waters belonging to the Commonwealth.

In reaching this conclusion, I have given due consideration to the ruling of the district court to which you call my attention. It is not the function of the Attorney General to review decisions of the district courts. In advising a State official as to the performance of his official duties, rulings of the inferior courts of the Commonwealth have persuasive value and are entitled to consideration and respect. But as a binding and authoritative ruling

upon questions of State law can be rendered by the Supreme Judicial Court alone, the ruling of an inferior court cannot be held to be conclusive except in the case and upon the parties before it. It cannot, as matter of law, conclude the Attorney General in advising you as to your duties under this act.

---

COMMISSIONER OF CORRECTION — SPECIAL STATE POLICE OFFICER  
— WARRANTS.

A special State police officer appointed under the provisions of G. L., c. 127, § 127, has authority to serve only the warrants and orders of removal or transfer of prisoners issued by the Commissioner of Correction.

To the Com-  
missioner of  
Correction.  
1922  
March 21.

You request my opinion as to whether or not a special State police officer appointed under the provisions of G. L., c. 127, § 127, may serve a warrant issued by an authority other than the Commissioner of Correction.

Said section 127 reads as follows: —

The governor, upon the written recommendation of the commissioner, may appoint any agent or employee of the department of correction or any employee of any penal institution a special state police officer for a term of three years, unless sooner removed. Officers so appointed may serve warrants and orders of removal or transfer of prisoners issued by the commissioner, and may perform police duty about the premises of penal institutions.

The statutory provisions as to the powers of the State police are found in G. L., c. 147, § 2, and the general provisions relative to the service of criminal warrants are found in G. L., c. 276, § 23. Both of these statutes are general.

G. L., c. 127, § 127, however, is a special statute. Sections 97 to 127, inclusive, of that chapter have to do with the removal of prisoners from and to the institutions therein designated by the Commissioner of Correction. This legislation was first enacted in 1899. The bill which resulted in chapter 243 of the acts of that year, authorizing the appointment of special officers for the removal and transfer of prisoners, was reported in pursuance of a recommendation in the annual report of the Board of Commissioners of

Prisons covering the year ending Sept. 30, 1898. In that report the commissioners stated as follows concerning the removal of prisoners:—

The statutes authorize the commissioners to transfer prisoners from one prison to another; they also require the Board to secure and return to prison such prisoners as have violated the terms of their permit of release. An appropriation is annually made by the Legislature to cover the expense of this work. After the issuing of the proper papers by the secretary, the duty of removing the prisoner is delegated to either the local police or a member of the State force. The amount of this work has increased to such an extent that it is frequently inconvenient to secure the services of the police in order promptly to perform the work. It is believed that the duty of removals of prisoners by order of the commissioners should be performed by the agents of this office. It is therefore recommended that authority be given the commissioners to appoint one or more of its agents who shall be empowered to serve their warrants and orders of removal or transfer of prisoners anywhere within the limits of the Commonwealth.

The provisions of chapter 243 were carried along as follows: R. L., c. 225, § 112; Gen. St. 1919, c. 105; G. L., c. 127, § 127.

In the light of the history of this statute, it is my judgment that a special State police officer appointed under said section 127 has authority to serve only the warrants and orders of removal or transfer of prisoners issued by the Commissioner of Correction.

---

PUBLIC HEALTH — DANGEROUS DISEASES — SUPPORT — OVERSEERS OF THE POOR.

Under G. L., c. 111, § 6, the Department of Public Health shall define what diseases shall be deemed to be dangerous to public health, and, under section 32, where a local board of health has acted in the matter, it shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

You request my opinion as to whether all cases involving a disease which the Department of Public Health has declared to be dangerous to the public health are now to be supported by the local board of health, where support may be needed, to the exclusion of the overseers of the poor.

To the Commissioner of  
Public Health.  
1922  
March 23.

G. L., c. 111, § 6, provides that the Department of Public Health shall define what diseases shall be deemed to be dangerous to the public health.

Section 112 of said chapter provides as follows: —

If the board of health of a town has had notice of a case of any disease declared by the department dangerous to the public health therein, it shall within twenty-four hours thereafter give notice thereof to the department, stating the name and the location of the patient so afflicted, and upon request the department shall forthwith certify any such reports to the department of public welfare.

Section 32 of said chapter provides: —

A board of health shall retain charge, to the exclusion of the overseers of the poor, of any case arising under this chapter in which it has acted.

Section 116 of said chapter provides as follows: —

Reasonable expenses incurred by boards of health or by the commonwealth in making the provision required by law for persons infected with smallpox or other disease dangerous to the public health shall be paid by such person or his parents, if he or they be able to pay, otherwise by the town where he has a legal settlement, upon the approval of the bill by the board of health of such town or by the department of public welfare. Such settlement shall be determined by the overseers of the poor, and by the department of public welfare in cases cared for by the commonwealth. If the person has no settlement, such expense shall be paid by the commonwealth, upon the approval of bills therefor by the department of public welfare. In all cases of persons having settlements, a written notice, sent within the time required in the case of aid given to paupers, shall be sent by the board of health of the town where the person is sick to the board of health of the town where such person has a settlement, who shall forthwith transmit a copy thereof to the overseers of the poor of the place of settlement. If the person has no settlement, such notice shall be given to the department as provided in section one hundred and twelve; and also, in any case liable to be maintained by the commonwealth when public aid has been rendered to such sick person, a written notice shall be sent to the department of public welfare, containing such information as will show that the person named therein is a proper charge to the commonwealth, and reimbursement shall be made for reasonable expenses incurred within five days next before such notice is mailed, and thereafter until

such sick person is removed under section twelve of chapter one hundred and twenty-one, or is able to be so removed without endangering his or the public health.

I am consequently of the opinion that in any case involving a disease which your department has declared to be dangerous to the public health, and which, accordingly, is to be reported under section 112, *supra*, and a local board of health has acted in the matter, such local board of health shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.

---

CONSTITUTIONAL LAW — REFERENDUM PETITION — LAW SUBJECT TO REFERENDUM PETITION.

Under Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, a law, "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or localities of the commonwealth," is not subject to a referendum petition.

St. 1922, c. 161, which regulates the granting of licenses to take lobsters from the waters of the Commonwealth within three miles of the shore of the nine sea-coast counties of the Commonwealth is subject to a referendum petition, since it is a general regulation of the lobster fishery of the Commonwealth, even though the nine counties to which a general law could physically apply are expressly enumerated.

You inquire whether St. 1922, c. 161, is excluded by section 2 of part III of Mass. Const. Amend. XLVIII, The Referendum, from the operation of the referendum provisions. Said section 2 is as follows:—

To the  
Secretary.  
1922  
March 24.

No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

St. 1922, c. 161, amends G. L., c. 130, § 104, in a manner not material to your inquiry. G. L., c. 130, § 104, provides in part:—

The clerk of any town in Essex, Middlesex, Suffolk, Norfolk, Plymouth, Barnstable, Bristol, Dukes or Nantucket county, situated on the shores of the commonwealth, shall grant licenses in the form prescribed and upon a blank furnished by the director, to catch or take lobsters from the waters of the commonwealth within three miles of the shores of the county where the town lies. Except as hereinafter provided, such licenses shall be granted only to individuals who are citizens of the commonwealth and who have resided therein for at least one year next preceding the date of the same. . . .

The further provisions define how and to whom licenses may be granted, impose certain duties on the town clerk granting the license, and require certain acts by the licensees.

If this act had provided that "the clerk of any town shall grant licenses . . . to catch and take lobsters from the waters of the commonwealth within three miles of the shores of the county where the town lies," there can be no question that the law would be a general law. In all probability no licenses would be granted in the inland counties, since there would be no waters upon which such licensees could operate, but this physical situation would not in any way affect the general character of that law. The present act is plainly intended as a general regulation of the lobster fishery of the Commonwealth. The counties enumerated are the only ones which possess seashore. Such enumeration does not, from the practical standpoint, limit the operation of the law, since, in any event, the license is confined to the waters of the Commonwealth within three miles of the shores of the county where the town lies. I am therefore of opinion that the present law is a general law, the operation of which is not "restricted to . . . a particular town, city or other political subdivision or to particular districts or localities of the commonwealth," within the meaning of Mass. Const. Amend. XLVIII. A law, general in its terms, may be restricted in its operation to a few counties or even a single county for the reason that it is not applicable elsewhere. Statutes relating to alewife fisheries and salmon and trout fishing obviously are local in their application, although included among the general laws. For the reasons stated, I am of the opinion that the statute about which you inquire is not excluded from the referendum.



DOMICIL — SETTLEMENT — MARRIED WOMAN.

Under G. L., c. 116, § 1, where a woman born in Boston, having a settlement there derived from her parents, married a man who never had a legal settlement in any city or town in the Commonwealth, and her parents left Boston in 1911 and acquired a settlement elsewhere, the legal settlement of such woman after the death of her husband continues to be in Boston.

You request my opinion as follows: —

To the Commissioner of Public Welfare.  
1922  
March 25.

The question is as to the place of settlement of a woman who was born in Boston April 4, 1896, and married July 18, 1914. At the date of marriage she had a settlement in Boston derived from her parents. The husband died Jan. 8, 1919, and never had a legal settlement in any city or town in the Commonwealth. Her parents left Boston in 1911 and acquired a settlement in Hanson by residence from 1911 to 1916. What was her legal settlement after the death of her husband?

G. L., c. 116, § 1, provides, in part, as follows: —

Legal settlements may be acquired in any town in the following manner and not otherwise:

First, Except as provided in the following clause, each person who after reaching the age of twenty-one has resided in any town within the commonwealth for five consecutive years shall thereby acquire a settlement in such town.

Second, A married woman shall follow and have the settlement of her husband; but if he has no settlement within the commonwealth, she shall retain the settlement, if any, which she had at the time of her marriage and may acquire a settlement under the preceding clause.

. . . . .

In the case of *Treasurer and Receiver-General v. City of Boston*, 229 Mass. 83, it is stated: —

A woman who has a legal settlement in the Commonwealth, at the time of her marriage to a man who is without a settlement here does not lose her settlement; . . . The statute should not be so construed as to deprive the wife of a settlement once acquired, in the absence of language clearly manifesting such an intention; and it is not to be extended by implication or judicial construction to include persons whom the Legislature has not seen fit to embrace within its scope.

Accordingly, it is my opinion that under the facts stated the place of settlement of the woman above referred to continued to be in Boston after the death of her husband, that being her settlement at the date of her marriage and her husband never having had a legal settlement in any city or town in the Commonwealth.

---

#### ATTORNEY GENERAL — DUTY TO ADVISE.

As the Attorney General is an executive, not a judicial, officer, who cannot exercise judicial power, he will not give an advisory opinion upon a justiciable controversy pending between third parties.

To the Commission on Probation.  
1922  
March 27.

Your inquiry concerning a controversy between certain probation officers and the county treasurer of Middlesex County does not, so far as I can perceive, involve any question of the duties imposed by law upon the commission. Under these circumstances, the question arises whether I can properly advise you in answer to your inquiry.

The Attorney General is an executive, not a judicial, officer. He cannot exercise the judicial power; that is, the power to hear and determine controversies or causes. The Supreme Judicial Court takes the same view of the duty to advise the Governor and Council or either branch of the Legislature, imposed upon it by Mass. Const., pt. 2d, c. III, art. II. It will not exert this advisory power in order to decide controversies which should be determined by the exercise of the judicial power in a cause arising between party and party. In *Opinion of the Justices*, 122 Mass. 600, that court declined to advise the House of Representatives whether a certain judicial officer had vacated his office by accepting a seat in the House of Representatives, upon the ground that the inquiry presented a judicial question which could not be definitely or justly decided without trial and argument.

Your inquiry presents a judicial question which can readily be determined in a suit by the officers in question to recover the salary alleged to be due. Under these circumstances, I am constrained to advise you that I ought not to forecast the outcome of legal proceedings by an answer to your inquiry.

CONSTITUTIONAL LAW — POLICE POWER — GARAGE — SCHOOL,  
HOSPITAL OR CHURCH —, PROPERTY RIGHTS.

The Legislature, in the exercise of the police power, may regulate and limit rights of property in the interest of public health, public morals and public safety. A statute providing that no permit shall be issued for the erection, maintenance or use of a building as a garage for more than two cars on the same street as, and within 500 feet of, a school, hospital or church, is not an unreasonable exercise of the police power.

I acknowledge receipt from the Honorable Senate of the following order: —

To the Senate.  
1922  
March 27.

*Ordered*, That the Senate request the opinion of the Attorney General as to the constitutionality of House Bill No. 1358, entitled "An Act relative to garages in the city of Boston."

House Bill No. 1358 reads as follows: —

SECTION 1. Section three of chapter five hundred and seventy-seven of the acts of nineteen hundred and thirteen, as amended by section two of chapter one hundred and nineteen of the acts of nineteen hundred and fourteen, is hereby further amended by adding at the end thereof the following: —; provided, that no application shall be granted and no permit issued for the erection, maintenance or use of any structure or building as a garage for more than two cars on the same street as, and within five hundred feet of, any building occupied in whole or in part as a public or private school for more than fifty pupils, or as a public or private hospital having more than twenty-five beds, or as a church, — so as to read as follows: — *Section 3.* At the time and place specified in the notice for the hearing the said board shall hear all parties interested, and after giving consideration to the interests of all owners of record notified, and the general character of the neighborhood in which is situated the land or building referred to in the application, shall determine whether or not the application shall be granted and a permit issued; provided, that no application shall be granted and no permit issued for the erection, maintenance or use of any structure or building as a garage for more than two cars on the same street as, and within five hundred feet of, any building occupied in whole or in part as a public or private school for more than fifty pupils, or as a public or private hospital having more than twenty-five beds, or as a church.

SECTION 2. The provisions of this act shall not apply to a building maintained as a garage for the storage, keeping or care of automobiles

at the time of the passage of this act, but any enlargement or alteration of, or addition to, any such building shall be subject to the provisions of this act.

SECTION 3. This act shall take effect upon its passage.

The order of the Senate is not directed to any particular feature of the bill, and I have confined my attention to those questions which I conceive might be raised. The principal question may be subdivided as follows:—First, can the Legislature, in the exercise of the police power, regulate the erection and maintenance of garages; second, can it prohibit the erection, maintenance or use of any structure or building as a garage for more than two cars on the same street as, and within 500 feet of, any building occupied in whole or in part as a public or private school for more than fifty pupils, or as a public or private hospital having more than twenty-five beds, or as a church.

As to the first question, in my opinion it is well settled that the Legislature can regulate the erection and maintenance of garages. This is a valid exercise of the police power. In the exercise of this power the Legislature may regulate and limit rights of property in the interest of public health, public morals and public safety. *Welch v. Swasey*, 193 Mass. 364.

In *Storer v. Downey*, 215 Mass. 273, the Supreme Judicial Court used the following language concerning the regulation of garages:—

Oil and gasoline, almost inevitably stored and used in them, are so highly inflammable and explosive that they may increase the danger of fire, no matter how carefully the building be constructed nor how non-combustible its materials. Although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use is well within settled principles as to the police power.

The second question, summarized, is whether or not the Legislature may prohibit the erection, maintenance and use of a garage for more than two cars within a specified distance of a public or private school, or a public or private hospital, or a church. Similar statutes and municipal ordinances have been attacked in the courts on constitutional grounds in several instances. In the case of *Re McIntosh*, 211 N. Y. 265, it was held that no constitutional prop-

erty rights were interfered with, even with respect to existing plants, by forbidding the issuance of any garage permit allowing the storage of volatile, inflammable oil for a building within a prescribed distance of any school, place of public amusement, tenement house or hotel. The regulation was challenged as being in violation of the applicant's constitutional rights because it deprived him of his property without due process of law and denied to him the equal protection of the law. In that case it was held that the object sought was the preservation of the public safety and the welfare of the community, and that the regulation was not an arbitrary interference with the rights of the individual, but was a fair, reasonable and appropriate exercise of the police power. In the case of *People v. Ericson*, 263 Ill. 368, it was held that forbidding the location of a public garage within 200 feet of a church was not unreasonable.

In my opinion, the Legislature is clearly empowered to deal with a subject which may endanger the safety of persons and property, and the provision that no permit shall be issued for the erection, maintenance or use of a building as a garage for more than two cars on the same street as, and within 500 feet of, a public or private school for more than fifty pupils, or a public or private hospital having more than twenty-five beds, or a church, is not, in my judgment, an unreasonable exercise of the police power.

Accordingly, I advise you that, in my opinion, said House Bill No. 1358 would be constitutional if enacted.

---

WORKMEN'S COMPENSATION — STATE EMPLOYEES — METROPOLITAN DISTRICT COMMISSION — APPROPRIATION.

Compensation for injuries received by laborers, workmen and mechanics employed under the provisions of St. 1922, c. 13, should be paid from the appropriation under that act.

You request my opinion as to whether compensation for injuries received by men employed under the provisions of St. 1922, c. 13, should be paid from the appropriation under that act.

The act creates a special commission for the purpose of clearing

To the  
Governor.  
1922  
March 29.

the forests of the metropolitan parks of fallen trees and broken limbs and branches, provides that the work shall be done under the immediate supervision of the Metropolitan District Commission, and appropriates \$50,000 to provide for the expenditures, half of which shall be paid from the Metropolitan Parks Maintenance Fund, and be assessed upon the cities and towns of the metropolitan parks district.

Under the act the work can be done only in the metropolitan parks and under the immediate supervision of the Metropolitan District Commission. It is similar to some of the work now being carried on by the Metropolitan District Commission, and but for this act would in all probability have been performed by that commission in so far as its regular appropriation permitted.

G. L., c. 152, § 69, provides that compensation shall be paid by the Commonwealth to laborers, workmen and mechanics employed by it who receive injuries arising out of and in the course of their employment. It is the established practice that compensation for injuries received by laborers, workmen and mechanics employed by the Metropolitan District Commission be paid out of the regular appropriation of that commission, because half of its expenditures is assessed upon the cities and towns comprising the metropolitan district. The work performed under St. 1922, c. 13, is in all respects similar, and half of the expenditures is similarly assessed upon the cities and towns of the metropolitan parks district. Uniformity of practice would seem to require, in the absence of other compelling circumstances, that compensation should be paid in the same manner.

I am therefore of the opinion that compensation for injuries received by laborers, workmen and mechanics employed under St. 1922, c. 13, should be paid from the appropriation under that act.

WAREHOUSEMAN — BOND — RELEASE BY GOVERNOR AND  
COUNCIL.

As the bond given by a warehouseman, under G. L., c. 105, § 3, is held in trust to secure the public, the Governor and Council should not undertake to determine and advise the warehouseman and his surety as to the effect upon the bond of the retirement of the warehouseman from business.

You ask my opinion upon the following state of facts: A public warehouseman gives bond according to law. He later ceases to do business, surrenders his license and makes proper publication of that fact. You inquire whether the Governor, by and with the consent of the Council, may properly advise the surety upon said bond that his liability thereunder is confined to defaults occurring prior to the time when the warehouseman completes his retirement from the business.

To the  
Governor.  
1922  
March 30.

The bond in question is given to secure faithful performance of his duties by the warehouseman. G. L., c. 105, § 1. Whoever is injured by failure of the warehouseman to perform his duties or by his violation of any provision of chapter 105 may bring action upon the bond in the name of the Commonwealth, but for his own benefit. G. L., c. 105, § 3. The bond is, therefore, held in trust to protect the public from the defaults of the warehouseman. Liability thereon is in most cases a mixed question of law and fact.

If, under the circumstances of the particular case, surrender of the license and due publication thereof are, as matter of law, a good defence to future liability, both warehouseman and surety have the benefit of it, irrespective of any further action by the Governor and Council. If, under the particular circumstances of the case, such defence does not exist as matter of law, neither warehouseman nor surety ought to be relieved from liability upon the bond. In view of the fact that public warehousemen are required to issue receipts (G. L., c. 103, §§ 8, 9), retirement from business and surrender of the license do not preclude subsequent accrual of liability for default upon a receipt outstanding at the time of such retirement. Under these circumstances, I am of opinion that the Governor and Council should not determine for the benefit of the warehouseman and surety what effect retire-

ment, under the circumstances of the particular case, has upon an outstanding bond. The question is one for the judicial rather than the executive branch. Bill of Rights, art. XXX.

---

STATUTES — AMENDMENT — AMENDMENT OF ACT BY A RESOLVE.

The General Court has power to ratify corrections made in the General Laws by the committee which printed the same.

While the question whether an act can be amended by a resolve appears to be open in this Commonwealth, such amendment should, as matter of form, at least, be made by an act.

To avoid question, corrections made by the committee on printing the General Laws should be ratified by an act rather than by a resolve.

To the  
Governor.  
1922  
April 1.

You have submitted for my consideration House Resolve No. 703, entitled "Resolve ratifying certain corrections in the General Laws." There can be no question that the General Court has power to correct the General Laws and also to ratify any corrections made by the committee on printing the same, pursuant to Res. 1921, c. 54. There is, however, serious question whether such ratification should not be made by an act rather than by a resolve. It may be assumed that a distinction exists between acts and resolves, and that an act ought, as a matter of form, at least, to be amended by an act. The question whether an act can be amended by a resolve appears to be open in this Commonwealth. If any of these "corrections" change the meaning of the law corrected, even by eliminating an obvious error, a resolve might be held insufficient to render the correction effective. This question would be eliminated if an act of like tenor were substituted for the present resolve. If this should be done, I further suggest that such act expressly include the corrections "ratified" by Res. 1921, c. 55.



CONSTITUTIONAL LAW — THEATRES — REGULATION OF PRICE  
CHARGED FOR ADMISSION — REGULATION BY CONDITION IN-  
SERTED IN THE LICENSE.

- As a theatre is not a business affected with a public use, a statute fixing the rates of admission to be charged, or forbidding an increased price upon Saturdays or holidays, would not be constitutional.
- As a statute directly forbidding theatres to charge an increased admission upon Saturdays or holidays would not be constitutional, a statute which requires that condition to be inserted in the theatre license is equally unconstitutional.

I have the honor to acknowledge the following order adopted  
by the Senate: — To the Senate.  
1922  
April 4.

*Ordered,* That the Senate request the opinion of the Attorney General as to the constitutionality, if enacted into law, of Senate Bill No. 159, entitled "An Act to prevent discriminatory admission charges by theatres and places of public amusement."

Senate Bill No. 159 reads as follows: —

Chapter one hundred and forty of the General Laws is hereby amended by inserting after section one hundred and eighty-one the following new section: — *Section 181A.* Licenses granted under the preceding section shall be expressed to be subject to the condition that prices for admission shall be uniform throughout the week, and that the price for admission on a Saturday or a holiday shall not exceed that charged for the same performance on any other day. The licensing authority shall revoke the license of any licensee for violation of the foregoing condition. Said violation shall also be punished by a fine of not more than five hundred dollars.

This bill does not directly fix the prices to be charged for theatre tickets, nor directly forbid an increase of price on Saturdays or holidays. Instead, it provides that there shall be inserted in the license a condition that the price charged on a Saturday or a holiday shall not exceed the price charged for the same performance on any other day, and violation of this condition requires revocation of the license. Two questions are presented: Can the Legislature directly regulate the price of theatre tickets to the extent above indicated? If such direct regulation is not within the scope

of legislative power, can the result be lawfully achieved through the exercise of the licensing power?

1. A theatre is not a public enterprise affected with a public use, but is, on the contrary, a private business. *People v. Flynn*, 189 N. Y. 180; *Collister v. Hayman*, 183 N. Y. 250; *People v. Steele*, 231 Ill. 340; *Chicago v. Powers*, 231 Ill. 560; *Ex parte Quarg*, 149 Cal. 79; III Op. Atty.-Gen. 491; IV Op. Atty.-Gen. 519. Ordinarily the Legislature has no power to regulate the price to be charged by a private business. V Op. Atty.-Gen. 484. On the other hand, an unusual emergency — such as the shortage of houses — may so affect the health and welfare of the people that an unusual measure of regulation, appropriate to the emergency, may be proper during the continuance of such emergency. *Marcus Brown Holding Co., Inc., v. Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co., Inc., v. Siegel*, 258 U. S. 242. The present act discloses no emergency which in any constitutional sense so affects the health, safety, morals or, in a limited sense, the welfare of the people as to justify special regulation of the character proposed in this bill. I am unable to perceive any reasonable ground upon which the sale of theatre tickets can create an emergency of the kind held sufficient to sustain the extraordinary rent regulations upheld in *Marcus Brown Holding Co., Inc., v. Feldman, supra*. The subject-matter excludes it from the grounds which sustain a regulation of the sale of goods reasonably adapted to check monopolies. *Commonwealth v. Strauss*, 191 Mass. 545; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441. In my opinion, the sale of theatre tickets is governed by the ordinary rule that in a private business the price to be charged must be fixed by agreement of the parties themselves. III Op. Atty.-Gen. 491; IV Op. Atty.-Gen. 519; V Op. Atty.-Gen. 484. I am constrained to advise you that a direct regulation of the kind provided in this bill would be unconstitutional.

2. It may be assumed that theatres are subject to a reasonable measure of regulation under the police power. It is not beyond the scope of that power to require a license, upon appropriate conditions, reasonably adapted to secure the health, safety, morals and, in a limited sense, the general welfare of the people. *Mutual*

*Film Corpn. v. Industrial Commission of Ohio*, 236 U. S. 230; *Brazee v. Michigan*, 241 U. S. 340. But the power to license cannot be invoked in order to impose by indirection restrictions or regulations which would be unconstitutional if directly imposed. Such use of the licensing power could be made as efficient as direct regulation to deprive the citizen of those rights of liberty and property guaranteed to him both by the Constitution of Massachusetts and by the Fourteenth Amendment. *Wyeth v. Cambridge Board of Health*, 200 Mass. 474; IV Op. Atty.-Gen. 207. The present bill cannot be distinguished in principle from a bill proposed in 1914, which made it a condition of the theatre license that the licensee should not sell theatre tickets to any other person with intent or knowledge that such tickets should be resold at an advanced price. In advising that such an act would be unconstitutional, the then Attorney General said (IV Op. Atty.-Gen. 207): —

The Legislature has certain powers of regulation and has not certain other powers of regulation, and the distinction between these two sorts of powers remains the same, regardless of the manner in which the Legislature seeks to enforce them. Direct statutory prohibition or indirect prohibition by means of conditions in licenses is merely a method of enforcement, and does not go to the root of the question of legislative power.

With this opinion I agree.

I am therefore constrained to advise you that the present bill, if enacted, would infringe upon the right of property and of liberty of contract guaranteed by the Constitution of this Commonwealth and by the Fourteenth Amendment. See *Wyeth v. Cambridge Board of Health*, 200 Mass. 474.

CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT — APPROPRIATION OF PUBLIC MONEY TO A PRIVATE ACADEMY TO PAY FOR HIGH SCHOOL INSTRUCTION — EXEMPTION OF TOWN FROM STATUTORY DUTY TO MAINTAIN A HIGH SCHOOL.

The Department of Education has no power, under G. L., c. 71, § 4, to exempt a town from the statutory duty to maintain a high school, because such town, in violation of Mass. Const. Amend. XLVI, § 2, is appropriating money to pay for high school instruction to children resident in such town at a private academy located therein.

To the  
Commissioner  
of Education.  
1922  
April 6.

You ask my opinion upon the following state of facts: Prior to the adoption of Mass. Const. Amend. XLVI, commonly known as the “anti-aid” amendment, the Department of Education, acting under authority of laws since re-enacted in G. L., c. 71, § 4, exempted certain towns containing over five hundred families from maintaining high schools. It appears that three of these towns are appropriating money to private academies located therein to pay for high school instruction to children resident in those towns. In this way a large number of such children are obtaining their high school education from these academies at an expense to the town less than the town would pay for maintaining a high school of its own. You inquire whether the Department of Education should withdraw or deny the aforesaid exemption provided for by G. L., c. 71, § 4, if it is established that the town is providing or intends to provide high school facilities in a private academy at public expense in the manner above described.

G. L., c. 71, § 4, provides, in part: —

Every town containing, according to the latest census, state or national, five hundred families or householders, shall, unless specifically exempted by the department and under conditions defined by it, maintain a high school, adequately equipped, which shall be kept by a principal and such assistants as may be needed, of competent ability and good morals, who shall give instruction in such subjects as the school committee considers expedient. . . .

This provision does not define the conditions under or upon which the Department of Education may exempt a town containing over five hundred families from maintaining a high school. The au-

thority to exempt is given without qualification. It is coupled with a further power to affix conditions to the exemption, to be performed by the town. The words "and under conditions to be defined by it" manifestly refer to conditions imposed by the department upon the town rather than to a definition by the department of the rules which should govern its own action in granting or withholding the exemption. The statute does not define what these conditions shall be. But neither authority is wholly without limits. Both must be exerted in accordance with a sound discretion and with due regard for the rules of law.

The duty imposed by law upon cities and towns to maintain public schools is of stringent character. *Commonwealth v. Dedham*, 16 Mass. 141; *Commonwealth v. Connecticut Valley St. Ry. Co.*, 196 Mass. 309, 311. It includes the duty to provide high schools when the law so requires. G. L., c. 71, § 4; *Jenkins v. Andover*, 103 Mass. 94, 98. It must be discharged in the mode prescribed by law. *Commonwealth v. Dedham*, 16 Mass. 141. Even under Mass. Const. Amend. XVIII (now superseded by Mass. Const. Amend. XLVI) the Legislature had no power to authorize a town to discharge this duty by appropriation of public money to aid in maintaining a free school in the nature of a high school, which had been founded by a private benefactor, and which, under the terms of his will, was not under public superintendence and control. *Jenkins v. Andover*, 103 Mass. 94. Nor could the constitutional prohibition be evaded by payment of the money for tuition of such children, resident in the town, as might attend the school. I Op. Atty.-Gen. 319. The same principles apply to the broader provisions of article XLVI of the Amendments. Under that amendment a town cannot constitutionally appropriate money either to pay for the tuition of town pupils at a privately controlled academy or to reimburse the parents for tuition paid to such academy by them. V Op. Atty.-Gen. 204; V Op. Atty.-Gen. 711. The exception made by section 3 of the latter amendment, in respect to institutions for the deaf, dumb and blind, does not apply to ordinary academies for normal pupils. V Op. Atty.-Gen. 711. I am therefore of opinion that a plan to educate town pupils at public expense at an academy which is not

“under the order and superintendence of the authorities of the town or city in which the money is expended” would be insufficient, as matter of law, to warrant you in granting or continuing the exemption authorized by G. L., c. 71, § 4.

It does not follow, however, that the execution of such a plan in the past or the tender of such a plan in the present would, as matter of law, require you to withhold or cancel the exemption. It may be that the required high school instruction can be furnished in some manner permitted by law without building and maintaining a high school. See *Dickey v. Putnam Free School*, 197 Mass. 468. The question whether the plan submitted by the town is one which would warrant your department in granting the exemption, either absolutely or upon terms, is to be determined by your department in the exercise of a sound discretion and subject to the rules of law. It is not for this department to determine how that discretion shall be exercised by your department within the limits permitted by law. I am, however, constrained to advise you that even a saving of expense to the town would not authorize the granting or continuance of the exemption if such exemption involves an expenditure of public money in a manner forbidden either by statute or by the Constitution.

---

STATE HIGHWAY — COUNTY COMMISSIONERS — TAKING BY EMINENT DOMAIN — ENTRY WITHIN TWO YEARS.

Under G. L., c. 82, § 11, county commissioners are authorized to take land by eminent domain for the purpose of relocating a State highway.

Where an order of taking for highway purposes has been adopted, in accordance with the provisions of G. L., c. 79, § 3, entry must be made or possession taken within two years from the date of the order.

You have requested my opinion upon a question of law arising out of the following situation: —

In connection with the reconstruction of a State highway in Leicester it is necessary to make certain takings outside of the existing State highway in order to widen and straighten the same. The town of Leicester, at a town meeting, voted not to agree to indemnify the Commonwealth against any land damage, and,

consequently, the county commissioners have been asked to make the necessary takings of land for the widening of the highway and to assess the land damage as they might see fit. One of the county commissioners has stated that inasmuch as this is a State highway, and not a county way, he did not consider that the county had a right to make takings for the purpose of widening a State highway. You inquire as to whether or not the county commissioners can take action as outlined above.

On Jan. 6, 1920, the then Attorney General stated in an opinion:—

Upon oral inquiry from your department I find that when it is desired to relocate a State highway it has been a common practice to have the relocation made in the first instance by the county commissioners, and then to take over the relocation as a State highway under Gen. St. 1917, c. 344, pt. I, §§ 5 and 6 (now G. L., c. 81, §§ 4 and 5).

I am of the opinion that county commissioners may make a taking, as requested by your department, under the authority given them by G. L., c. 82, § 11, which reads as follows:—

If application is made to the commissioners by a town, or by five inhabitants thereof, to relocate or order specific repairs on a way within such town, whether it was laid out by authority of the town or otherwise, they may, either for the purpose of establishing the boundary lines of such way or of making alterations in the course or width thereof, or of making specific repairs thereon, relocate it in the manner prescribed for laying out highways in sections two to nine, inclusive. The expense shall be assessed upon the petitioners or upon the county or town, or upon the land benefited by the improvement under chapter eighty, as the commissioners may order. The commissioners may, without petition, after giving notice as provided in section three, relocate any public way for the purpose of establishing its boundaries, or of making specific repairs thereon, in which case no part of the expense shall be assessed upon the town.

You will note that this section applies to a way within a town, whether it was laid out by authority of the town or otherwise, and that the county commissioners may, for the purpose of making alterations in the width thereof, relocate it in the manner prescribed by G. L., c. 82, §§ 2-9, for laying out highways.

It is important that your attention be called, also, to the provision found in G. L., c. 79, § 3, that, if an entry is not made or possession taken within two years of the date of the order of taking, the taking shall be void. As to this point, referring again to the opinion of Jan. 6, 1920, it was stated: —

If it is desired to place liability for land and grade damages upon the county, city or town, as the case may be, possession should be taken for the purpose of construction of the relocation by the county commissioners before the two-year period expires. In my opinion, an entry and doing of some construction work would be sufficient for this purpose. It would not, in my opinion, be necessary to complete construction immediately, or even within any stated period. But under a county, city or town location, construction should be completed within a reasonable time under all the circumstances.

I also call your attention to an opinion rendered to you under date of May 10, 1920, the conclusion of which reads as follows: —

The Commonwealth will be doubly protected if the actual entry and some construction work is done in the first instance by the county, city or town and then have the Commonwealth take over the relocation and secure a stipulation or indemnification from the county, city or town, as the case may be.

---

#### CONSTITUTIONAL LAW — PUBLIC SCHOOLS — SUPERINTENDENCY UNION — WITHDRAWAL — EFFECT OF DISSOLUTION.

Under G. L., c. 71, § 63, where the joint committee of a superintendency union has entered into a contract with a superintendent for a term of three years, which contract will not expire until June, 1924, the contract comes within the protection afforded by U. S. Const., art. I, § 10. Accordingly, in the event of the withdrawal of one of the towns from the superintendency union, the constituent towns will not be relieved of their financial obligations under the contract, provided the superintendent fulfils his part thereof and has not been previously removed in accordance with said section 63.

You request my opinion on the following question: —

The joint committee of a superintendency union consisting of the towns of Lee, Otis, Monterey and Tyringham elected a superintendent of schools in June, 1921, for a term of three years, in accordance with the provisions of G. L., c. 71, § 63. The school committee of Lee is



now desirous that Lee should withdraw from the union, and has petitioned the department to take such steps as may be necessary to effect a dissolution of said union. The question arises as to whether such dissolution would relieve the constituent towns of their financial obligations to the superintendent of schools for the remainder of his three-year term.

G. L., c. 71, § 61, provides as follows: —

The school committees of two or more towns, each having a valuation of less than two million five hundred thousand dollars, and having an aggregate maximum of fifty, and an aggregate minimum of twenty-five, schools, and the committees of four or more such towns, having said maximum but irrespective of said minimum, shall form a union for employing a superintendent of schools. A town whose valuation exceeds said amount, may participate in such a union but otherwise subject to this section. Such a union shall not be dissolved except by vote of the school committees representing a majority of the participating towns with the consent of the department, nor by reason of any change in valuation or the number of schools.

The authority of a superintendency union to contract with a superintendent of schools for a three-year term is contained in G. L., c. 71, § 63, as follows: —

The school committees of such towns shall, for the purposes of the union, be a joint committee and shall be the agent of each participating town, provided that any school committee of more than three members shall be represented therein by its chairman and two of its members chosen by it. The joint committee shall annually, in April, meet at a day and place agreed upon by the chairman of the constituent committees, and shall organize by choosing a chairman and a secretary. It shall employ for a three year term, a superintendent of schools, determine the relative amount of service to be rendered by him in each town, fix his salary, which shall not be reduced during his term, apportion the payment thereof in accordance with section sixty-five among the several towns and certify the respective shares to the several town treasurers. He may be removed, with the consent of the department, by a two thirds vote of the full membership of the joint committee.

Under the authority vested by the above statute, the joint committee of the superintendency union has entered into a contract with the superintendent in question for a term of three

years, which contract will not expire until June, 1924. It is therefore my opinion that said contract comes within the protection afforded by U. S. Const., art. I, § 10, whereby it is provided that no State shall pass any law impairing the obligation of contracts. It accordingly follows that in the event of a withdrawal of the town of Lee from the superintendency union the constituent towns will not be relieved of their financial obligations to the superintendent of schools for the remainder of his three-year term, provided that he continues willing, able and fit to perform the duties of his position, and also provided that he has not previously been removed in accordance with the right reserved and contained in the statute under which his position is created, to wit, section 63, *supra*. See *Hall v. Wisconsin*, 103 U. S. 5; V Op. Atty.-Gen. 422.

#### SAVINGS BANKS — DEFINITION — POWERS AND DUTIES — LIFE INSURANCE BUSINESS.

A savings bank is an institution for receiving the moneys of depositors in moderate amounts, and investing them for the use and benefit of depositors.

The powers and duties of a savings bank are strictly defined and regulated by statute, and do not include those pertaining to a general banking business.

A contract by which a savings bank is to act as agent for a depositor in holding a life insurance policy and receiving and transmitting premiums thereon, and is to make payments to the depositor and others of amounts called for by the policy, requires the doing of a life insurance rather than a savings bank business, and is unauthorized.

To the Com-  
missioner of  
Banks.  
1922  
April 11.

You state that there have been presented to you three plans providing for a combination of savings accounts and life insurance, with requests for rulings whether contracts made under the conditions imposed by those plans would be in violation of law. You ask my opinion whether a savings bank or a trust company in its savings department may contract to receive deposits, pay life insurance premiums from such deposits, and act generally as provided for in any or all of the plans submitted.

The question arises at the outset whether the persons who seek an opinion on the legality of the plans which they have submitted are entitled to such opinion, whether it is my duty to give advice on that subject, and whether, if given, it would be of any binding

effect. I have come to the conclusion, although not without hesitation, that these requests may be treated as requests for approval of proposed services to be performed by a savings bank under G. L., c. 178, § 13, and therefore proceed to consider the question which you ask.

A savings bank is an institution for receiving the moneys of depositors in small or moderate amounts, and investing them for the use and benefit of the depositors. *Lewis v. Lynn Institution for Savings*, 148 Mass. 235, 243; *Commonwealth v. Reading Savings Bank*, 133 Mass. 16, 19. Its powers and duties are strictly defined and regulated by statute. It has no authority to do a general banking business. *Bradlee v. Warren Savings Bank*, 127 Mass. 107. It is not authorized to establish a safe deposit department or to make a business of receiving securities for safe keeping, except to the extent and under the conditions prescribed by G. L., c. 168, § 33. V Op. Atty.-Gen. 661.

The General Court has made specific statutory provision authorizing savings banks, with the written permission of and under regulations approved by the Commissioner of Banks, to receive and hold for their depositors any securities issued by the United States (G. L., c. 168, § 33); to contract for the deposit, at intervals within any period of twelve months, of sums of money in the aggregate not in excess of the statutory limit on deposits in savings banks (G. L., c. 167, § 16); and, with the approval of the Commissioner of Banks and the Commissioner of Insurance, to act as agents for savings and insurance banks (G. L., c. 178, § 13). Said three sections are as follows:

G. L., c. 168, § 33: —

Savings banks may, with the written permission of and under regulations approved by the commissioner, receive and hold for their depositors any securities issued by the United States.

G. L., c. 167, § 16: —

Savings banks and trust companies in their savings departments may contract, on terms to be agreed upon, for the deposit at intervals within any period of twelve months, of sums of money in the aggregate not in excess of the statutory limit on deposits in savings banks, and

for the payment of interest on the same at a rate not more than one per cent less than the rate of their last regular dividend on savings deposits. A sum thus accumulated, if left in such a depository as a regular savings deposit within fifteen days after the date on which money ordinarily begins to draw interest, may, if the depository so provides, draw interest from such prior date.

G. L., c. 178, § 13: —

Savings and insurance banks shall not employ solicitors of insurance, and shall not employ persons to make house to house collections of premiums; but the trustees may establish such agencies and means for the receipt of applications for insurance and of deposits and of premium and annuity payments, at such convenient places and times, of such nature and upon such terms as the commissioner of banks and the commissioner of insurance may approve. The trustees may also, with like approval, appoint any savings bank or savings and insurance bank its agent to make, so far as thereunto authorized, payments due on policies of insurance and on contracts for annuities, and to perform other services for the insurance department. All savings banks and all savings and insurance banks may, with like approval, act as such agents. The business of the insurance department may, in the discretion of the trustees, be carried on either in the same building with that of the savings department or in a different building.

These provisions authorizing savings banks to do acts outside the ordinary business of a savings bank must be construed to define the limits of their powers in respect to the subjects to which the provisions relate.

By the first of the three plans which you have submitted to me it is proposed that a savings bank shall enter into a contract, evidenced by a certificate, with each depositor desiring to secure the benefits of the plan, by which the depositor agrees to open a savings account with the depository upon signing the certificate, to deposit \$7.40 monthly for a period of ten years, to take out a policy of insurance on his life in the sum of \$1,000, written by a savings and insurance bank, and to deliver the policy to the depository; and the depository agrees, so long as the depositor makes the deposits, to pay the premiums and charge them to his account, and, in ten years from date, if the depositor has made his monthly deposits, upon surrender of the certificate and pass

book, to pay the depositor the balance standing to his credit and, at his option, either (A) to pay him the cash surrender value of his policy or (B) to deliver the policy to him, and, in the event of the death of the depositor, to pay the balance in his account to the person entitled to receive it, and, if the premiums are fully paid, to pay to the beneficiary under the policy \$1,000. There are further provisions authorizing the depository to hold the policy and in the event of his death to deliver it to the beneficiary, to receive from the insuring bank all dividends payable under the policy, to pay the premiums in his behalf, and at the expiration of ten years, if he elects to take option (A), to surrender the policy and receive its cash surrender value for his account; and other provisions in case the depositor is in default or desires to withdraw the whole or a part of his account. By the certificate the savings bank certifies that the depositor "is insured and is a depositor under its ten-year savings-insurance plan," and that the bank is holding the policy subject to the terms of the agreement, and has delivered the pass book to the depositor.

These provisions of the proposed contract manifestly purport to require the savings bank to engage in a business which is not the business of a savings bank and which is not authorized by any of the statutes which I have referred to. The contract is a contract for the deposit at intervals of sums of money, not within a period of twelve months as authorized by G. L., c. 167, § 16, but for a period of ten years. The bank agrees to hold for the depositor a security which is not of the kind authorized by G. L., c. 168, § 33. In so far as it acts as an agent the bank is to act as the agent of the depositor and not the agent of the savings and insurance bank, as permitted by G. L., c. 178, § 13. And beyond that the bank agrees to pay to the depositor, at the end of the ten-year period, at his option, the cash surrender value of the policy, and in the event of his death to pay the beneficiary under the policy \$1,000, thereby lending its own credit to the transaction, and to that extent itself engaging in the business of life insurance. There can be no legal justification for a scheme which assumes to permit and require savings banks to act as agents for depositors in transmitting insurance premiums for depositors, and to make pay-

ments to depositors and others of amounts called for by insurance policies. Such a business has nothing in common with a savings bank business.

It will not be necessary to describe in detail the other two plans submitted, since an examination shows that they are open to most, if not all, of the objections which I have stated.

I must advise you, therefore, that savings banks and trust companies in their savings departments cannot lawfully do business as outlined in the plans submitted.

---

#### LEGACY AND SUCCESSION TAX — STOCK OF VOLUNTARY ASSOCIATION OWNED BY NON-RESIDENT.

Under St. 1920, c. 396, stock of a voluntary association owned by a non-resident is not subject to a succession tax on his death, where the property of the association consists wholly of stocks of foreign corporations, and neither the trustees nor any office for the transfer of shares is within the jurisdiction, since complete succession may be accomplished without invoking the aid of our laws, and there is nothing to which the taxing power can be applied.

But if at the time of the decedent's death the voluntary association owned property in the Commonwealth, his interest through the voluntary association in that property is subject to the tax.

The mere fact that a voluntary association is stated to be organized under the laws of Massachusetts does not give jurisdiction to tax its shares, where neither shareholders, trustees nor property of the association is within the State.

To the Commissioner of  
Corporations and Taxation,  
1922  
April 12.

You request my opinion whether stock of The Mackay Companies owned by a non-resident of Massachusetts who died since the enactment of St. 1920, c. 396, is subject to a succession tax in this Commonwealth. You state that it appears by Poor's Manual of Public Utilities for 1921 that The Mackay Companies is "a voluntary association organized under Massachusetts laws by an agreement and declaration of trust executed and carried out on December 19, 1903;" and that Poor's Manual also contains the information that The Mackay Companies owns the entire \$25,000,000 capital stock of the Commercial Cable Company, and the whole or a portion of the capital stock of a number of telegraph and cable companies in the United States, Canada and Europe, including the land line system known as the Postal Telegraph-Cable Company; that there are twelve trustees, of

whom ten are residents of New York, one of London, Eng., and one of Toronto, Can.; and that the company has an office in New York and an office in Boston.

By a subsequent communication you state further that you are informed that The Mackay Companies maintains an office in Boston, at which there is an agent of the company upon whom process may be served, and that the annual meeting of the company is held in Boston; that none of the officers of the company have an office in Boston, and, except as previously stated, none of the business of the company is transacted here; that the stock is not transferable in Massachusetts, and none of the trustees are residents of this Commonwealth; that the subsidiary companies, the stock in which is owned by The Mackay Companies, have offices in Massachusetts at which the regular business of sending and receiving telegrams, etc., is carried on. I am further informed by counsel for The Mackay Companies that it has no office here for which it pays rent; that one of the officials of the subsidiary companies doing business here is an officer of The Mackay Companies, but that, so far as he can learn, no business of that organization is transacted here. He also states that at one time The Mackay Companies owned stock in subsidiary companies which were Massachusetts corporations; that recently that stock has been transferred to other of its subsidiary companies; but that he does not know whether that stock was transferred before or after the decease of the non-resident referred to.

By St. 1920, c. 396, § 1, "all property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to the inhabitants of the commonwealth or not, which shall pass by law, or by the laws regulating intestate succession," is made subject to a legacy and succession tax. Such a tax is an excise tax imposed upon the privilege of passing title to property. It can lawfully be applied only when some necessary incident of the transfer of title depends for its efficacy upon the law of the State levying the tax. "Where the property is not physically within the jurisdiction of the taxing power, and its complete succession may be accomplished without invoking any privilege or sanction conferred by its law, then there is nothing to

which taxation can attach." *Walker v. Treasurer and Receiver-General*, 221 Mass. 600, 602. See also *Kinney v. Treasurer and Receiver-General*, 207 Mass. 368, 369; *Peabody v. Treasurer and Receiver-General*, 215 Mass. 129, 130; *Welch v. Treasurer and Receiver-General*, 223 Mass. 87, 92.

Where property is held by a voluntary association organized under a declaration of trust, the beneficial interest in which is represented by certificates of shares, the organization may be in law either a partnership or a strict trust, depending upon the construction of the instrument by which it was created. *Williams v. Milton*, 215 Mass. 1; *Frost v. Thompson*, 219 Mass. 360, 365. If the organization is a partnership, the shares may be taxable to the owners in the places of their residence, or they may be taxable at the situs of the property owned by the organization. *Dana v. Treasurer and Receiver-General*, 227 Mass. 562; *Priestley v. Treasurer and Receiver-General*, 230 Mass. 452. If the organization is a trust, they may also be taxable at the place of residence of the trustees. *Kennedy v. Hodges*, 215 Mass. 112; *Peabody v. Treasurer and Receiver-General*, 215 Mass. 129; *Welch v. Boston*, 221 Mass. 155; *Dana v. Treasurer and Receiver-General*, *supra*; *cf. Clark v. Treasurer and Receiver-General*, 218 Mass. 292. It may be, also, that such shares would be taxable in any place where the trustees had an office for the transaction of the business of the trust, especially if the office were one at which shares could be transferred, since that would give the State power to direct the succession. *Cf. Blackstone v. Miller*, 188 U. S. 189; *Buck v. Beach*, 206 U. S. 392; *Wheeler v. New York*, 233 U. S. 434.

If at the time of the decedent's death The Mackay Companies owned stock in Massachusetts corporations, it is my opinion that his interest through The Mackay Companies in that stock was subject to a legacy and succession tax.

But where the property of an association consists wholly of stocks of foreign corporations, and neither the trustees nor the certificate holders nor any office for the transfer of shares is within the jurisdiction of the State, and where, accordingly, complete succession may be accomplished without invoking the aid of the laws of that State, there is nothing to which the taxing power can



be applied. Assuming that the facts are as stated, that The Mackay Companies has no real office in Boston where business is transacted and where certificates may be transferred, it is my opinion that no jurisdiction to tax is conferred by the existence of any power over the trustees. The mere fact that this trust is stated to be organized under the laws of Massachusetts does not mean that the Commonwealth has acquired any control over the organization as a separate entity or that the organization receives any benefit from its laws. The organization derives no power from statutory enactment. *Eliot v. Freeman*, 220 U. S. 178; *cf. G. L., c. 182*.

It is true that in *Kennedy v. Hodges*, *supra*, and in *Peabody v. Treasurer and Receiver-General*, *supra*, the court, in holding that shares in certain real estate trusts where the trustees were resident in the Commonwealth were taxable here, although owned by non-residents, said, in substance, that shares in such organizations were, in respect to those cases, indistinguishable in principle from shares of stock in domestic corporations; but, in my judgment, the court relied largely on the fact that the trustees and the office for the transfer of shares were within the jurisdiction, and the dictum should be confined to the circumstances of those cases. It cannot be that the mere fact that a group of people make an agreement relating to the management of property, providing for a representation of interests therein by shares, and state in their agreement that it is made under the laws of Massachusetts, gives jurisdiction to this State to tax those shares, where neither the property, the owners or managers of the property nor the shareholders are within this jurisdiction.

CONSTITUTIONAL LAW — ELECTIONS — MUNICIPAL PRIMARIES —  
FREEDOM OF ELECTIONS.

G. L., c. 43, § 44G (added by St. 1922, c. 282, § 1), is not in conflict with the Bill of Rights, art. IX.

To the  
Governor.  
1922  
April 12.

You have submitted for my consideration Senate Bill No. 334, entitled: "An Act providing for the nomination at preliminary elections of candidates for elective municipal office in cities governed under a standard form of city charter." Section 1 of the proposed bill amends G. L., c. 43, by inserting therein, after section 44, seven new sections providing for preliminary elections or primaries, designed to select candidates for the various city offices which are to be filled by popular election. Section 44G provides: —

If at the expiration of the time for filing statements of candidates to be voted for at any preliminary election not more than twice as many such statements have been filed with the city clerk for an office as are to be elected to such office, the candidates whose statements have thus been filed shall be deemed to have been nominated to said office, and their names shall be voted on for such office at the succeeding regular or special election, as the case may be, and the city clerk shall not print said names upon the ballot to be used at said preliminary election and no other nomination to said office shall be made. If in consequence it shall appear that no names are to be printed upon the official ballot to be used at any preliminary election in any ward or wards of the city, no preliminary election shall be held in any such ward or wards.

You inquire whether said section 44G is in conflict with article IX of the Bill of Rights, which provides: —

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.

The precise point appears to have been determined in *Graham v. Roberts*, 200 Mass. 152, where the court said, at pages 155-157: —

The petitioners contend that the rights of inhabitants of Haverhill are not equal to the rights of other inhabitants of the Commonwealth in the following particulars, namely: —

1. Restricting printed names on the ballot to the two highest candidates for an office in a preliminary election for nomination.

The first five of these particulars are merely regulations of the methods of voting. First, for the final election, an official ballot is prescribed. Then a preliminary election for nomination is provided, to determine what names shall appear on the final official ballot. General provisions for a similar object are found in our law for voting by the Australian ballot, the constitutionality of which has been affirmed. *Cole v. Tucker*, 164 Mass. 486.

The regulation that only the names of the two candidates chosen at the preliminary election shall appear on the final official ballot is simply a regulation for the election, which the Legislature and the people may adopt, and the same is true of the prohibition of the use of the names of candidates nominated by nomination papers, or by a caucus of a political party.

There is no constitutional restriction upon the power of the General Court to fix the qualifications of city officers. *Opinion of the Justices*, 138 Mass. 601, 603; *Larcom v. Olin*, 160 Mass. 102, 108; *Commonwealth v. Plaisted*, 148 Mass. 375, 386; *Opinion of the Justices*, 165 Mass. 599, 601. There is a space for writing in names not printed on the ballot. This secures the right of every one to vote as he pleases, and the requirements limiting the names that are to be printed on the ballot are within the power of the Legislature. That was settled in regard to the Australian ballot in *Cole v. Tucker*, 164 Mass. 486, and *Minor v. Olin*, 159 Mass. 487. See also *Eckerson v. Des Moines*, 115 N. W. Rep. 177; *In re Pfahler*, 150 Cal. 71; *Brown v. Galveston*, 97 Texas, 1.

It is covered in principle by *Cole v. Tucker*, 164 Mass. 486, which upheld the constitutionality of the Australian ballot. I am therefore of opinion that section 44G is not unconstitutional.

## FIRE — FIRE PREVENTION — REMOVAL OF SLASH AFTER CUTTING TIMBER.

Under G. L., c. 48, § 16, both the owner of lands, as therein defined, and the owner of standing timber thereon, who cuts or permits the cutting of brush, wood or timber, under the circumstances therein defined, may be liable to the penalty prescribed by section 20 if he fails to dispose of the slash in the manner prescribed in said section 16.

The purchaser of timberland after the timber has been cut but before the slash is deposited of, who fails to dispose of such slash in the manner prescribed by G. L., c. 48, § 16, is not liable to the penalty prescribed by section 20, since he has neither cut such timber nor permitted the cutting of such timber.

To the State  
Forester.  
1922  
April 12.

G. L., c. 48, § 16, provides: —

Every owner, lessee, tenant or occupant of lands or of any rights or interests therein, except electric, telephone and telegraph companies, who cuts or permits the cutting of brush, wood or timber on lands which border upon woodland, or upon a highway or railroad location, shall dispose of the slash caused by such cutting in such a manner that the same will not remain on the ground within forty feet of any woodland, highway or railroad location.

Section 20 provides: —

Violation of any provision of sections sixteen to eighteen, inclusive, shall be punished by a fine of not less than twenty nor more than one hundred dollars.

The owner of a tract of timber sells the standing timber thereon, to be removed. You inquire whether the owner of the land or the purchaser of the timber shall comply with the provisions of section 16 relative to the disposal of slash. You further inquire where the responsibility would rest if, after the timber has been removed and before the slash has been disposed of, the owner of the land shall sell the land to a third party.

1. Section 16 imposes the duty to dispose of the slash upon every person who satisfies both conditions of that section, to wit: (1) he must be the owner of lands or of some right or interest therein or an occupant thereof; (2) he must cut or permit the cutting of brush, wood or timber under the conditions defined in that section. It is plain that more than one person may fulfill

the conditions prescribed by the statute at one and the same time and with respect to the same timber and slash, yet the statute does not designate which of these several persons shall be first subject to the penalty. I am unable to believe that the Legislature intended that the order in which the several parties are named in the section determines the order in which they should be prosecuted, assuming all to be guilty. Answering your first inquiry, therefore, it would seem that both the owner of the land and the purchaser of the timber may be found liable under this section. The owner of the land may be liable if he cuts or permits the cutting of brush, wood or timber, as in this section provided. Since standing timber is a right or interest in land, the purchaser of the timber, if he cuts it or permits it to be cut, may be liable also. It follows that the answer to your first inquiry must be either or both.

2. Like considerations determine the answer to your second question. The purchaser of the land after the timber has been removed but before the slash is disposed of does not satisfy the second condition imposed by section 16. He has neither cut nor permitted the cutting of brush, wood or timber, as therein defined. It follows that he cannot be prosecuted under this section.

---

DEPARTMENT OF PUBLIC HEALTH — RULES AND REGULATIONS —  
DELEGATION OF LEGISLATIVE POWER — PROTECTION OF  
WATER SUPPLY — GREAT PONDS.

Under the delegation of legislative power conferred by G. L., c. 111, § 160, the Department of Public Health may make rules and regulations to prevent the pollution and secure the sanitary protection of all waters in this Commonwealth used as sources of water supply.

You have requested my opinion upon a question of law in the following situation: —

The city of Fall River takes water from North Watuppa Pond, the flowage rights in which are in the Watuppa Reservoir Company, but the city of Fall River has the unlimited use of the water for domestic purposes and owns most of the land around the pond. The city is negotiating for the full control of the flowage rights.

To the Com-  
missioner of  
Public Health.  
1922.  
April 13.

A plan to prevent the pollution of this pond has been adopted by the city and approved by the State Department of Public Health, which provides for two intercepting drains, one on the easterly and the other on the westerly shore of the pond, to intercept and divert polluted waters from the north pond into the south pond. The intercepting drain on the westerly shore has been built, but on the easterly shore the construction work was held up by the war.

Certain persons are now proposing to erect ice houses on the easterly shore of the pond on the portion of that shore which would be cut off from North Watuppa Pond and diverted to South Watuppa Pond as soon as the intercepting drain is built. A chain of ice houses already exists on the pond, which will doubtless be taken by the city when arrangements therefor can be made.

Your question is as to whether or not the Department of Public Health, under the above circumstances, can make rules and regulations for the sanitary protection of North Watuppa Pond and, to that end, prohibit ice cutting thereon under the provisions of G. L., c. 111, § 160.

G. L., c. 111, § 160, reads as follows:—

The department may cause examination of such waters to be made to ascertain their purity and fitness for domestic use, or the possibility of their impairing the interests of the public or of persons lawfully using them or of imperilling the public health. It may make rules and regulations to prevent the pollution and to secure the sanitary protection of all such waters used as sources of water supply. It may delegate the granting and withholding of any permit required by such rules or regulations to state departments, boards and commissions and to selectmen in towns, and to boards of health, water boards and water commissioners in cities and towns, to be exercised by such selectmen, departments, boards and commissions, subject to such recommendation and direction as shall be given from time to time by the department; and upon complaint of any person interested, the department shall investigate the granting or withholding of any such permit, and make such orders relative thereto as it may deem necessary for the protection of the public health. Whoever violates any such orders, rules or regulations shall be punished by a fine of not more than five hundred dollars, to the use of the commonwealth, or by imprisonment for not more than one year, or both.

The essential facts in determining your question are two: first, North Watuppa Pond is a great pond, situated near the city of Fall River, about four miles long and from three-fourths of a mile to a mile and a quarter wide (*Watuppa Reservoir Co. v. Fall River*, 147 Mass. 549); second, the said pond is used by the city of Fall River as a source of water supply.

It is well settled that the control of great ponds in the public interest is in the Legislature, which represents the public. It may regulate and change these public rights or take them away altogether, to serve some paramount public interest. *Hittinger v. Eames*, 121 Mass. 539, 546; *Paine v. Woods*, 108 Mass. 160, 169; *Commonwealth v. Vincent*, 108 Mass. 441, 447; *Commonwealth v. Tiffany*, 119 Mass. 300; *Gage v. Steinkrauss*, 131 Mass. 222; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 557, 564, 567; *Rockport v. Webster*, 174 Mass. 385, 392; *Sprague v. Minon*, 195 Mass. 581, 583.

It is within the power of the Legislature to deprive the general public of the right to go upon a great pond with boats or otherwise, on the ground that a safe and advantageous use of the water for drinking, and for other domestic purposes, would be best promoted by terminating this former public right and putting the property in the control of a public board. It could give to this public board, as its representative, power to exclude all persons from the waters of the great pond. This power naturally and properly might include the right to permit persons to go upon them under reasonable regulations. *Sprague v. Minon*, 195 Mass. 581, 583; *Brodline v. Revere*, 182 Mass. 598, 601; *Sprague v. Dorr*, 185 Mass. 10; *Commonwealth v. Sisson*, 189 Mass. 247; *Commonwealth v. Plaisted*, 148 Mass. 375. Such legislation might be enacted under the sovereign power of this Commonwealth to control and regulate our public rights, as there are no private rights of property in the great ponds. *Sprague v. Minon*, 195 Mass. 581.

The Legislature, if it sees fit, may make rules and regulations, and the delegation of its right to make rules and regulations is within its power. *Commonwealth v. Hyde*, 230 Mass. 6; *Commonwealth v. Sisson*, 189 Mass. 247; *Commonwealth v. Kingsbury*, 199 Mass. 542.

In the Hyde case, *supra*, a regulation of the State Board of Health forbade fishing in Crystal Lake in Haverhill. Concerning this regulation the court stated that —

The regulation passed by the State Board of Health, in pursuance of the statutory authority, prohibiting fishing upon a body of water used as a source of water supply for a municipality, cannot be pronounced unreasonable. It requires no discussion to demonstrate that the preservation of the purity of the water supply for the domestic uses of the people is within the police power. The absolute prohibition of fishing upon such a source of supply could not be said to be unreasonable under the circumstances here disclosed. It is not irrational for a public board to deem it likely or possible that sources of contamination and germs of disease might have a casual connection with the presence of fishermen upon the ice or waters of a supply of drinking water. *Nelson v. State Board of Health*, 186 Mass. 330; *Sprague v. Minon*, 195 Mass. 581.

You will note that the practical result of this power might lead to the forbidding of an ice-cutting business that had been conducted on the pond for some years, and that no compensation would be due to the owners because of the enforcement of a health rule and regulation. This may seem a drastic right, but it is no more drastic than the practical results in several cases which have been decided by our Supreme Judicial Court. For instance, in the case of *Nelson v. State Board of Health*, 186 Mass. 330, the petitioner claimed that his land had been used as a farm for over one hundred years, and he had maintained a privy on the shore for some thirty years, but it was held that the State Board of Health had the power to pass a general regulation forbidding, among other things, privies within a specified distance from the shore of the pond, and the right to maintain the same ceased, although the order was made without a hearing, and the action of the Board was final. In the case of *Commonwealth v. Sisson*, 189 Mass. 247, a riparian owner had maintained a sawmill on the bank of a stream for thirty years, but, nevertheless, the court decided that he held his property subject to the right of the Legislature to prohibit or regulate the discharge of sawdust into the stream, for the protection of edible fish; that the defendants were not entitled to a hearing; that the action of the Board was final;



and that no compensation was due to the owners. The theory is that the determination of the facts is legislative in case the Legislature decides to make a thing a nuisance *per se*. The court points out that the delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given. In the opinion of the court it is within the constitutional power of the Legislature, and the court can give no remedy.

Accordingly, in consideration of the statutory authority, to wit, G. L., c. 111, § 160, and the decisions of our Supreme Judicial Court, in my judgment, your department has the power to make rules and regulations to prevent the pollution and secure the sanitary protection of the waters of North Watuppa Pond at Fall River.

---

SERGEANT-AT-ARMS — AUTHORITY TO ARREST DISORDERLY PERSONS IN THE CHAMBERS OF THE GENERAL COURT — SUPERINTENDENT OF BUILDINGS.

The sergeant-at-arms is charged with the duty of maintaining order in the chambers of the General Court, and he is authorized to make arrests, if necessary, in the performance of this duty.

The Superintendent of Buildings has authority to make arrests for criminal offences committed in any part of the State House or its appurtenances.

You have requested my opinion as to what your authority is and how far you can go in case of disorder among the spectators in the chambers of the General Court, or in case of an interruption of the business of either branch or of the committees thereof, or in case of any disturbance by a member of the General Court. You also ask as to whether or not the General Laws give you and your doorkeepers and messengers sufficient authority to quell disturbance if the occasion should arise, and to lay hands on a person to remove him from a chamber or a committee room if the necessity requires, and also to make an arrest if necessary.

G. L., c. 3, § 17, reads as follows: —

The sergeant-at-arms shall serve such processes and execute such orders as may be enjoined upon him by the general court or by either

To the Ser-  
geant-at-Arms.  
1922  
April 13.

branch thereof, attend the members or clerks of either branch when they are charged with a message from one branch to the other or to the governor and council, maintain order among the spectators admitted into the chambers in which the respective branches hold their sessions, prevent the interruption of either branch or of the committees thereof, and shall have the control of, and superintendence over, his subordinate officers, taking care that they promptly perform their duties.

Considering, first, the question as to whether or not you have the power to make an arrest in the performance of your duties, I would state that the general powers to make arrests for criminal offences committed in any part of the State House, or the grounds thereof, have been given to the Superintendent of Buildings by G. L., c. 8, § 12, which reads as follows: —

The superintendent shall take proper care to prevent any trespass on, or injury to, the state house or its appurtenances, or any other building or part thereof in Boston owned by or leased to the commonwealth for public offices; and if any such trespass or injury is committed, he shall cause the offender to be prosecuted therefor. For any criminal offence committed in any part of the state house or the grounds appurtenant thereto, or in any other building in Boston owned by or leased to the commonwealth, the superintendent and his watchmen shall have the same power to make arrests as the police officers of Boston.

These general powers to make arrests at the State House were formerly given to the sergeant-at-arms. See R. L., c. 10, § 8. Consequently, in my judgment, the sergeant-at-arms and his subordinate officers do not now have the power to make arrests that they had before this power was transferred to the Superintendent of Buildings and his officers by Gen. St. 1919, c. 350, § 17.

You will note, however, that, by Mass. Const., pt. 2d, c. I, § III, art. X, it is provided that the House of Representatives “shall have authority to punish by imprisonment every person, not a member, who shall be guilty of disrespect to the house, by any disorderly or contemptuous behavior in its presence”; or who threatens or assaults members; or assaults or arrests witnesses, etc., ordered to attend the house; or rescues any person arrested by it. By article XI it is provided: —

The senate shall have the same powers in the like cases: . . . provided, that no imprisonment on the warrant or order of the . . . senate, or house of representatives, for either of the above described offences, be for a term exceeding thirty days.

Under this constitutional provision it has been held that the sergeant-at-arms may lawfully detain in the county jail, with the permission of the sheriff, a prisoner committed by authority of the House of Representatives. See *Burnham v. Morrissey*, 14 Gray, 226. Accordingly, you would have the power to arrest and detain a person upon a process enjoined upon you by the General Court, or either branch thereof, under authority of the constitutional provision referred to.

Considering, second, the question of your authority, as sergeant-at-arms, and that of your subordinates to quell disturbances in the chambers of the General Court, and in the committee rooms thereof, you will observe that, by G. L., c. 3, § 17, it is provided that you shall "maintain order among the spectators admitted into the chambers in which the respective branches hold their sessions, prevent the interruption of either branch or of the committees thereof, . . ." This duty to maintain order and to prevent the interruption of the Legislature is obligatory upon you, and, in my judgment, you, as sergeant-at-arms, and your subordinates are justified in using such force as is reasonably necessary to secure and maintain the order contemplated by the Legislature. In other words, within reasonable limits the amount of force and the means employed are necessarily left to the sound discretion of the sergeant-at-arms.

STATE POLICE OFFICERS — ADDITIONAL APPOINTMENTS — DATE  
OF COMMENCEMENT OF SERVICE — PENSIONS — STATE RE-  
TIREMENT ASSOCIATION.

The provisions of G. L., c. 32, § 68, as amended by St. 1921, c. 487, § 1, relative to retirement for disability, are not applicable to the additional officers appointed to the Division of State Police under G. L., c. 22, § 9A.

The provisions of law relative to the State Retirement Association are applicable to the additional officers appointed under G. L., c. 22, § 9A.

To the Com-  
missioner of  
Public Safety.  
1922  
April 14.

You have requested my opinion upon the following questions of law: —

1. Do the provisions of G. L., c. 32, § 68, apply to the additional officers appointed to the State police under G. L., c. 22, § 9A?

G. L., c. 32, § 68, was amended by St. 1921, c. 487, § 1, and reads, so far as is pertinent to your question, as follows: —

Any officer or inspector of the department of public safety, who began continuous service prior to July first, nineteen hundred and twenty-one, if in the judgment of the commissioner of public safety he is disabled for useful service in the department and a physician designated by said commissioner certifies that he is permanently incapacitated, either physically or mentally, for the further performance of his duty in the department, by injuries sustained through no fault of his own in the actual performance of his duty, or any such officer or inspector of said department who has performed continuous faithful service for the commonwealth for not less than twenty years, if in the judgment of said commissioner he is incapacitated for further service as a member of the department, shall, if he so requests, be retired, and shall annually receive a pension from the commonwealth equal to one half the compensation received by him at the time of his retirement. . . .

Said section 9A, referred to by you, was enacted May 27, 1921. See St. 1921, c. 461. No emergency clause having been placed in the act, it did not take effect for ninety days after enactment. Consequently, none of the State police officers in question could have begun continuous service prior to July 1, 1921. Accordingly, said section 68 does not apply to the said additional State police officers.

2. Whether or not the provisions relative to the State Employees'

Retirement Association apply to the additional officers appointed under said section 9A.

By an order passed by the Senate and House on June 4, 1920, a joint special committee on pensions was established to study the entire question of pensions and retirement allowances provided under existing laws for officials and employees of the Commonwealth and of the counties, cities and towns. That committee transmitted a report to the Legislature in January, 1921. In this report it was stated that —

We believe that all future pension laws should be based on the contributory plan, and that future appointees in the services for which non-contributory pensions are now provided should be brought into the contributory system.

The committee recommended certain legislation relative to the State police, and drafted a bill, by section 1 of which it was provided that "the present non-contributory pensions for state police shall be limited to those appointed before July first, nineteen hundred and twenty-one. Those appointed after July first, nineteen hundred and twenty-one will thereby automatically come under the state system." Pursuant to this recommendation, St. 1921, c. 487, was enacted. As stated above, the additional State police officers appointed under said section 9A began continuous service after July 1, 1921, and, consequently, the provisions relative to the State Employees' Retirement Association are applicable to them.

I might point out, in addition, that, even before G. L., c. 32, § 68, was amended, State police officers were not prohibited from becoming members of the Retirement Association. This was for the reason that their right to the pension conferred by said section 68 was not absolute and did not necessarily become absolute even upon completion of the term of service prescribed. There were certain conditions that might never be fulfilled. Thus, while an officer might have become entitled to a non-contributory pension if all the conditions were fulfilled, it could not be said that he "either is or will be entitled" thereto, within the meaning of G. L., c. 32, § 2, cl. (3) [St. 1911, c. 532, § 3, par. (3)]. See V Op. Atty.-Gen. 634.

CONSTITUTIONAL LAW — TAXATION — DUE PROCESS OF LAW —  
 APPROPRIATION OF PUBLIC MONEY FOR PRIVATE PURPOSE —  
 PAYMENT OF UNEARNED SALARY TO DEPENDENTS OF  
 DECEASED OFFICER OR EMPLOYEE OF A CITY OR TOWN.

An appropriation of public money to a private purpose takes the property of the taxpayer without due process of law, in violation both of the State Constitution and of the Fourteenth Amendment.

In the absence of any showing that a public purpose is thereby accomplished, the Legislature has no power to authorize cities and towns to pay to the widow or dependents of a deceased officer or employee the salary which such person would have received during a stated period after his decease.

To the Senate.  
 1922  
 April 17.

I have considered the question presented by the following order: —

*Ordered*, That the Senate request the opinion of the Attorney General as to the constitutional right of the General Court to authorize cities and towns to pay to the widow or dependents of a deceased officer or employee thereof sums of money equivalent to the salary or compensation which would have been payable to such deceased officer or employee for a stated period following his decease.

I note that no bill accompanies this request. No concrete question is before me. I am therefore necessarily confined to a statement of the constitutional principle applicable to your inquiry.

Most of the public revenue is raised by taxation. Taxes cannot constitutionally be raised or spent for a purpose not public. Bill of Rights, art. X; Mass. Const., pt. 2d, c. I, § I, art. IV; pt. 2d, c. II, § I, art. XI; *Freeland v. Hastings*, 10 Allen, 570; *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608; *Opinion of the Justices*, 211 Mass. 624; *Boston v. Treasurer and Receiver-General*, 237 Mass. 403. To tax or to expend taxes for a purpose not public takes the property of the taxpayer without due process of law, within the meaning of the Fourteenth Amendment. *Loan Association v. Topoka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 1. Even public money not derived from taxation cannot be expended for a private pur-

pose. *Opinion of the Justices*, 211 Mass. 624. The reason for and justice of this rule is plain. Taxes are raised according to law, and, by compulsion of law, for purposes authorized by law. The Constitution limits both the power to tax and the power to expend. To take property from the citizen by force in a manner or for a purpose not authorized by the Constitution of the Commonwealth denies to him that protection from lawless force which is one of the fundamental purposes of government.

The precise question is whether a payment authorized under the circumstances disclosed in the order would be an appropriation for a private purpose. If that be the case, the Legislature cannot authorize such payment by cities and towns. *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255. In *Whittaker v. Salem*, 216 Mass. 483, the principal of a school, who had worked especially hard, devoted his entire vacation to installing furnishings in a new school building, and had become ill from overwork, was reappointed principal for another year and granted leave of absence for that year upon half pay. In holding that the grant of half pay for work not performed was beyond the power of the school committee, the court said, by Rugg, C.J.: —

But they must keep within the broad principles which govern all public boards of officers. They are charged with the expenditure of moneys raised by taxation. They can vote it only for public uses. They have no right to devote it to private purposes. However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted. *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624.

In my opinion, the facts stated in the order are even less favorable to the widow and dependents than the facts of the Whittaker case. If the grant to Whittaker could not be sustained, I am unable to perceive any ground upon which payment of unearned salary to the widow or dependents, under the circumstances stated

in the order, can be held to be for a public purpose. I am therefore constrained to advise you that an act authorizing cities and towns to make such payment would, in my opinion, be unconstitutional.

---

CIVIL SERVICE — FIRE DEPARTMENT — APPOINTMENT AND  
REMOVAL — PLYMOUTH.

Acceptance of G. L., c. 31, § 48, applying the civil service classification to the permanent members of the Plymouth fire department, does not conflict with Spec. St. 1916, c. 84, § 1, authorizing said town to establish a fire department to be under the control and direction of one fire commissioner appointed by the selectmen.

To the Com-  
missioner of  
Civil Service.  
1922  
April 18.

You request my opinion upon the question as to whether or not acceptance of the civil service law by the town of Plymouth conflicts with Spec. St. 1916, c. 84.

Spec. St. 1916, c. 84, § 1, reads as follows: —

The town of Plymouth is hereby authorized to establish a fire department, to be under the control and direction of one fire commissioner, who shall be appointed by the selectmen for a term of three years. He shall signify his acceptance in writing and shall receive no salary. He shall serve until his successor is appointed and may be removed for cause by the selectmen at any time after a hearing. The fire commissioner shall have charge of extinguishing fires in said town and the protection of life and property in case of fire, and he shall purchase and keep in repair all apparatus used by the fire department. He shall have and exercise all the powers and discharge all the duties conferred or imposed by statute upon boards of engineers for towns, and he shall appoint a chief of department and such other officers and firemen as he may think necessary, and may remove the same at any time. He shall have full and absolute authority in the administration of the department, shall make all rules and regulations for its control, shall report to the selectmen from time to time as they may require, and shall annually report to the town the condition of the department, with his recommendations relative thereto. In the expenditure of money the fire commissioner shall be subject to such limitations as the town may prescribe.

It appears that at a town meeting held on March 4, 1922, the town of Plymouth voted to accept G. L., c. 31, § 48, applying



the civil service classification to the permanent members of the Plymouth fire department. This section reads as follows:—

A town which has not accepted this chapter or the corresponding provisions of earlier laws may accept this section as to its regular or permanent police and fire forces, or as to either of them. Acceptance as to the fire force shall include regular members, and may include call members; and a town which has accepted this section or the corresponding provisions of earlier laws as to regular firemen may afterward accept it as to call firemen. In a town which accepts this section by vote of the town at a town meeting, or has accepted corresponding provisions of earlier laws, as to any or all of said forces, the members of the forces to which the acceptance relates shall be subject to this chapter and the rules made hereunder, and shall hold office until their death, resignation or removal; but members in office at the time of such acceptance shall continue in office without examination or reappointment.

G. L., c. 31, § 50, provides:—

Nothing in this chapter shall repeal, amend or affect any special provision of law relative to any city or town, or extend to any city or town any provision of law to which it is not now subject.

It is my opinion that the provisions of Spec. St. 1916, c. 84, relating to appointment and removal of a fire commissioner, chief of the department and such officers and firemen as may be thought necessary, are not so inconsistent with the civil service law or so unworkable as to involve either a surrender of powers granted to the town or an abatement or modification of any essential provision of said special act of 1916. In the matter of appointments of permanent members of the fire force, authority is limited only in that the selection of the appointees must be made from a list of competent persons duly certified by the Civil Service Commission, while in the matter of removals, under the Civil Service Rules formal charges must be preferred and an opportunity given for a public hearing. *Tucker v. Boston*, 223 Mass. 478. "To say that any city was to be exempted from the provisions of either the whole or any particular part of this legislation (civil service law) would be to frustrate the manifest intent of the Legisla-

ture." See *Logan v. Mayor and Aldermen of Lawrence*, 201 Mass. 506, 511.

Accordingly, I am of the opinion that G. L., c. 31, § 50, does not exempt the Plymouth fire department from the application of the civil service law.

---

CONSTITUTIONAL LAW — TAXATION — DUE PROCESS OF LAW —  
APPROPRIATION OF PUBLIC MONEY FOR PRIVATE PURPOSE —  
AUTHORITY OF TOWN TO REIMBURSE THE VICTIMS OF A  
POWDER EXPLOSION.

An appropriation of public money for a private purpose takes the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

The General Court cannot authorize a city or town to expend public money for a private purpose.

An incidental advantage to the public will not sustain a gift of public money for a purpose primarily private.

The General Court cannot constitutionally authorize a town to reimburse the victims of an explosion of a fireworks factory not caused by any act or default of the town.

Since article XXX of the Bill of Rights forbids the General Court to exercise judicial power, a recital in the bill that a fireworks factory was "illegally licensed by said town" is an expression of legislative opinion and not a determination that such was the case.

A bill authorizing a town to reimburse the victims of an explosion of a fireworks factory, "in consideration of the fact that said factory was illegally licensed by said town," would be unconstitutional in that it neither primarily promotes a public purpose nor discharges any moral but unenforceable obligation of the town, since the responsibility for the explosion (if any) rests upon those who caused it and not upon the town.

You have submitted for my consideration House Bill No. 1523, entitled "An Act authorizing the town of Randolph to pay certain claims for damages arising from an accident caused by an explosion at a fireworks factory located in said town." The material portion of this bill is as follows: —

SECTION 1. The town of Randolph may pay to the following named persons, to reimburse them for damages sustained as a result of an explosion occurring at a fireworks factory located in said town on April fifteenth, nineteen hundred and twenty-one, in consideration of the fact that said factory was illegally licensed by said town, the following sums of money: . . .

Then follows an enumeration of the sums to be paid to various designated persons. The words "in consideration of the fact that said factory was illegally licensed by said town" were inserted by amendment in the Senate. You inquire whether the bill, thus amended, would be constitutional.

Public money cannot be spent for any purpose for which it would be unconstitutional to levy a tax. Taxes are levied in order to raise money for public purposes. They are collected by force, if need be. The Legislature cannot appropriate, or authorize cities and towns to expend, public money for a private purpose. To do so would take the property of the taxpayer in violation of the rights guaranteed to him not only by the Constitution of this Commonwealth but also by the Fourteenth Amendment. *Freeland v. Hastings*, 10 Allen, 570; *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608; *Opinion of the Justices*, 211 Mass. 624; *Boston v. Treasurer and Receiver-General*, 237 Mass. 403; *Loan Association v. Topeka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. LaGrange*, 113 U. S. 1; Opinion, Attorney General to the President of the Senate (VI Op. Atty.-Gen. 474).

The test which distinguishes a public from a private use is whether the expenditure primarily promotes a public rather than a private purpose. No matter how strong the appeal to sentiment or generosity may be, money cannot constitutionally be taken by taxation in order to make a gift to individuals. The principle is declared in no uncertain words by Chief Justice Rugg in *Whittaker v. Salem*, 216 Mass. 483, 485, where, in holding that a school committee had no power to give a school teacher, ill from overwork, a year's leave of absence upon half pay, he said: —

But they must keep within the broad principles which govern all public boards of officers. They are charged with the expenditure of moneys raised by taxation. They can vote it only for public uses. They have no right to devote it to private purposes. However meritorious the project may appear to be either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respect-

ing a great variety of subjects and cannot be doubted. *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624.

The bill in its original form would seem to be within *Lowell v. Boston*, 111 Mass. 454. In that case the court, in holding unconstitutional an act authorizing a loan of public money upon mortgage to private individuals to aid them in rebuilding after the great fire of 1872, said, by Wells, J. (page 460): —

The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. 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. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

If it was beyond the power of the Legislature to authorize a loan of public money to fire victims, to aid them to rebuild, a gift of public money to reimburse those injured by an explosion can scarcely be sustained.

It remains to consider whether the Senate amendment has so changed the original bill as to make it constitutional. The amendment provides that the proposed payments are authorized "in consideration of the fact that said factory was illegally licensed by the town." I assume that the license referred to was the license required by G. L., c. 148, § 13, which provides: —

No building shall be used for the manufacture of fireworks or fire-crackers without a license from the aldermen or selectmen and a permit from the marshal.

The inquiry whether a license was "illegally" issued by the selectmen under this section raises a judicial question. The judicial power, that is, the power to hear and determine judicial questions, is not vested in the Legislature but in the judicial branch. Indeed, article XXX of the Bill of Rights provides, in part:—

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: . . .

In view of this express prohibition, I am of opinion that the Legislature cannot finally determine, either as against the town or in favor of the claimants, whether this license was "illegally" issued. *Denny v. Mattoon*, 2 Allen, 361, 378; *Opinion of the Justices*, 237 Mass. 619, 623. If so, the Senate amendment must be regarded as a statement of opinion as to the conclusion of law to be drawn from facts not stated, rather than as an effective determination that the town has failed in any duty to the claimants.

I am not unmindful that there are authorities which hold that the legislative branch may authorize the payment of a just but unenforceable obligation. *United States v. Realty Co.*, 163 U. S. 427. In this class falls a statute authorizing repayment of expenses incurred in reliance upon a subsidy act which was repealed before the subsidy was earned (*United States v. Realty Co.*, *supra*); or a tax illegally collected (*United States v. Jordan*, 113 U. S. 418). It is unnecessary to determine whether the Legislature of this Commonwealth possesses so broad a power. In my opinion, the present act discloses no such obligation on the part of the town.

The fireworks factory was either lawful or it was not. If lawful, no semblance of responsibility for its continuance could rest upon the town. If unlawful, it constituted a nuisance, the liability for which rested upon those who maintained it rather than upon

the town. *Oulighan v. Butler*, 189 Mass. 287; *Moeckel v. Cross & Co.*, 190 Mass. 280. Even assuming that the town might have maintained a bill in equity to abate the factory as a public nuisance (*Somerville v. Walker*, 168 Mass. 388), or that the Commonwealth might have proceeded by indictment (*Commonwealth v. Packard*, 185 Mass. 64), any person as to whom the factory constituted a private nuisance could also have had relief in equity. *Wright v. Lyons*, 224 Mass. 167. Under these circumstances, a contention that the citizens of the town can constitutionally be taxed in order to make good damage caused by the supposed wrongful acts of third parties presents a claim far weaker than that overthrown in *Whittaker v. Salem*, 216 Mass. 483. On no theory can those who maintained the factory be relieved at public expense from liability to the claimants. *Woodward v. Central Vermont Ry. Co.*, 180 Mass. 599. Even if those who maintained the factory are financially unable to respond in damages, no just claim arises against the town. As matter of law, the town cannot be found to have caused the injury. *Horan v. Watertown*, 217 Mass. 185.

I am not unmindful that, when a statute is assailed in court, the court will make all rational presumptions in favor of constitutionality. *Perkins v. Westwood*, 226 Mass. 268, 271. What are rational presumptions necessarily depends upon the apparent purpose of the bill. *Lowell v. Boston*, 111 Mass. 454; *Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608. In other words, the court assumes that the Legislature intended to exercise only those powers conferred upon it by the Constitution, according to the true meaning and construction thereof. But this presumption cannot add to those powers or enlarge their scope. On the contrary, it adds, if anything can add, to the obligation assumed by each legislator under his oath of office "to discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution. . . ." Mass. Const., pt. 2d, c. VI, art. I. The test applicable to the present bill is whether the proposed expenditure primarily benefits the public rather than individuals. I assume that you desire

me to advise you from the viewpoint of legislative duty, unaffected by any presumption, subject to which the court might ultimately examine this bill. So considering the bill, and giving due effect to the amendment added by the Honorable Senate, I am constrained to the conclusion that the proposed expenditure neither furthers a public purpose nor discharges any just but unenforceable obligation of the town, and therefore cannot constitutionally be authorized. *Lowell v. Boston*, 111 Mass. 454; *Woodward v. Central Vermont Ry. Co.*, 180 Mass. 599; *Whittaker v. Salem*, 216 Mass. 483.

---

CONSTITUTIONAL LAW — POLICE POWER — STATUTE FORBIDDING ONE WHO DEALS IN REFINED PETROLEUM PRODUCTS TO SELL OR LEASE DISTRIBUTING APPARATUS UPON CONDITION THAT IT BE USED EXCLUSIVELY FOR HIS OWN PRODUCTS.

A statute which forbids a person engaged in producing or selling refined petroleum products to sell or convey distributing apparatus upon condition that it be used exclusively for the distribution of his own products would be constitutional.

A statute which forbids a person engaged in producing or selling refined petroleum products to lease or loan distributing apparatus upon condition that it be used exclusively for the distribution of his own products would conflict both with the Constitution of this State and with the Fourteenth Amendment.

As the manufacture and sale of refined petroleum products is a private business not affected with a public use, one engaged therein cannot constitutionally be compelled to permit distributing apparatus leased or loaned by him to a retailer to be used to distribute the products of competitors, either with or without compensation.

Goodwill is property, within the meaning of those constitutional guaranties which forbid the taking of property without due process of law.

Reasonable agreements for the protection of goodwill are within that liberty of contract guaranteed by the Constitution.

You inquire whether Senate Bill No. 47, entitled "An Act to prevent discrimination in sales or leases of apparatus for distributing refined petroleum products," would be unconstitutional if enacted into law. The bill amends G. L., c. 93, by inserting a new section, the material part of which is as follows:—

To the Senate,  
1922  
May 1.

*Section 14A.* No person, firm, association or corporation engaged in the production, refining, sale or distribution of refined petroleum products shall insert in or make it a condition or provision of any sale,

lease, loan or other conveyance or letting of any machinery, apparatus or device for retailing, distributing or dispensing such products that the same shall be used for the sole and exclusive sale or distribution of the products of such person, firm, association or corporation. . . .

The bill further punishes violation by fine or imprisonment, and provides for specific enforcement of the prohibition by injunction or other appropriate remedy.

Mass. Const., pt. 2d, c. 1, § I, art. IV, provides, in part: —

And further, full power and authority are hereby given and granted to the said general court, from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; . . .

For convenience this power is termed the police power. Broadly speaking, it embraces regulations which promote the safety, health, morals and, in a limited sense, the public welfare. *Commonwealth v. Libbey*, 216 Mass. 356, 358; *Commonwealth v. Beauclieu*, 213 Mass. 138, 141; *Opinion of the Justices*, 208 Mass. 619, 622; *Commonwealth v. Strauss*, 191 Mass. 545, 550; *Chicago & Alton R.R. v. Tranbarger*, 238 U. S. 67, 69, 77. On the other hand, both the State and Federal Constitutions place limits upon the exercise of the police power. The Fourteenth Amendment forbids any State to “deprive any person of life, liberty or property without due process of law,” or to deny to any person the equal protection of the laws. The State Constitution contains provisions (Bill of Rights, arts. I, X, XII, XXIX) which guarantee life, liberty and property and the equal protection of the laws to the same extent as does the Fourteenth Amendment. *Opinion of the Justices*, 220 Mass. 627, 630; *Opinion of the Justices*, 211 Mass. 618; *Wyeth v. Cambridge*, 200 Mass. 474, 478; V Op. Atty.-Gen. 484. Neither the police power nor the limitations thereon are capable of precise and exhaustive definition. The lines are



pricked out by gradual approach and contact of decisions on opposing sides. *Noble State Bank v. Haskell*, 219 U. S. 104, 112.

Statutes which prohibit monopolies and contracts in unreasonable restraint of trade are within the police power. *Commonwealth v. Strauss*, 191 Mass. 545; *Opinion of the Justices*, 193 Mass. 608; *Opinion of the Justices*, 211 Mass. 620; *Mallinckrodt Chemical Works v. Missouri*, 238 U. S. 41. See also *International Harvester Co. v. Missouri*, 234 U. S. 199. We have laws of that character upon our statute books. G. L., c. 93, §§ 1, 2, 14. Federal legislation forbidding similar practices in interstate commerce has been upheld. *Standard Oil Co. v. United States*, 221 U. S. 1; *United Shoe Machinery Corp. v. United States*, 258 U. S. 451.

The line of power may be discerned from three concrete examples: A statute forbidding sales of goods, wares and merchandise upon condition that the purchaser shall not deal in the goods, wares and merchandise of others than the seller is valid, especially if it does not forbid exclusive agencies. *Commonwealth v. Strauss*, 191 Mass. 545. See also *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502; *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346. So, also, an act forbidding the sale or lease of any tool, implement, appliance or machinery upon condition that the purchaser or lessee shall not buy or use tools, implements, appliances, machinery, materials or merchandise of others than the seller or lessor is not invalid where due provision is made for the monopoly conferred by patents, and exclusive agencies are not forbidden. *Opinion of the Justices*, 193 Mass. 608. Again, section 3 of the Clayton Act, which forbids persons engaged in interstate commerce to lease machinery, supplies or other commodities, whether patented or unpatented, upon an agreement or condition that the lessee shall not use or deal in the machinery, supplies or commodities of competitors where the effect of such lease, agreement or condition may be substantially to lessen competition or tend to create a monopoly,

has recently been held to forbid tying clauses inserted in leases of shoe machinery where the effect of those clauses substantially lessened competition and tended to create a monopoly in shoe machinery and supplies therefor. *United Shoe Machinery Corp. v. United States, supra*. Taking these cases together, it seems clear that the police power extends to prohibiting either leases or sales upon agreements or conditions which unreasonably limit competition or tend to monopoly.

There are likewise cases which to some extent indicate the line of limitation. Both the State Constitution and the Fourteenth Amendment forbid taking private property for private use even upon payment of full compensation. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 247; *Salisbury Land & Imp. Co. v. Commonwealth*, 215 Mass. 371; *Hairston v. Danville & Western Ry.*, 208 U. S. 598, 606; *Madisonville Traction Co. v. St. Bernard Traction Co.*, 196 U. S. 239, 251; *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403. Still less can private property be taken by law from one party and given to another without compensation. *Woodward v. Central Vermont Ry. Co.*, 180 Mass. 599; *Kingman v. Brockton*, 153 Mass. 255; *Whittaker v. Salem*, 216 Mass. 483; *Loan Association v. Topeka*, 20 Wall. 655; *Cole v. LaGrange*, 113 U. S. 1. Opinion, Attorney General to the President of the Senate, April 17, 1922. Although reasonable burdens fairly incident to the transaction of its business or the discharge of its duties may be placed upon a railroad or other business affected with a public use, even a railroad cannot be required to furnish to the public special facilities not reasonably required for the performance of its public duties, such as unnecessary spur tracks (*Missouri Pac. Ry. Co. v. Nebraska*, 217 U. S. 196, *Washington v. Fairchild*, 224 U. S. 510); unnecessary track scales (*Great Northern R.R. v. Minnesota*, 238 U. S. 340); or a site for a grain elevator (*Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403). And while reasonable interchange of business between connecting railroads may be compelled, a statute which in effect compels a railroad to furnish car and terminal facilities to a competitor cannot be sustained. *Louisville & Nashville R.R. v. Central Stock Yards Co.*, 212 U. S. 132. If even a railroad which

is affected with a public use cannot be compelled to furnish unnecessary facilities to the public or special facilities to a competitor, it seems plain that one engaged in private business cannot be required to do so.

The provisions of the proposed bill divide into two classes, — those which govern sale or conveyance, and those which govern leases or loan. One who sells or who in effect parts with final control of personal property may be forbidden to attach conditions to its subsequent use. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Motion Picture Co. v. Universal Film Co.*, 243 U. S. 502; *United States v. A. Schrader & Son, Inc.*, 252 U. S. 85; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441; but *cf. Garst v. Hall & Lyon Co.*, 179 Mass. 588. Devices designed to conceal the fact that the transaction is in effect a sale, or to reserve a nominal control which does not exist in fact, cannot avail to support what are in truth restraints upon use or alienation. I am therefore of opinion that the proposed bill would not be unconstitutional as applied to sales of the apparatus in question.

The application of the bill to leases or loans of vending apparatus presents a different question. Refined petroleum products are inflammable. Some are explosive. The bill recognizes that special apparatus is required to distribute them with safety to the public. The form of such apparatus and the safeguards to be taken are to some extent prescribed by law. It is common knowledge that special tanks, pumps, tank wagons and cans are used; that the refiners identify their product by placing their brands or names upon such apparatus; and that such brands or names are relied on by the public as a guarantee of the genuineness of the product within. In this way some manufacturers have won a goodwill of large commercial value. Moreover, the cost of such apparatus is in some instances considerable. The precise question, therefore, is whether the Legislature has power to forbid a refiner to lease or loan such vending apparatus upon condition that it shall be used exclusively to sell his own products.

The condition which this bill forbids does not restrict the retailer either with respect to the refiners with whom he shall

deal or the products which he shall sell. Even if enforced to its full extent, it leaves the retailer free to procure apparatus from as many refiners as he chooses, and to sell any products which he sees fit. The validity of such a condition under the sweeping provisions of the Clayton Act has been passed on by the Circuit Court of Appeals of the Second, Sixth and Seventh Circuits, and all three courts have upheld it upon the ground that it neither substantially lessens competition nor tends to monopoly. *Standard Oil Co. v. Federal Trade Commission*, 273 Fed. 478; *Canfield Oil Co. v. Federal Trade Commission*, 274 Fed. 571; *Auto Acetylene Light Co. v. Prest-O-Lite Co.*, 276 Fed. 537; *Sinclair Refining Co. v. Federal Trade Commission*, 276 Fed. 686. At most, it forbids the retailer to use the vending facilities, and, possibly, the goodwill, of one refiner to sell the goods of another, to the possible deception of the public. To such a condition cases upholding the constitutionality of statutes which forbid leases which restrain trade or tend to monopoly cannot, in my opinion, apply.

The manufacture, sale and distribution of refined petroleum products is not charged with a public use. It is private business. One engaged in private business cannot be required by law to furnish selling facilities to another either with or without compensation. Such a statute would take private property for private use without due process of law. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242; *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403; *Missouri Pac. Ry. Co. v. Nebraska*, 217 U. S. 196; *Great Northern R.R. Co. v. Minnesota*, 238 U. S. 340; *Louisville & Nashville R.R. Co. v. Central Stock Yards Co.*, 212 U. S. 132. In my opinion, to forbid a private manufacturer to lease selling apparatus upon condition that it shall not be used to sell the goods of others not only takes his property in such apparatus without due process of law, but also denies that reasonable liberty of contract which is guaranteed by both State and Federal Constitutions. *Allgeyer v. Louisiana*, 165 U. S. 578, 589; *Coppage v. Kansas*, 236 U. S. 1, 14; *Commonwealth v. Boston & Maine R.R.*, 222 Mass. 206, 208; *Opinion of the Justices*, 220 Mass. 627, 630; V Op. Atty.-Gen. 484.

Another aspect of the matter must not be overlooked. Fre-

quently the vending apparatus bears a name or brand which purports to identify the goods sold therefrom. Customers may prefer one brand to another. Such demand or preference is known as goodwill. To a qualified extent it is property which may be protected by reasonable agreements. *Oregon Nav. Co. v. Winsor*, 20 Wall. 64; *Old Corner Book Store v. Upham*, 194 Mass. 101. Equity will enjoin A from imitating the brand of B, and thereby appropriating B's goodwill to himself by deceiving the public into buying his goods as and for the goods of B. *George G. Fox Co. v. Glynn*, 191 Mass. 344. Putting aside the manifest injury to the public, it seems plain that a statute which forbids a manufacturer to require that his own goods alone shall be sold under his name or brand not only appropriates his goodwill to others without compensation, but also denies to him liberty to make an agreement which reasonably protects his fair name and the business reputation of his goods.

I am therefore constrained to advise you that, as applied to leases or loans of any machinery, apparatus or device for retailing, distributing or dispensing petroleum products, the proposed bill would, in my opinion, be unconstitutional, if enacted.

---

DEPARTMENT OF LABOR AND INDUSTRIES — APPEAL FROM RULING  
OF DIRECTOR OF STANDARDS — STANDARD CLINICAL THER-  
MOMETERS.

A person aggrieved by a ruling of the Director of Standards under G. L., c. 98, §§ 9-14, has no right of appeal from such ruling to the Commissioner of Labor and Industries, as the head of the department, or to the full board.

As to whether the Commissioner of Labor and Industries, of his own motion, may review the decisions of the Director of Standards, *quarre*.

A third party cannot raise a question of conflict of jurisdiction or powers between executive and administrative departments, or officers or boards thereof, so as to bring a situation within the provisions of G. L., c. 30, § 5, where no conflict actually exists between such departments.

You have requested my opinion upon certain questions respecting the powers, duties and responsibilities of the Commissioner of Labor and Industries in relation to the conduct of the Division of Standards; more specifically, in a case where the Director of

To the Com-  
missioner of  
Labor and  
Industries.  
1922  
May 2.

Standards, acting under that portion of G. L., c. 98, relating to the examination of clinical thermometers, has made a ruling which the manufacturer contends is wrong. You ask, first, whether such manufacturer has the right to appeal either to the Commissioner, as the head of the department, or to the full board, and second, whether the Commissioner, as executive and administrative head of the department, has power, upon his own motion, to review any decision the Director of Standards has made concerning the standard set for the sale of clinical thermometers in this Commonwealth, or any other matter concerning the same.

The powers and duties of the Director of Standards, relating to clinical thermometers, are prescribed by G. L., c. 98, §§ 9-14. They contain no provision for appeal by any person aggrieved, either to the Commissioner or to the full board. If the Legislature had intended to provide for such appeal it could easily have done so. The express provisions for appeal in certain other cases (*cf.* G. L., c. 149, § 9), coupled with their omission here, constrain me to the conclusion that no right to appeal to the Commissioner or to the full board has been conferred. The question is not presented, and I express no opinion, as to whether and to what extent the decision of the Director of Standards is subject to judicial review.

With respect, however, to the second part of your inquiry I do not now determine the question as to whether the Commissioner has power of his own motion to review the acts of the Director of Standards. That necessarily involves a conflict of jurisdiction, as to which our statutes specifically prescribe the tribunal to determine such questions.

G. L., c. 30, § 5, provides:—

In all cases where a question arises between executive or administrative departments, or officers or boards thereof, as to their respective jurisdictions or powers, or where such departments, or officers or boards thereof, issue conflicting orders or make conflicting rules and regulations, the governor and council may, on appeal by any such department or by any person affected thereby, determine the question, and order any such order, rule or regulation amended or annulled; provided, that this section shall not deprive any person of the right to pursue any

other lawful remedy. The time within which such appeal may be taken shall be fixed by the governor and council.

It is clear from this section that it is intended to apply broadly to two situations: first, to a situation where there is a conflict between departments, or officers or boards thereof; and second, where conflicting rules or regulations have been made. So far as is disclosed by the facts upon which your present inquiry is based, neither of these situations obtains. A determination of that question must necessarily be deferred until the time when the question actually arises, and before the tribunal authorized to settle the issue. It is quite clear that a third person or party cannot raise the question of conflict to bring the situation within the provisions of the section last cited, where no conflict actually exists.

CONSTITUTIONAL LAW — SHEPPARD-TOWNER MATERNITY AND  
INFANCY ACT — EXTENT OF GENERAL WELFARE CLAUSE OF  
FEDERAL CONSTITUTION — VIOLATION OF RIGHTS RESERVED  
TO STATES — RIGHT OF STATE TO BRING SUIT.

The purpose and effect of the Federal Constitution was to secure a Federal government with limited and enumerated powers, for national purposes, reserving all other powers to the States and the people.

The power of local self-government, commonly called the police power, was reserved to the States by the Tenth Amendment.

The so-called "general welfare" clause of the Federal Constitution (art. I, § 8) is not a substantive grant of power but a qualification of the power "to lay and collect taxes, duties, imposts and excises."

The act of Congress approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," commonly known as the Sheppard-Towner Act, purporting to establish a system by which States desiring to secure the benefits of promised appropriations are required to submit plans for carrying out the provisions of the act, to make appropriations to match Federal appropriations and to co-operate with Federal authorities in the administration of the act, is an incursion into the field of the local police power reserved to the States by the Tenth Amendment, and is unconstitutional.

The power to declare an act unconstitutional can be exercised only when proper parties are before the court, in an actual controversy, involving the constitutional question in the determination of the rights of litigants.

It seems probable that the Commonwealth may maintain a suit in equity in the Supreme Court of the United States to test the constitutionality of the Sheppard-Towner Act, on the ground either that its own rights or those of its taxpaying citizens are invaded, the issue being plainly justiciable.

In such case Federal officials charged with the duty of administering the act may properly be made defendants, and an injunction may be sought against them.

The passage of an act by the General Court accepting the provisions of the Sheppard-Towner Act would place the Commonwealth in a less favorable position to contest its validity.

To the Senate  
and House of  
Representatives.  
1922  
May 2.

You have requested my opinion on the following questions: —

1. Is the act of Congress, approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," within the constitutional powers of the Federal government?

2. Has the Commonwealth of Massachusetts any right, as a sovereign State, to question the constitutionality of said act?

3. Would the Commonwealth of Massachusetts, by the acceptance of said act, waive its rights as a sovereign State, if such rights exist, to contest the constitutionality of said act before the courts of the United States?



4. If, in your opinion, said act is unconstitutional, what procedure can the Commonwealth adopt to raise the question of constitutionality?

It is a matter of considerable delicacy for a State official to venture to pass upon the validity of acts of Congress and the rights of sovereign States before the Supreme Court of the United States, and it is with some hesitation that I undertake to comply with your request. It would seem, however, that it is within the statutory duty imposed upon me, as that duty has been construed by my predecessors in office, to give you an opinion upon questions of law, when such opinion is requested, in order that you may be informed as to your powers and duties with respect to pending matters of legislation.

I. The act of Congress, approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," commonly known as the Sheppard-Towner Act, authorizes annual appropriations "to be paid to the several States for the purpose of co-operating with them in promoting the welfare and hygiene of maternity and infancy." It contains provisions substantially as follows:—

It authorizes the appropriation, for the purposes of the act, of \$480,000 for the current year and \$240,000 for subsequent years, for a period of five years, to be equally apportioned among the several States, and an additional sum of \$1,000,000 a year, for a period of five years, to be apportioned \$5,000 to each State and the balance among the States in proportion to their population, with a proviso that no payment out of the additional appropriation shall be made in any year to any State until an equal sum has been appropriated by such State.

The act creates a "Board of Maternity and Infant Hygiene," with certain supervisory powers. It provides that the "Children's Bureau of the Department of Labor" shall be charged with the administration of the act, and gives the Children's Bureau all necessary powers to co-operate with the States in such administration, for which purpose the Children's Bureau may deduct an amount not exceeding 5 per cent of the additional appropriations in any year.

Every State is required, in order to secure the benefits of the

appropriations authorized, through its Legislature to accept the provisions of the act and to designate or authorize the creation of a State agency to co-operate with the Children's Bureau.

Any State desiring to receive the benefits of the act is required by its agency to submit to the Children's Bureau detailed plans for carrying out the provisions of the act within such State, such plans to be subject to the approval of the board.

Within sixty days after any appropriation under the act, the Children's Bureau is directed to make the apportionment provided for, to certify to the Secretary of the Treasury the estimated expense of administration, and to certify to the Secretary of the Treasury and to the treasurers of the various States the amount apportioned to each State. Within the same period and from time to time thereafter the Children's Bureau is directed to ascertain the amounts appropriated by the several States and to certify to the Secretary of the Treasury the amount to which each State is entitled by reason of such appropriation.

Each State agency co-operating with the Children's Bureau is required to make such reports concerning its operations and expenditures as shall be prescribed by the Children's Bureau, which may, subject to the supervision of the board, withhold the certificate authorizing payment to any State whenever it is determined that the agency thereof has not properly expended the money paid to it or the moneys required to be appropriated by the State for the purposes of the act, an appeal being given from such determination to the President of the United States.

Thus, in effect a system is created by which appropriations are to be made by the Federal government and the States which accept the provisions of the act, and plans are to be submitted to Federal boards, the nature of which appears to be wholly undetermined except that they must have some relation to the "welfare and hygiene of maternity and infancy" and are subject to certain restrictions stated in the act. Those plans are to be administered by officials, agents and representatives of the Children's Bureau in co-operation with the different State agencies, and control over the conduct of the State agencies is vested in the Children's Bureau and the board by the provision authorizing

the withholding of the Federal appropriation in cases where it is determined as to any State that Federal or State funds have not been properly expended.

The purpose and effect of the Federal Constitution was to secure a Federal government with limited and enumerated powers, for national purposes, reserving all other powers to the States and the people. *McCulloch v. Maryland*, 4 Wheat. 316, 405; *United States v. Cruikshank*, 92 U. S. 542, 549-551; *Kansas v. Colorado*, 206 U. S. 46, 81. The powers expressly granted to Congress, including the power to make all laws necessary and proper for carrying the powers enumerated into execution, are all stated in section 8 of article I of the Constitution. All powers not granted to the United States by the Constitution are reserved by the Tenth Amendment to the States or the people. *United States v. Cruikshank*, *supra*.

The powers given to the Federal government are only those which are necessary to the existence and effective maintenance of the nation. There is no grant of power to Congress to regulate the internal affairs of the States (excepting that given by the Eighteenth Amendment). The police power is a necessary part of the sovereign powers of the States, and was reserved to them by the Tenth Amendment. Each State has the right and duty to provide for the general welfare of its people, and in those respects the authority of the State is complete, unqualified and exclusive. *New York v. Miln*, 11 Pet. 102, 139; *In re Rahrer*, 140 U. S. 545, 554, 555; *Keller v. United States*, 213 U. S. 138; *Hammer v. Dagenhart*, 247 U. S. 251, 274-276; *The Federalist*, No. 45.

The present act vests in the Federal government certain powers relating to maternity and infancy. These matters manifestly fall within the scope of the police power. Most of the expense will be borne by a small minority of the States, while a majority of the States will receive a corresponding benefit for which they do not pay. If the United States possesses no police power, as the Supreme Court of the United States has often held, it would seem that this act is an attempt to usurp an authority reserved to the States, and to exercise it at the expense of a minority of them, of which this Commonwealth is one.

It appears from the debates in Congress that the proponents of this measure attempt to support it upon the ground that it is a provision for the general welfare of the people of the United States. The words "general welfare" occur twice in the Constitution, once in the preamble and once in article I, section 8.

The preamble is as follows:—

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The preamble, however, contains no grant of power. It is a mere statement of the purposes effected by the Constitution itself. *Jacobson v. Massachusetts*, 197 U. S. 11, 22; Story on the Constitution, § 462.

I pass, therefore, to a consideration of article I, section 8, of which the first clause is as follows:—

The congress shall have power . . . to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . .

It is plain that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, but a qualification of the first-enumerated power "to lay and collect taxes, duties, imposts and excises." Argument is not needed to support this proposition because the authority for it is conclusive.

The history of the adoption of this clause is given in George Ticknor Curtis's *Constitutional History of the United States*, vol. I, pp. 518-521, as follows:—

In the first draft of the Constitution the power to tax was stated in what was there article VII, section 1, in the following words (5 Elliot's Debates, p. 378):—

The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises.

It was thought that there should be some restraint on the revenue power, with a view to prevent perpetual taxes of any kind. The matter was referred to a committee of detail, which reported the following addition (*Ibid.*, p. 462): —

For payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than \_\_\_\_\_ years.

This was referred to a grand committee, which introduced an amendment making the whole clause read as follows (*Ibid.*, pp. 506, 507): —

The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States.

This amendment was unanimously adopted. The provision for uniformity was added later. 5 Elliot's Debates, p. 543. \*

In *Loughborough v. Blake*, 5 Wheat. 317, 318, Chief Justice Marshall said: —

The eighth section of the first article gives to Congress the "power to lay and collect taxes, duties, imposts and excises," for the purposes thereafter mentioned.

Again, in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 448, 449, the court said: —

The revenue of the United States is intended by the Constitution to pay the debts and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute all the express powers, "and all other powers vested by the Constitution in the government of the United States."

In *Ward v. Maryland*, 12 Wall. 418, 428, the power to tax was referred to as existing "by virtue of an express grant for the purpose; among other things, of paying the debts and providing for the common defence and general welfare."

In *United States v. Boyer*, 85 Fed. 425, it was held that the "general welfare clause" did not confer any distinct and substantial power on Congress to enact any legislation, but constituted a limitation upon the taxing power.

The text writers also are agreed that the words "to pay the debts and provide for the common defence and general welfare of the United States" are to be construed as if they were preceded by the words "in order," or similar words amounting to a declaration of purpose. Story on the Constitution, §§ 906-911; Miller on the Constitution of the United States, pp. 229-231.

The form of the Constitution lends strong support to this construction. The document in the rolls of the Department of State shows that in article I, section 8, each of the enumerated powers is numbered, from 1 to 18 inclusive, the first being the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;" and the second the power "to borrow money on the credit of the United States;" and that each power is separated by a semi-colon. Curtis's Constitutional History of the United States, vol. I, pp. 728 note, and 731.

While it seems to be definitely settled that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, there has been from the time the Constitution was adopted a controverted question regarding the interpretation of those words and their bearing on the power of Congress to appropriate money. Hamilton held that Congress had a power to appropriate as broad as the power to tax, and that the revenues of the United States could be appropriated for any public purpose connected with the general welfare of the United States. This doctrine was stated by Hamilton in his Report on Manufactures in 1791. It was adopted and followed by Story (§§ 975-992), and by President Monroe in his message respecting the bill for the repairs of the Cumberland Road, May 4, 1822. On the other hand, Madison held that the general welfare clause is merely descriptive of and

limited by the specific grants of power to Congress contained in section 8, and that the power to appropriate money is also confined to the enumerated powers. Madison expressed this view in the *Federalist*, No. 41, and the statement there made must be presumed to have had some effect in obtaining the ratification of the Constitution by the States. He renewed the same statement in his message vetoing the bill for internal improvements, March 3, 1817, and in a letter to Speaker Stevenson, dated Nov. 27, 1830. Madison's view was supported and emphasized by Jefferson, as stated in his *Opinion on the Constitutionality of a National Bank*, Feb. 15, 1791. See *Tucker's Constitution of the United States*, §§ 222-231.

The view that the general welfare clause is merely descriptive of the substantive grants of power which follow it in section 8 is supported by the circumstance that provisions for the common defence are contained in the grants of power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, and to provide for organizing, arming and disciplining the militia, while the other powers granted in that section are clearly provisions for the general welfare of the United States.

The question as to the extent of the general welfare clause in its application to appropriations of money was expressly reserved by the Supreme Court in *United States v. Realty Co.* 163 U. S. 427, 440, where the court said: —

It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

But the question which I have to determine does not depend for its answer upon a solution of the controversy concerning the limits of the power of Congress to appropriate money. In fact, the Sheppard-Towner Act makes no appropriation of money. It merely purports to authorize sums to be appropriated, thereby

announcing, it seems, an intention to appropriate at some future time. It does, however, establish a system by which States desiring to secure the benefits of promised appropriations are required to submit plans for carrying out the provisions of the act to designated Federal authorities for their approval, to make appropriations to match Federal appropriations, and to cooperate with the Federal authorities in the administration of the act, subject to the supervision of those authorities, who, if they determine that either Federal or State funds have not been properly expended, may withhold the Federal appropriation. This, in my judgment, is not an appropriation bill, but an attempted exercise of power over the subject of maternity and infancy, and thus an incursion into the field of the local police power, reserved to the States by the Tenth Amendment. The objections to the act go further, in that the proposed appropriations are not *general* in their application, but are confined to those States which accept the act and appropriate their own funds to be used for its purposes. Hamilton, in his Report on Manufactures, cited above, although contending for the broad power of appropriation, says that "the object to which an appropriation of money is to be made must be *general* and not *local*." For this reason the appropriations, if made, in my opinion, would not be for the "general welfare of the United States," even if those words are given the broadest signification. Indeed, it is yet to be determined that Congress has the power to appropriate to the States, according to any method of apportionment, revenues raised from the people of the United States for national purposes.

If the powers attempted to be exercised by the Sheppard-Towner Act are outside the powers conferred upon Congress by the Constitution and within the field of the powers reserved to the States, the act is not made constitutional and valid by the circumstance that those powers will only be exercised in or with respect to those States whose Legislatures accept it; for Congress cannot assume and the State Legislatures cannot yield the powers reserved to the States by the Constitution. They can only be granted to the Federal government by an amendment to the Constitution. On this precise subject President Monroe, in his



message vetoing the Cumberland Road bill, referred to above, holding that Congress had not the power, even with the consent of the States affected, to establish turnpikes with gates and tolls as internal improvements, said:—

I am of opinion that Congress does not possess this power; that the states, individually, cannot grant it; for, although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution, and in the mode prescribed by it.

In reply to your first question, I am therefore constrained to say that I am of opinion that the act referred to is not within the constitutional powers of the Federal government.

II. Your second question, whether the Commonwealth of Massachusetts has any right as a sovereign State to question the constitutionality of the act, and your fourth question, what procedure can be adopted to raise the question of constitutionality, will be considered together.

It is well established that any person whose rights are directly affected by an act of Congress may question its constitutionality before the court, and that it is the court's duty, in a proper case, where an act of Congress infringes upon the provisions of the Constitution, to declare that act unconstitutional and void. *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 308, 309; *Marbury v. Madison*, 1 Cranch, 137; *M'Culloch v. Maryland*, 4 Wheat. 316, 400, 401.

But the right to declare an act unconstitutional can be exercised only when proper parties are before the court, in an actual controversy, involving the constitutional question in the determination of the rights of litigants. *Liverpool, etc., Steamship Co. v. Commissioners of Emigration*, 113 U. S. 33, 39; *Muskrat v. United States*, 219 U. S. 346, 361; *Fairchild v. Hughes*, 258 U. S. 126.

The most direct method of testing the constitutionality of the Sheppard-Towner Act, if not the only method, is by proceedings in equity against those officials of the Federal government who are acting or preparing to act to carry its provisions into effect.

By U. S. Const., art. III, § 2, the Supreme Court has original jurisdiction of all cases in which a State shall be a party. The inquiry, therefore, is, in the first instance, whether the Commonwealth may maintain such a suit in the Supreme Court as party plaintiff, and secondly, whether the suit will lie against Federal officials as parties defendant.

1. There are instances of suits brought by States which the Supreme Court has declined to entertain, on the ground that they called upon the court to determine questions which were political and not judicial. The most noteworthy of these cases is *Georgia v. Stanton*, 6 Wall. 50, where the State brought an original bill to restrain the Secretary of War and other officers of the government from carrying into effect the so-called Reconstruction Acts. The court held that the rights for which protection was sought were rights of sovereignty, that no rights of persons or property were being infringed, and that the questions were political; and they dismissed the bill for want of jurisdiction. The decision, however, seems to go no further than *Luther v. Borden*, 7 How. 1, and *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U. S. 118, holding that it is for Congress and not for the court to decide what is the established government in a State, and to enforce the constitutional guaranty of a republican form of government, the questions involved being political and beyond the judicial power.

On the other hand, the court has from early times entertained suits to determine which of two States had political jurisdiction over disputed territory, since such a controversy is clearly justiciable. *Rhode Island v. Massachusetts*, 12 Pet. 657, 736-738; *Virginia v. West Virginia*, 11 Wall. 39. More recently, the jurisdiction has in many cases been sustained in suits by States to enforce their sovereign rights, and as *parens patrie* or representatives of their citizens.

The question whether a State may sue as representative of its citizens was presented but not settled in *Louisiana v. Texas*, 176 U. S. 1, 19. But in later decisions this question has been answered in the affirmative, and the distinction made in *Georgia v. Stanton*, 6 Wall. 50, between rights of property and rights of sovereignty has been disregarded. These decisions have made it plain that

suits by States will lie for the protection both of their own sovereign rights and of the personal and property rights and welfare of their citizens generally. On these grounds suits have been sustained to restrain interference with the flow of rivers and water supply and pollution of the air. Jurisdiction is accepted broadly wherever the controversy is justiciable in its nature, in recognition of the fact that the States, in joining the Union, relinquished the right they would otherwise have had to seek remedies by negotiation or force, that there should be some remedy for the settlement of disputes, and that one may be found in the constitutional provisions giving the Supreme Court jurisdiction of suits by States. *Missouri v. Illinois & Sanitary District of Chicago*, 180 U. S. 208, 241; *Kansas v. Colorado*, 185 U. S. 125; 206 U. S. 46, 83, 84, 99; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Virginia v. West Virginia*, 220 U. S. 1, 27; *New York v. New Jersey*, 256 U. S. 296, 301, 302.

The question whether an act of Congress is in violation of the reserved powers of the States, and therefore unconstitutional, seems clearly to be justiciable, and the Supreme Court has so decided in *Hammer v. Dagenhart*, 247 U. S. 251. In that case the court held that a United States district attorney should be enjoined from enforcing an act of Congress prohibiting the transportation in interstate commerce of products of child-labor, on the ground that the law was an invasion of the local police power reserved to the States by the Tenth Amendment.

Where an act of Congress encroaches upon the rights reserved to the States by the Tenth Amendment, any State affected thereby must have the right to resort to some tribunal for the protection of those rights, or be without remedy. That the States themselves are entitled to such protection by the judicial power, and that it is the duty of the court, in a proper case, to hold such an act unconstitutional, and to grant relief, has several times been declared. *Ableman v. Booth*, 21 How. 506, 519, 520; *Gordon v. United States*, 117 U. S. 697, 700, 701, 705; *Matter of Heff*, 197 U. S. 488, 505; *South Carolina v. United States*, 199 U. S. 437, 448.

If, for the reasons stated, the Sheppard-Towner Act is unconstitutional as representing an attempt by Congress to exceed its

constitutional powers and to usurp the rights reserved to the States by the Tenth Amendment, it follows that the Commonwealth, in a proper case, can raise the question of constitutionality by bringing suit in the Supreme Court, if and when it is affected by the act.

The act does not confer upon the Federal agencies created or designated by it any authority which operates in Massachusetts unless and until its Legislature accepts the act and makes the required appropriation. If the Legislature purports to accept the act, the right of the Commonwealth subsequently to complain that the act is unconstitutional, as hereafter stated in reply to your third question, will be open to serious question. If the act is not accepted and does not become operative within the Commonwealth, there would be no encroachment upon the police power of Massachusetts if the act should be put into effect in other States.

It does not follow, however, that the Commonwealth is not affected if the act is put into effect in other States. The grants to such States are to be paid out of the Federal treasury. That treasury is replenished by internal revenue taxes paid by the people of the several States. It has been estimated that 5.66 per cent of those taxes are paid by the citizens of Massachusetts. If Massachusetts can and does accept the act it has been estimated that the return to it thereunder will be less than half the amount collected from its citizens. If Massachusetts does not accept the act, its citizens will be taxed in order to carry into effect an unconstitutional law in other States. Assuming that a Federal tax, otherwise lawful, imposed to raise revenues for lawful purposes does not become unconstitutional because it taps and diminishes a source of revenue available to the States (*Knoulton v. Moore*, 178 U. S. 41; *New York Trust Co. v. Eisner*, 256 U. S. 345), it does not follow that a State whose revenues are diminished by Federal taxation imposed in order to execute an unconstitutional law is not so affected thereby that it cannot attack that expenditure in the Supreme Court of the United States. If the State is without remedy it is under the dilemma of consenting to be stripped of a power reserved by the Tenth Amendment, in order to share in such unconstitutional benefits as Congress may choose

to accord, or else of bearing unheard and without redress a part of the burden of conferring such alleged benefits on other States.

The right of Massachusetts to bring suit may be supported upon the further ground that the rights of its taxpaying citizens are invaded. It is doubtful whether taxpayers can maintain suits in their individual capacity to restrain an unconstitutional expenditure. See *Bradfield v. Roberts*, 175 U. S. 291; *Millard v. Roberts*, 202 U. S. 429, 438. There is, however, in my opinion, strong argument for the view that the State can present the question on their behalf as *parens patriæ*, following the analogy of the nuisance cases already cited. If neither the State nor the taxpayer can sue, then there can be no remedy against such an unconstitutional exercise of power by Congress, although the issue is plainly justiciable.

The novelty of the question prevents a more definite answer to your inquiry. It is for the Legislature, in its wisdom, to determine whether a question of such vital importance to the State, involving, as it does, a principle capable of indefinite application in the broad and paternalistic field of social welfare, should not be submitted for adjudication to our highest court.

2. It remains to be considered whether suit may be brought against the Federal officials whose duty it is to administer the act.

In *Mississippi v. Johnson*, 4 Wall. 475, the Supreme Court denied leave to file a bill against President Johnson to restrain him from putting the Reconstruction Acts into force. In *Georgia v. Stanton*, 6 Wall. 50, the Supreme Court dismissed a similar bill, as already stated. The circumstances which led to the passage of these bills, which were designed to create a temporary government for the seceded States, and the effect of later decisions, afford ground for belief that those decisions would not govern in the present case.

Later cases hold that suit will lie where rights of property are unlawfully invaded by Federal officers, and where the United States is not a defendant or a necessary party. *United States v. Lee*, 106 U. S. 196, 204-208; *Noble v. Union River Logging R.R. Co.*, 147 U. S. 165, 171, 172; *Belknap v. Schild*, 161 U. S. 10, 18; *American School of Magnetic Healing v. McAnnulty*, 187 U. S.

94; *Lane v. Watts*, 234 U. S. 525, 540. Furthermore, the court has frequently held broadly that State officers clothed with some duty in regard to the enforcement of the laws of the State may be enjoined from proceeding under an unconstitutional statute which they are about to enforce to the plaintiff's injury, and that a suit for such injunction cannot be regarded as a suit against the State. *Osborn v. United States Bank*, 9 Wheat. 738, 846, 857; *Davis v. Gray*, 16 Wall. 203; *Peunoyer v. McConnaughy*, 140 U. S. 1, 10; *Smyth v. Ames*, 169 U. S. 466, 518, 519; *Ex parte Young*, 209 U. S. 123, 149, 155, 156; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Truax v. Raich*, 239 U. S. 33, 37; *Greene v. Louisville & I. R.R. Co.*, 244 U. S. 499, 506, 507. Recently this same principle has also been extended to suits against Federal officers seeking to restrain them from acting under statutes alleged to be unconstitutional. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619, 620; *Wilson v. New*, 243 U. S. 332; *Hammer v. Dagenhart*, 247 U. S. 251. Federal jurisdiction does not depend on diversity of citizenship, but exists because such suits arise under the Constitution or laws of the United States. *Ex parte Young*, 209 U. S. 123, 143-145.

In the *National Prohibition Cases*, 253 U. S. 350, two of the cases were suits by the States of Rhode Island and New Jersey against the Attorney General and the Commissioner of Internal Revenue, seeking to have the Eighteenth Amendment and the Volstead Act declared unconstitutional and void, and to enjoin the enforcement of the act. The main ground on which unconstitutionality was claimed was that the amendment and the act constituted an interference with the sovereign rights of the States to govern their internal affairs, that is, the local police power. Original bills in each of the two cases were permitted by the court to be filed (252 U. S. 570), and no question of jurisdiction was raised or reserved in the opinion by which all the suits were dismissed on the merits.

The opinion in the recent case of *Texas v. Interstate Commerce Commission*, 258 U. S. 158, contains an intimation that the original jurisdiction of the court over suits where States are parties may

be somewhat narrow, but the decision of the case goes on the ground that necessary parties were not before the court.

I conclude, therefore, that assuming that the Commonwealth may bring the suit as party plaintiff, the fact that the defendants would be Federal officials would not defeat it.

3. Your third question is whether the Commonwealth by accepting the act would waive any right it may have to contest the constitutionality of the act before the courts of the United States.

The act provides that any State, in order to secure the benefit of Federal appropriations, must accept the provisions of the act, designate the State agency with which the Children's Bureau is to co-operate, and submit to the Children's Bureau detailed plans for carrying out the provisions of the act within the State. It contemplates also appropriations by the State to match Federal appropriations. These provisions, it seems to me, must be construed as a proposal for a contract with the several States which, when accepted by any State, would constitute an agreement by the State to be bound by the terms of the act, if such an agreement could be made. Whether the State, acting by its Legislature alone or in any manner other than that provided by the Constitution itself, can contract away its sovereign rights is a matter of grave doubt. But apart from any question of the validity of such a contract, there would appear to be an inconsistency in accepting the benefits of the act and then bringing suit to avoid its obligations and effect.

I am therefore of opinion that the passage of an act by the General Court accepting the provisions of the Sheppard-Towner Act would place the Commonwealth in a less favorable position to contest its validity.

CONSTITUTIONAL LAW — EMINENT DOMAIN — TAKING OF PICTURE EXHIBITED IN A PUBLIC LIBRARY UPON A PUBLIC CHARITABLE TRUST — PUBLIC OR PRIVATE PURPOSE.

The power to take private property for public use, upon payment of reasonable compensation, extends to all property within the jurisdiction of the Commonwealth, including personal property, and can neither be bargained away by statute nor defeated by private contract.

A "taking" by eminent domain of private property which is subject to a contract does not "impair" that contract, within the meaning of U. S. Const., art. I, § 10, even though further performance of that contract is defeated by such "taking."

Private property cannot be "taken" by eminent domain for a private purpose, even upon payment of reasonable compensation.

A statute which authorizes a "taking" by eminent domain for a public purpose or for a private purpose is unconstitutional.

A picture held and publicly exhibited in a public library upon a public charitable trust cannot be "taken" by eminent domain in order to remove it from exhibition in said library, since such a taking is not for a public purpose.

A "taking" by eminent domain of property already devoted to a public purpose is unconstitutional if the taking may or does work a mere change of control without change of use.

A picture held and publicly exhibited in a public library upon a public charitable trust cannot be "taken" by the Department of Education by eminent domain under a statute which would permit the use of the picture by the department for the same public purpose to which it is now devoted, since such a taking would work a mere change in control without change of use.

You submit for my consideration a bill entitled "An Act to take the picture 'The Synagogue' for educational purposes," which provides:—

SECTION 1. The department of education of the commonwealth is hereby authorized and directed within thirty days of the passage of this act to take by right of eminent domain for educational purposes the picture entitled "The Synagogue" now in the Boston public library. At the time of the taking, the department shall file a statement of the taking with the city clerk of the city of Boston, and shall award all damages sustained by any person by reason of such taking.

Any person entitled to an award of damages under this act, or the commonwealth, whether or not an award has been made, may petition for the assessment of all such damages to the superior court of Suffolk county within sixty days from the taking.

All damages incurred under this act shall be paid by the treasurer of the commonwealth upon due presentation.

The provisions of chapter seventy-nine of the General Laws, save



as herein expressly provided, shall apply to this act so far as they are applicable.

SECTION 2. The department of education is authorized to make rules and regulations for the custody of the picture and its use for educational purposes under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws or for any other educational purpose.

SECTION 3. This act shall take effect upon its passage.

With the bill have been submitted: (1) a contract, dated Jan. 18, 1893, between the trustees of the Boston Public Library and John S. Sargent, an artist of recognized reputation, by which Mr. Sargent agreed, for the sum of \$15,000, to paint certain pictures for the "Special Library Hall of the new Public Library building in Copley Square in Boston;" (2) a contract between said Sargent and the trustees of a fund subscribed by citizens, dated Dec. 5, 1895, whereby said Sargent agreed to paint certain additional pictures for lunettes in said hall, and the said trustees agreed to pay said \$15,000 for the original paintings and the extra panels. It further appears that over eighty persons subscribed to this fund over \$16,000; that "The Synagogue" was painted pursuant to said contracts and installed in said hall in said library in 1919; that a movement for the removal of said picture was undertaken; and that the corporation counsel of Boston, on April 12, 1920, advised the trustees of the library that the facts disclosed a public charitable trust which precluded them from removing said picture. *Eliot v. Trinity Church*, 232 Mass. 517.

At this legislative session a petition (No. 723) was filed, praying "for legislation relative to the removal of the picture 'The Synagogue' from the Boston Public Library, or for such further legislation as may be necessary for the taking of the picture by the right of eminent domain." This petition was accompanied by a bill (House 1131), which directed the trustees of the Boston Public Library to remove said picture from the library. Upon suggestion that this bill impaired the obligation of the contract with the subscribers, the present bill was substituted.

You ask whether the proposed bill would be constitutional. Your inquiry raises two questions: first, whether the contracts

with Mr. Sargent and with the subscribers prevent taking said picture by eminent domain either with or without taking said contracts; second, whether the "taking" is for a public purpose.

1. The power to take private property for public use is incident to and inseparable from sovereignty. *Kohl v. United States*, 91 U. S. 367, 371. It extends to all property within the jurisdiction of the Commonwealth, including personal property (*Offield v. New York, N. H. & H. R.R. Co.*, 203 U. S. 372) and contracts. *West River B. Co. v. Dix*, 6 How. 507; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Cincinnati v. Louisville & Nashville R.R.*, 223 U. S. 390, 400; *Meade v. United States*, 2 Ct. Cl. 224; *Brimmer v. Boston*, 102 Mass. 19. It cannot be diminished or bargained away by statute. *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20. Nor can private parties remove property from the scope of the power of eminent domain by making contracts concerning it. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Chicago, etc., R.R. Co. v. Nebraska*, 170 U. S. 57, 74; *McGrath v. Boston*, 103 Mass. 369. The fact that the taking renders impossible further performance of a contract touching the property taken does not "impair" the obligation of such contract, within the meaning of U. S. Const., art. I, § 10. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685. I am therefore of opinion that the contracts with Mr. Sargent and with the subscribers are not a bar to taking said picture for a public purpose.

2. The authority of the Commonwealth could not be preserved if it lacked power to take the instruments needed by it to execute public ends. But the social necessity upon which the power rests imposes limits upon its exercise. Article X of the Bill of Rights provides, in part:—

. . . And 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 property must be "appropriated to public uses" and "reasonable compensation" must be paid. While neither individual obstinacy nor individual greed can defeat an appropriation to public uses, both the citizen whose property is taken and the

taxpayer who pays for the taking have a right under both the State and the Federal Constitution to require that private property shall not be appropriated to private uses by eminent domain. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242; *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403. In *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, 377, the court said: —

Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional. It would enable that to be achieved by indirection which by plain statement would be impossible.

The question whether a statute appropriates property by eminent domain to a public use or to a private use is a judicial one upon which the constitutionality of the act depends.

The picture is now held upon a charitable trust of indefinite duration. *Eliot v. Trinity Church*, 232 Mass. 517. It is one of a series which is daily exhibited free to the public in a building dedicated to public education, which is centrally located in the capital and largest city of the Commonwealth. As the picture is in effect a part of the Public Library of the city of Boston, it is, in my opinion, dedicated to educational purposes to the same extent as that library. See *Cary Library v. Bliss*, 151 Mass. 364.

The proposed bill directs the Department of Education to take the picture for "educational purposes." Section 2 provides as follows: —

The department of education is authorized to make rules and regulations for the custody of the picture and its use for educational purposes under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws or for any other educational purpose.

G. L., c. 69, § 7, provides: —

The department may co-operate with existing institutions of learning in the establishment and conduct of university extension and corre-

spondence courses; may supervise the administration of all such courses supported in whole or in part by the commonwealth; and also, where deemed advisable, may establish and conduct such courses for the benefit of residents of the commonwealth. It may, in accordance with rules and regulations established by it, grant to students satisfactorily completing such courses suitable certificates.

G. L., c. 73, § 1, provides:—

The department of education, in this chapter called the department, shall have general management of the state normal schools at Barnstable, Bridgewater, Fitchburg, Framingham, Lowell, North Adams, Salem, Westfield and Worcester, and the normal art school at Boston, wherever said schools may be hereafter located, and of any other state normal schools hereafter established, and of boarding houses connected therewith, and may direct the expenditure of money appropriated for their maintenance.

While the act appropriates the picture to educational purposes generally, the manner in which it shall be used to accomplish those purposes is left to be determined by the Department of Education. The picture is already appropriated to educational purposes by the trust under which it is now held. Under the proposed bill the Department of Education might determine that the picture should remain where it now is and be exhibited in the same manner as heretofore. If so, the bill works simply a change of control. To such a situation *Cary Library v. Bliss*, 151 Mass. 364, seems applicable. In that case, in holding that a public library held upon a public charitable trust of indefinite duration by trustees provided by the donor could not be taken by eminent domain and transferred to a corporation created to manage it for like purposes, the court said:—

The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must

exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the Legislature to be, a matter of public necessity. *West River Bridge v. Dix*, 6 How. 507; *Lake Shore & Michigan Southern Railway v. Chicago & Western Indiana Railroad*, 97 Ill. 506; *Chicago & Northwestern Railway v. Chicago & Evanston Railroad*, 112 Ill. 589.

The suggestion that the Department of Education might make a different or more effective use of the picture for educational purposes than the use to which it is at present devoted cannot, in my opinion, save the bill. It is not enough that under the authority of a statute the property may be appropriated either to public or to private uses. An act which appropriates private property either to a use which is public or to a use which is private is unconstitutional. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371. Similarly, an act which permits the Department of Education to devote the picture either to the same use to which it is now devoted or to a different use would not be constitutional.

The committee is entitled to take into consideration all the facts relating to the pending bill in determining whether or not, in the particular case now before it, the necessity exists for taking the picture. If the result which is to be achieved by the proposed legislation is in reality to secure the removal of the picture from the place where it is now devoted to a public use, a taking to achieve such a result would not be authorized. See also Mass. Const. Amend. XI and XLVI. If the result is to take the picture from public trustees who hold it for a public use, to be held by a public official for what is in effect the same public use, such taking would not be within the power of the Legislature. In order to enable the Commonwealth to take the picture by eminent domain the committee must be satisfied that the result to be achieved by the taking is not to accomplish the removal of the picture to prevent it from being put to the public use to which it is now

devoted, but that, when taken by the Department of Education, it is not only to be devoted to a public use which is in reality different from the exhibition purposes to which it is now devoted, but also to such a use that the resultant benefit to the public will justify the expenditure of the tax-payers' money as a matter of public necessity. Otherwise, under the rule laid down in *Cary Library v. Bliss*, *supra*, the result would not be one to achieve which the power of eminent domain could constitutionally be employed or public money spent.

---

DRAINAGE LAW — LAND OWNED BY TWO PROPRIETORS — MEANING OF WORD "SEVERAL."

Under G. L., c. 252, §§ 1 and 5, improvements of low land can be made on petition to the Drainage Board only when such land is owned by more than two proprietors.

The word "several," in relation to number, means more than two, but not very many.

You ask me to advise you whether or not the Drainage Board can act on a petition in regular form signed by two men who own a swamp of thirty acres and who ask help of the Board in forming a drainage district.

G. L., c. 252, § 1, is as follows: —

If it is necessary or useful to drain or flow a meadow, swamp, marsh, beach or other low land held by several proprietors, or remove obstructions in rivers or streams leading therefrom, such improvements may be made as provided in the thirteen following sections.

G. L., c. 252, § 5, provides, in part, as follows: —

The proprietors, or a majority in interest either in value or area, may petition the board setting forth their desire to form a drainage district. . . . If the board approves of the undertaking, it shall issue a certificate appointing three, five or seven district drainage commissioners. . . .

I understand your inquiry to be directed to the question whether the provisions of the chapter are applicable where the land which it is desired to improve is owned by but two proprietors.

The answer to your question seems to be governed by the pro-

vision in section 1 limiting the application of the chapter to low land held by "several proprietors." The word "several," in relation to number, is defined by Webster as "consisting of a number more than two, but not very many," and other definitions are to the same effect. This definition was approved in *Einstein v. Marshall*, 58 Ala. 153. See also *Lunt v. Post Printing Co.*, 48 Colo. 316, 321. While the question is not free from doubt, I am of opinion that the intention of the General Court, as expressed in section 1, was to limit the application of G. L., c. 252, to improvements of low land owned by more than two proprietors.

---

TOWN MEETING — WARRANT — APPROPRIATION — MUNICIPAL FINANCE — VOTE — RESCISSION — DIRECTOR OF ACCOUNTS.

Under an article of the warrant for an annual town meeting an appropriation was passed by a majority vote for the purpose of building a school building. Under another article of the same warrant the town authorized the borrowing of the amount appropriated by a two-thirds vote "of the voters present and voting," as required by G. L., c. 44, §§ 1 and 7.

Subsequently, at a special town meeting called pursuant to a warrant containing articles expressly calling for the rescinding of the action taken at the annual town meeting, it was voted by a majority vote to rescind the appropriation aforesaid, while consideration of the remaining articles specifically referring to the borrowing was indefinitely postponed.

*Held*, That the revocation and rescission of the original appropriation by a majority vote of the special town meeting resulted in rendering the action taken at the annual town meeting ineffective without an express rescission thereof. Accordingly, the Director of Accounts would not be authorized to approve notes issued under authority granted by vote of the annual town meeting.

You request my opinion upon the following facts: —

The town of Chatham has voted to borrow \$65,000 to build, furnish, and equip a new school building; and it is proposed to issue notes of the town for this purpose.

Under article 22 of the warrant for the annual town meeting, it was voted, by a vote of 243 to 152, to raise and appropriate \$65,000 for the purpose of building a school building. Under article 23 a committee was appointed to carry out the preceding vote; under article 24 the committee was given full powers to construct the school building; and under article 25 the treasurer was authorized to borrow \$65,000 on notes of the town.

Subsequently, on March 23, a special town meeting was held. The warrant for this meeting contained articles calling for the rescinding of

To the Commissioner of Corporations and Taxation.  
1922  
May 11.

the action taken at the annual town meeting. The first article was to rescind the vote passed under article 22; and it was voted to rescind the vote passed, by 195 to 167, or a majority vote. The articles in the warrant for the special meeting which referred to articles 23, 24, and 25 were indefinitely postponed.

I would therefore like to be advised as to whether the Director of Accounts is authorized to approve notes issued under authority granted by the vote passed under article 25 of the warrant for the annual town meeting, in view of the action taken at the special town meeting held on March 23.

I would also like to be advised as to whether or not all four articles in the warrant for the annual town meeting must be considered in connection with the articles in the warrant for the special town meeting, as a question arises as to whether a two-thirds vote would be required to rescind the authority granted under article 25 of the warrant for the annual town meeting.

The facts stated disclose that the original action taken under article 22 of the warrant for the annual town meeting was passed by a majority vote. This was sufficient to pass the appropriation of \$65,000 for the purpose stated.

The action taken under article 25 of said warrant, authorizing the borrowing of said sum, received the two-thirds vote "of the voters present and voting" (G. L., c. 44, § 1), as required by G. L., c. 44, § 7, which provides, in part, as follows: —

Cities and towns may incur debt, within the limit of indebtedness prescribed in section ten, for the following purposes, and payable within the periods hereinafter specified:

(3) For acquiring land for any purpose for which a city or town is or may hereafter be authorized to acquire land, not otherwise herein specified, and for the construction of buildings which cities and towns are or may hereafter be authorized to construct, including the cost of original equipment and furnishing, twenty years.

Debts may be authorized under this section only by a two-thirds vote.

Subsequently, at the special town meeting called pursuant to a warrant containing articles calling for the rescinding of the action



taken at the annual town meeting, and referring specifically to the articles contained in the warrant thereof, it was voted by a majority vote to rescind the action taken at the annual town meeting under article 22, while consideration of the remaining articles, which specifically referred to articles 23, 24 and 25 of the annual town meeting, was indefinitely postponed. Apparently this was done under the supposition that the rescinding of the action taken under article 22 aforesaid automatically rescinded the action taken under the remaining articles, which specifically referred thereto, that being the keystone article under which the appropriation was voted. But since article 25 required a two-thirds vote for its passage (G. L., c. 44, § 7, *supra*), it would follow that the same majority would be required for its express rescission.

It is apparently well settled that a corporate body may rescind previous votes and orders at any time before the rights of third persons have vested. "But where the original vote requires for its adoption a specified proportion of the council, *e.g.*, three-fifths or three-fourths, the same proportion is necessary to carry a motion to reconsider." II Dillon on Municipal Corporations, § 539; *Whitney v. Hudson*, 69 Mich. 189; *Beach v. Kent*, 142 Mich. 347. "Where by statute a vote of two-thirds is required to pass a resolution, and no rule has been adopted regulating practice on motions for reconsideration, a two-thirds vote is necessary therefor." 29 Cyc. 1690, and cases cited.

It would seem, therefore, that the action taken under said article 25, authorizing the treasurer to borrow \$65,000 on notes of the town, would still be outstanding unless the rescinding of the action taken under article 22 aforesaid renders it ineffective, in that it cancels the original purpose for which the appropriation was made, and to meet the expenditure for which the action under article 25 aforesaid was taken. The vote under said article 25 was as follows:—

*Voted*, That the treasurer, with the approval of the selectmen, be and hereby is authorized to borrow a sum not to exceed sixty-five thousand dollars (\$65,000) for the purpose of building, furnishing and equipping a new school building on the town lands near the high school building, in accordance with the provisions of a vote under a preceding

article in this warrant, and to issue notes therefor, said notes to be payable in accordance with the provisions of section 19, chapter 44, General Laws, so that the whole loan shall be paid in not more than ten years from the date of the issue of the first bond or note, or at such earlier dates as the treasurer and selectmen may determine.

Clearly, this vote is not an unconditional authorization to expend money for the building of a new high school, but by its express terms the vote limits the expenditure of the money to building, furnishing and equipping the building *in accordance with the prior vote*. If the words "in accordance with the provisions of a vote under a preceding article in this warrant" were not included, a different interpretation of the statute might be argued with some force. But it is not necessary to consider what might be the effect of a different wording of the statute. The question is not before us. It is to be observed that the four articles in the warrant for the annual town meeting relate to one and the same objective, and each expressly refers to and is dependent upon the passage of the appropriation called for by article 22 aforesaid.

In view of all the surrounding facts, it would seem, therefore, that the words above quoted, as contained in said article 25, cannot be treated as mere surplusage, but condition the authority to borrow upon the appropriation called for and passed under article 22. Since the original purpose upon which rested the authority to borrow has been rescinded, the authority to borrow lapses.

I am therefore led to the conclusion that the revocation and rescission of the original appropriation by a majority vote of the special town meeting under article 2 resulted in rendering the action taken at the annual town meeting under articles 22, 23, 24 and 25 ineffective without an express rescission thereof. It accordingly follows that, as the facts stand, the Director of Accounts would not be authorized to approve notes issued under authority granted by the vote passed under article 25 of the warrant for the annual town meeting.

CONSTITUTIONAL LAW — CONTRACT MADE BY STATUTE — REVIEW OF QUESTION WHETHER CONTRACT WAS PROCURED BY FRAUD OR UNDUE INFLUENCE.

The Legislature has power to investigate the conduct of its own members in enacting legislation.

If a contract be made by statute, a repeal of said act impairs the obligation of said contract, within the meaning of U. S. Const., art. I, § 10.

If a contract be made by statute, the Legislature has no power to set said contract aside upon the ground that it was procured by fraud and corruption.

As the court does not possess legislative power and cannot repeal a statute which the Legislature has constitutional power to enact, it will not hear and determine whether a constitutional statute, which creates a contract, was procured by fraud or corruption.

You request my opinion upon the following question: —

To the House  
Committee on  
Rules.  
1922  
May 15.

If a contract be made by a statute which is within the constitutional power of the Legislature, is there any tribunal which has power to hear and determine whether such contract was procured by fraud, bribery or undue influence and to set such contract aside if such fraud, bribery or undue influence be established?

I am informed that this question, though general in form, relates to the so-called Boston Elevated Act, Spec. St. 1918, c. 159. It divides naturally into two parts, — first, as to the power to investigate; second, as to the power to set an act aside for the reasons named.

1. There can be no question that the Legislature has power to investigate the conduct of its own members in respect to legislation. *In re Chapman*, 166 U. S. 661. The Legislature conducted such an investigation last year to ascertain the circumstances under which Spec. St. 1918, c. 159, was passed. The record of that investigation was referred by the Legislature to the then district attorney for the Suffolk District. I assume that that record is still in the office of the district attorney and that it is available to the Legislature. If in any respect the Legislature should deem that investigation to be incomplete, I perceive no obstacle either to reopening it or to instituting a new one.

2. In *Boston v. Treasurer and Receiver-General*, 237 Mass. 403, the Supreme Judicial Court held that Spec. St. 1918, c. 159, created a contract, and that said act was constitutional. Where a contract is made by an act which is within the constitutional power of the Legislature, the question whether such contract can be set aside upon the ground of legislative corruption has been several times considered by the Supreme Court of the United States. By reason of U. S. Const., art. I, § 10, which forbids any State to impair the obligation of contracts, the decisions of that court constitute the ultimate and binding authority upon the second branch of your inquiry.

In *Fletcher v. Peck*, 6 Cranch, 87 (1810), the Legislature of Georgia, by an act within its constitutional authority, contracted to sell certain public lands, which were sold and granted pursuant to said act. Subsequently the Legislature of Georgia repealed said act upon the ground that it was procured by legislative fraud and corruption. In holding that the repealing act impaired the obligation of the contract previously made, and therefore was unconstitutional, the Supreme Court said, by Chief Justice Marshall, at page 132:—

That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would

the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the Legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned.

The circumstances under which both the original and the repealing acts were passed by the Georgia Legislature, as described in Beveridge's *Life of Marshall*, vol. III, c. X, set in high relief the decision in *Fletcher v. Peck*, *supra*. That description is too long to quote and must be briefly summarized. A previous bill, in which a majority of Georgia's law-making body was financially interested, which was passed, to use Beveridge's own words, amid "a saturnalia of corruption," had been vetoed by the Governor (pp. 546-549). A new bill, which disposed of more than thirty million acres of fertile, well-watered and well-wooded land to four corporations, at less than  $1\frac{1}{2}$  cents an acre, was introduced as a supplement to a law just enacted to pay the State troops. Again every possible influence was brought to bear to pass this bill with the utmost dispatch. Some members who would not support it were induced to leave the capital; others who were recalcitrant were browbeaten and bullied. One senator actually menaced, with a loaded riding whip, members who objected to the scheme. In little more than a week the bill was rushed through both houses, and this time received the reluctant approval of the Governor on Jan. 7, 1795 (pp. 549, 550). It later came out "that every member of the Legislature who had voted for the measure, except one, had shares of stock in the purchasing companies" (p. 561).

The tidings of the corruption which attended the sale were swiftly carried over the State. Indignation meetings were held in every hamlet. Crowds marched on the capital determined to lynch their legislative betrayers, whose lives were saved either by the pleadings of those who had voted against the bill or by flight (pp. 559, 560). Nearly every man elected to the new Legislature was pledged to vote for the undoing of the fraud in any manner that might seem the most effective (p. 561). The repeal-

ing act declared the former statute null and void and "annulled" all claims directly or indirectly arising therefrom (p. 563). The Legislature further enacted that all records, documents and deeds connected with the fraud be expunged, and that the "usurped act" be publicly burnt (p. 564). This was done, with elaborate ceremonies, in front of the State House and in the presence of both branches of the Legislature (p. 565).

It is perhaps not without interest that the decision in *Fletcher v. Peck, supra*, was anticipated by the Supreme Judicial Court of Massachusetts by some eleven years. In *Derby v. Blake*, decided in 1799, which was a case involving a subsequent sale of some of the Georgia lands, and of which a fragmentary report is reprinted in 226 Mass. 618, that court, in holding unconstitutional the repealing act of Georgia, said, in substance: —

It was also decidedly the *opinion of the Court*, that the bargain with J. and Williamson, had not been legally affected by the *Repealing Act of Georgia* — That Act they considered a mere nullity — as a flagrant, outrageous violation of the first and fundamental principles of social compacts. The idea of a Legislature reclaiming property they had once sold, and been paid for, was said by the Court to be not less preposterous, than for an individual to repeal his own note of hand, or to render void by his own act and determination, any contract, however sacred or solemn. The vociferations of the Georgia Legislature, who were the very granters of the property in question, about fraud and circumvention, could not be admitted in a Judiciary of *Massachusetts*, as evidence of the real existence of such facts — Whether the original grant of the Georgia Legislature were valid or not, was considered by the Court a cause of judicial, and not of legislative cognizance. The Repealing Act of Georgia was moreover declared void, because it was considered directly repugnant to Article 1st, Sec. 10, of the United States Constitution, which provides that "no State shall pass any *ex post facto Law*, or Law impairing the obligation of contracts." — On this ground, the Court expressed a clear and decided opinion, that the title of the State of *Georgia*, at the time of their grant, held to the territory in dispute, had been fairly and legally conveyed to the purchasers, under J. and Williamson.

Although the question as to the effect of legislative corruption arose in *Fletcher v. Peck, supra*, in a suit between private individuals, the broad rule laid down in that case has been affirmed and

reaffirmed by the Supreme Court of the United States without any qualification as to the manner in which the question is presented. *Ex parte McCordle*, 7 Wall. 506, 514; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 541; *Soon Hing v. Crowley*, 113 U. S. 703, 710; *Amy v. Watertown*, 130 U. S. 301, 319; *United States v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 545; *United States v. Old Settlers*, 148 U. S. 427, 463; *Angle v. Chicago, St. Paul &c. Ry.*, 151 U. S. 1, 17-19; *New Orleans v. Warner*, 175 U. S. 120, 145; *Calder v. Michigan*, 218 U. S. 591, 598. In *Soon Hing v. Crowley*, 113 U. S. 703, 710, the court said:—

And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

In *Angle v. Chicago, St. Paul &c. Ry.*, 151 U. S. 1, 18, the court, after quoting from *Fletcher v. Peck*, said:—

The rule upon which this decision rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the Legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the Legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly.

In *New Orleans v. Warner*, 175 U. S. 120, 145, the court said, before proceeding to quote from *Fletcher v. Peck*:—

It may be that the city made a bad bargain. It may be that it paid far more than the fair value of the property and claims purchased. It may be that the action of the common council was dictated by improper considerations, though this is rather hinted at than asserted; but from the case of *Fletcher v. Peck*, 6 Cranch, 87, 130, to the present time we have uniformly refused to inquire into the motives of legislative bodies.

In *Calder v. Michigan*, *supra*, the State was a party to the proceeding, but the rule was reaffirmed none the less. The same is true of *Lynn v. Polk*, 8 Lea (Tenn.), 121, and *State v. Terra Haute, etc.*, R.R., 166 Ind. 580, in each of which the court declined to investigate whether the action of the Legislature was procured by corrupt means.

The question, in the last analysis, turns upon the scope of the judicial power. As to that, the ultimate authority is the courts of this Commonwealth (see Bill of Rights, art. XXX; *Boston v. Chelsea*, 212 Mass. 127; *Dinan v. Swig*, 223 Mass. 516), subject to review by the Supreme Court of the United States as to any question arising under the Federal Constitution. The decisions of the latter court, to which your attention has been directed, seem to be conclusive as to the power of the court to set aside a statute upon the ground of corruption practised by or upon a Legislature. If, in the face of these decisions, any person desires to put that question to the test of judicial determination again, the courts are always open.

---

CONSTITUTIONAL LAW — REARRANGEMENT OF THE CONSTITUTION — PRINTING OF REARRANGEMENT IN BLUE BOOK — EXPENDITURE OF PUBLIC MONEY.

Under Mass. Const., pt. 2d, c. I, § I, art. IV, and c. II, § I, art. XI, authority to expend public money must be conferred by an act or resolve.

G. L., c. 5, § 2, does not authorize the printing of the Rearrangement of the Constitution in the annual laws (Blue Book), since that rearrangement is neither a constitution nor an act or resolve.

As the rearrangement is neither a constitution nor an act or resolve, it can itself confer no authority to expend public money to print the same as a part of the annual laws (Blue Book).

You inquire whether, in view of *Loring v. Young*, 239 Mass. 349, both the Constitution, with amendments thereof, and the Rearrangement of the Constitution which was ratified by the



people on Nov. 4, 1919, shall be printed in the annual volume of laws of the Commonwealth, and, if so, in what order.

G. L., c. 5, § 2, provides, in part: —

The state secretary shall, at the close of each regular session of the general court, collate and cause to be printed in a single volume the following:

- (1) The constitution of the commonwealth.
- (2) All acts and resolves passed at such session.
- (3) All amendments to the constitution referred at such session to the next general court or to be submitted to the people at the next state election.
- (4) All acts and resolves passed at any special session of the general court, except a general revision of the statutes, and not theretofore published in any preceding annual volume.
- (5) All laws and constitutional amendments adopted by the people at the last preceding state election, with the aggregate vote thereon, both affirmative and negative, arranged in such detail as the secretary may determine.

1. In *Loring v. Young* and *Bates v. Loring*, decided together (239 Mass. 349), the Supreme Judicial Court decided that the Rearrangement was not the Constitution of the Commonwealth, and dismissed two petitions for writs of mandamus ordering it to be printed as and for such Constitution. Under those decisions it is clear that the Rearrangement is not within said section 2, clause (1), which directs the secretary to print "the constitution of the commonwealth." For the same reason the Rearrangement is not within section 2, clauses (3) and (5). In my opinion, the two latter clauses are also inapplicable for the further reason that the Rearrangement is not a constitutional amendment referred at the session of 1922 to the next General Court or to be submitted to the people at the next State election, nor is it a law or constitutional amendment adopted by the people at the last preceding State election.

2. The Rearrangement is not within section 2, clause (2). It is not an act or resolve passed at the session of 1922.

3. Articles 157 and 158 of the Rearrangement do not authorize you to print it. Those articles provide: —

ART. 157. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative.

ART. 158. This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of such laws.

As the Rearrangement is not the Constitution, those sections impose no constitutional duty. Nor is the Rearrangement an act or resolve. It was not passed by the Legislature and either approved by the Governor or permitted to become a law without his signature, in the manner prescribed by the Constitution. It was not enacted by the people in the manner prescribed by the Mass. Const. Amend. XLVIII. If the Rearrangement be neither a constitution nor a law, it cannot impose any duty to print it.

Mass. Const., pt. 2d, c. I, § I, art. IV, provides that public moneys shall "be issued and disposed of . . . according to such acts as are or shall be in force within" the Commonwealth, and pt. 2d, c. II, § I, art. XI, further provides: —

No moneys shall be issued out of the treasury of this commonwealth, and disposed of . . . but by warrant . . . and agreeably to the acts and resolves of the general court.

The printing of the Rearrangement as a part of the annual laws (Blue Book) necessarily involves some expense which, if incurred, must be met out of public funds. If neither G. L., c. 5, § 2, nor any other act or resolve authorizes such expenditure, and the Rearrangement itself is neither a constitution nor an act or resolve, it seems plain that, under the constitutional provisions above cited, no money can be issued from the treasury for this purpose.

I am not unmindful of the opinion of my predecessor to which you call my attention, but, as it was rendered on Jan. 21, 1920, long prior to *Loring v. Young, supra*, and in part relies upon

article 158 of the Rearrangement, I am constrained to a different conclusion. I am therefore of opinion that the Constitution of 1780, with amendments thereof, should be printed, and that the Rearrangement should not be printed in the annual volume of laws.

---

CONSTITUTIONAL LAW — WOMEN — ELIGIBILITY TO BE APPOINTED A JUSTICE OF THE PEACE — EFFECT OF NINETEENTH AMENDMENT.

As the Constitution prescribes the mode of appointment, tenure and method of removing justices of the peace, the qualifications for that office cannot be prescribed or modified by statute, and therefore St. 1922, c. 371, does not apply thereto.

By reason of the adoption of the Nineteenth Amendment to the Constitution of the United States, women are not excluded by the Constitution from any elective or appointive office, and are therefore now eligible to appointment as justices of the peace.

You inquire whether, in view of St. 1922, c. 371, women are eligible to appointment as justices of the peace.

St. 1922, c. 371, § 1, provides, in part: —

Women shall be eligible to election or appointment to all state offices, positions, appointments and employments. . . .

To the  
Governor.  
1922  
May 25.

The office of justice of the peace is a constitutional office. The mode of appointment, tenure and method of removal are all prescribed by the Constitution. Mass. Const., c. III, arts. I and III; Amend. XXXVII. The question whether women are eligible depends upon the Constitution. *Opinion of the Justices*, 107 Mass. 604. If the Constitution fixes the qualifications for an office, they cannot be modified by statute. *Kinneen v. Wells*, 144 Mass. 497; *Opinion of the Justices*, 165 Mass. 599. In my opinion, St. 1922, c. 371, is inapplicable to any office the qualifications for which are fixed by the Constitution, but for the reasons hereinafter stated the right of women to hold such offices is not thereby diminished or abridged.

Prior to the adoption of the Nineteenth Amendment to the Constitution of the United States, women were ineligible to the office of justice of the peace in this Commonwealth. *Opinion*

of the *Justices*, 107 Mass. 604. In *Opinion of the Justices*, 240 Mass. 601, the justices advised that, by reason of that amendment, "women are not excluded by the Constitution from any elective or appointive civil office." In the light of that opinion it is plain that the earlier opinions which advised that women were ineligible to certain constitutional offices no longer apply. I therefore advise you that, irrespective of St. 1922, c. 371, women are now eligible to appointment as justices of the peace.

---

CIVIL SERVICE — VETERAN — REAPPOINTMENT WITHIN TWO YEARS AFTER HONORABLE DISCHARGE OR RELEASE FROM ACTIVE DUTY.

A person who is employed in the classified public service of the Commonwealth, or of any city or town therein, and who leaves such employment for the purpose of serving in the military or naval service of the United States, is entitled, under G. L., c. 31, § 27, within two years from the date of the receipt of his honorable discharge or release from active duty, whichever is granted first, to be reinstated in his former position.

You have asked my opinion as to the construction of G. L., c. 31, § 27, reading, in part, as follows: —

Any person who resigns from or leaves the classified public service of the commonwealth or of any city or town therein or who is discharged, suspended or granted a leave of absence therefrom, for the purpose of serving in the military or naval service of the United States in time of war, and who so serves, shall, if he so requests of the appointing authority within two years after his honorable discharge from such military or naval service, or release from active duty therein, and if also, within said time, he files with the division the certificate of a registered physician that he is not physically disabled or incapacitated for the position, be reappointed or re-employed, without civil service application or examination, in his former position, provided that the incumbent thereof, if any, is a temporary appointee; . . .

Your question is whether the two years commenced to run from the date of receiving the honorable discharge, or whether it is reckoned from the date of receiving a release from active duty, if the release is received before the honorable discharge.

I quote a portion of an opinion of my predecessor which seems to cover the precise question in point, and with the reasoning in which I concur:—

I am informed that the release from active duty is given in the navy only to men who later receive an honorable discharge, and that the only difference between the release and a discharge is that in the former case the navy reserves the right to call a man back into service. Under the bonus act a release from active duty is sufficient to entitle a man to his compensation, and is treated as equivalent to an honorable discharge, so far as the terms of that act are concerned.

It is my opinion that the words are used in a similar sense here, and that the year commences from the date of receipt of the honorable discharge or release from active duty, whichever is granted first, and that a man who has received a release from active duty, and at some later date gets his honorable discharge, is not entitled to be reappointed within the year after the date of the receipt of said honorable discharge.

In the case in which the above opinion was given the question related to reappointment of members to the Boston police force. In your case it is a question of reinstating an employee of the city of Boston.

Any other interpretation of the statute as it now stands, which is the result of the amendments of Gen. St. 1919, c. 14, and St. 1920, c. 219, would defeat the very purposes toward which these amendments were directed, namely, to treat men serving in the army and navy on an equal basis, as far as possible, with respect to their right to reinstatement in the classified public service.

---

WORKMEN'S COMPENSATION — STATE EMPLOYEES — MEDICAL SERVICES.

State employees, not entitled to the benefits of the workmen's compensation act, are not entitled to medical services for injuries sustained in the course of their employment.

You have requested my opinion on the following question:—

If a State employee who is not entitled to the benefits of G. L., c. 152, commonly known as the Workmen's Compensation Act, is injured while

To the  
Auditor.  
1922  
June 6.

in the course of his employment, may the charges for medical services be paid out of the maintenance appropriation of his department?

Money can be paid out of the State treasury for such purposes only by statutory authority. There is no statute which authorizes payment for medical services in the case of employees who are not entitled to the benefits of G. L., c. 152. I am therefore of the opinion that the question should be answered in the negative.

---

CONSTITUTIONAL LAW — TAXATION — DUE PROCESS OF LAW —  
 APPROPRIATION OF PUBLIC MONEY FOR A PRIVATE PURPOSE  
 — PAYMENT OF UNEARNED SALARY OF DECEASED REPRESENTATIVE TO HIS WIDOW.

An appropriation of public money for a private purpose takes the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

A payment of public money as a reward for conspicuous public service, in order to stimulate others to render similar service, may be found to promote the public welfare and to be constitutional even though the recipient has no right to the money in law or in equity.

Public money cannot constitutionally be given away as a mere gratuity.

In the absence of any showing by recital in the resolve or otherwise that a deceased representative to the General Court has rendered such conspicuous public service that a payment of the unearned balance of his salary to his widow will primarily promote a public purpose, such resolve violates both the Constitution of this Commonwealth and the Fourteenth Amendment.

You have submitted for my consideration House Resolve No. 1736, entitled "Resolve providing for the payment to the widow of the late representative Walter S. Hale of the balance of the salary to which he would have been entitled for the current session," and which provides as follows:—

*Resolved,* That there be allowed and paid out of the treasury of the commonwealth to the widow of Walter S. Hale of Gloucester, who died while a member of the present house of representatives, the balance of the salary of fifteen hundred dollars to which he would have been entitled had he lived and served until the end of the present session. The state treasurer is hereby directed to make the payment hereby authorized out of the appropriation made in item three of the current general appropriation act.

The question before me is whether this resolve is constitutional.

In the leading case of *Lowell v. Boston*, 111 Mass. 454, the court, in holding unconstitutional a statute which authorized a loan of public money upon mortgage to victims of the Boston fire of 1872, in order to enable them to rebuild, said, by Wells, J.: —

The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. 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. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

In 1900 the Senate submitted to the justices the following question: —

Has the General Court the right to appropriate money to pay to the widow, heirs or legal representatives of a person who died while holding an office, the salary of which is payable from the treasury of the Commonwealth, or from the treasury of a county, city or town, the salary, for any period of time after such decease, to which such person would have been entitled if living and continuing to hold such office?

In *Opinion of the Justices*, 175 Mass. 599, in answering that question the justices said, in part: —

In general the power to pay gratuities to individuals is denied to the Legislature by the Constitution. Ordinarily a gift of money to an individual would be an appropriation of public funds to private uses which

could not be justified by law. *Mead v. Acton*, 139 Mass. 341; *Lowell v. Boston*, 111 Mass. 454; *Freeland v. Hastings*, 10 Allen, 570; *Loan Association v. Topoka*, 20 Wall. 655; *Parkersburg v. Brown*, 106 U. S. 487, 500, 501; *Cole v. LaGrange*, 113 U. S. 1, and cases cited there and in *Kingman v. Brockton*, 153 Mass. 255, 259. Cooley, Const. Lim. (6th ed.) 601, 602. We deem this proposition so plain that we do not delay to enforce it, but it is not a proposition which disposes of the questions before us. For it is hardly less clear that when a public purpose can be carried out or helped by spending public money, the power of the Legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind.

. . . . .

The power to give rewards after the event for conspicuous public service, if it exists at all, cannot be limited to military service. If a man has deserved greatly of the Commonwealth by civil services, the public advantage of recognizing his merit may stand on ground as strong as that for rewarding a general. We cannot foresee the possibilities of genius or distinguished worth and settle in advance the tariff at which its action shall be paid.

It will be plain from what we have said that in our opinion the public welfare alone must be the ground, as it is the only legal justification, for this kind of payment. And it follows that our answer to the first of the two questions before us is that the General Court has the right to appropriate money for the purposes supposed in a case where it fairly can be thought that the public good will be served by the grant of such an unstipulated reward, but that it has not that right where the only public advantage is such as may be incident and collateral to the relief of a private citizen. To a great extent the distinction must be left to the conscience of the Legislature. Whether a judicial remedy could be found if a clear case should arise of an unconstitutional appropriation, it happily is unnecessary to inquire.

In *Opinion of the Justices*, 186 Mass. 603, the Governor and Council requested the justices to advise as to the constitutionality of St. 1904, c. 458, section 1 of which read as follows:—

There shall be allowed and paid out of the treasury of the Commonwealth the sum of one hundred and twenty-five dollars to every veteran of the civil war living at the date of the passage of this act, not being a conscript or a substitute, who served in the army or navy of the United States to the credit of Massachusetts during the civil war, and who was honorably discharged from such service: *provided*, that he has not received a bounty from any city or town or from the Commonwealth



for such service; and *provided*, that he makes application for the said bounty prior to the first day of November in the year nineteen hundred and six.

In advising that this act was unconstitutional the justices said:—

It is a familiar rule of law that, under the Constitution of the Commonwealth, money can be raised by taxation only for public purposes. This rule has been stated and explained in many judicial opinions. See *Lowell v. Boston*, 111 Mass. 454, and cases hereinafter cited. Whether the use of money under the provisions of a particular statute is for a public purpose, or merely for the benefit of individuals, is sometimes a question difficult to answer, although usually it is easy of determination. In the present case, if the only object of the statute is to give gratuities to individuals of a certain class, without any benefit to the general public, the statute is unconstitutional.

But in this opinion we need not consider the subject of pensions to soldiers, for the statute does not purport to grant pensions or rewards for meritorious service, or money for the relief of present necessities. It purports to give bounties now only to those who did not receive them at the time of enlistment, which, if given then, would have been given as inducements to enlist in the service of the United States. Under the provisions of this statute, those who enlisted without a bounty, under other influences or upon other inducements, would receive now as a gratuity this sum of money representing an additional inducement. The object of the act, as disclosed by its provisions, is not to give rewards in recognition of valuable services, and thus to promote loyalty and patriotism, but to equalize bounties given to induce enlistments in a particular military service many years ago.

Following the law as stated in *Mead v. Acton*, we are of opinion that the proposed expenditure of money is for a use which is not public, but private, and that therefore the statute is not in conformity with the Constitution of the Commonwealth.

In *Opinion of the Justices*, 190 Mass. 611, the Senate submitted to the justices the following question:—

Is it a constitutional exercise of the legislative power of the General Court to enact a law providing for an appropriation of money from the treasury of the Commonwealth for the purpose of recognition of valuable services of persons who served to the credit of Massachusetts during the Civil War and who were honorably discharged from such service,

such appropriation to be used either for the payment of sums of money to such persons, or for medals or other evidences of appreciation of their services, if in the opinion of the General Court the public good will be served, and loyalty and patriotism promoted, by such recognition?

In advising thereon the justices said:—

It is a familiar rule of law that a statute is to be interpreted in reference to its purpose and effect, as shown by its application to the subject to which it relates. If a bill should appear, by its substantive provisions, to be a measure for the equalization of bounties among the soldiers of Massachusetts who served in the Civil War, or for the payment of moneys to make the result of their contracts of enlistment more favorable to certain soldiers because the contracts of other soldiers were made on better terms, it would be unconstitutional, even if it contained recitals that the payments would be made in recognition of valuable services, with a view to the promotion of loyalty and patriotism.

We cannot undertake to answer the question of the Honorable Senate in reference to every conceivable application of it. We infer that our opinion is desired in regard to the right of the State to give sums of money or other like rewards, in recognition of valuable military service. The power to reward distinguished public service, with a view to the promotion of loyalty and patriotism, has long been regarded as one of the attributes of organized government.

The question asked by the Honorable Senate should be answered in the affirmative, so far as to say that the general principle referred to may have legitimate application to services such as generally have been treated as deserving recognition by the payment of sums of money, the erection of statues, or the bestowal of medals, decorations or other badges of honor. In the application of the principle the question ordinarily will be, whether the benefit is conferred as an appropriate recognition of distinguished and exceptional service, such that the dignity of the State will be enhanced and the loyalty and patriotism of the people will be promoted by making it a subject of governmental action.

In *Opinion of the Justices*, 211 Mass. 608, the Senate requested the justices to advise as to the constitutionality of Senate Bill No. 240, the first two sections of which provided as follows:—

SECTION 1. For the purpose of promoting the spirit of loyalty and patriotism, and in recognition of the sacrifice made both for the commonwealth and for the United States by those veteran soldiers and

sailors who volunteered their services in the civil war, and for the purpose of promoting the public welfare, by giving visible evidence to this generation and future generations that, if danger should again threaten the nation and the call should again come for men, Massachusetts will not forget the great service of those who volunteer, a gratuity of one hundred and twenty-five dollars to each veteran is hereby authorized to be paid from the treasury of the commonwealth under the conditions hereinafter set forth.

SECTION 2. The gratuity herein provided for shall be paid to every person, or his legal representative, not being a conscript or a substitute, and not having received a bounty from the commonwealth or from any city or town therein, who served in the army or navy of the United States to the credit of the commonwealth during the civil war, and was honorably discharged from such service, and is living at the time of the passage of this act; it being intended and provided that the said gift shall not be a bounty, nor a payment in equalization of bounties, nor a payment for services rendered, nor a payment for the purpose of making the result of their contracts of enlistment more favorable to them because the contracts of other soldiers were on better terms, but a testimonial for meritorious service such as the commonwealth may rightly give, and such as her sons may honorably accept and receive.

Five of the justices advised that, in view of the provisions and recitals of the bill, it sufficiently appeared that the payments authorized were for a public purpose, namely, the promotion of the spirit of loyalty and patriotism, and that the bill was therefore constitutional. Chief Justice Rugg dissented, upon the ground that in spite of the recitals of the bill it was upon its face a measure designed to equalize bounties, and was therefore unconstitutional.

In *Whittaker v. Salem*, 216 Mass. 483, the school committee reappointed as principal of the high school for another year one who had been principal for several years, who had worked especially hard during the previous year, had devoted his entire vacation to school matters, and who had, as a result, become ill from overwork. At the same meeting the committee granted such principal leave of absence for the year upon half pay on account of sickness. In holding that the grant of half pay was void as an unauthorized gift of public money for a private purpose, the court said, by Rugg, C.J.: —

The power of school committees within the scope of the authority conferred upon them by the statute is extensive. Their right to fix the salaries of teachers is comprehensive. Their duty and responsibility in this direction is a heavy one. *Charlestown v. Gardner*, 98 Mass. 587; *Batchelder v. Salem*, 4 Cush. 599. In the performance of their functions they have a wide discretion, and to a large degree they are unhampered as to the details of administration and their acts are not subject to review. *Morse v. Ashley*, 193 Mass. 294; *Kimball v. Salem*, 111 Mass. 87. But they must keep within the broad principles which govern all public boards of officers. They are charged with the expenditure of moneys raised by taxation. They can vote it only for public uses. They have no right to devote it to private purposes. However meritorious the project may appear to be, either in its practical or ethical or sentimental aspects, if it is in essence a gift to an individual rather than a furthering of the public interest, money raised by taxation cannot be appropriated for it. These principles often have been declared respecting a great variety of subjects and cannot be doubted. *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Opinion of the Justices*, 204 Mass. 607; *Opinion of the Justices*, 211 Mass. 624.

The court has more rigidly applied the rule that public money can be expended only for a public purpose in actual, decided cases than in its advisory opinions. *Freeland v. Hastings*, 10 Allen, 570; *Lowell v. Boston*, 111 Mass. 454; *Mead v. Acton*, 139 Mass. 341; *Kingman v. Brockton*, 153 Mass. 255; *Whittaker v. Salem*, 216 Mass. 483. An advisory opinion is given by the justices as individuals, without the benefit of argument, and is not a decision binding upon the court under the rule of *stare decisis*. *Young v. Duncan*, 218 Mass. 346, 351. On the contrary, if the question considered in an advisory opinion arises in actual litigation, "the ground is reëxamined by the justices sitting as a court in the light of the arguments presented, and with the effort to guard against any influence flowing from the earlier opinion." *Boston v. Treasurer and Receiver-General*, 237 Mass. 403, 410. In so far as decisions and advisory opinions differ, the decisions must control.

Both decisions and advisory opinions agree that public money cannot be presented to individuals as a gratuity. The advisory opinions indicate that there is power to reward conspicuous public service where such reward will promote the public welfare by inducing others to render similar service and inculcating

loyalty and patriotism. On the other hand, the decisions clearly declare that an incidental benefit to the public will not sustain either a gratuity or an expenditure which is primarily and in essence for a private purpose. *Lowell v. Boston*, 111 Mass. 454; *Whittaker v. Salem*, 216 Mass. 483. It seems, also, that where a bill or statute authorizes a payment of public money to one who has no legal right thereto, the ordinary presumption of constitutionality does not obtain, and the bill must disclose upon its face a sufficient public purpose to warrant the payment. *Cf. Opinion of the Justices*, 186 Mass. 603; *Opinion of the Justices*, 211 Mass. 608; *Whittaker v. Salem*, 216 Mass. 483. Were it otherwise, a bare direction to pay would, in such a case, be a substitute for the constitutional authority to authorize the payment. In my opinion, a bill or resolve which directs a payment of public money to persons not legally entitled to it, without affirmatively disclosing any sufficient public purpose which is thereby primarily and directly furthered, would not be constitutional. See VI Op. Atty.-Gen. 474.

The present resolve directs that the balance of the salary to which a deceased member of the House would have been entitled had he lived shall be paid to his widow. It contains no statement of any public purpose to be furthered by such payment. Even if it were permissible to infer what the Legislature has not chosen to determine and declare, no public purpose appears by inference. The sum paid increases in proportion to the service which has *not* been rendered, and diminishes in proportion to the service which *has* been rendered. A payment which is inversely as the service rendered can scarcely be intended as a reward for conspicuous and meritorious service. It does not appear, and I cannot believe, that a payment of unearned salary is intended to inculcate loyalty and patriotism among the members of the House or to stimulate the citizens to volunteer for legislative service. These considerations compel the conclusion that the resolve authorizes a private gratuity rather than an expenditure for a public purpose. I am therefore constrained to advise you that, in my opinion, it is unconstitutional.

ARMORIES — USE FOR A “BUSINESS PAGEANT” — PUBLIC  
PURPOSE.

Under G. L., c. 33, § 52, armories may be used for certain public purposes therein defined.

Whether an entertainment to be given in an armory and designed to raise funds for a purpose authorized by G. L., c. 33, § 52, is a “meeting,” within the meaning of the statute, is a mixed question of law and fact, to be determined by the Adjutant General.

To the Adjutant General.  
1922  
June 12.

You have submitted a request by the Elks Charitable Relief Association of Wakefield for authority to use the armory at Wakefield for a “business pageant,” the proceeds to be used “for any and all charitable purposes in the towns of Wakefield, Stoneham and Reading.”

Armories may be used for a “public purpose,” as defined in G. L., c. 33, § 52. Under this section meetings to raise funds are limited to “meetings to raise funds for any non-sectarian charitable or non-sectarian educational purpose,” or funds “for a benefit association of policemen or firemen.” As the present request states that the proceeds are to be used “for any and all charitable purposes,” it is not limited to “non-sectarian charitable purposes,” as required by the act.

The question whether an entertainment designed to raise funds for a purpose authorized by the statute is a “meeting,” within the meaning of the act, is a mixed question of law and fact, to be determined by your department in the exercise of a sound discretion, in the light of the principles already set forth in opinions previously rendered to you. See VI Op. Atty.-Gen. 72.

CONSTITUTIONAL LAW — EMINENT DOMAIN — TAKING OF PICTURE EXHIBITED IN PUBLIC LIBRARY UPON PUBLIC CHARITABLE TRUST — PUBLIC OR PRIVATE PURPOSE — REASONABLE COMPENSATION.

The promotion of popular education is a public purpose for which property may be taken by eminent domain.

Where a picture is held by a public library upon a public charitable trust for educational purposes, a bill already enacted, which provides that the picture shall be taken by the Department of Education for use in teaching art or the history of art, under G. L., c. 69, § 7, or c. 73, but not in or in connection with any public library, cannot be held, as matter of law, to take the picture for a purpose not public.

Article X of the Bill of Rights requires that reasonable compensation shall be paid for property taken by eminent domain.

Payment of reasonable compensation for property taken by eminent domain cannot be limited to a particular fund or made to depend upon a contingency.

A bill which provides for taking private property by eminent domain, all damages to be paid "from such appropriation as the General Court may make for the purpose," does not adequately secure the right to receive reasonable compensation, since such compensation is restricted in amount to such appropriation as shall be made, and is contingent upon the appropriation, which may never be made.

You have submitted for my consideration House Bill No. 1749, entitled "An Act providing for the taking, for educational purposes, of the picture entitled 'The Synagogue,'" which provides: —

To the  
Governor.  
1922  
June 13.

SECTION 1. The department of education of the commonwealth is hereby authorized and directed within six months of the effective date of this act to take by right of eminent domain for educational purposes in teaching art or the history of art under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws, but not in, or in connection with, any public library, the picture entitled "The Synagogue," now in the Boston public library, and all rights therein, of whatever nature or description. At the time of the taking the department shall file a statement of the taking with the city clerk of the city of Boston, and shall award all damages sustained by any person by reason of such taking. Any person entitled to an award of damages under this act, or the commonwealth, whether or not an award has been made, may petition to the superior court for Suffolk county within six months from the taking for the assessment of all such damages. All damages incurred under this act shall be paid from such appropriation as the general court may make for the purpose by the treasurer of

the commonwealth upon due presentation. The provisions of chapter seventy-nine of the General Laws, so far as applicable and save as herein otherwise expressly provided, shall apply to any action under this act.

SECTION 2. The department of education is authorized to make rules and regulations for the custody of said picture and its use for the educational purposes stated in section one.

I assume that you desire to be advised whether this bill is constitutional.

1. It is settled that property cannot be taken by eminent domain for a private use. *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242. A taking ostensibly for a public purpose, but in reality for a private purpose, cannot be sustained. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371, 377. The picture is held upon a public charitable trust for educational purposes. *Cary Library v. Bliss*, 151 Mass. 364; *Eliot v. Trinity Church*, 232 Mass. 517. The bill now provides that the picture shall be taken for educational purposes different from those to which it is now put, and thereby avoids a constitutional defect which existed in an earlier form of the same measure. See VI Op. Atty.-Gen. 508. The promotion of popular education is a public purpose. *Knights v. Treasurer and Receiver-General*, 237 Mass. 493, 496. In view of the amendment of the use for which the picture is to be taken, and of the presumption of constitutionality which attends enactment by the Legislature, I cannot advise you that the bill does not appropriate the picture to a public purpose.

2. Article X of the Bill of Rights provides, in part: —

And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

A "taking" without compensation is also forbidden by the Fourteenth Amendment to the Federal Constitution. *Chicago, etc., R.R. Co. v. Chicago*, 166 U. S. 226, 241. Unless adequate provision for compensation is made, either by the statute which authorizes the "taking" or by a general act applicable to it, the authority to "take" is void. *Boston & Lowell R.R. Corpn. v. Salem*



& *Lowell R.R. Co.*, 2 Gray, 1, 37. Nor can the Legislature prescribe in advance the amount of the compensation which shall be paid. *Monongahela Nav. Co. v. United States*, 148 U. S. 312. Moreover, the right to receive compensation must be given unconditionally. Nichols: *Eminent Domain*, 2d ed., § 206. It cannot be restricted to a particular fund. *Bent v. Emery*, 173 Mass. 495, 498; *Connecticut River R.R. Co. v. County Commissioners*, 127 Mass. 50. By an amendment made since the measure was previously before me, the bill now provides that "all damages incurred under this act shall be paid from such appropriation as the general court may make for the purpose. . . ." This clause expressly excludes the provisions for compensation made by G. L., c. 79. Under it the right to compensation is contingent upon an appropriation which may never be made, and is restricted in amount to such appropriation as shall be made.

I am therefore constrained to advise you that under the bill in its present form the right to compensation is not secured in the manner required by the Constitution.

---

#### RESTRAINT OF TRADE — MINIMUM RESALE PRICES — AGREEMENTS TO MAINTAIN PRICES.

Agreements designed to maintain prices after the seller has parted with the title to his goods, and to prevent competition among those who trade in them, is a violation of law.

Such agreements may be expressed or implied from a course of dealings, or other circumstances.

A system for maintaining resale prices, which is made effective by co-operative methods between the manufacturer and various dealers and agents to the extent that it constitutes a scheme which restrains the natural flow of trade, is illegal.

You have requested my opinion as to whether the practice of a baking company in refusing to sell its bread to retail dealers who do not maintain a minimum resale price is a violation of law.

G. L., c. 93, § 2, provides: —

Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article

To the Commission on the  
Necessaries of  
Life.  
1922  
June 13.

or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void.

Section 13 of that act reads as follows: —

Maintaining or increasing unreasonably the price of any necessary of life is hereby declared to be unlawful. Whoever, in combination or association with another or others, enters into any agreement or understanding to maintain or increase or cause to be maintained or increased unreasonably the price of any necessary of life shall be deemed guilty of criminal conspiracy, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than two years, or both. Prosecutions hereunder shall be under the control of the attorney general and shall be conducted by him or an assistant designated by him.

It seems to be firmly established that *agreements* designed to maintain prices after the seller has parted with the title to the articles, and to prevent competition among those who trade in them, is a violation of law. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373; *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441. See also VI Op. Atty.-Gen. 483. Such agreements may be expressed or implied from a course of dealing, or other circumstances. *United States v. A. Schrader's Son, Inc.*, *supra*; *Federal Trade Commission v. Beech-Nut Packing Co.*, *supra*.

If the system for maintaining resale prices is made effective by co-operative methods between the manufacturer and various dealers and agents to the extent that it constitutes a scheme which restrains the natural flow of trade or commerce and the

freedom of competition, it is illegal. *Federal Trade Commission v. Beech-Nut Packing Co., supra.*

The facts stated in your letter are not sufficient to enable me to determine whether the refusal of the company in question to sell its bread to retail dealers who do not sell at a minimum resale price constitutes a violation of law.

---

TAXATION — BANKS AND BANKING — SAVINGS DEPOSITS —  
NATURE OF SUCH DEPOSITS — RETURNS BY TRUST COMPANIES TO THE COMMISSIONER OF CORPORATIONS AND TAXATION OF THE AMOUNT OF PROFITS PAID UPON DEPOSITS IN THE SAVINGS DEPARTMENT.

A deposit in the savings department of a trust company is a trust rather than a debt.

A book evidencing a deposit in the savings department of a trust company is not an "evidence of indebtedness," within the meaning of G. L., c. 62, § 33.

While the division of profits made by trust companies upon deposits in their savings departments may for some purposes be regarded as "interest" and for other purposes be regarded as "dividends," it is not interest paid by the trust company "on its bonds, notes or other evidences of indebtedness," within the meaning of G. L., c. 62, § 33, and the trust company is not required by that section to make a return thereof to the Commissioner of Corporations and Taxation.

You inquire whether, under G. L., c. 62, § 33, you can require trust companies and national banks which have savings departments to return the names and addresses of all residents of the Commonwealth to whom they have paid "taxable interest" in such departments during the preceding calendar year. You state that by taxable interest you mean interest upon deposits in such departments which exceed the amount prescribed by G. L., c. 168, § 31, and which are not taxable to the corporation under G. L., c. 63, § 11. You have submitted with your request two specimen books, each of which provides that the book must be presented at the time when deposits are made or withdrawn. See G. L., c. 172, §§ 60, 70.

G. L., c. 62, § 33, provides, in part: —

Every corporation, partnership, association or trust doing business in the commonwealth shall report annually to the commissioner, in such

To the Commissioner of  
Corporations  
and Taxation.  
1922  
June 14.

---

form as he shall from time to time prescribe, the names and addresses of all residents of the commonwealth to whom it has paid interest during the preceding calendar year on its bonds, notes or other evidences of indebtedness, and to whom it has paid any annuities, except, however, interest coupons payable to bearer, and income exempt from taxation under this chapter. In any individual case, any such corporation, partnership, association or trust shall, upon request of the commissioner, state the respective amounts of interest and annuities so paid by it to any person during any calendar year.

Assuming, without deciding, that the book "evidences" the obligation from the trust company or bank to the customer, the controlling question is whether that obligation is an "indebtedness." A deposit in the commercial department of a bank or trust company is a debt. *Demmon v. Boylston Bank*, 5 Cush. 194; *National Mahaiwe Bank v. Peck*, 127 Mass. 298. But deposits in the savings department of a trust company have in general the incidents of a deposit in a savings bank. *J. S. Lang Engineering Co. v. Commonwealth*, 231 Mass. 367; *Bachrach v. Commissioner of Banks*, 239 Mass. 272, 273. Under G. L., c. 127, § 61, they constitute "special" deposits, and the legal relation between bank and depositor is not that of debtor and creditor, but substantially that of trustee and *cestui que trust*. *Bachrach v. Commissioner of Banks*, 239 Mass. 272, 274; *Greenfield Savings Bank v. Abercrombie*, 211 Mass. 252; *Kelly v. Commissioner of Banks*, 239 Mass. 298, 301; see also *Commissioner of Banks v. Jordan Marsh Co.*, 241 Mass. 273. As a trust is not a debt, it would seem that a book which "evidences" the obligation of a trustee to the *cestui que trust* is not an "evidence of indebtedness" within the meaning of this statute.

G. L., c. 167, § 17, and G. L., c. 172, § 65, describe the payments made upon savings deposits as "interest or dividends." G. L., c. 172, § 67, refers to them as "interest," while section 68 refers to them as dividends. It may be that this seeming confusion in terms springs from the dual character of these payments. They are at no fixed rate and can be made only out of earnings. G. L., c. 167, § 17; G. L., c. 172, §§ 65, 68; V Op. Atty.-Gen. 442. In this respect they resemble dividends upon corporate stock rather

than interest paid upon money loaned by the depositor. On the other hand, they are derived in large part from interest paid upon loans made by or bonds owned by the trust company. Even if they are viewed as a division of the earnings of trust funds which are invested by the trust company in loans or bonds, rather than as hire paid by the trust company for the use of money loaned by the depositor, they might still be regarded as payments of interest earned by those funds. I am of opinion, however, that such interest is not interest paid in the manner defined by G. L., c. 62, § 33. A division of interest earned by trust funds is not interest paid upon the bank books as "evidences of indebtedness," similar to notes or bonds.

For these reasons I am constrained to advise you that, in my opinion, your inquiry must be answered in the negative. This renders it unnecessary to determine whether G. L., c. 62, § 33, can apply or does apply to national banks, which are Federal instrumentalities.

---

#### DRAINAGE LAW — APPLICATION OF AMENDATORY STATUTE TO PENDING PROCEEDINGS.

It is a general principle that a new statute which provides merely for changes in remedy or in modes of procedure will not invalidate steps taken before the statute goes into effect, but will apply to all proceedings taken thereafter.

St. 1922, c. 349, making certain changes in the procedure prescribed by G. L., c. 252, and other changes not material to the inquiry, is applicable to proceedings pending when the statute took effect, since no constitutional rights are impaired.

You request my opinion in behalf of the Drainage Board regarding the effect of St. 1922, c. 349, upon a pending petition from landowners in the town of Salisbury for the formation of a drainage district. Said statute amends certain sections of G. L., c. 252, relative to the improvement of low land and swamps, and adds a new section thereto. You state that upon receipt of the petition the Board proceeded to appoint district drainage commissioners, and ask whether it will be necessary, in view of the passage of the amendatory law, to reappoint them or whether they may go ahead and function under the new law.

To the Com-  
missioner of  
Agriculture.  
1922  
June 20.

The principal purpose and effect of St. 1922, c. 349, is to make certain changes in the procedure prescribed by G. L., c. 252, for the formation by the district drainage commissioners of a drainage district and for the submission of estimates and the drawing of funds from the county treasury, to give the district drainage commissioners expressly the power to acquire property outside the Commonwealth, and to give to the drainage district the power to assess upon its members such sums as may be necessary for further improvements and maintenance. Other changes are merely incidental and not material to the present inquiry. The effect of the amendments is merely to substitute the language of the sections as amended for the sections as they appear in G. L., c. 252; and of course the sections of that chapter not amended stand as they are. *Fitzgerald v. Lewis*, 164 Mass. 495. The act contains an emergency preamble reciting that "it is important and for the interest of the Commonwealth that prompt action should be taken in respect to the method of formation of drainage districts and their powers."

The object of the act appears, from the nature of its provisions as well as from the preamble, to be to make needed changes in the existing law, to clarify provisions which were uncertain, and to supply omissions for the purpose of making the law more workable. The intention seems clearly to have been that the amendments should go into effect upon the passage of the act, and should apply to all proceedings thereafter, whether or not they had been begun before the passage of the amending act.

It is a general principle that a new statute which provides merely for changes in remedy or in modes of procedure will not invalidate steps taken before the act goes into effect, but will apply to all proceedings taken thereafter. In *Commissioners of Union County v. Greene*, 40 Oh. St. 318, there were proceedings before county commissioners, begun by petition, for the improvement of a road pursuant to a statute. After the proceedings were brought, but before contracts for the improvement had been made and before assessment of the cost had been ordered, the statute was amended in a way which materially changed the rule of apportionment. The assessors subsequently applied the

rule prescribed in the amendatory act. The court held that the assessment was correctly made, that the statute was simply remedial in its operation on pending proceedings, and was not in conflict with constitutional inhibition against retroactive laws. See also *Howard v. Fall River Iron Works Co.*, 203 Mass. 273, 276; *In re Hickory Tree Road*, 43 Pa. St. 139; *Mayne v. Huntington County*, 123 Ind. 132; Endlich: Interpretation of Statutes, § 482.

The intention manifested by the Legislature must be observed and carried into effect unless the amendatory act is found to operate retroactively to destroy or diminish rights created by the former law and proceedings under it which could not be constitutionally taken away by the Legislature.

The objection to retroactive legislation, to be valid, must be founded on the constitutional prohibition against the taking away of vested rights or the impairment of the obligation of a contract. *Wilson v. Head*, 184 Mass. 515, 518; *Danforth v. Groton Water Co.*, 178 Mass. 472; *National Surety Co. v. Architectural Co.*, 226 U. S. 276. In my opinion, the amendatory act has no such effect. The changes made thereby were in part formal and in part changes in procedure. There was in addition an amendment giving to the district drainage commissioners a power to acquire land outside the Commonwealth, which, as a corporation organized under the provisions of G. L., c. 158, it probably had before, and an additional provision authorizing the drainage district to assess upon its members such sums as might be necessary for further improvements and for maintenance, which previously, under G. L., c. 252, §§ 13 and 14, were to be paid for by the towns where the land improved was located, and assessed on the parcels benefited by the improvement.

It is my opinion that there were no constitutional rights acquired either under the original statute or by virtue of the filing of the petition prior to the amendatory act, which are taken away by St. 1922, c. 349, and that the amendments are applicable to proceedings under the petition filed by landowners in Salisbury.

PUBLIC RECORDS — REGISTRAR OF MOTOR VEHICLES — REPORT  
OF ACCIDENT.

The report required to be sent to the registrar by every person operating a motor vehicle which is in any manner involved in an accident is not open to public inspection.

To the Com-  
missioner of  
Public Works.  
1922  
June 20.

I have your request for an opinion as to whether you should allow examination of the records of automobile accidents on file in your department.

I assume that your inquiry concerns the report required to be sent you by every person operating a motor vehicle which is in any manner involved in an accident, which is required by St. 1913, c. 530, now G. L., c. 90, § 26. This report is not a paper "received for filing," within the meaning of G. L., c. 4, § 7, cl. 26. It is therefore not a public record open to public inspection, as provided by G. L., c. 66, § 10. See *Round v. Police Commissioner*, 197 Mass. 218.

CIVIL SERVICE — VETERANS — INSPECTORS OF PLUMBING —  
QUALIFICATIONS — INTERPRETATION OF THE WORD "CON-  
TINUOUSLY."

Whether persons, otherwise eligible, would be precluded from taking the civil service examination for plumbing inspectors because, by reason of having served in the military or naval service during the past five years, they have not had "practical experience . . . continuously," as required by G. L., c. 142, § 11, is a mixed question of law and fact, the decision of which rests upon the official who passes upon the qualifications of applicants for examination.

To the Com-  
missioner of  
Civil Service.  
1922  
June 21.

You have requested my opinion upon a question of law in connection with the interpretation of G. L., c. 142, § 11, relating to the appointment of inspectors of plumbing, which section provides, in part, as follows: —

The said inspector of buildings, if any, otherwise the board of health, of each city and town, shall, within three months after it becomes subject to sections one to sixteen, inclusive, appoint from the classified civil service list one or more inspectors of plumbing who shall be practical plumbers and shall have had practical experience either as master plumbers or journeymen, continuously, during five years next preceding their appointment.



Your specific inquiry concerns the correctness of a ruling made by you, as Commissioner, to the effect that persons who have served in the military or naval service during the last five years, and who would otherwise be eligible to take the civil service examination for plumbing inspectors, are excluded by the law, for the reason that they have not had "practical experience either as master plumbers or journeymen, continuously, during the five years next preceding their appointment."

Your inquiry, of course, requires a construction of the phrase "shall have had practical experience either as master plumbers or journeymen, continuously, during five years next preceding their appointment." While it is to be presumed that "continuously" is used in the ordinary sense, as meaning without interruption, this does not necessarily mean that the individual must have been engaged every day or every week or every month of the specified period. But in view of the fact that interruptions, if of long duration, might affect the knowledge and ability of the applicant to perform the duties incumbent upon the position of plumbing inspector, and would prevent such applicant from keeping up with the improvements and changes made from time to time in the practice of his trade, particular care must be taken not to give an interpretation to the law which is contrary to its spirit and which would defeat its purpose.

This is really a mixed question of law and fact, and it is for the official upon whom rests in a given case the responsibility to determine whether the applicant has been continuously having practical experience, within the meaning of the statute. In determining this question the intent of the applicant with respect to his occupation during the interim period, the length of the interim period, and all other facts respecting his employment are to be considered, the decision to rest upon the person finally passing upon the qualifications of the applicant, having due regard for the express language, the spirit and the purpose of the law.

FOREIGN MORTGAGE CORPORATIONS — BRANCH OFFICES — USE  
OF WORDS "TRUST COMPANY."

With certain exceptions, only trust companies incorporated under the laws of Massachusetts can lawfully use the words "Trust Company."

An exemption in a statute which limits the application of a general policy should be construed strictly in favor of the Commonwealth.

Such a statute should be construed so as to carry out the intent of the Legislature, if the intent can be reasonably ascertained from the words used, or by fair implication, although such construction may seem contrary to the ordinary meaning of the letter of the statute.

Foreign mortgage corporations which were authorized to do business in the Commonwealth prior to Oct. 1, 1899, and which were conducting an established business here at the time of the passage of that act, may use the words "Trust Company."

To the Com-  
missioner  
of Banks.  
1922  
June 30.

You request my opinion upon the following question: —

May a foreign corporation not now registered under G. L., c. 181, legally establish and maintain a branch office in this Commonwealth, by registration with the Commissioner of Corporations and Taxation, and carry on a foreign mortgage business within the meaning of G. L., c. 172, § 4?

From the papers and data submitted by you it appears that the — Trust Company was incorporated under the laws of North Dakota in 1886; that it paid the assessment required by St. 1889, c. 427, § 6, for several years; that it paid the Commissioner of Foreign Mortgage Corporations' tax in 1894; that it had no usual place of business in Massachusetts; that it contended that it was not required to, and that it did not, comply with the provisions of St. 1884, c. 330; and that it conducted its business through the mails or through persons principally in banks who were not agents of the company.

G. L., c. 172, § 4 (St. 1899, c. 467, as amended), reads as follows: —

No person or association and no bank or corporation, except trust companies, shall use in the name or title under which his or its business is transacted the words "Trust Company" even though said words may be separated in such name or title by one or more other words, or advertise or put forth a sign as a trust company or in any way solicit or receive deposits as such. Whoever violates this section shall forfeit one hundred dollars for each day during which such violation continues.

But this section shall not prohibit an insurance company authorized prior to October first, eighteen hundred and ninety-nine, to do business in the commonwealth nor a company authorized prior to said date to transact a foreign mortgage business in the commonwealth from using the words "Trust Company" as a part of its corporate name.

St. 1899, c. 467, established the policy, which has since been strictly adhered to, that, with certain exceptions, only trust companies incorporated under the laws of the Commonwealth could lawfully use the words "Trust Company." The reason for the policy, obviously, was that trust companies were subject to specific laws affecting such companies and were subject to the supervision of the Savings Bank Commissioners, and that the use of the words "Trust Company" by persons or corporations not subject to such laws or supervision might deceive the public.

The Legislature, however, provided that certain companies should not be prohibited from using the words "Trust Company." Since this exemption limits the application of the general policy thus laid down and is in the nature of a privilege or legislative grant, it should be construed strictly in favor of the Commonwealth, and should not be extended by implication in favor of parties on whom such rights may be bestowed. *Butchers Slaughtering &c. Assn. v. Boston*, 214 Mass. 254, 258. The act must also be construed so as to carry out the intent of the Legislature, if the intent can be reasonably ascertained from the words used or by fair implication, although such construction may seem contrary to the ordinary meaning of the letter of the statute. *Staniels v. Raymond*, 4 Cush. 314, 316; *Moore v. Stoddard*, 206 Mass. 395, 399; *Bergeron, Petr.*, 220 Mass. 472, 475; *Holy Trinity Church v. United States*, 143 U. S. 457, 459, 472.

In *Moore v. Stoddard*, *supra*, the court said, at page 399:—

A construction which would lead to such a result is to be avoided if that fairly can be done. The manifest intention of the Legislature, as gathered from its language considered in connection with the existing situation and the object aimed at, is to be carried out. This rule has been declared in many of our decisions.

In *Holy Trinity Church v. United States*, *supra*, the court said, at pages 459, 463 and 472:—

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body.

The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute.

G. L., c. 172, § 4, was aimed at a specific evil. The Legislature, while laying down a new policy, manifestly intended not to disrupt the *existing* business of foreign mortgage corporations in the Commonwealth. This was fair dealing with respect to such corporations which had for a number of years paid a special tax for the privilege of doing business here. But the Legislature clearly did not intend to extend the privilege or exemption to companies which were not at the time of the passage of the act doing business in Massachusetts, merely because such companies had at some prior time been authorized to do business here.

The act provides that it shall not be construed "to *prohibit* . . . any company heretofore authorized to transact a foreign mortgage business in this commonwealth *from using* the words 'Trust Com-

pany' as a part of its corporate name." A company which was not doing business in the Commonwealth at the time of the passage of the act was not within our jurisdiction, and the prohibition could not operate upon such company. The language also clearly applies to a present situation and to a company doing business at that time.

Whether or not the corporation above referred to was authorized to do business in the Commonwealth prior to Oct. 1, 1899, and was conducting an established business at that time, is a question of fact for you to determine. The mere payment of the assessment under St. 1889, c. 427, would not constitute such authorization, since the Commissioner of Foreign Mortgage Corporations, under that act, had no power to authorize or prohibit the transaction of such business. The issuance of a license under St. 1893, c. 303, would constitute such authorization.

St. 1895, c. 311, § 2, provides: —

Such corporations [foreign mortgage corporations] shall make an annual return to the commissioner of corporations of their assets and liabilities, and shall make such further statements of fact to him at such times and in such form as he may require or approve.

Whether or not the — Trust Company filed such returns might be of assistance to you in determining whether the company did business in Massachusetts continuously to Oct. 1, 1899. I am of the opinion that the question should be answered in the negative unless it be found as a fact that the company was authorized to do business in the Commonwealth prior to Oct. 1, 1899, and was actually conducting an established business at that time.

## BANKS — BOND AND INVESTMENT COMPANIES.

The business of selling foreign currency on the instalment plan and issuing certificates therefor is not the business of receiving deposits of money for transmission abroad, under G. L., c. 169, § 1, but is the business of issuing, negotiating or selling bonds, certificates or obligations on the instalment plan, and is subject to the requirements of G. L., c. 174.

To the Com-  
missioner  
of Banks.  
1922.  
June 30.

You call my attention to an examination made by you of three closely affiliated companies, as follows: —

1. The First State Bank, a banking corporation organized and doing business under R. L., c. 115. This bank receives deposits of money for transmission to foreign countries.

2. The Nutile-Shapiro Company, a Massachusetts corporation now dissolved by legislative act as a delinquent corporation. This company sells steamship tickets. Although the corporation is dissolved, the business, you state, is still being conducted under the name of the company.

3. The State Bankers Corporation, organized under the laws of Massachusetts for the purpose of dealing in notes, drafts and other evidences of debt, securities of all kinds, coin and bullion, and for other purposes. This company is engaged in the business of buying and selling foreign bonds and foreign currency. It sells foreign currency on the partial payment plan, a certain amount being paid in cash and a note given for the balance. The customer receives a so-called "exchange interim certificate," on the back of which successive payments are entered. It also receives payments in money of the United States, the equivalent of which in foreign currency is placed to the credit of the customer and a certificate given for a like amount. Interest is allowed on a full-paid certificate at the rate of 2 or  $2\frac{1}{2}$  per cent. The certificate states that the holder is entitled to receive upon surrender a draft for the amount named in foreign currency, and that the corporation agrees upon request to convert the foreign amount into dollars at the corporation's buying rate of exchange. You state that the State Bankers Corporation does not have a foreign correspondent, but that it buys drafts from the First State Bank, drawn on the First State Bank's correspondent. Your examina-

tion has disclosed that the State Bankers Corporation is in an insolvent condition.

The officers and stockholders of the three corporations are the same, the same officers and clerks handle their daily transactions, and they all do business in the same building at 107 Salem Street, Boston.

On the above facts you ask the following three questions: —

1. Would the close connection between the State Bankers Corporation, the First State Bank and the Nutile-Shapiro Company and the manner of receiving funds, as set forth above, warrant the Commissioner of Banks in taking the position that the State Bankers Corporation is subject to the provisions of G. L., c. 169, § 1?

2. Does the fact that the "exchange interim certificate," issued by the State Bankers Corporation, states that the holder is entitled to a draft on a correspondent abroad warrant the Commissioner of Banks in assuming that the corporation is engaged in the business of transmitting money or equivalents thereof to foreign countries, and therefore subject to the provisions of the second clause of the above section?

3. As the State Bankers Corporation issues a certificate payable on the instalment plan, and as this corporation is insolvent, is the Commissioner of Banks warranted in taking the position that this corporation is transacting business in the Commonwealth in violation of the provisions of G. L., c. 174, § 1?

1. G. L., c. 169, § 1, is as follows: —

This chapter shall apply to —

First. All persons engaged in the selling of steamship or railroad tickets for transportation to or from foreign countries, or in the supplying of laborers, who, in conjunction with said business, carry on the business of receiving deposits of money for safe keeping, or for the purpose of transmitting the same, or equivalents thereof, to foreign countries, or for any other purpose.

Second. All persons who carry on the business, or make a practice, of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries, except banks or trust companies or express companies having contracts with railroad or steamship companies for the operation of an express service upon the lines of such companies, or persons engaged in the banking or brokerage business.

Third. Any person engaged or financially interested in the selling of tickets or supplying of laborers as aforesaid who is also engaged or financially interested in the business of receiving deposits of money as aforesaid, and any person engaged or financially interested in the business of receiving deposits of money as aforesaid who is also engaged or financially interested in the selling of tickets or supplying of laborers as aforesaid, under whatever name or by whatever persons the said business of selling tickets or supplying laborers or the said business of receiving deposits is carried on.

Your first question is largely a question of fact. If the business purporting to be done by the First State Bank or by the Nutile-Shapiro Company were really being done by the State Bankers Corporation, either directly or through the other concerns as agents, then the State Bankers Corporation would be engaged in the business done by the other concerns, within the meaning of G. L., c. 169, § 1, but otherwise not. I am informed by conversation with an officer of your department that the business done by the three concerns is probably actually an independent business. That being so, there seems to be no basis for the application of G. L., c. 169, to the State Bankers Corporation on account of the business done by the other two concerns.

2. G. L., c. 169, § 1, cl. 2d, is applicable only to "persons who carry on the business, or make a practice, of receiving deposits of money for the purpose of transmitting the same or equivalents thereof to foreign countries." The business of the State Bankers Corporation, as you state it, is the selling of certificates for cash or on the instalment plan, entitling the holder to a draft in foreign currency on a foreign correspondent. These drafts the State Bankers Corporation procures from the First State Bank. The customer frequently leaves the money which he has deposited with the corporation, even after the maturity of the certificate, receiving interest from the corporation thereon.

It is apparent that the purpose for which deposits are received is not to transmit money to foreign countries but to speculate in foreign exchange, and that the State Bankers Corporation does not do the business of transmitting money to foreign countries but merely receives deposits, and, when necessary, purchases



drafts on foreign correspondents from the First State Bank. It takes no part itself in the transmission of any money abroad. In my opinion, therefore, its business does not come within the second clause.

3. G. L., c. 174, § 1, provides, in part, as follows: —

The business of issuing, negotiating or selling any bonds, certificates or obligations of any kind on the partial payment or instalment plan, unless such bond, certificate or obligation shall at the time of issuance, negotiation or sale be secured by adequate property, real or personal, shall be transacted in the commonwealth only by corporations subject to the requirements of this chapter. . . .

In my opinion, the business of the State Bankers Corporation, as already described, of selling exchange interim certificates to be paid for on a partial payment plan, comes within the description of this provision as the business of issuing, negotiating and selling unsecured certificates or obligations on the partial payment or instalment plan in this Commonwealth. The corporation, doing business in Boston, issues documents which it calls certificates, purporting to state its obligation upon surrender thereof to deliver drafts in foreign currency for stated amounts or to convert them on request into dollars. Such certificates are issued on a partial payment plan, and they are unsecured. Consequently, the corporation is subject to the requirements of said chapter. Sections 1 and 3 of said chapter contain requirements, as a prerequisite to the doing of such business by corporations in the Commonwealth, for the deposit of capital with the Treasurer and Receiver-General or some other duly authorized officer, and the receipt of a certificate of authority from the Commissioner of Banks. Section 4 authorizes the Commissioner to examine the affairs of any corporation engaged in such business. Section 8 provides as follows: —

If upon examination the commissioner is of opinion that any domestic corporation subject to the requirements of this chapter is in an unsound financial condition or has exceeded its powers, or has failed to comply with any provision of law, he shall apply to the supreme judicial court in equity for an injunction restraining the corporation from further

proceeding with its business in whole or in part. The court may issue an injunction forthwith, and may, after a full hearing, make the injunction permanent, and may appoint a receiver or receivers to take possession of the property and effects of the corporation and to settle its affairs, subject to the order of the court.

Since, as you state in your letter, the State Bankers Corporation is in an insolvent condition, and as I am informed it has not complied with the provisions of G. L., c. 174, it is my opinion, and I advise you, that you may apply to the Supreme Judicial Court in equity for relief, under section 8.

---

#### SAVINGS BANKS — SAVINGS INSURANCE PLAN.

A plan by which a savings bank, as agent for a savings and insurance bank under G. L., c. 178, § 13, transmits payments of premiums and receives dividends for a depositor, and performs other incidental services for the savings and insurance bank, is not unlawful.

Since G. L., c. 178, § 13, does not authorize the savings departments of trust companies to act as agents of savings and insurance banks, they would not be authorized to engage in business under the plan proposed.

Following my opinion of April 11, 1922, you have submitted to me a revised savings insurance plan prepared by parties interested in savings bank life insurance, and ask my opinion whether such a plan may be lawfully adopted by savings banks and trust companies in their savings departments.

The plan originally presented was in the form of a certificate purporting to be issued by a savings bank and signed by the depositor desiring to secure the benefits of the plan and by the treasurer of the bank, whereby the depositor agreed to open a savings account, to deposit a certain amount monthly for a period of ten years, to take out a policy of insurance on his life written by a savings and insurance bank, and to deliver the policy to the savings bank; and the savings bank agreed to pay the premiums on the policy, to hold the policy for the depositor, and upon surrender of the certificate and pass book to pay the depositor the balance standing to his credit, and also either to pay him the cash surrender value of his policy or to deliver the policy to him, and in the event of the death of the depositor to pay the balance in

his account to the person entitled to receive it, and to pay the amount of the policy to the beneficiary thereunder. I stated that in my opinion this plan seemed to require the savings bank to engage in a business which was not the business of a savings bank and which was not authorized by the statutes; that the contract for the deposit at intervals of sums of money exceeded the authority given by G. L., c. 167, § 16; that the agreement by the bank to hold the policy for the depositor was in excess of the authority given by G. L., c. 168, § 33; that in so far as the bank was to act as an agent it was to act as the agent of the depositor and not of the savings and insurance bank, as permitted by G. L., c. 178, § 13; and that the bank, by agreeing at the end of the period to pay the depositor the cash surrender value of the policy, and in the event of his death to pay the beneficiary the amount of the policy, was to that extent itself engaging in the business of life insurance.

By the revised plan the objections stated to the original plan appear to have been eliminated. By this plan the savings bank certifies that it has been appointed agent of the insurance department of the insuring bank, under G. L., c. 178, § 13, and as such has agreed, so far as authorized by the depositor, to receive and transmit payments of premium on the policy issued to him by the insuring bank, to receive for the depositor dividends paid him by the insuring bank, and to perform other incidental services for the insurance department. The certificate states the amounts which the depositor will be entitled to receive, either ascertained or estimated, from the insuring bank on his policy and from the savings bank on his account, either at the end of the period or on his death. There is no agreement by the depositor to make monthly deposits, but a mere statement that he intends to do so. The depositor does not deliver his policy to the savings bank, but merely states that he has received it. The depositor authorizes the bank to receive dividends payable under the policy and to pay premiums in his behalf as they become due. The savings bank's liability under the certificate is limited to the making of payments on the depositor's account, as it is required to do by law.

The objections which I stated to the original plan appear to have been removed in the revised plan. This plan seems to provide for the doing of certain acts by a savings bank as agent for a savings and insurance bank under the authority given by G. L., c. 178, § 13. I therefore find nothing objectionable in the plan which you have now submitted to me so far as it applies to services to be performed by savings banks. But G. L., c. 178, § 13, does not authorize the savings departments of trust companies to act as agents of savings and insurance banks. With respect to trust companies in their savings departments, therefore, I conclude that they would not be permitted by statute to engage in the business proposed.

---

PUBLIC PARK — CHANGE OF USE — METROPOLITAN DISTRICT  
COMMISSION — ARMORY COMMISSION.

To transfer certain land now owned by the Commonwealth and acquired for boulevard purposes by the Metropolitan Park Commission, now succeeded by the Metropolitan District Commission, to the Armory Commission, to construct and maintain an armory thereon, legislative authority is necessary.

You ask my opinion as to the proper procedure to be followed in the matter of transferring to the Armory Commission, to construct an armory thereon, certain land now owned by the Commonwealth and taken for boulevard purposes by the Metropolitan Park Commission, now succeeded by the Metropolitan District Commission.

In this situation it should be noted that while the title to lands taken by the Metropolitan District Commission vests in the Commonwealth, the expense of acquiring such land does not fall on the Commonwealth altogether, but one-half is assessed on the cities and towns of the district.

G. L., c. 92, § 85, empowers the Metropolitan District Commission, under certain conditions and under a certain form of procedure, to sell any of its lands thus obtained. I am of the opinion that this section is not sufficiently broad to authorize a transfer of the said land to the Armory Commission, especially in view of section 87 of said chapter 92, which provides for a transfer of care and control of such land by the Metropolitan

District Commission. Section 87, however, does not empower a transfer to any State department, and apparently contemplates such transfer as will substantially carry out the purpose of the taking by the Metropolitan District Commission.

It appears, therefore, that the transfer you desire would be appropriating for a public use land taken for another distinct public use.

In *Eklon v. Chelsea*, 223 Mass. 213, 216, the court said: —

Land taken for one public use may be devoted to another public use only by legislative authority clearly expressed, whose mandate as to the method of actually making the change must be exactly followed.

And in *Higginson v. Treasurer, etc., of Boston*, 212 Mass. 583, 591, the court said: —

Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end.

See also III Op. Atty.-Gen. 406.

Neither does this transfer come within G. L., c. 79, § 5, relating to the taking of land already in public use.

I am of the opinion, therefore, that there is no “legislative authority clearly expressed” by virtue of which the Metropolitan District Commission may transfer this land to the care and control of the Armory Commission, and that the power granted the Armory Commission by G. L., c. 33, § 45, to take land by eminent domain is not such “explicit legislation” as would permit the exercise of that power in this instance.

I am therefore of opinion that such transfer as you desire requires further authorization by the Legislature.

BANKS AND BANKING — SAVINGS BANKS — INVESTMENT OF DEPOSITS — PURCHASE OF, AND EXTRAORDINARY ALTERATIONS IN, BANK BUILDING.

A savings bank may, with the approval of the Commissioner of Banks, invest in the acquisition of a suitable bank building a sum not exceeding an amount determined in the manner prescribed by the first sentence of G. L., c. 168, § 54, cl. 11, but in no event exceeding \$200,000.

The authority of a savings bank, with the approval of the Commissioner, to invest deposits in extraordinary alterations in or additions to a bank building already owned by it, which is conferred by the second sentence of G. L., c. 168, § 54, is separate from and independent of the authority to invest such deposits in the acquisition of such building, and the amount which may be expended for alterations is not diminished by the sum spent for such acquisition, although the amount which may be invested in such alterations is likewise determined in the manner prescribed by the first sentence.

The amount which the Commissioner should approve either for the acquisition of a bank building or for extraordinary alterations in or additions thereto, is, within the limits prescribed, to be determined by him in the exercise of a sound discretion.

To the Commissioner  
of Banks.  
1922  
July 10.

G. L., c. 168, § 54, cl. 11, provides:—

Deposits and the income therefrom shall be invested only as follows:

A sum not exceeding the guaranty fund and undivided earnings of such corporation, nor in any case exceeding five per cent of its deposits or two hundred thousand dollars, may, subject to the approval of the commissioner, 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. Extraordinary alterations in, or additions to, a bank building owned by a savings bank, involving an expense exceeding ten thousand dollars, shall not be made without the approval of the commissioner, and the cost of such alterations or additions shall not exceed the sum specified in this clause.

A certain savings bank, which carries its bank building upon its books at \$100,000, now proposes to expend a further sum for additions and alterations which will increase the amount invested in the building to more than \$200,000. You inquire whether such expenditure is permitted by said section 54, clause 11.

1. Section 54, clause 11, places two limitations upon the investment of the funds of a savings bank in the purchase of a suitable site for, and the preparation or erection of, a suitable bank build-

ing. In the first place, such investment must be approved by the Commissioner of Banks. In the second place, the maximum amounts which the Commissioner has power to approve for this purpose must be determined in the manner prescribed by the first sentence. Even with such approval, the bank cannot invest for this purpose more than the amount of its guaranty fund and undivided surplus earnings. If this sum exceeds 5 per cent of the deposits, the latter amount is the permitted maximum. Finally, if each of said sums exceeds \$200,000, not more than \$200,000 may be so invested in the acquisition and erection or preparation of such building. In other words, that one of the three prescribed sums which is the smallest is the maximum amount which, with the approval of the Commissioner, may be invested in the purchase of a suitable site and the erection or preparation of a suitable bank building.

2. The second sentence of section 54, clause 11, is in form a prohibition. No extraordinary alterations in or additions to a bank building already owned, which involve an expense of more than \$10,000, can be made without the approval of the Commissioner, and even with such approval the cost of such alterations or additions must "not exceed the sum specified in this clause." But an express prohibition of such expenditures beyond certain prescribed limits authorizes, by implication, an expenditure for extraordinary alterations or additions within such limits. The prohibition was imposed and the implied authority was conferred by St. 1910, c. 281, which was enacted after the first sentence of clause 11 had been in force many years.

In my opinion, the authority conferred by the second sentence is separate from and independent of the authority conferred by the first sentence. In other words, the amount which may, with the approval of the Commissioner, be expended for extraordinary alterations in or additions to a building already owned does not depend upon, and is not diminished by, the sum originally expended to erect or prepare that building. On the other hand, it would be a plain evasion of the law for a bank to expend the maximum sum to acquire the building, and then to ask immediate approval of alterations or additions.

The amount which the Commission may approve for extraordinary alterations or additions is not without limit. The second sentence of clause 11 expressly provides that "the cost of such alterations or additions shall not exceed the sum specified in this clause." In my opinion, the "sum specified" refers to the several limits of cost defined in the first sentence, and makes those applicable to the alterations or additions authorized by the second sentence. Whichever one of those limits is applicable to the particular bank at the time when the Commissioner is asked to approve an expenditure for extraordinary alterations or additions fixes the maximum sum which the Commissioner may approve for that purpose. I am of the opinion, however, that if the Commissioner approves an expenditure for extraordinary alterations or additions, the authority to approve for that purpose is correspondingly diminished, and if further approval be subsequently sought, the maximum sum which the Commissioner may authorize for such purpose is the appropriate limit less the sum already approved for such alterations or additions.

3. In the present instance the bank already owns the building. Approval of extraordinary alterations or additions is therefore governed by the second sentence of clause 11. In my opinion, you have power to approve an expenditure for this purpose not exceeding the limit applicable to this particular bank at the present time. This amount is not diminished by the sum which the bank originally spent to acquire the building, but any sum which you now approve for alterations or additions does diminish the amount which you can later approve for this purpose. Within the limits prescribed by law, the actual amount which you should approve is to be determined by you, in the exercise of a sound discretion, in the light of all the facts.



CONSTITUTIONAL LAW — MASS. CONST. AMEND. XLVI — LEGAL OBLIGATIONS ALREADY ENTERED INTO — EXEMPTION OF A TOWN FROM MAINTAINING A HIGH SCHOOL — ATTORNEY-GENERAL.

The exception touching "legal obligations . . . already entered into," made by Mass. Const. Amend. XLVI, § 2 (anti-aid amendment), must be construed to mean lawful contracts entered into prior to the adoption of the amendment, and still existing.

A bequest to trustees to establish a high school, free to all the children of Deerfield, made upon condition that the town shall annually appropriate and pay over to the trustees a sum equal to all the taxes assessed upon the trust estate, with a gift over to the town of Whately in case the town of Deerfield should fail to comply with said condition for the space of one year, does not, when accepted by the town, constitute a legal obligation to make such appropriation, within the meaning of Mass. Const. Amend. XLVI, § 2, since the town is left free either to fulfil the condition or to forfeit the property.

A bequest upon condition that the town of Deerfield shall pay over to trustees who hold the gift a sum equal to the taxes assessed upon the trust estate imposes no obligation upon the town to make any payment, where the property is by special statute exempted from taxes.

An illegal appropriation of money by a town to a private academy which furnishes free high school teaching to the children of the town will not justify the Department of Education in exempting the town from maintaining a public high school.

The Attorney General does not determine the facts upon which he advises; such facts must be determined by the department which requests the opinion.

You state the following facts: —

Mrs. Esther Dickinson died in 1875, leaving the residue of her property to five trustees to carry out certain trusts, largely for public purposes. Finally, it was provided that the funds should accumulate until they should be sufficient to erect necessary buildings for a school, library and reading room, the school to be under the management of the trustees, "in which the scholars may be fitted for college, and free to all the children of Deerfield whom my trustees may deem qualified for admission thereto." The will went on to provide: —

As a condition on which this bequest for the establishment of the high school, library and reading room and other minor objects of a public character is given, I order and direct that from and ever after the establishment of the high school, library and reading room, *the town of Deerfield shall annually appropriate and pay over to my said trustees or their successors, a sum of money at least equal to all the taxes assessed*

To the Commissioner of Education.  
1922  
July 11.

*upon the estate held in trust by my trustees not including any tax assessed by the government of the United States. Should the town of Deerfield refuse or neglect for the space of one year to comply with this condition, then I give and bequeath my entire estate (except the legacies to private individuals) to the town of Whately, for the establishment of a high school and library on the same principles as designated for the town of Deerfield.*

St. 1876, c. 97, § 1, provides:—

For the purpose of encouraging the establishment of a high school, library and reading-room, under the will of Mrs Esther Dickinson, late of Deerfield, deceased, and of obviating certain objections which now exist to the execution of the trusts thereby created, all the estate real and personal held in trust under said will for the purpose aforesaid, shall be exempt from all manner of taxes, rates and impositions, so soon and so long as the trustees shall maintain the high school, library and reading-room therein provided for: *provided, however*, that this act shall not take effect unless accepted by the town of Deerfield on or before the fifteenth day of June next, at a regular annual town meeting, or a town meeting called for the purpose.

Section 2 incorporated the trustees of the Deerfield Academy and Dickinson High School.

On April 10, 1876, the town voted to accept said St. 1876, c. 97.

Of late the town has made appropriations for the support of said school.

Mass. Const. Amend. XLVI, § 2, provides:—

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 commonwealth 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 expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both,

except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

You inquire whether, upon the above facts, there was any "legal obligation . . . already entered into" by the town, prior to the adoption of said amendment on Nov. 6, 1917, by which the town was and is bound to appropriate public money for the support of said school.

The Attorney-General has no power to determine the facts upon which he advises. That must be done by the department by whom the inquiry is made. While your letter does not expressly state that you find the above facts to be true, I have assumed that such was the case.

Your letter discloses that your inquiry is made in order to determine whether the town of Deerfield should be exempted, under G. L., c. 71, § 4, from maintaining a high school. It appears that the Deerfield Academy and Dickinson High School is not under public control, within the meaning of Mass. Const. Amend. XLVI. St. 1876, c. 97. It further appears that the town is appropriating public money to the support of said school. If Deerfield is providing high school facilities at public expense in a manner forbidden by Mass. Const. Amend. XLVI, such facilities would not justify your department in exempting the town from the statutory duty to maintain a high school, imposed by G. L., c. 71, § 4. See VI Op. Atty.-Gen. 448. Upon the facts presented by you, the determination of that question depends upon whether the town is under a legal obligation to make the appropriations which it has made to the Deerfield Academy and Dickinson High School.

The exception touching "legal obligations . . . already entered into" was undoubtedly inserted in Mass. Const. Amend. XLVI in order to save it from possible conflict with U. S. Const., art. I, § 10, which forbids any State to pass any "law impairing the

obligation of contracts." The exception must therefore be construed to mean lawful contracts entered into prior to the adoption of the amendment, and still existing, which are within the protection of said U. S. Const., art. I, § 10. The question whether the town of Deerfield entered into such a contract with the academy, and whether such contract, if any, justifies the appropriations made to the academy by the town, are questions of fact to be determined by your department in deciding whether or not to exempt the town under G. L., c. 71, § 4. I can only advise you whether the facts submitted by you do or do not, as matter of law, warrant a finding that such a contract now exists.

The quoted portion of Mrs. Dickinson's will, coupled with acceptance of the bequest upon the part of the town, does not, in my opinion, warrant a finding that the town contracted to make the designated appropriation "annually." There is serious doubt whether the town could have so bound itself even if it had desired to do so. *Drury v. Natick*, 10 Allen, 169, 183. But the will does not require such an agreement on the part of the town. Instead, the will imposes a condition, to be annually fulfilled, violation of which entails a forfeiture of the property. The provision for a forfeiture of the bequest for breach of the condition is not a contract upon the part of the town upon which the condition is imposed. The town is left free either to fulfil the condition or to give up the property. The threat of forfeiture is an inducement to perform the condition, but it is not an obligation to do so. No action would lie to recover the designated appropriation in case the town failed to make it.

Even if the condition imposed by the will upon the town could be held to be a contract by the town to fulfil it, I am of opinion that it would not warrant any appropriation by the town at the present time. When the town accepted St. 1876, c. 97, all the real and personal property of the trust was exempted from taxation in the manner therein provided. That statute is still in force. No State taxes are assessed upon the property. If no State taxes are assessed upon the property, no obligation to appropriate a sum equal to such taxes can or does arise. The exemption from

taxes is equivalent of an appropriation to pay them. If the condition be satisfied, no further appropriation can be rested upon any assumed (but in my opinion non-existent) obligation to fulfil it.

I am therefore constrained to advise you that, in my opinion, the facts submitted by you do not, as matter of law, warrant any finding by you that there is any legal obligation upon the town to appropriate public money to this academy.

---

BANKS AND BANKING — PROPERTY OF INSOLVENT PRIVATE BANKER IN POSSESSION OF COMMISSIONER OF BANKS, UNDER G. L., c. 167, §§ 1 AND 22 — RIGHT OF BANKER'S ADMINISTRATOR TO ADMINISTER SUCH PROPERTY.

Where the Commissioner of Banks takes possession of the property of an insolvent private banker, under G. L., c. 167, §§ 1 and 22, the bond given by such banker, under G. L., c. 169, §§ 2 and 3, is not an asset of the estate of such banker after his decease, and neither that bond nor its proceeds should be surrendered by the Commissioner to the administrator of such banker.

Where the Commissioner of Banks takes possession of the property of an insolvent private banker, under G. L., c. 167, §§ 1 and 22, and such banker fails to contest his right so to do within the ten days prescribed by section 33, and thereafter dies, his administrator succeeds only to the rights of his intestate, and is likewise barred.

You ask my opinion upon the following facts: —

To the Commissioner  
of Banks.  
1922  
July 12.

Acting under G. L., c. 167, §§ 1 and 22, on Feb. 11, 1921, you took possession of the property and business of F, a private banker. I assume, therefore, that you found that said F was not only conducting the business defined in G. L., c. 169, § 1, but was also "doing a banking business in the commonwealth under the supervision of the commissioner," within the meaning of G. L., c. 167, § 1, and that the circumstances rendered said section 22 applicable. You further state that said F conducted the business of a private banker as an individual, that he carried all his assets, both real and personal, upon the books of the bank, and that you took possession of all said assets whenever discovered. Said general assets consisted principally of real estate which has not been sold. Under the provisions of G. L., c. 169, §§ 2 and 3, said F filed a bond in the sum of \$200,000, and out of the proceeds of this bond a dividend of 25 per cent has been paid, leaving a balance of between \$6,000 and \$7,000 therefrom which is still undis-

tributed. Said F died subsequently to Feb. 11, 1921, and an administrator of his estate has been appointed. You inquire whether you should surrender to such administrator (1) the said general assets, and (2) the balance of the proceeds of said bond given under G. L., c. 169, §§ 2 and 3. You do not state what, if any, demand has been made upon you by said administrator. For convenience I shall consider these questions in the reverse order.

1. G. L., c. 169, § 2, provides, in part, as follows:—

All persons subject to this chapter shall, before entering into or continuing in any business described in section one, make, execute and deliver a bond to the state treasurer in such sum as the commissioner of banks, in this chapter called the commissioner, may deem necessary to cover money or deposits received for the purposes mentioned in said section by such persons, the bond to be conditioned upon the faithful holding and repayment of the money deposited, and upon the faithful holding and transmission of any money, or equivalent thereof, which shall be delivered to them for transmission to a foreign country, and in the event of the insolvency or bankruptcy of the principal upon the payment of the full amount of such bond to the assignee, receiver or trustee of the principal, as the case may require, for the benefit of such persons as shall deliver money to said principal for safe keeping or for the purpose of transmitting the same to a foreign country. . . .

The bond required by this section is not an asset of the banker. It is a liability. *Russo v. Chapin*, 197 Mass. 64. G. L., c. 169, § 3, further provides, in part:—

. . . The money and securities deposited with the state treasurer as herein provided, and the money which in case of default shall be paid on the aforesaid bond by any licensee or the surety thereof, shall constitute a trust fund for the benefit of such persons as shall deliver money to the licensee for safe keeping or for the purpose of transmitting the same to foreign countries, and such beneficiaries shall be entitled to an absolute preference as to such money or securities over all general creditors of the licensee. . . .

Under these circumstances it seems plain that the administrator of the defaulting banker has no claim to any part of the proceeds of said bond.

2. In taking possession of a "bank," under G. L., c. 167, § 22, *et seq.*, the Commissioner of Banks exerts administrative powers

conferred upon him by statute. *Greenfield Savings Bank v. Commonwealth*, 211 Mass. 207; *Commonwealth v. Commissioner of Banks*, 240 Mass. 244.\* The statute covers the entire field and provides a comprehensive and exclusive scheme for the liquidation of such "bank." *Commonwealth v. Commissioner of Banks, supra*. Section 33 provides a mode in which the "bank" may contest the right of the Commissioner to take possession. In my opinion, this remedy is exclusive. As such remedy must be invoked within ten days after the Commissioner takes possession, I assume that F did not successfully avail himself of it, and that it had been lost prior to F's death. If F was barred of this exclusive remedy prior to his death, F's administrator could not succeed to it. I am therefore of opinion that upon the facts presented the rights of F's administrator cannot rise higher than the rights of F at the time of F's death. Accordingly, I advise you that unless and until a court of competent jurisdiction shall order you to surrender the property in your possession, or some part thereof, to F's administrator, you should retain it and conduct the liquidation according to law.

---

#### RETIREMENT — PENSION — PERQUISITES.

The right of the superintendent of the State Farm to reside there, with his family, is a perquisite and not a part of his salary.

The value of the family maintenance of such superintendent cannot be considered in determining the amount of his pension upon retirement.

You request my opinion upon the following facts:—

The superintendent of the State Farm at Bridgewater, whose retirement you are about to recommend, has in addition to receiving a salary of \$4,000 been permitted to reside with his family at the State Farm. Last year the State Income Tax Division assessed a tax on the basis of an income of \$4,425, and the tax so assessed was paid. His maintenance for many years has been worth at least \$425 to him. You desire to know whether upon retirement the superintendent should be allowed a pension equal to one-half of \$4,000 or one-half of \$4,000 plus one-half the value of his family maintenance.

To the Commissioner of  
Correction.  
1922  
July 13.

G. L., c. 32, § 48, provides, in part: —

An officer, instructor or employee who is retired under section forty-six shall be allowed a pension equal to one half of the salary which he was receiving at his retirement. . . .

G. L., c. 125, § 47, provides: —

The superintendent and physician may reside with their families at the state farm. The superintendent shall receive no perquisites for his services except as aforesaid.

The statute thus refers to the family maintenance as a perquisite. A "perquisite," as defined by Webster in the International Dictionary, is "a gain or profit incidentally made from employment in addition to regular salary or wages." A similar definition is given by Bouvier's Law Dictionary and by "Words and Phrases." It therefore seems clear that the right of the superintendent and his family to reside at the State Farm is in the nature of a privilege granted by the Commonwealth, and is not part of his salary, within the purview of G. L., c. 32, § 48. See also III Op. Atty.-Gen. 128, 141.

I am therefore of the opinion that the salary of the superintendent of the State Farm at Bridgewater is \$4,000, and that upon retirement he should be allowed a pension equal to one-half of that amount.

---

BOARD OF HEALTH — PUBLIC FUNDS — APPROPRIATION —  
EMERGENCY.

The failure on the part of a town to appropriate a reasonable sum of money for board of health work does not constitute an emergency, within the meaning of G. L., c. 44, § 31, but if a case of extreme emergency, as therein defined, should arise, the selectmen of a town, who act as a board of health, could incur liability in excess of the appropriation made for the use of such department to the extent of adequately caring for the emergency existing.

You request my opinion on the following questions: —

1. As to whether or not the failure on the part of a town to appropriate a reasonable sum of money for board of health work does not



constitute an emergency whereby it would be permissible to expend public funds which have not been specifically appropriated.

2. What is the proper procedure for the local board to adopt where no reasonable fund has been appropriated?

The powers and duties vested in boards of health of cities and towns under the present law are broad and comprehensive. G. L., c. 111, enumerates many of these, among which are the following: organization, section 27; regulations, section 31; report of diseases to State Department of Public Health, section 112; householders to report to local boards of health, section 109; local board of health to examine nuisances, section 122; duties relative to vaccination, sections 181-183; control of communicable diseases, section 122. These and many other duties imposed upon local boards of health all require and involve the expenditure of money.

G. L., c. 40, § 5, par. (19), authorizes the expenditure of money by towns for board of health purposes in the following language:—

A town may at any town meeting appropriate money for the following purposes:

(19) For the performance of the duties of the board of health and for the establishment and maintenance of hospitals, or of beds therein, sanitary stations, clinics, dispensaries and quarantine grounds, and for the care of indigent persons suffering from disease, in accordance with the provisions of chapter one hundred and eleven.

It is a fixed principle that cities and towns shall not incur liability in excess of appropriations. An exception to this rule exists "in cases of extreme emergency involving the health or safety of persons or property." This authority is conferred by G. L., c. 44, § 31, as follows:—

No department of any city or town, except Boston, shall incur liability in excess of the appropriation made for the use of such department, except in cases of extreme emergency involving the health or safety of persons or property, and then only by a vote in a city of two thirds of the members of the city council, and in a town by a vote of two thirds of the selectmen.

I am informed that in the town of Rowe, to which your inquiry especially pertains, the selectmen also act as the board of health, as is the case in many other towns. No separate appropriation for the salary of such members of the board of health is therefore necessary, and I am accordingly of the opinion that the failure on the part of the town to appropriate a reasonable sum of money for board of health work does not constitute an emergency, within the meaning of G. L., c. 44, § 31, *supra*, and I so answer your first question.

It would seem that your second question is answered by the provisions of law above quoted, for if a case of "extreme emergency," as defined in section 31, *supra*, should arise, the selectmen of such towns, acting as a board of health, could incur liability in excess of the appropriation made for the use of such department to the extent of adequately caring for the emergency existing.

---

ORDINANCES — FRUITS AND VEGETABLES — HAWKERS AND  
PEDLERS — LICENSE.

G. L., c. 101, § 22, is to be construed as an assumption by the Commonwealth of the right to regulate the sale by hawkers and pedlers, in any city or town mentioned in the license, of any fish, fruits, vegetables or other goods, wares or merchandise, the sale of which is not prohibited by law; and while the aldermen or selectmen may license the sale of fish, fruit and vegetables within their respective territories, under the authority conferred by G. L., c. 101, § 17, they have no legal right or power to prohibit the sale of said articles by hawkers and pedlers duly licensed by the Director of Standards, regardless of whether a local license has or has not been granted therefor.

You request my opinion on the following question: —

Has a city or town any legal authority to restrain or limit the exercise of a State license in the sale of fruits and vegetables in such municipality by adopting ordinances, by-laws or regulations prohibiting the sale of fruits and vegetables by hawkers and pedlers unless a local license has been granted therefor.

The general question which arises, where a by-law of a town or ordinance of a city is concerned, is whether it is authorized by a statute, and whether it is reasonable. See *Commonwealth v.*

*Stodder*, 2 Cush. 562; *Commonwealth v. Crowninshield*, 187 Mass. 221.

The right of towns and cities to require the licensing of hawkers and pedlers of fish, fruit and vegetables is conferred by G. L., c. 101, § 17, which provides as follows:—

Hawkers and pedlers may sell without a license books, newspapers, pamphlets, fuel, provisions, yeast, ice, live animals, brooms, agricultural implements, hand tools used in making boots and shoes, gas or electric fixtures and appliances, flowering plants and all flowers, fruits, nuts and berries that are uncultivated. The aldermen or selectmen may by regulations, not inconsistent with this chapter, regulate the sale or barter, and the carrying for sale or barter or exposing therefor, by hawkers and pedlers, of said articles without the payment of any fee; may in like manner require hawkers and pedlers of fish, fruit and vegetables to be licensed except as otherwise provided, and may make regulations governing the same, provided that the license fee does not exceed that prescribed by section twenty-two for a license embracing the same territorial limits; and may in like manner affix penalties for violations of such regulations not to exceed the sum of twenty dollars for each such violation. A hawker and pedler of fish, fruit and vegetables licensed under this section need not be licensed under section twenty-two.

G. L., c. 101, § 22, provides as follows:—

The director may grant a license to go about carrying for sale or barter, exposing therefor and selling or bartering any goods, wares or merchandise, the sale of which is not prohibited by section sixteen, to any person who files in his office a certificate signed by the mayor or by a majority of the selectmen, stating that to the best of his or their knowledge and belief the applicant therein named is of good repute as to morals and integrity, and is, or has declared his intention to become, a citizen of the United States. The mayor or selectmen, before granting such certificate, shall require the applicant to make oath that he is the person named therein, and that he is, or has declared his intention to become, a citizen of the United States. The oath shall be certified by an officer duly qualified to administer oaths and shall accompany the certificate. The director shall cause to be inserted in every such license the amount of the license fee and the name of the town for which it is issued. The licensee may go about carrying for sale or barter, exposing therefor and selling or bartering in any town mentioned in his license any fish, fruits, vegetables or other goods, wares or merchandise, not

prohibited in section sixteen, upon payment to the director of the following fees: for each town containing not more than one thousand inhabitants, according to the then latest census, state or national, four dollars; for each town containing more than one thousand and not more than two thousand inhabitants, seven dollars; for each town containing more than two thousand and not more than three thousand inhabitants, nine dollars; for each town containing more than three thousand and not more than four thousand inhabitants, eleven dollars; and for each city and each other town, eleven dollars, and one dollar for every one thousand inhabitants thereof over four thousand; but the fee shall in no case exceed twenty-six dollars, and the amount paid shall be certified on the face of the license. The director shall retain one dollar for every city and town named in each of the above described licenses, and shall pay over to the respective cities and towns at least semi-annually the balance of said fees so received. The director may grant, as aforesaid, special state licenses upon payment by the applicant of fifty dollars for each license; and the licensee may go about carrying for sale or barter, exposing therefor and selling or bartering in any city or town in the commonwealth any fish, fruits, vegetables, or other goods, wares or merchandise, the sale of which is not prohibited by statute.

It is to be observed that section 17 applies to the hawking and peddling of the specific articles therein mentioned, while section 22 vests in the Director of Standards the authority to grant a license to go about carrying for sale or barter "any goods, wares or merchandise," including fish, fruits and vegetables, the sale of which is not prohibited by G. L., c. 101, § 16, which forbids the sale by hawkers or peddlers of jewelry, furs, wines, spirituous liquors and playing cards. It is also significant that said section 17, in conferring authority upon aldermen of cities or selectmen of towns to require hawkers and peddlers of fish, fruit and vegetables to be licensed, contains the phrase "except as otherwise provided," and that said section 22 specifically confers upon the hawker or peddler acting under a license given by the Director of Standards authority to go about carrying for sale or barter, exposing therefor and selling or bartering "in any town mentioned in his license" any fish, fruits, vegetables or other goods, wares or merchandise not prohibited in said section 16, and fixes the fees for such licenses according to the number of inhabitants of the respective towns, as shown by the latest census.

In the case of *Greene v. Mayor of Fitchburg*, 219 Mass. 121, it was decided that the express authority given by R. L., c. 65, § 15, as amended by St. 1906, c. 345 (now G. L., c. 101, § 17), to cities and towns to license the sale by hawkers and pedlers of fruits and vegetables must be interpreted as excluding any authority in cities and towns to require a license for the sale of the other articles mentioned in that section, and it accordingly follows that cities and towns have no authority to require licenses of hawkers and pedlers before permitting them to sell the articles described in that section, other than fruits and vegetables.

If a city or town has in fact licensed the hawking and peddling of fish, fruit and vegetables, there is no necessity for the obtaining of a license under section 22, covering the sale of said articles in such city or town.

But if, on the other hand, a license has been granted by the director under section 22, no other license is required to enable the licensee to sell as a hawker and pedler fish, fruit and vegetables in any city or town in the Commonwealth.

It is to be observed that the statute (section 17) does not confer any authority upon cities and towns to enact ordinances and by-laws regulating the sale by hawkers and pedlers of the aforesaid articles. Such authority, in fact, existed under R. L., c. 65, § 15, and subsequent amendments thereto. St. 1920, c. 591, § 20, repealed said section and substituted in place thereof the present law embodied in section 17, which confers upon the aldermen of cities and the selectmen of towns the authority to impose regulations upon, and to require licenses by, such hawkers and pedlers. But it is expressly provided therein that such regulations, if made, shall be "not inconsistent with the provisions of this chapter."

I am accordingly of the opinion that section 22 is to be construed as an assumption by the Commonwealth of the right to regulate the sale by hawkers and pedlers, in any city or town mentioned in the license, of any fish, fruits, vegetables or other goods, wares or merchandise, the sale of which is not prohibited by law; and that while the aldermen or selectmen may license the sale of fish, fruit and vegetables within their respective ter-

ritories, under the authority conferred by section 17, they have no legal right or power to prohibit the sale of said articles therein by hawkers and peddlers duly licensed by the director under section 22, regardless of whether a local license has or has not been granted therefor.

---

COMMONWEALTH — BACK BAY LANDS — ENFORCEMENT OF RESTRICTIONS.

Even though the Commonwealth has sold all of its lands in the Back Bay (Boston), it may, in its sovereign capacity, enforce restrictions imposed by it in the deeds conveying such lands.

Under G. L., c. 91, § 37, grantees of the Commonwealth may enforce in equity, in the manner and under the conditions defined in that section, restrictions imposed upon lands in the Back Bay by the Commonwealth.

Unless a public interest in enforcing such restrictions is disclosed, the Commonwealth should leave its grantees to the remedy provided by G. L., c. 91, § 37.

To the Commissioner of  
Public Works.  
1922  
August 9.

You submit certain correspondence from which it appears that certain real estate owners in the Back Bay hold under deeds from the Commonwealth to them or their predecessors in title, which deeds impose certain restrictions upon the use of said premises and reserve a right to the Commonwealth to enter upon the premises, and, at the expense of the party at fault, to remove or alter any building or portion thereof which may be erected in violation of the restrictions. Certain other owners who hold under similar deeds from the Commonwealth to them or their predecessors are proposing to erect private garages upon their lots. It appears that the Commonwealth has sold all its lands in the Back Bay area. You inquire whether the erection of said garages is in violation of the restrictions imposed by said deeds from the Commonwealth, and if so, what your duty is under G. L., c. 91, § 37, which provides:—

If the commonwealth has the right under stipulations in a deed given in its name to enter upon premises and, at the expense of the party at fault, to remove or alter a building, any of its grantees under similar deeds, their heirs, legal representatives or assigns may institute proceedings in equity to compel the division to enforce such stipulations.

When the Back Bay lands were laid out by the Commonwealth it imposed certain restrictions as a part of the scheme of development. Even though it has disposed of all its lands, it may still enforce these restrictions in its sovereign capacity by an information in equity in the name of the Attorney General. *Attorney General v. Williams*, 140 Mass. 329; *Attorney General v. Gardiner*, 117 Mass. 492. On the other hand, the several grantees of the Commonwealth have a private remedy, as between themselves, by a proceeding under G. L., c. 91, § 37, to which the Commonwealth, by the Division of Waterways and Public Lands of the Department of Public Works, is a party, because the Commonwealth holds the restrictions in trust for the benefit of all its grantees. *Attorney General v. Williams*, 140 Mass. 329, 331.

The question whether the Commonwealth should proceed by an information in the name of the Attorney General or should leave its grantees to assert such rights as they may have in the manner provided in G. L., c. 91, § 37, depends primarily upon whether a public or a private interest is involved. Litigation necessarily involves risk, burden and expense. Public money cannot be spent for a private purpose. *Whittaker v. Salem*, 216 Mass. 483. It ought not to be spent for a purpose nominally public and in fact private. To bring an information in the name of the Attorney General in order to enforce these restrictions against one grantee for the private benefit of another grantee would in effect be an expenditure of public money for a private purpose. In such a case the risk, burden and expense of the controversy should fall upon the party who is in effect asserting his private right. Unless, therefore, a public interest is disclosed, the question whether or not these restrictions have been violated may properly be left to a proceeding under G. L., c. 91, § 37. *Lawrence v. Smith*, 201 Mass. 214.

Your inquiry and the correspondence attached do not disclose that any interest of the Commonwealth is involved. It appears that the Commonwealth has sold all its lands in the Back Bay area. Certain grantees of the Commonwealth or their successors in title object to the erection of private garages

upon the lands of other grantees of the Commonwealth or their successors in title. The fact that the controversy arises under restrictions imposed by the Commonwealth does not necessarily give to it a public character. See *Lawrence v. Smith*, 201 Mass. 214. It does not appear to differ in any practical respect from a similar question arising under restrictions imposed by a private grantor. See *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217. Under these circumstances, I perceive no reason why the Commonwealth should assume the risk and expense of litigation designed to determine this question for the benefit of certain of its grantees as against other grantees. Even if it be a trustee for the benefit of all its grantees, no reason appears why it should take sides at the expense of the general taxpayer as between its beneficiaries. In my opinion, the parties should be left to their remedy under G. L., c. 91, § 37.

That proceeding, if brought, will determine the question. It is therefore unnecessary to decide whether the erection of such garages does or does not violate the restrictions in question. In my opinion, your department should await such action as the objectors may take under G. L., c. 91, § 37.

---

LICENSE — PERMIT TO STORE GASOLINE — PERMIT TO ERECT A GARAGE — FIRE MARSHAL — STREET COMMISSIONERS OF BOSTON.

The authority vested in the Fire Marshal by G. L., c. 148, §§ 30, 31 and 45 (formerly St. 1914, c. 795), to issue permits for the storage of gasoline is entirely distinct from the authority vested in the street commissioners of Boston by St. 1913, c. 577, as amended, to issue permits for the erection of garages; and the authority so vested in the Fire Marshal does not depend upon the issuance of a permit to erect a garage, and is not affected by St. 1922, c. 316.

You state, in substance, the following facts: —

Acting under St. 1913, c. 577, as amended by St. 1914, c. 119, the street commissioners of the city of Boston, on Sept. 13, 1921, issued a permit to a certain corporation to erect a garage in Charlestown on land bounded on three sides by Tremont, Edgeworth and Ferrin streets. At the same time the street commissioners, acting under authority delegated by the Fire Marshal under G. L., c. 148, §§ 30, 31 and 45,



issued a permit to store gasoline on said premises, from which an appeal to the Fire Marshal was taken under said section 45. On Dec. 19, 1921, the street commissioners, without hearing, voted to revoke both permits. On June 29, 1922, the Supreme Judicial Court, in *General Baking Co. v. O'Callaghan*, held that the permit to erect the garage had not been effectively revoked. By St. 1922, c. 316, which was approved on April 18, 1922, and was accepted by the city of Boston on May 1, 1922, the Legislature amended St. 1914, c. 119, so as to prohibit the issue of a permit for the erection, maintenance or use of any building as a garage for more than four cars on the same street as, and within 500 feet of any building occupied as, a public or private school. Section 2 of said act excepted garages "maintained" at the time of the passage of this act. You state that upon Edgeworth Street there is located a school within 100 feet of the wall of the proposed garage, but that the garage will not have an entrance on Edgeworth Street.

On these facts you inquire (1) whether St. 1922, c. 316, has affected the validity of the license to *erect the garage* previously granted by the street commissioners; and (2) whether the State Fire Marshal has power to act upon the appeal from the issue of the permit to *store gasoline*. I shall deal with these questions in reverse order.

1. Under St. 1914, c. 795, since re-enacted as G. L., c. 148, §§ 30, 31 and 45, power to grant permits for the *storage of gasoline* is vested in the Fire Marshal. This authority is entirely distinct from the power to issue permits for the *erection of garages*, which is vested in the street commissioners of Boston by St. 1913, c. 577, as amended by St. 1914, c. 119, and St. 1922, c. 316. V Op. Atty.-Gen. 718; VI Op. Atty.-Gen. 329. The issue by the street commissioners of a permit to erect a garage is not in law a condition precedent to the issue by the Fire Marshal of a permit to store gasoline. The permit to store gasoline may be issued for a purpose wholly unconnected with a garage. St. 1922, c. 316, does not amend or affect the power of the Fire Marshal to issue permits for the storage of gasoline. On the contrary, it expressly amends the statute under which the street commissioners issue permits for the erection of garages. It follows that the power of the Fire Marshal to hear and determine an appeal from the issue of the permit to store gasoline is not affected by St. 1922, c. 316.

2. Your inquiry as to the effect of St. 1922, c. 316, upon the permit to erect the garage previously issued by the street commissioners presents a legal question which you need not consider. St. 1913, c. 577, as amended, is distinctly a home rule measure, and in its enforcement the State officials have no concern. V Op. Atty.-Gen. 718. It is therefore unnecessary to answer this question.

---

CONSTITUTIONAL LAW — FUEL ADMINISTRATOR — POWER TO FIX  
PRICE OF FUEL IN TIME OF EMERGENCY — POWER OF GOVERNOR TO DETERMINE WHETHER EMERGENCY EXISTS.

Those portions of Gen. St. 1917, c. 342, relating to the appointment, duties, authority and powers of a fuel administrator, which are revived and made operative until April 1, 1923, by St. 1922, c. 544, confer power upon the Governor, "when in his opinion the public exigency so requires," to fix reasonable prices for fuel during the period of the emergency, and to delegate power to such persons as he may select, to do in his name whatever may be necessary to carry said powers into effect; and as so construed the statute is not unconstitutional.

Under the police power and the authority conferred by Mass. Const. Amend. XLVII, the General Court has power to provide for distribution of fuel at reasonable rates in time of public emergency, and to that end may authorize the Governor to determine whether such emergency exists, to fix reasonable prices for fuel during the continuance of the emergency, and to delegate to persons selected by him power to do in his name whatever may be necessary to carry said powers into effect.

You inquire (1) whether St. 1922, c. 544, is constitutional; (2) whether, if a Fuel Administrator were appointed under it, such Fuel Administrator would have power to fix the price of coal sold within the Commonwealth.

St. 1922, c. 544, is as follows:—

AN ACT AUTHORIZING THE APPOINTMENT BY THE GOVERNOR OF A FUEL  
ADMINISTRATOR.

*Whereas*, In order to secure an adequate supply of fuel for the citizens of Massachusetts in the event of an emergency, the services of a fuel administrator are necessary, and whereas, the provisions of the Commonwealth Defence Act of nineteen hundred and seventeen have become inoperative, therefore this act is hereby declared to be an emergency law, necessary for the immediate preservation of the public health and convenience.

To the  
Governor.  
1922  
August 21.

*Be it enacted, etc., as follows:*

The provisions of the Commonwealth Defence Act of 1917, being chapter three hundred and forty-two of the General Acts of nineteen hundred and seventeen, relating to the appointment, duties, authority and powers of a fuel administrator, are hereby revived and made operative until April first, nineteen hundred and twenty-three.

Gen. St. 1917, c. 342, contains the following provisions:—

SECTION 6. Whenever the governor shall believe it necessary or expedient for the purpose of better securing the public safety or the defence or welfare of the commonwealth, he may with the approval of the council take possession: (a) Of any land or buildings, machinery or equipment. (b) Of any horses, vehicles, motor vehicles, aeroplanes, ships, boats, or any other means of conveyance, rolling stock of steam or electric railroads or of street railways. (c) Of any cattle, poultry and any provisions for man or beast, and any fuel, gasoline or other means of propulsion which may be necessary or convenient for the use of the military or naval forces of the commonwealth or of the United States, or for the better protection or welfare of the commonwealth or its inhabitants. He may use and employ all property so taken possession of for the service of the commonwealth or of the United States, for such times and in such manner as he shall deem for the interests of the commonwealth or its inhabitants, and may in particular, when in his opinion the public exigency so requires, sell or distribute gratuitously to or among any or all of the inhabitants of the commonwealth anything taken under clause (c) of this section and may fix minimum and maximum prices therefor. He shall, with the approval of the council, award reasonable compensation to the owners of any property of which he may take possession under the provisions of this section and for its use, and for any injury thereto or destruction thereof caused by such use.

SECTION 7. Any owner of property of which possession has been taken under section six of this act, to whom no award has been made, or who is dissatisfied with the amount awarded him by the governor and council as compensation, may file a petition in the superior court to have the amount to which he is entitled by way of damages determined. Either the petitioner or the commonwealth shall have the right to have the amount of such damages fixed by a jury in the said court upon making claim in such manner as the court may have provided or shall provide by its rules.

SECTION 8. The petition provided for by section seven of this act may be filed either in the county in which the petitioner lives or has

his usual place of business, if the petitioner either lives or has a usual place of business in the commonwealth, or otherwise in the county of Suffolk. The petition shall be brought within one year after the date when possession of the property was taken under section six of this act, and except as is otherwise provided herein, shall be heard and determined in accordance with the provisions of chapter two hundred and one of the Revised Laws and all acts in amendment thereof or in addition thereto.

SECTION 9. Upon such petition full damages shall be awarded whether or not the same had fully accrued at the time of the filing of the petition, and, whenever necessary, the hearing on the petition shall on the application of either the petitioner or the commonwealth be continued for assessment of damages until the same are fully ascertained.

SECTION 12. Whenever the governor shall determine that circumstances warrant the exercise by him of all or any of the powers conferred on him by this act, he may, with the approval of the council, by writings signed by him, confer upon such officials of the commonwealth or any political division thereof, or such officer of the military or naval forces of the commonwealth, or such other person or persons as he may select, full power and authority to do in his name whatever may be necessary to carry the said powers into effect. He may revoke such written authority at any time.

On Oct. 6, 1920, the Governor, acting under the authority of Gen. St. 1917, c. 342, as continued to Jan. 1, 1922, by St. 1920, c. 610 (an act substantially similar to St. 1922, c. 544), appointed a Fuel Administrator, to hold said office until Jan. 1, 1922. It thus appears that the powers revived and made operative by St. 1922, c. 544, have been exercised in this Commonwealth from Oct. 6, 1920, to Jan. 1, 1922.

1. There can be little, if any question as to the power of the Legislature to revive and continue in force a statute previously enacted. St. 1922, c. 544, revives and continues certain powers created by Gen. St. 1917, c. 342. It follows that the questions which underlie your inquiry are (1) whether the portion of Gen. St. 1917, c. 342, so revived and continued is constitutional, and (2) whether it confers power to fix the price of coal sold within the Commonwealth.

2. Gen. St. 1917, c. 342, § 6, expressly provides that —

Whenever the governor shall believe it necessary or expedient for the purpose of better securing the public safety . . . or welfare of the commonwealth, he may with the approval of the council take possession . . . of any fuel . . . which may be necessary or convenient . . . for the better protection or welfare of the commonwealth or its inhabitants. He may, . . . when in his opinion the public exigency so requires . . . fix minimum and maximum prices therefor.

By St. 1922, c. 544, these powers and others are revived and made operative. This act was declared an emergency measure by the preamble, which states that it was passed "in order to secure an adequate supply of fuel in the event of an emergency." In my opinion, the two acts when construed together authorize the Governor, during the period indicated, to fix minimum and maximum prices for fuel (which includes coal) "when in his opinion the public exigency so requires." The remaining question is whether the act as so construed is constitutional.

3. Mass. Const. Amend. XLVII provides: —

The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessities of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine.

In addition to the powers specifically conferred by this amendment, the General Court has the broad powers conferred by Mass. Const., pt. 2d, c. I, § I, art. IV, which are for convenience called the police power. While the courts have not made an exhaustive and complete definition of the police power, it is in general held to include legislation reasonably adapted to promote the safety, health, morals, and, in a limited sense, the welfare of the people. *Commonwealth v. Libbey*, 216 Mass. 356, 358; *Commonwealth v. Beaulieu*, 213 Mass. 138, 141; *Commonwealth v. Strauss*, 191 Mass. 545, 550; *Chicago & Alton R.R. v. Tranbarger*, 238 U. S. 69, 77. Ordinarily, this power does not extend to regulating the price of property which is not affected with a public use. V Op. Atty.-Gen. 484; VI Op. Atty.-Gen.

445. On the other hand, a change in circumstances may carry a business previously private across the line into the classes of business which are affected with a public use. *Mum v. Illinois*, 94 U. S. 113; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; V Op. Atty.-Gen. 484. Even an emergency of a continuing though not necessarily permanent character — such as a shortage of houses — may temporarily affect a business ordinarily private with a public use, and thereby subject the rates charged therein to an appropriate measure of public regulation. *Marcus Brown Holding Co., Inc. v. Feldman*, 256 U. S. 170; *Edgar A. Levy Leasing Co., Inc. v. Siegel*, 258 U. S. 242. Moreover, a finding and declaration by the Legislature that such an emergency exists or continues will not be lightly disturbed. *Marcus Brown Holding Co. v. Feldman*, *supra*; *Edgar A. Levy Leasing Co., Inc. v. Siegel*, *supra*; *Block v. Hirsh*, 256 U. S. 135. As Amendment XLVII declares in express words that “the maintenance and distribution at reasonable rates . . . during time of . . . public exigency, emergency or distress of a sufficient supply of food and other common necessities of life are public functions . . .” I am of opinion that if such exigency, emergency or distress is determined to exist with respect to fuel, which is manifestly a common necessary of life in this State, the power to fix the price of fuel comes into existence and may be exerted in the manner prescribed by the General Court. *Jones v. Portland*, 245 U. S. 217; V Op. Atty.-Gen. 331. In view of Amendment XLVII, the *Opinions of the Justices* in 155 Mass. 598 and 182 Mass. 605, advising that the Legislature has no power to authorize cities and towns to buy coal and wood for resale to their inhabitants, no longer apply.

The question then arises whether the Legislature may authorize the Governor to determine whether the emergency exists, so as to put into operation the emergency powers conferred by Gen. St. 1917, c. 342, as revived by St. 1922, c. 544. This question is, in essence, whether the act is an unconstitutional delegation of legislative power. The true distinction is between a delegation of power to make the law, and conferring a discretion as to its execution to be exercised under and in pursuance of

the law. *Field v. Clark*, 143 U. S. 649, 692; *Cincinnati, Wilmington, &c. R.R. v. Commissioners*, 1 Ohio St. 77, 88. In the present case the power to fix coal prices, conferred by the law already exists. It comes into operation when and if the Governor determines that the emergency exists. The power to determine whether the emergency exists does not differ materially from the power to fix rates, which latter power, though it may be exerted by the Legislature, may be conferred upon the executive or upon a commission. *Martin v. Witherspoon*, 135 Mass. 175, 178; *Brown v. Boston & Maine R.R.*, 233 Mass. 502, 510; *Minnesota Rates Cases*, 230 U. S. 352. Nor is the authority vested in the Governor by section 12 to delegate the power to fix prices open to constitutional objection. As the Legislature might have directly conferred it upon the nominee appointed by the Governor, with the approval of the Council, it may confer power to select that nominee. In my opinion, the act is not an unconstitutional delegation of legislative power. VI Op. Atty.-Gen. 179.

The final question is whether the act confers too broad a power to regulate prices. It is well settled that the constitutional power to fix prices is not unlimited. The price must be reasonable, not confiscatory. *Denver v. Denver Union Water Co.*, 246 U. S. 178. V Op. Atty.-Gen. 484; *ibid.* 507. The present act confers power to "fix minimum and maximum prices." It does not, in express words, require that such prices shall be reasonable. The act must, however, be construed in connection with Amendment XLVII, which is expressly confined to "reasonable rates," and in connection with the police power, which is subject to a similar restriction. It is well settled that if an act is susceptible of two constructions, one constitutional and one unconstitutional, it will be presumed that the Legislature intended the constitutional construction. *County of Berkshire v. Cande*, 222 Mass. 87, 90; *Salisbury Land and Improvement Co. v. Commonwealth*, 215 Mass. 371, 373. This is simply one aspect of the broader principle that every rational intendment is made in favor of constitutionality. *Perkins v. Westwood*, 226 Mass. 268. In view of the well-settled limitation upon the power to fix prices, it is not to be

presumed that the Legislature intended to authorize either the Governor or his nominee to fix prices which would be unreasonable or confiscatory. I am therefore of opinion that the act must be construed in relation to the scope of the power vested in the Legislature; that, as so construed, it confers power to fix only reasonable rates or prices; and that, as so construed, it is constitutional.

---

OFFICERS — WOMEN — ELIGIBILITY TO BE APPOINTED STANDING MASTERS IN CHANCERY.

A standing master in chancery is not a "judicial officer," within the meaning of Mass. Const., pt. 2d, c. III, art. I.

Under St. 1922, c. 371, a woman is eligible to appointment as a standing master in chancery.

To the  
Governor.  
1922  
August 22.

You have inquired whether a woman may be appointed a master in chancery. I assume that your inquiry relates to the standing masters in chancery for which G. L., c. 221, § 53, provides, rather than to the special masters appointed from time to time by the court in specific cases, under the authority conferred by G. L., c. 221, § 55.

Originally, masters in chancery acted as assistants of the chancellor. *Eastern Bridge & Structural Co. v. Worcester Auditorium Co.*, 216 Mass. 426, 430. One of my predecessors has advised that a standing master is not a "judge of any court in this Commonwealth," within the meaning of Mass. Const. Amend. VIII, which forbids such a judge to have, at the same time, a seat in the Senate or House of Representatives. IV Op. Atty.-Gen. 457. The first provision for appointment of standing masters by the Governor was made by St. 1826, c. 109, § 4, which authorized such appointment for a term of four years. This is a legislative determination that standing masters are not "judicial officers," within the meaning of Mass. Const., pt. 2d, c. III, art I, since such officers hold their offices during good behavior. As this legislative construction of the words "judicial officers" has stood, apparently unquestioned, for nearly a century, it is entitled to weight in determining the meaning of that provision.



It is not necessary to determine whether the eligibility of women to appointment as standing masters in chancery depends in any respect upon the Constitution. In *Opinion of the Justices*, 240 Mass. 601, the justices advised that by reason of the adoption of the Nineteenth Amendment to the Constitution of the United States "women are not excluded by the Constitution [of Massachusetts] from any elective or appointive civil office." In view of this opinion, I have already advised you that women are now eligible to appointment as justices of the peace — an office for which Mass. Const., pt. 2d, c. III, art. III, expressly provides. VI Op. Atty.-Gen. 527. That opinion disposes of any constitutional aspect of your inquiry.

St. 1922, c. 371, § 1, approved May 2, 1922, provides, in part: —

Women shall be eligible to election or appointment to all state offices, positions, appointments and employments. . . .

Section 2 makes similar provision in respect to "county offices, positions, appointments and employments." That act has now taken effect. In so far as the eligibility of women to the office of standing master in chancery depends upon statute, these provisions clearly make them eligible, whether the office be a State or a county office. See III Op. Atty.-Gen. 186.

I am therefore of opinion that women are now eligible to appointment as standing masters in chancery.

CERTIFIED PUBLIC ACCOUNTANT — RIGHT OF CERTIFIED PUBLIC  
ACCOUNTANT REGISTERED IN ANOTHER STATE TO HOLD  
HIMSELF OUT AS SUCH IN THIS COMMONWEALTH.

A person registered as a certified public accountant in another State is forbidden, by G. L., c. 93, § 39, as amended by St. 1922, c. 395, § 2, to designate himself as a certified public accountant, either with or without letters indicating the State in which he is registered, if he is not registered in this Commonwealth under G. L., c. 93, § 37.

A foreign certified public accountant is not forbidden to do business as such in Massachusetts if he does not designate or hold himself out as a certified public accountant, in violation of G. L., c. 93, § 39, as amended by St. 1922, c. 395, § 2.

To the Com-  
missioner  
of Banks.  
1922.  
August 28.

You ask my opinion upon the following question: —

Has a person, registered as a certified public accountant under the laws of any State other than the Commonwealth of Massachusetts, but not so registered in Massachusetts, the legal right to advertise or otherwise designate himself as a certified public accountant on his stationery heading or on the doors of his business office, or to solicit or receive business as a certified public accountant in any way in the Commonwealth of Massachusetts, even though he may affix after the letters "C. P. A." the name of the State from which he holds a certificate as a certified public accountant?

G. L., c. 93, §§ 35-39, as amended, provide a comprehensive scheme for licensing certified public accountants in this State. Both character and professional ability are conditions not only of receiving but also of retaining the certificate. These are to be ascertained by the Commissioner in the manner prescribed in section 36 and in section 37, as amended by St. 1922, c. 395, § 1. If the accountant is registered under section 37, he may, if his certificate is in force, style himself "Certified Public Accountant." (§ 38.) The plain purpose of these provisions is to protect the public from public accountants who are unscrupulous or unfit, by subjecting both the character and the qualifications of the applicant to scrutiny by an official of this Commonwealth.

Section 39 formerly provided as follows: —

Any person who falsely represents himself to be a public accountant registered under section thirty-seven shall be punished by a fine of not

more than five hundred dollars or by imprisonment for not more than six months, or both.

By St. 1922, c. 395, § 2, it was amended so as to read as follows:—

No person not registered under section thirty-seven shall designate himself or hold himself out as a certified public accountant. No partnership unless all of its members are registered under section thirty-seven, and no corporation, shall use the words "certified public accountant" in describing the partnership or corporation or the business thereof; provided, that any partnership or corporation may represent that a specified person registered under section thirty-seven is a member of such partnership or is in the service of such partnership or corporation. Any violation of this section shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than six months or both.

The change is significant. Formerly, section 39 provided punishment for one who falsely represented that he was registered under section 37. It may be assumed, without deciding, that one who described himself as registered in another State did not violate this provision. Section 39, as amended, now punishes one who designates himself or holds himself out as a certified public accountant *unless* he is registered under section 37. It seems plain that one who designates himself or holds himself out as a certified public accountant does not cease to do so because he adds words or letters which sufficiently indicate that he is registered in another State. To designate himself or hold himself out as a certified public accountant of that State manifestly embraces and includes designating himself or holding himself out as a certified public accountant. He therefore commits the offence made punishable by section 39, as amended, unless he is registered under section 37.

Your inquiry whether a foreign certified public accountant who "solicits or receives business in any way in Massachusetts" commits an offence under section 39, as amended, presents questions of fact upon which it is not my province to pass. The statute does not forbid a certified public accountant from another State to receive or do business here if he obtains and does that

business without violating section 37, as amended. It does forbid him to designate himself or hold himself out as a certified public accountant in this State if he is not registered under section 37. In this aspect the answer to your inquiry depends upon the facts of each case.

---

ILLEGITIMATE CHILD — SUPPORT FROM LABOR OF FATHER IN THE MASSACHUSETTS REFORMATORY.

Where the father of an illegitimate child is committed to the Massachusetts Reformatory on a complaint for bastardy, the child and its mother, when in needy circumstances, may claim the benefit of G. L., c. 273, § 9.

You ask my opinion whether, in the case of a prisoner committed to the Massachusetts Reformatory on a complaint for bastardy, under G. L., c. 273, § 11, the reformatory should pay over to the probation officer the sum of 50 cents per day as provided by G. L., c. 273, § 9. You state as a fact that the court has found that the mother and child are in needy circumstances.

G. L., c. 273, § 9, is as follows: —

If the court imposing a sentence under section one, finds the wife or child, as the case may be, of the defendant to be in destitute or needy circumstances, the superintendent, master or keeper of the reformatory or penal institution where he is confined upon such sentence shall pay over to the probation officer of such court at the end of each week, out of the annual appropriation for the maintenance of such reformatory or penal institution, a sum equal to fifty cents for each day's hard labor performed by the person so confined, and shall state the name of the person for whose labor the payment is made. The probation officer shall pay over said sum in the manner provided in section five for the payments therein provided for.

G. L., c. 273, § 16, is as follows: —

After the adjudication and the birth of the child, in proceedings under section eleven, or after conviction, in proceedings under the preceding section, the defendant shall be subject upon the original complaint or indictment in such proceedings to penalties and orders for payments similar to those provided by the first ten sections of this chapter; and the practice established thereby shall, so far as applicable, apply to any proceedings under sections eleven to nineteen, inclusive.

G. L., c. 273, § 15, is as follows: —

Any father of an illegitimate child, whether begotten within or without the commonwealth, who neglects or refuses to contribute reasonably to its support and maintenance, shall be guilty of a misdemeanor. If there has been any final adjudication of the paternity of the child, such adjudication shall be conclusive on all persons in proceedings under this section; otherwise, the question of paternity shall be determined in proceedings hereunder. The duty to contribute reasonably to the support of such child shall continue during its minority.

The question is not free from doubt in that section 16 says: "After the *adjudication* and the *birth* of the child, in proceedings under section eleven, or after *conviction*, in proceedings under the preceding section, the *defendant* shall be subject upon the original complaint or indictment in such proceedings to penalties and orders for payments similar to those provided by the first ten sections of this chapter." It does not refer to section 9 or make specific provision for payment by the superintendent, master or keeper of the reformatory or penal institution. However, section 16 goes on to say: "and the practice established thereby shall, so far as applicable, apply to any proceedings under sections eleven to nineteen, inclusive." It may, therefore, be fairly said that it was the intent of the Legislature that the mother and the illegitimate child, when in needy circumstances, should have the benefit of section 9, and I so advise you.

---

PUBLIC SCHOOL — FEDERAL RESERVATION — STATE REIMBURSEMENT — TUITION.

The town of Harvard is not required by St. 1921, c. 296, to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens. In this respect there can be no distinction between a high school and an elementary school.

You request my opinion on the following questions: —

1. Is the town of Harvard required to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens?

To the Commissioner of  
Education.  
1922  
August 30.

2. Is the town of Harvard entitled to receive State reimbursement for expenditures for high school tuition of such pupils?

3. Is the town of Harvard under legal obligation to provide elementary school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens?

1. By the provisions of St. 1921, c. 456, the consent of the Commonwealth of Massachusetts was granted to the United States of America to acquire by purchase or condemnation a certain tract of land situated in the townships of Shirley and Ayer, county of Middlesex, and the townships of Lancaster and Harvard, county of Worcester, known as Camp Devens. Section 2 of said chapter provides as follows: —

Jurisdiction over the said land is hereby granted and ceded to the United States of America, but upon the express condition that the commonwealth of Massachusetts shall retain concurrent jurisdiction with the United States of America in and over the land so acquired, in so far that all civil processes, and such criminal processes as may issue under the authority of this commonwealth against any person or persons charged with crimes, may be executed thereon in the same manner as though this consent and cession had not been granted; provided, that the exclusive jurisdiction shall revert to and revest in the commonwealth whenever the area so acquired shall cease to be used for purposes of national defence.

St. 1921, c. 296, § 1, provides as follows: —

Chapter seventy-one of the General Laws is hereby amended by striking out section six and inserting in place thereof the following: — *Section 6.* If a town of less than five hundred families or householders, according to such census, does not maintain a public high school offering four years of instruction, it shall pay the tuition of any pupil who resides therein and obtains from its school committee a certificate to attend a high school of another town included in the list of high schools approved for this purpose by the department. Such a town shall also, through its school committee, provide, when necessary, for the transportation of such a pupil at cost up to forty cents for each day of actual attendance, and it may expend more than said amount. The department shall approve the high schools which may be attended by such pupils, and it may, for this purpose, approve a public high school in an adjoining state. Whenever, in the judgment of the department, it is expedient

that such a pupil should board in the town of attendance the town of residence may, through its school committee, pay toward such board, in lieu of transportation, such sum as the said committee may fix.

If the school committee refuses to issue a certificate as aforesaid, application may be made to the department, which, if it finds that the educational needs of the pupil in question are not reasonably provided for, may issue a certificate having the same force and effect as if issued by the said committee. The application shall be filed with the superintendent of schools of the town of residence, and by him transmitted forthwith to the department with a report of the facts relative thereto.

Practically the same question raised in your first inquiry was presented to the justices of the Supreme Court by the House of Representatives in 1841, and their answer was as follows:—

We are of opinion that persons residing on lands purchased by, or ceded to, the United States for navy yards, forts and arsenals, where there is no other reservation of jurisdiction to the State, than that above mentioned (referring to the right to serve civil and criminal processes), are not entitled to the benefits of the common schools for their children, in the towns in which such lands are situated. — *Opinion of the Justices*, 1 Met. 580, 583.

This opinion is cited with approval by the Supreme Court of the United States in the case of *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 525, where the subject-matter is fully considered. In that case it was said by Mr. Justice Field:—

Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits.

See also *Benson v. United States*, 146 U. S. 325; *Chappell v. United States*, 160 U. S. 499; *Palmer v. Barrett*, 162 U. S. 399.

The question was also considered by the Supreme Judicial Court of Massachusetts in the case of *Newcomb v. Inhabitants of Rockport*, 183 Mass. 74. In that case the court used the following language (pages 78 and 79): —

Conceding, for the purposes of the case, that the United States has not exclusive jurisdiction over the islands in question, it by no means follows that the prayer of the petitioners should be granted. The petitioners contend that the town ought either to build a schoolhouse on Thatcher's Island or to provide suitable transportation for the scholars. We are of opinion that the town is not bound to do either. It is agreed that on the mainland the town of Rockport provides and maintains a sufficient number of schoolhouses, properly furnished and conveniently located for the accommodation of all children therein who are entitled to attend the public schools. This being so, we are of opinion that the town has done its whole duty so far as the building of schoolhouses is concerned. If a few persons happen to live on a small island, it cannot be expected that the town within the territorial limits of which the island is, is bound to build and maintain a schoolhouse for their benefit, especially where, as here, it does not appear that the town would have a right to build a schoolhouse, without authority derived from the Commonwealth, which owned the islands when the grants were made to the United States, and which, for aught that appears, may own them now.

See also *Davis v. Inhabitants of Chilmark*, 199 Mass. 112; V. Op. Atty.-Gen. 435.

I am accordingly of the opinion that the town of Harvard is not required by St. 1921, c. 296, to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens.

2. G. L., c. 71, §§ 8 and 9, are as follows: —

SECTION 8. If the valuation of a town of less than five hundred families or householders for its fiscal year preceding any school year does not exceed five hundred thousand dollars, the commonwealth shall reimburse it, subject to the following section, for the whole amount paid by it for such school year for tuition under section six; if said valuation exceeds five hundred thousand dollars but not one million dollars, the reimbursement shall be for three fourths of said amount; and if said



valuation exceeds one million dollars, the reimbursement shall be one half of said amount.

SECTION 9. No town shall receive any reimbursement for a school year under sections five and eight if its valuation for its fiscal year preceding said school year, divided by the net average membership of its public schools as defined by section five of chapter seventy for the school year preceding the year for which reimbursement is claimed, exceeds the corresponding quotient for the commonwealth.

The provision for reimbursement to towns for amounts expended from the treasury of the Commonwealth for tuition, in my opinion, refers to sums which the towns are compelled to pay. "If the town sees fit to expend money for tuition which it is not compelled to, it cannot ask reimbursement therefor from the treasury of the Commonwealth." See II Op. Atty.-Gen. 98.

3. G. L., c. 76, § 5, provides as follows:—

Every child shall have a right to attend the public schools of the town where he actually resides, subject to the following section, and to such reasonable regulations as to numbers and qualifications of pupils to be admitted to the respective schools and as to other school matters as the school committee shall from time to time prescribe. No child shall be excluded from a public school of any town on account of race, color or religion.

G. L., c. 71, § 68, provides as follows:—

Every town shall provide and maintain a sufficient number of school-houses, properly furnished and conveniently situated for the accommodation of all children therein entitled to attend the public schools. If the distance between a child's residence and the school he is entitled to attend exceeds two miles, and the school committee declines to furnish transportation, the department, upon appeal of the parent or guardian of the child, may require the town to furnish the same for a part or for all of the distance. If said distance exceeds three miles, and the distance between the child's residence and a school in an adjoining town giving substantially equivalent instruction is less than three miles, and the school committee declines to pay for tuition in such nearer school, and for transportation in case the distance thereto exceeds two miles, the department, upon like appeal, may require the town of residence to pay for tuition in, and if necessary provide for transportation for a part or for the whole of said distance to, such nearer school. The school

committee, unless the town otherwise directs, shall have general charge and superintendence of the schoolhouses, shall keep them in good order, and shall, at the expense of the town, procure a suitable place for the schools, if there is no schoolhouse, and provide fuel and all other things necessary for the comfort of the pupils.

I am of the opinion that the same general principles of law laid down in the cases above cited, in answer to your first and second questions, must govern the answer to your third question, as in this respect there can be no distinction between a high school and an elementary school. I am accordingly of the opinion that the town of Harvard is under no legal obligation to provide elementary school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens.

---

CIVIL SERVICE — VETERANS' PREFERENCE — SPECIAL PREFERENCE TO DISABLED VETERANS — ESTABLISHED LISTS.

The special preference accorded to disabled veterans by St. 1922, c. 463, applies to disabled veterans upon eligible lists already established.

You inquire whether St. 1922, c. 463, applies to eligible lists established prior to Aug. 21, 1922, the date when said chapter took effect. St. 1922, c. 463, amends G. L., c. 31, § 23, by striking out said section and inserting in place thereof a new section, of which the following are the provisions material to the present inquiry:—

The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the order of their respective standing above the names of all other applicants, except that any such veterans who are disabled and who present a certificate of any physician, approved by the board, that their disability is not such as to prevent the efficient performance of the duties of the position to which they are eligible and who shall present proof satisfactory to the commissioner that such disability was received in line of duty in the military or naval service of the United States in time of war or insurrection and is a continuing disability shall be placed ahead of all other veterans on such eligible lists in the order of their respective standing. . . . A disabled veteran shall be appointed and employed in preference to all other persons, including veterans.

To the Commissioner of  
Civil Service.  
1922  
August 31.

In answer to oral inquiries your department informs me that eligible lists are from time to time established as a result of competitive examinations held for that purpose; that under the regulations adopted by your department an eligible list remains in force for not exceeding two years from the date of establishment; that such lists are divided into two groups, consisting (1) of veterans in the order of their examination rank; and (2) of civilians in the order of their examination rank; that in some cases, where the list is a very active one, competitive examinations are held once a year or oftener; that in such a case the successful applicants are placed upon the proper eligible list (with due regard for veterans' preference) in the positions to which their respective marks entitle them, so that the head of an existing list may be displaced by an applicant who obtains a higher mark in a subsequent examination; that a person already upon a list may compete in a subsequent examination, taking such rank as he may achieve in that examination; that for these, and other reasons which need not be here enumerated, not only the absolute but also the relative rank upon a list already established is subject to change; and that from the head of such established lists the proper number of names is certified in response to requests from time to time received.

Assuming that St. 1922, c. 463, is constitutional (see *Brown v. Russell*, 166 Mass. 14; *Opinion of the Justices*, 166 Mass. 589), it seems clear that if an examination should be held on or after Aug. 21, 1922, in connection with a list already established, and one who duly establishes that he is a disabled veteran, within the meaning of the act, should pass such examination, he would outrank all veterans not disabled and all civilians upon such established list, irrespective of his competitive mark, just as a veteran not disabled, passing such an examination under the law as it previously existed, would outrank civilians already on the established list, even though such civilians had higher competitive marks than he. In other words, a place upon an established list ensures neither absolute nor relative rank, but is, on the contrary, held in continuing competition not only with those who in subsequent examinations achieve better com-

petitive marks, but also with those to whom the Legislature accords a valid preference by law. I am therefore of opinion that the preference accorded to disabled veterans by St. 1922, c. 463, applies to any such veteran who, as a result of an examination held on or after Aug. 21, 1922, is placed upon an eligible list already established.

A somewhat more difficult question arises in connection with a disabled veteran already upon an eligible list, in connection with which no examination is held subsequent to the date when St. 1922, c. 463, took effect. If such an examination were held, such veteran could take it, and if he passed, would outrank all others except other disabled veterans who obtain a better mark than he. The fundamental question is the order in which those upon such eligible list shall be certified for employment. If the act had said "veterans who shall hereafter pass examinations," it would clearly not apply to those who had already passed when it took effect. If, on the other hand, it had said "veterans who pass or shall have passed examinations," it would as clearly apply to those already upon the eligible lists. It actually employs the words "veterans who pass examinations," which may be so construed as to describe either class.

I am not unmindful that a statute will not be held to be retroactive unless that intention is clearly expressed. *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329. But this principle seems inapplicable to a list as fluid in character as these eligible lists appear to be. If both the absolute and relative standing of an applicant may be affected by preferences flowing from an examination held subsequent to the creation of such list, I am unable to believe that it remains unaffected by preferences created by a subsequent statute, assuming that such preferences are otherwise valid. A different conclusion would make the preference conferred upon disabled veterans by St. 1922, c. 463, depend upon whether an examination shall or shall not be held in connection with the particular list upon which such veteran happens to be. I cannot believe that the Legislature intended such a discrimination as between disabled veterans. I am therefore of opinion that if a veteran shall establish,

in the manner prescribed by the act, that he is a disabled veteran, within the meaning of the act, he becomes entitled to the preference thereby accorded, assuming that said act is constitutional.

---

SALARIES OF OFFICERS AND EMPLOYEES OF THE COMMONWEALTH — CLASSIFICATION — METROPOLITAN DISTRICT COMMISSION.

The power granted to the commissioners of the Metropolitan District Commission, under G. L., c. 28, § 4, to fix the compensation of employees is subject to G. L., c. 30, §§ 45 and 46, providing that the salaries of all officers and employees holding offices and positions required to be classified, with certain exceptions, shall be fixed in accordance with the classification and specifications of the Supervisor of Administration.

The salaries of employees of the Metropolitan District Commission are not "salaries . . . regulated by law," within the excepting clause of G. L., c. 30, § 46.

You ask my opinion as to whether the Commission has authority to fix the rate of pay of laborers and other employees in its employ, or whether, on the contrary, its exercise of this authority is subject to the approval of the Supervisor of Administration and may be limited by him.

To the Metropolitan District Commission.  
1922  
September 12.

G. L., c. 28, § 4, granting certain powers to the commissioners of the Metropolitan District Commission, is as follows:—

The commissioners may appoint a secretary, engineering chiefs, a purchasing agent, engineers, inspectors, officers and members of the police force, one or more women as special police officers, clerks and such other officers and employees as the work of the commission may require, may assign them to divisions, transfer and remove them, and fix their compensation. The secretary and engineering chiefs shall be exempt from chapter thirty-one.

G. L., c. 30, §§ 45-50, provide for the classification of "all appointive offices and positions in the government of the commonwealth, except those in the judicial branch and those in the legislative branch other than the additional clerical and other assistants in the sergeant-at-arms' office" (G. L., c. 30, § 45). Section 46 is, in part, as follows:—

. . . The salaries of all officers and employees holding offices and positions required to be classified under said section, except those whose salaries are now or shall be otherwise regulated by law and those whose salaries are required by law to be fixed subject to the approval of the governor and council, shall be fixed in accordance with such classification and specifications.

Whether the Metropolitan District Commission is a part of the "government of the commonwealth," within the meaning of G. L., c. 30, § 45, so that appointive offices and positions under the Commission are required to be classified, might, in the absence of legislative enactment, be a question of considerable doubt. See Gen. St. 1919, c. 150. But the General Court has expressly provided that the power of the Commission to fix compensation of officers and employees is subject to the statute requiring classification. G. L., c. 28, § 4, is a re-enactment of Gen. St. 1919, c. 350, § 126, which contains the provision:—

The commissioners may also appoint a secretary and engineering chiefs, and, subject to the civil service law and rules, where they apply, appoint a purchasing agent, engineers, inspectors, officers and members of the police force, clerks and such other officers and employees as the work of the commission may require; may assign them to divisions, transfer and remove them, and, subject to the provisions of chapter two hundred and twenty-eight of the General Acts of nineteen hundred and eighteen, and to the approval of the governor and council, where that is required by law, fix the compensation of the said persons.

Gen. St. 1918, c. 228, is the act which appears in codified form in G. L., c. 30, §§ 45-50, providing, in section 1, for the classification of "all appointive offices and positions in the government of the commonwealth, except those in the judicial and legislative branches."

In G. L., c. 28, § 4, the provisos appearing in Gen. St. 1919, c. 350, § 126, are omitted; but it is a familiar principle of statutory interpretation that "verbal changes in the revision of a statute do not alter its meaning, and are construed as a continuation of pre-existing law in the absence of some accompanying report of revisers or other indication showing an express purpose to change the substance of the law." *Derinza's Case*,

229 Mass. 435, 442. See also *Wright v. Dressel*, 140 Mass. 147, 149; *Commonwealth v. Kozlowsky*, 238 Mass. 379, 387; G. L., c. 281, § 2. In this instance the revisers have indicated a purpose not to change the law. In the report to the General Court of the Joint Special Committee on Consolidating and Arranging the General Laws, at the end of chapter 30, there is the following note: —

The classification of salaries provided for in §§ 45 to 50 is a general provision relating to all state employees or appointees unless otherwise provided therein, and therefore the fact that the fixing of the salaries of such persons is subject to said sections has been omitted in each particular instance where the fixing of such salaries is provided for.

A further question arises whether the salaries of the employees of the Commission are “salaries . . . regulated by law,” within the excepting clause of G. L., c. 30, § 46. In an opinion rendered by me to the Supervisor of Administration, under date of May 12, 1920 (V Op. Atty.-Gen. 552), I advised him that the phrase “salaries . . . regulated by statute” in Gen. St. 1919, c. 320, § 1, and now appearing in G. L., c. 30, § 46, as “salaries . . . regulated by law,” meant “salaries fixed by law either in some definite sum or by a sliding scale which is automatically effective.” It clearly was not intended to apply to all those cases in which departments, commissions and officers are given authority to fix the compensation of employees. It is with respect to just those cases that the note referred to above is intended to apply.

I am clearly of the opinion that the provision in G. L., c. 28, § 4, authorizing the Metropolitan District Commission to fix the compensation of employees, is subject to G. L., c. 30, §§ 45-50, providing that the salaries of all officers and employees holding offices and positions required to be classified shall be fixed in accordance with the classification and specifications of the Supervisor of Administration, with the exceptions stated in section 46, and that the employees of your Commission are not within those exceptions.

BOARD OF DENTAL EXAMINERS — DETERMINATION WHETHER  
 APPLICANT FOR REGISTRATION HAS RECEIVED A DIPLOMA  
 FROM A REPUTABLE DENTAL COLLEGE — ATTORNEY GEN-  
 ERAL.

Under G. L., c. 112, §§ 45-46, the Board of Dental Examiners, in the exercise of a sound discretion, should determine whether an applicant for registration has furnished "satisfactory proof," under section 45, that he has attended a "reputable dental college," within the meaning of section 46, and in so determining the board is not, as matter of law, bound to accept the affidavit of the applicant.

The Attorney General neither decides questions of fact nor substitutes his discretion for the discretion vested by law in another officer or board.

To the Depart-  
 ment of Civil  
 Service.  
 1922  
 September 13.

I have your inquiry on behalf of the Board of Dental Examiners relative to acceptance of the affidavit of a graduate of a Russian dental school as proof of the requirements imposed by G. L., c. 112, §§ 45-46.

Section 45 requires the applicant to furnish "satisfactory proof" either that he has received a diploma from a "reputable dental college," as defined in section 46, or that he has attended such college for four years and has passed the examinations for the first three years. In order that there may be no doubt as to what is meant by a "reputable dental college" the Legislature has defined the same in section 46. "Satisfactory proof" means proof which either does satisfy the Board or ought to satisfy it, as reasonable men. Whether any particular proof is "satisfactory" is a question of fact for the Board itself to determine. Unless the decision of the Board in that regard is plainly unreasonable, it will not be reversed. The Board is not, as matter of law, bound to accept the affidavit of the applicant as a substitute for proof which the Board ordinarily requires from other sources. Indeed, the credibility of any affidavit is peculiarly a question of fact to be determined by the Board, under the circumstances of each case.



PRIVATE DETECTIVE — EFFECT OF LICENSE — RIGHT OF CONSTABLE TO ENGAGE IN THE BUSINESS OF A PRIVATE DETECTIVE.

The license granted to a private detective, under G. L., c. 147, § 23, authorizes the licensee to engage in and to solicit the business of procuring evidence for use in civil or criminal proceedings, and to employ operators, agents and assistants for the conduct of such business.

A constable, by virtue of his appointment as such, has no right to solicit business as, or engage in the business of, a private detective.

You ask my opinion upon the following questions: —

1. Referring to G. L., c. 147, §§ 22-30, being the law relative to the licensing of private detectives, will you please advise me what rights and privileges can be exercised by the person granted a private detective's license, in consequence of holding such license?

2. Is a constable, appointed in accordance with the provisions of G. L., c. 41, §§ 91-95, authorized, by virtue of such appointment, to exercise any or all of the rights and privileges granted to a licensed detective?

1. Prior to the enactment of Gen. St. 1919, c. 271, the licensing of private detectives was governed by R. L., c. 108, §§ 36 and 37. In construing these provisions the court said, in *Frost v. American Surety Co.*, 217 Mass. 294, 296: —

It is made a misdemeanor punishable by fine or imprisonment or both, for any citizen to engage in the general business of a private detective without having obtained a license from the public authorities authorized to grant it. While the statute expressly provides that the licensee shall not be clothed with the power and authority of constables or police officers, the purpose for which the license is granted is to enable him "to act as a private detective for the detection, prevention and punishment of crime."

It is for the licensing board to pass upon the competency and integrity of the applicant and while by the proviso he is not ranked with public officials entrusted with the conservation of the public peace, yet, in the accepted meaning of the words, he is designated as a person unofficially engaged in obtaining secret information for the use and benefit of those who choose to employ him and to pay his compensation. *State v. Bennett*, 102 Mo. 356. The license enables him to engage in a business which, if unlicensed, is prohibited, and, as a precedent condition to

To the Commissioner of  
Public Safety.  
1922  
September 16.

granting the license, a bond with sureties to be approved by the licensing board is required, running to the treasurer of the municipality with a condition that the licensee will properly discharge "the services which he may perform by virtue of such license." The "services" obviously are the services rendered in "the detection, prevention and punishment of crime" under his employment by private persons who generally desire to obtain evidence enabling them to support or defend civil actions or criminal prosecutions successfully.

R. L., c. 108, §§ 36 and 37, were repealed by Gen. St. 1919, c. 271, and the provisions of said chapter 271 are now codified in G. L., c. 147, §§ 22-30, to which you call my attention. The significant sections are sections 22, 23 and 29, which provide as follows:—

SECTION 22. No person shall engage in the business of or solicit business as a private detective, or the business commonly transacted by a private detective, under any name or title whatsoever, without first obtaining a license so to do as provided in sections twenty-three to thirty, inclusive.

SECTION 23. The said license may be granted by the commissioner to any reputable citizen of the United States, or to any firm or corporation making written application therefor. The persons making the application shall be not less than twenty-one years of age, and shall have had at least three years' experience as investigators. The holder of a license may employ as many agents, operatives and assistants as may be deemed necessary by the licensee for the conduct of the business.

SECTION 29. Any person other than an agent, employe or assistant of a licensee hereunder, and any corporation acting as a private detective without obtaining a license in accordance with sections twenty-three to thirty, inclusive, shall be punished by a fine of not more than five hundred dollars or by imprisonment for a term not exceeding one year, or both; but no corporation shall be liable to the said penalty if its resident manager or superintendent is duly licensed under said sections.

It is not without significance that the Legislature has not itself defined the "business of a private detective." It has not enumerated the rights thereto appertaining. My predecessor has already given you a general but not exhaustive definition of a private detective. V Op. Atty.-Gen. 425. As both the court and my predecessor point out, the primary function of a

detective is to seek out evidence for use in civil or criminal proceedings. The license issued to a private detective authorizes a private person, who would not otherwise have that right, to engage in that business for private persons and to solicit that business from private persons, and, further, to employ agents, operators and assistants for the conduct of such business. The things which he may lawfully do in connection with and in execution of that business must necessarily depend upon the facts of each case.

2. A constable is a public officer charged with the performance of public duties. G. L., c. 41, §§ 91-95; *Frost v. American Surety Co.*, 217 Mass. 294, 296. It is no part of the duty of a policeman, who is also a public officer, to act as a detective in order to procure evidence for private parties. *Attorney General v. Tufts*, 239 Mass. 458, 513. I find nothing in the powers conferred on constables by G. L., c. 41, §§ 91-95, which authorizes them to engage in the business of a private detective. A private detective is a private person engaged in a private business. The appointment of a constable as a public officer does not, in my opinion, carry by implication a right to engage in or solicit business as a private detective.

---

#### INCOME TAX — LOCAL TAXATION OF INTANGIBLE PERSONAL PROPERTY — EXEMPTION — DOMICIL.

A person who becomes a resident of this State prior to April 1 is not subject to local taxation upon intangible personalty owned by him upon that date when the income received therefrom during the previous year is not subject to the income tax.

G. L., c. 59, § 5, cl. 27, when construed with G. L., c. 62, §§ 49-53, exempts from local taxation intangibles, the income of which is of the kind made taxable by G. L., c. 62, even though such income cannot in fact be taxed because the recipient was not a resident of this State at the time such income was received.

You state the following facts: —

A was domiciled in another State in 1921. During that year he received income from intangible personal property, which income would have been taxable if he had been an inhabitant of this State. On Jan. 2, 1922, he became domiciled in this Commonwealth. On April 1, 1922,

To the Com-  
missioner of  
Corporations  
and Taxation.  
1922  
September 19.

he owned intangible personal property which would have been taxable prior to the enactment of the income tax law. Upon the authority of *Hart v. Tax Commissioner*, 240 Mass. 37, A seasonably and lawfully refused to pay an income tax upon said income so received in 1921. You inquire whether you should, because of such refusal, instruct the local assessors to levy a personal property tax upon said intangible personal property, under G. L., c. 59, §§ 2, 5, cl. 27, and § 75.

G. L., c. 59, §§ 2, 5 and 75, provide: —

SECTION 2. All property, real and personal, situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempt, shall be subject to taxation.

SECTION 5. The following property and polls shall be exempt from taxation:

Twenty-seventh, Property the income of which is taxed under chapter sixty-two, or would be taxable thereunder if the property yielded income, except as provided in sections forty-nine to fifty-three, inclusive, of said chapter.

SECTION 75. If the real or personal estate of a person, to an amount not less than one hundred dollars and liable to taxation, has been omitted from the annual assessment of taxes, the assessors shall between December tenth and twentieth following, both inclusive, assess such persons for such estate. The taxes so assessed shall be entered on the tax list of the collector, who shall collect and pay over the same. Such additional assessment shall not render the tax of the town invalid although its amount, in consequence thereof, shall exceed the amount authorized by law to be raised.

A lawful and seasonable refusal by A to pay a 1922 income tax (see G. L., c. 62, §§ 43-47) cannot subject him to local assessment upon the intangible personalty owned by him on April 1, 1922. A is either taxable upon such personalty or he is not. If he is subject to a local assessment thereon, he can neither discharge that liability nor acquire an exemption therefrom by payment of a 1922 income tax for which he is admittedly not liable. If he is not subject to such local assessment, that assessment cannot be grounded upon a seasonable refusal to pay an

income tax which he does not owe. A's refusal, therefore, is immaterial and may be laid aside. The fundamental question is whether a want of jurisdiction to tax A's 1921 income (*Hart v. Tax Commissioner*, 240 Mass. 37) renders A subject to local assessment upon the intangible personal property owned by him on April 1, 1922.

Prior to the adoption of Mass. Const. Amend. XLIV and the enactment of Gen. St. 1916, c. 269, which imposed the income tax, intangible personal property was subject to local assessment. That assessment had to be "proportional," within the meaning of Mass. Const., pt. 2d, c. I, § I, art. IV. *Perkins v. Westwood*, 226 Mass. 268. But the word "proportional" did not require that the rate be uniform throughout the Commonwealth. *Northampton v. County Commissioners*, 145 Mass. 108. The variation in local rates and the failure to require compulsory returns led to grave inequalities in the taxation of intangible personalty. Various expedients were suggested or tried, but they did not meet the "proportional" requirement. See *Perkins v. Westwood*, *supra*. In November, 1915, the people ratified Mass. Const. Amend. XLIV, which conferred power to levy a tax "at a uniform rate throughout the commonwealth upon incomes derived from the same class of property," and authorized the Legislature to exempt from proportional taxes "any class of property, the income from which is taxed under this article." Pursuant to the authority thus conferred, the Legislature enacted Gen. St. 1916, c. 269, which classified the income from intangible personal property, imposed a tax upon each class of income at a uniform rate throughout the Commonwealth, and, by section 11, conferred certain exemptions, which, as amended, are not codified in G. L., c. 59, § 5, cl. 27. The history of this legislation manifests a general purpose to substitute a State-wide tax upon the income of intangible personalty for the more onerous and unequal local tax previously imposed upon the property itself. *Duffy v. Treasurer and Receiver-General*, 234 Mass. 42; *Tax Commissioner v. Putnam*, 227 Mass. 522, 525; *Maquire v. Tax Commissioner*, 230 Mass. 503, 506; *Dane v. Jackson*, 256 U. S. 589. It is plain that the exemptions con-

ferred by Gen. St. 1916, c. 269, § 11, and now codified, as amended, in G. L., c. 59, § 5, cl. 27, must be construed in the light of the history of the law of which they form a part.

The exemption from local taxation conferred by G. L., c. 59, § 5, cl. 27, is of broad scope. It is not confined to such specific property as produces income which is in fact assessed under G. L., c. 62. It also includes property the income of which would be taxable under chapter 62 if such property yielded income. This second clause of the exemption is plainly generic; that is, it describes a class of property which is exempted from local taxation. It does not define a condition which must be met by specific parcels of property in order to secure exemption. This is a plain indication that the first clause of the exemption is generic also. If so, the words "property the income of which is taxed under chapter sixty-two" must be held to describe those classes of property, the income of which is taxable under chapter 62, rather than the specific property, the income of which is actually assessed thereunder. This construction is consistent with and effectuates the general intent to substitute for the local tax upon intangible personalty a tax upon the income thereof.

The scope of the exemption from local taxation conferred by G. L., c. 59, § 5, cl. 27, may be tested by the express exception to it. This exception is defined in G. L., c. 62, §§ 49 to 53, inclusive, which read as follows:—

SECTION 49. All property owned by a resident of the commonwealth on April first in any year, which during the preceding calendar year had produced for such owner any income taxable under this chapter, shall, despite anything in this chapter, be subject to taxation to such owner in accordance with chapters fifty-nine and sixty, if such owner does not make to the commissioner a full return of his taxable income from such property on or before September first of the year in which a return of income is required by sections twenty-two to twenty-five, inclusive, and provided the tax so assessed is greater than the amount of the tax properly payable under sections one and thirty-five to thirty-seven, inclusive.

SECTION 50. Property taxable in any year under the preceding section shall be assessed in that year between September second and De-

ember tenth, both inclusive. The amount of taxes assessed by the local assessors upon such property in such town in any year, less the amount assessed and collected by the commissioner as hereinafter provided, shall be entered on the tax list of the collector of such town, and he shall collect and pay over the same to the town.

SECTION 51. Any taxpayer aggrieved by the assessment of a tax under section forty-nine may appeal to the commissioner within thirty days after the receipt of the tax bill therefor, or other actual notice of the assessment. In case of an adverse determination by the commissioner, the taxpayer may appeal to the board of appeal as provided in section forty-five, or to the superior court as provided in section forty-seven; and if the taxpayer shall prove that the income of the property was duly returned or that it was not taxable or that there was reasonable excuse for not making the return, the tax shall be abated, and, if it has previously been paid, the amount abated shall be repaid by the town to the taxpayer, with interest from the time of such payment.

SECTION 52. At any time prior to the collection by the town of the tax provided for by section forty-nine the commissioner may assess and collect the tax provided for by this chapter on the income of the property, subject to the limitation of time provided by section thirty-seven. Upon the collection of the tax, the commissioner shall at once notify the tax collector of the town where the taxpayer resides, and the tax collected by the commissioner shall be deducted from the tax assessed in that town; and if the tax assessed therein has been collected, the amount so deducted shall be repaid by the town to the taxpayer. If a tax collected by a town under section forty-nine is afterward abated, the amount of the abatement, together with the amount of any interest paid by the taxpayer on that amount, shall be paid by the town to the taxpayer.

SECTION 53. Upon discovery of property the income of which for the preceding calendar year, taxable under this chapter, has not been returned on or before September first of the year in which the return is required, the commissioner shall forthwith notify the assessors of the town where the property is taxable, unless there is within his knowledge a reasonable excuse for the failure of the taxpayer to file the return. Upon making any assessment under section forty-nine, the assessors shall forthwith notify the commissioner.

Section 49 subjects to local taxation "all property owned by a resident of this commonwealth on April first in any year, which during the preceding calendar year had produced for such owner *any income taxable under this chapter*" (*i.e.*, chapter 62) if such owner does not make "a full return of his *taxable income* from

*such property*” on or before September 1 as required by law. The condition upon which liability to local taxation attaches, and the nature of the property to be taxed in that event, are both significant. Liability to local taxation does not attach unless there be a failure to file a return of the “taxable income from such property.” The property to be locally taxed in that event is property “which during the preceding year . . . produced . . . income taxable under this chapter” (*i.e.*, chapter 62). Thus, the liability to local taxation accrues because of failure to return taxable income, not because the jurisdiction to tax such income fails. The property subjected to local taxation is property which produces taxable income which is not returned, not property which produces income which would normally be taxable, but which cannot in this instance be taxed because it is not within the jurisdiction of the Commonwealth.

Sections 51 and 53 support and compel the same conclusion. Section 51 requires that a local tax assessed under section 49 shall be abated, or if paid, shall be repaid with interest, if the taxpayer seasonably appeals and proves either “that the income of the property was duly returned *or that it was not taxable.*” Section 53 imposes on the Commissioner a duty to notify the local assessors “upon discovery of property, the income of which for the preceding calendar year, *taxable under this chapter,*” has not been duly returned. It is plain that this duty does not arise in respect of property the income of which for the preceding calendar year is *not* taxable under chapter 62. Indeed, if such property should be locally taxed, the taxpayer could, under section 51, compel an abatement or recover such tax if paid, by proving that the income thereof was not taxable. Both these provisions repel any intention to tax the property locally because the income thereof, though within the provisions of chapter 62, is outside the taxing jurisdiction of Massachusetts.

Comparison of G. L., c. 59, § 75, with G. L., c. 62, § 50, is significant. Section 75 provides that the local assessment of omitted property to be made thereunder shall be made between December 10 and 20, both inclusive. Section 50 provides that the local assessment to be made under section 49 shall be made



between September 2 and December 10, both inclusive. Neither assessment can be made at a different time. *Gannett v. Cambridge*, 218 Mass. 60. It is plain that property, the income of which is subjected to taxation under chapter 62, cannot be included in the regular local assessment, made as of April 1, since the liability to local assessment does not arise until there is a failure to file the required income tax return on or before September 1. The local assessment upon such property is in that case made under G. L., c. 62, § 50, between September 2 and December 10, both inclusive. It is not made between December 10 and 20 under G. L., c. 59, § 75. In my opinion, the provisions of G. L., c. 62, § 50, exclude such property from local assessment under G. L., c. 59, § 75.

When G. L., c. 59, § 5, cl. 27, is read in connection with G. L., c. 62, §§ 49-53, I am constrained to the conclusion that intangible personal property is not to be subjected to local taxation except under the conditions and in the manner defined by the latter provisions. Such seems to be the necessary scope of the express exemptions conferred by said section 5, clause 27. This is entirely in accord with the principle that an exemption from taxation is not to be lightly inferred, but must be established either expressly or by clear intentment of the statute. *Wheelwright v. Tax Commissioner*, 235 Mass. 584, 586; G. L., c. 59, § 2. G. L., c. 62, §§ 49-53, must be held to define a comprehensive and exclusive scheme for local taxation of intangible personalty under chapter 59, and the exemption conferred by G. L., c. 59, § 5, cl. 27, must, in my opinion, be construed accordingly.

For the reasons already pointed out, it is plain that the facts stated by you do not present a case which is within G. L., c. 62, §§ 49-53. So far as appears, there has been no failure by A to return taxable income on or before Sept. 1, 1922. Indeed, it does not appear that the intangible personalty owned by A on April 1, 1922, produced in 1921 any income which would have been taxable if A had then been an inhabitant of this State. But even if it be assumed that the intangible personalty owned by A on April 1, 1922, produced income otherwise taxable, it is

admitted that under the rule of *Hart v. Tax Commissioner, supra*, such income cannot be taxed. If, therefore, the intangible personality in question were locally taxed in 1922 under G. L., c. 62, § 49, A could require such tax to be abated if he seasonably invoked the remedy given by section 51. I am therefore constrained to advise you that your inquiry must be answered in the negative.

---

INSURANCE — DECLARATION OF TRUST — PARTNERSHIP —  
AGENT'S OR BROKER'S LICENSE.

Partnership licenses under G. L., c. 175, § 173, may not be granted to persons doing business under a declaration of trust.

To the Com-  
missioner of  
Insurance.  
1922  
September 20.

I have your letter, with copy of an instrument attached purporting to be a declaration of trust, stating that application has been made by three persons under said declaration for agents' or brokers' licenses from your department, under G. L., c. 175, § 173. Section 173 reads as follows: —

The licenses described in sections one hundred and sixty-three, one hundred and sixty-six, one hundred and sixty-seven, one hundred and sixty-eight and one hundred and seventy-two may be issued to partnerships on the conditions specified in and subject to said sections, except as otherwise provided herein. Each member of the partnership shall file the statement or application required by law, including a written request that the license be issued in the partnership name. Together with said statements or applications, there shall be filed a duplicate original of the written partnership agreement signed by all the partners. The license shall be issued in the partnership name, and may be revoked or suspended as to one or all members of the partnership. Minors who are parties to the written articles of partnership may be included in the partnership license, provided that there is one adult member of the firm. If the partnership is terminated prior to the expiration of the license, the partners shall forthwith give notice thereof to the commissioner, who shall thereupon without a hearing revoke the license. Each partner shall be personally liable to the penalties of the insurance laws for any violation thereof, although the act of violation is done in the name of or in behalf of the partnership. Whoever, being licensed as a partner under this section, fails to give notice as required herein of the termination of the partnership, or after the partnership is terminated acts under such

license, shall be punished by a fine of not less than twenty nor more than five hundred dollars.

You ask the following questions:—

1. Does said section 173 authorize the Commissioner to license, as agents or brokers, persons operating under a declaration of trust in the form hereto attached?
2. Is the declaration of trust a written partnership agreement within the meaning of said section?
3. If the provisions of article 13 and article 14 were omitted from the declaration, would the Commissioner have the authority referred to in question 1, and would the declaration then constitute a partnership agreement for the purposes of said section 173?

Answering your first question, I point out that the instrument filed with you purports on its face to be an agreement and declaration of trust. I am advised by counsel for the petitioners that it is intended to be one, drafted, however, to make the trust as responsible for its acts as a corporation. It is apparent, therefore, that these petitioners do not consider themselves partners, and the instrument submitted is not a partnership agreement such as section 173 requires. I am of opinion that the Legislature contemplated and intended the usual partnership relation, especially since limited partnerships are not permitted to do insurance business. G. L., c. 109, § 1. Your first and second questions, therefore, are answered in the negative.

In the light of my answer to questions 1 and 2, I do not think I should advise you further as to what the suggested change in the instrument might effect as a matter of law. These petitioners would still, on the face of things, be applying for the license, not as partners, but as trustees under a written declaration of trust.

TAXATION — INCOME TAXES — ADDITIONAL ASSESSMENTS —  
 NOTICE AND OPPORTUNITY TO CONFER WITH THE COMMISSIONER OF CORPORATIONS AND TAXATION.

- An additional assessment of income taxes cannot be made after the two-year period prescribed by G. L., c. 62, § 37, has expired.
- The notice and opportunity to confer, for which G. L., c. 62, § 37, as amended by St. 1922, c. 143, provides, are conditions precedent to the making of an additional assessment of income tax.
- If a taxpayer, having received notice of the intention of the Commissioner of Corporations and Taxation to assess an additional income tax, confers with the Commissioner before the ten days prescribed by G. L., c. 62, § 37, as amended by St. 1922, c. 143, have expired, the Commissioner need not wait to make the assessment until the ten-day period has expired.
- The Commissioner cannot shorten the ten-day period by prescribing the time at which such conference shall be had.
- If the taxpayer has not conferred with the Commissioner, the Commissioner cannot make an additional assessment of income tax until the ten-day period prescribed by G. L., c. 63, § 37, as amended by St. 1922, c. 143, has expired, even though the two-year period within which such assessment may be made will expire before the ten days have elapsed.

To the Com-  
 missioner of  
 Corporations  
 and Taxation.  
 1922  
 September 25.

You ask my opinion upon the following facts: —

A formal notice in respect of a proposed additional assessment of income taxes for the year 1920 is given to the taxpayer on Aug. 28, 1922. The taxpayer has his hearing on Aug. 30, 1922. You inquire whether, under G. L., c. 62, § 37, as amended by St. 1922, c. 143, the Commissioner may proceed to make the assessment on August 31 or September 1, without waiting for the ten days after August 28 to expire. You further inquire whether, if a verification of 1920 income taxes be begun on Aug. 28, 1922, and during such verification omissions are called to the attention of the taxpayer, the taxpayer may insist upon the notice and opportunity to confer, for which section 37 provides.

The material portion of G. L., c. 62, § 37, as amended by St. 1922, c. 143, provides: —

If the commissioner finds from the verification of a return, or otherwise, that the income of any person subject to taxation under this chapter or any portion thereof, has not been assessed, he may, at any time within two years after September first of the year in which such assessment should have been made, assess the same, with interest at six per cent from the date when such tax was due under section thirty-nine,

first giving notice to the person so to be assessed of his intention, and such person shall thereupon have an opportunity within ten days after such notification to confer with the commissioner in person or by counsel or other representative as to the proposed assessment. After the expiration of ten days from such notification the commissioner shall assess the income of such person subject to taxation, or any portion thereof, which he believes has not theretofore been assessed, and he shall thereupon give notice under section thirty-nine to the person so assessed, and the tax, with interest as aforesaid, shall be payable fourteen days after the date of such notice. . . .

1. In my opinion, the provisions of the first sentence are mandatory. In *Gannett v. Cambridge*, 218 Mass. 60, it was held that where a statute (now G. L., c. 59, § 75) provided that property omitted from the regular annual assessment of real and personal property should be assessed "between December tenth and twentieth, following, both inclusive," an assessment made in May of the next year was void, because not made within the permitted period. I am of opinion that the provision for assessment "within two years after September first of the year in which such assessment should have been made" is a limitation upon the power to make such additional assessment. An assessment made after the expiration of that period would be void. *Gannett v. Cambridge, supra*.

2. The statute provides that before making the assessment the Commissioner shall "first" give notice to the person to be assessed, who "shall thereupon have an opportunity, within ten days after such notification, to confer with the commissioner . . . as to the proposed assessment." In *Torrey v. Millbury*, 21 Pick. 64, 67, Chief Justice Shaw stated the test for distinguishing directory regulations from conditions precedent as follows:—

In considering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures, which are intended for the security of the citizen, for ensuring an equality of taxation, and to enable every one to know, with reasonable certainty, for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions prece-

dent, and if they are not observed he is not legally taxed, and he may resist it in any of the modes authorized by law for contesting the validity of the tax.

But many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or non-compliance with which, does in no respect affect the rights of tax-paying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them; but yet their observance is not a condition precedent to the validity of the tax. On consideration, the Court are of opinion that the requirement in the statute, in regard to "reduced value," is of the latter character.

In my opinion, the provisions for notice and opportunity to confer must be regarded as conditions precedent to the assessment rather than as merely directory. Doubtless the notice may be given in the manner provided in section 39 (*i.e.*, either by mail, postage paid and duly addressed, or otherwise delivered at such address), and it may be that failure to receive such notice would not affect the validity of the tax. But it is significant that both sections 35 and 36 likewise provide for notice as a condition precedent to the action therein provided for. I am therefore constrained to the view that failure to give the required notice or to accord the prescribed opportunity to confer would render the assessment invalid.

3. I am of opinion, however, that upon the facts stated in your first inquiry there has been a sufficient compliance with these conditions precedent. The notice was given on August 28. The taxpayer had his conference on August 30. He has therefore received every substantial right to which these provisions of law entitle him. The provision of the next sentence, that the assessment shall be made "after the expiration of ten days from such notification," must be construed with the first sentence. It is manifestly intended to ensure to the taxpayer the opportunity for conference "within ten days after such notification," to which he is entitled under the first sentence. It does not require that the Commissioner shall wait the whole ten days, if within that time the taxpayer has had his conference. I am therefore of opinion

that, under these circumstances, the assessment may be made at any time after the conference and before midnight of September 1.

4. These considerations dispose of your second inquiry. Even if it be assumed, without deciding, that calling certain omissions to the attention of the taxpayer in the course of verification under G. L., c. 62, § 30, could be found to be equivalent to the notice required by section 37 (a question of fact as to which I express no opinion), the taxpayer is still entitled to choose his own time, within the ten days, for the conference with the Commissioner. The conference is not an idle ceremony. It is an opportunity for the taxpayer to show why he should not be subjected to an additional assessment. He is entitled to prepare for it. If the Commissioner could select the time for such conference, the taxpayer would not receive the right which the statute gives him, namely, opportunity to confer "within ten days after such notification." Unless such conference shall have been had, I am of opinion that the assessment cannot be made until the ten days after such notification have expired. The possible expiration of the two-year period for assessment within the ten days cannot relieve from compliance with the conditions precedent upon which the assessment depends.

---

#### REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS — ILLEGITIMATE CHILDREN.

Marriage of the parents of a child born out of wedlock does not operate to change the name of the child.

G. L., c. 46, § 13, does not provide for the making of any change in the record of birth, upon the marriage of the parents of a child born out of wedlock.

The recording of the name of the father of an illegitimate child, on the written request of both father and mother, as authorized by G. L., c. 46, § 1, does not change the rule that illegitimate children have no family names and take the names they have gained by reputation.

Under G. L., c. 46, § 13, the record of a birth, marriage or death can be corrected only to conform with the facts as they existed at the time of the birth, marriage or death to which the record relates.

You ask my opinion in answer to the following questions: —

1. Does a child born out of wedlock, when parents subsequently marry, take the name of the father, and can the record of birth be corrected accordingly, as provided in G. L., c. 46, § 13?

To the  
Secretary.  
1922  
September 25.

2. Does an illegitimate child take the name of the father when the name of the father is recorded on the written request of both the father and mother, as provided in G. L., c. 46, § 1?

3. Can a record made at the time the birth, marriage or death occurred be amended or corrected to agree with subsequently acquired names or facts, or can the record only be corrected in accordance with the facts as they existed at the time of the happening of the event?

To these questions I reply in order, as follows:—

1. Your first question consists of two distinct parts, which must be answered separately, the first being whether a child born out of wedlock takes the name of the father upon the subsequent marriage of the parents; and the second, whether, in that event, the record of birth can be changed.

In an opinion to you under date of June 10, 1921 (VI Op. Atty.-Gen. 207), I stated:—

Illegitimate children have no family names, and take the names which they have gained by reputation. . . . If a child goes by its mother's name it should be so recorded; otherwise not.

If a child born out of wedlock has gained a name, that name can be changed only in ways provided or recognized by the law. Our statutes permit a change of name by petition to the probate court. G. L., c. 210, §§ 12-14. In addition to the statutory method, it seems also that a person may assume a name by which he can contract and be sued. *Young v. Jewell*, 201 Mass. 385; *William Gilligan Co. v. Casey*, 205 Mass. 26, 31. But while it is true that the marriage of the parents of a child born out of wedlock and the acknowledgment of the child by the father will legitimize that child (G. L., c. 190, § 7), there is no statute or rule of law which operates to change the name of the child in that event. In my judgment, the child's name will not be changed except by a decree of the probate court or by the assumption and common use of the father's name by the child.

If in any way the name of the child is changed upon the marriage of the parents, it is my opinion that the statute does not provide for the making of any change in the record of birth.



G. L., c. 46, § 13, which you cite, providing for the correction of errors in the record, is, in part, as follows:—

If the record relating to a birth, marriage or death does not contain all the required facts, or if it is claimed that the facts are not correctly stated therein, the town clerk shall receive an affidavit containing the facts required for record, if made by a person required by law to furnish the information for the original record, or, at the discretion of the town clerk, by credible persons having knowledge of the case. . . .

The remainder of the section provides for the filing and recording of the affidavit, correcting the record by drawing a line through the incorrect statements, and entering the facts required to amend the record, etc. Manifestly this section is intended to provide for a correction of the record by the addition of facts not previously stated, or a correction of facts incorrectly stated, and not to provide for a change of the record occasioned by subsequent occurrences.

2. G. L., c. 46, § 1, is, in part, as follows:—

Each town clerk shall receive or obtain and record in separate columns the following facts relative to births, marriages and deaths in his town;

In the record of births, date of record, date of birth, place of birth, name of child, his sex and color, names, places of birth and residence of his parents, including the maiden name of the mother and occupation of the father. In the record of birth of an illegitimate child, the name of, and other facts relating to, the father shall not be recorded except on the written request of both father and mother. The term "illegitimate" shall not be used in the record of a birth unless the illegitimacy has been legally determined, or has been admitted by the sworn statement of both the father and mother. . . .

I find nothing herein to change the rule of law which I have previously stated to be that illegitimate children have no family names and take the names which they have gained by reputation.

3. My answer to this question is, as I have already indicated, that the record can only be corrected so as to conform with the facts as they existed at the time of the birth, marriage or death to which the record relates.

## DRAINAGE LAW — JURISDICTION OF DRAINAGE BOARD.

Under G. L., c. 252, § 5, as amended by St. 1922, c. 349, § 4, the question whether the petitioners hold an interest sufficient to authorize them to petition the Drainage Board is a jurisdictional question, for the Board to determine.

To the Com-  
missioner of  
Agriculture.  
1922  
October 3.

You state that a question has arisen with respect to the State drainage law (G. L., c. 252, as amended by St. 1922, c. 349), as to how the valuation of property held by proprietors who seek to form a drainage district is to be determined in case the petitioners claim a majority in interest in respect to value, but do not have a majority in interest in respect to area. You ask whether in such a case the Drainage Board should determine the question of valuation, and if not, by whom such question should be determined and upon what basis. You say that in some instances mill rights or other special privileges may be involved which would give lands in a proposed district a special value, and might, if such value should be set very high, enable the holder of the mill right practically to control the formation of the district.

G. L., c. 252, § 5, as amended by St. 1922, c. 349, § 4, is, in part, as follows:—

The proprietors, or a majority in interest either in value or area, may petition the board setting forth their desire to form a drainage district as provided in the following section, stating the proposed name of said district, the necessity for the same, the objects to be accomplished, and a general description of the lands proposed to be affected, together with the names of known owners of said lands. Upon the receipt of said petition the board shall proceed, at the expense of the commonwealth, to make such surveys of the land proposed to be drained as it shall deem necessary, and shall further ascertain by such surveys or other investigations the need of any drainage required for the benefit of the public health, agricultural and other uses to which the land can be put after drainage, and its value for such uses after drainage, and in general the advisability of undertaking the proposed drainage or maintenance, and shall make recommendations in relation thereto, including a statement of what portion, if any, of the expense should be borne by the commonwealth on account of the cost of that part of the improvement relating to the public health, and, after notice by publication in a newspaper published in the county where the greater part of the land

lies and further notice to each known proprietor by registered mail and a hearing, if the board approves of the undertaking, it shall issue a certificate appointing three, five or seven district drainage commissioners, who shall be sworn to the faithful performance of their duties, and fix their compensation, which shall not exceed five dollars a day, while in conference, and their necessary traveling expenses while performing their duties, and authorize said commissioners to form a drainage district under the following section. . . .

The authority given by this section to proprietors of land to petition for the formation of a drainage district extends to all cases where either the value of the lands held by the proprietors amounts to more than half of the value of the land in the district proposed to be formed, or the area of the lands so held amounts to more than half of the area of the proposed district. The question whether the petitioners hold an interest sufficient to authorize them to petition the Board is a jurisdictional question which the Board must determine. Every tribunal has necessarily the power, in connection with proceedings before it, to hear and determine in the first instance the question of its own jurisdiction. *Cf. Brougham v. Oceanic Steam Navigation Co.*, 205 Fed. 857. What remedy a proprietor of land in the district, who is not a petitioner, may have by certiorari or otherwise, it is not for me to decide.

You refer to instances where mill rights and other special privileges may give to lands in a proposed district a special value which might enable the holder of such a right to exercise an influence disproportionate to the area of the land held by him. No doubt the value of land may be increased by mill rights and other rights involving the use of water or water power appurtenant to the land. *Lowell v. County Commissioners*, 152 Mass. 372; *Essex Co. v. Lawrence*, 214 Mass. 79, 90. In every such case the question must be, what is the value of the land with the appurtenant rights?

STATE TEACHERS' RETIREMENT ASSOCIATION — TERMINATION  
OF MEMBERSHIP — PART-TIME EMPLOYMENT BY CITY OF  
BOSTON.

Teachers who are members of the State Teachers' Retirement Association discontinue their membership in such association after appointment by the city of Boston to positions where they receive only part of their salary for courses that come under the provisions of G. L., c. 74, §§ 1-24, inclusive, serving the remainder of their time in courses for which there is no reimbursement, and under which they would be subject to the retirement laws for regular Boston public school teachers.

To the  
Teachers' Retirement Board.  
1922  
October 9.

You request my opinion as to whether teachers who are members of the State Teachers' Retirement Association continue to be members of the association after they are appointed by the city of Boston to positions where they receive only part of their salary for courses that come under the provisions of G. L., c. 74, §§ 1-24, serving the remainder of their time in courses for which there is no reimbursement, and under which they would be subject to the retirement laws for regular Boston public school teachers.

St. 1908, c. 589, established a permanent school pension fund for the payment of pensions to members of the teaching and supervising staff of the public day schools of the city of Boston. These pensions are non-contributory and are met out of taxation (§§ 4-6). The act was accepted by the city in accordance with the provisions of section 9 thereof, and went into effect on June 22, 1908.

St. 1913, c. 832, established a Massachusetts Retirement Association for teachers in the public day schools of the Commonwealth. Members of this association are assessed a certain proportion of their salaries, and at retirement receive an annuity based upon the contributions so made. In addition, they receive from the State a pension equal to the amount of such annuity. (See VI Op. Atty.-Gen., 324.) This act became effective on July 1, 1914, and as amended is now codified in G. L., c. 32, §§ 6-19. G. L., c. 32, § 7, provides, in part: —

There shall be a teachers' retirement association organized as follows:  
(1) All persons now members of the teachers' retirement association

established on July first, nineteen hundred and fourteen, shall be members thereof.

(2) All teachers hereafter entering the service of the public schools for the first time shall thereby become members of the association. . . .

But this provision must be read with section 18, which provides: —

Sections six to fifteen, inclusive, shall not apply to teachers in the public schools of Boston, except teachers employed by Boston in day schools conducted under sections one to twenty-four, inclusive, of chapter seventy-four.

As originally enacted in St. 1913, c. 832, § 3, cl. 3, this provision read: —

Teachers in the service of the public schools of the city of Boston shall not be included as members of the retirement association.

It is plain that under this clause teachers in the “public schools” of Boston were excluded from and were ineligible to membership in the State Retirement Association. I am of opinion that the change in form made in G. L., c. 32, § 18, has not in this respect changed the meaning. Verbal changes made in the course of the periodic codifications of our laws will not be held to change the meaning unless the intent to change clearly appears. *Commonwealth v. Kozlowsky*, 238 Mass. 379, 387. Teachers in the “public schools” of Boston are still excluded by said section 18 from membership in the State Retirement Association. The reason for the exclusion appears to be that membership in the State association would render such teachers ineligible to receive the non-contributory pension for which St. 1908, c. 589, provides. (G. L., c. 32, § 15.)

St. 1911, c. 471, §§ 1-24 (now G. L., c. 74), provided for the establishment of vocational schools. St. 1914, c. 494, §§ 1 and 2, provided, in substance, that teachers employed by the city of Boston in such vocational schools, prior to June 30, 1914, might become members of the State Retirement Association established by St. 1913, c. 832. and that all teachers employed in said vocational schools for the first time after July 1, 1914, “shall thereby” become members of such association. These pro-

visions are now re-enacted in and continued in force by G. L., c. 32, § 7. In other words, while teachers employed in the regular "public schools" of Boston, no matter at what date employed, were and are excluded from membership in the State Retirement Association, teachers in the vocational schools, which are not a part of the regular public school system, were required to join the State Retirement Association if employed for the first time in such schools after July 1, 1914.

In June, 1920, the Department of Education presented to this Department the question of the status of a teacher in the regular "public schools" of Boston who was thereafter employed upon a part-time basis in the vocational schools of Boston, for the first time, after July 1, 1914. This presented a situation where, under the particular circumstances, one provision of law excluded such teacher from the State Association, while another provision required such teacher to be a member. Under these circumstances, the Attorney General advised that the provision of law which required the teacher in the vocational schools to be a member of the State Association (St. 1914, c. 494, § 1) did not relieve from the disability arising from the fact that such teacher was, at the same time, a teacher in the regular "public schools" of Boston, and that therefore such teacher should not be enrolled in the State Association. V Op. Atty.-Gen. 576. In the same opinion the Attorney General further advised, in answer to another inquiry, that even though both employments were entered into at the same time, employment as teacher in the regular "public schools" of Boston excluded such teacher from the State Retirement Association. This opinion governs in the present case. Even though the teacher in question be a member of the State Retirement Association by reason of employment in the vocational schools of Boston, subsequent acceptance of employment in the regular "public schools" renders such teacher ineligible to continue a member of such association. A different view would lead to the confusing and inequitable result that the respective rights of two teachers, each employed in both classes of schools, would depend upon the order in which the employments were undertaken. I am unable to believe that

such was the intention of the Legislature, and therefore advise you that under the circumstances stated in your inquiry such teacher does not continue to be a member of the State Association.

---

DRUGGIST — LICENSE — FEDERAL PERMIT — BOARD OF REGISTRATION IN PHARMACY — INTOXICATING LIQUOR — ATTORNEY GENERAL.

The revocation of the Federal permit issued to a druggist, authorizing him to have intoxicating liquor in his store, is not a judgment which establishes a violation of law, and it is the duty of the Board of Registration in Pharmacy to give a hearing, as required by G. L., c. 112, § 40, and decide for itself, upon the evidence, whether or not a violation of law has occurred which would justify the Board in suspending or revoking the registration of such druggist.

The Attorney General does not decide questions of fact or substitute his judgment for the judgment of the officer or Board to which the decision of such questions is committed by law.

You request my opinion on the following case: —

To the Commissioner of  
Civil Service.  
1922  
October 18.

A drug store in Cambridge was visited by Federal authorities in search of liquor. The druggist held a permit from the Federal government authorizing him to have liquor in his store. The agents found, however, several bottles of whiskey, spuriously labeled, which had not been purchased under the permit from the Federal government. The druggist testified that these bottles of whiskey had been given him by a friend, and that they were kept in his store for his personal use.

This druggist has been brought before the Board, has had a hearing at which he appeared and testified, confirming the facts as given above. He holds a permit to operate a drug store, issued to him by the Board of Registration in Pharmacy under the provisions of G. L., c. 112, §§ 37-42. The Board desires to know whether, under these circumstances, it is authorized by law to suspend this drug store permit.

It is disclosed that, by order of the Federal Prohibition Director of the Third Judicial District of Massachusetts, dated Aug. 9, 1922, permit No. H-5428, issued to the druggist in question, "be, and the same hereby is, revoked and canceled upon the following grounds, to wit; in that said permittee has not in good faith conformed to the provisions of the National Prohibition Act and the permit issued from this Department."

G. L., c. 112, § 40, provides as follows: —

The board may suspend or revoke any registration made under the preceding section and any permit issued thereunder for any violation of the law pertaining to the drug business or the sale of intoxicating liquors or for aiding or abetting in a violation of any such law; but before such suspension or revocation the board shall give a hearing to the holder of the permit, after due notice to him of the charges against him and of the time and place of the hearing. Such holder may appear at the hearing with witnesses and be heard by counsel. Witnesses shall testify on oath and any member of the board may administer oaths to them. The board may require the attendance of persons and compel the production of books and documents. Three members of the board shall be a quorum for such a hearing, but no registration or permit shall be suspended or revoked unless upon the affirmative vote of three or more members thereof.

This section expressly provides that the Board may suspend or revoke any registration or permit issued thereunder "for any violation of the law pertaining to the drug business or the sale of intoxicating liquors or for aiding or abetting any violation of any such law."

In my opinion, this provision must be held to include violations of the Federal law passed to enforce the Eighteenth Amendment to the Federal Constitution, commonly called the Volstead Act, which is operative in Massachusetts and regulates the sale of liquor in this State. Under appropriate circumstances a violation of that law, or aiding or abetting in such violation, may be found to establish that the violator is not of fit character to hold the license or permit in question. See *Lawrence v. Board of Registration*, 239 Mass. 424, 428. On the other hand, proof of such violation cannot be held in every instance to require revocation of such license or permit. Each case must rest upon its own facts and be determined by the Board in the exercise of a sound discretion. I therefore advise you that the Board must determine in the manner prescribed by law whether or not a violation of the Volstead Act has occurred. If that fact be found adversely to the druggist, the Board should then determine what action ought to be taken, in the exercise of a sound discretion.

In this connection it may be advisable to point out that the office of Federal Prohibition Director is an administrative and



not a judicial office. Accordingly, the revocation of the Federal permit in question is not a judgment which establishes a violation of law. It is a finding of fact which neither adds to nor detracts from the evidence upon which it rests. Such a finding of fact by an administrative officer cannot relieve your Board either from the duty to give a hearing, as required by G. L., c. 112, § 40, or from the duty to decide for itself upon the evidence whether or not a violation of law has occurred.

---

STATE EMPLOYEE — PENSION DEDUCTION — WORKMEN'S COMPENSATION ACT — WAGES — BOARD — AUDITOR.

St. 1922, c. 341, § 2, providing for the addition of \$5 per week, in certain instances, to the cash payment for regular services, concerns only the basis upon which annuity contributions and computation of pensions based upon prior service are to be made under the retirement and pension system outlined in G. L., c. 32, and, consequently, should not enter into the basis of the computation of awards made to injured employees under the workmen's compensation law.

Whenever an employee is provided with board, in accordance with the practice in a State institution, the same is in the nature of a perquisite, which is not to be included in determining the "average weekly wages" under G. L., c. 152. Accordingly, the State Auditor is not required to approve vouchers for awards made by the Department of Industrial Accidents under the provisions of G. L., c. 152, if it appears that the \$5 addition granted under St. 1922, c. 341, and the value of maintenance have been included in the basis of computation for said awards.

You request my opinion as to whether or not St. 1922, c. 341, § 2, which adds \$5 per week to the cash payments made to institution employees for the purpose of pension deductions, would also have the effect of fixing the full amount of salary or wage said institution employees would receive for the purpose of finding the amount which should be used when making payments under the provisions of G. L., c. 152.

You state that recently the Department of Industrial Accidents has filed with your office certain agreements made with injured institution employees, which show the addition to their cash wages of amounts for maintenance valued at \$4.60, \$5 and \$7 per week, and then allowing payment on the basis of two-thirds of the same. You inquire whether the Department of Industrial Accidents has the right to fix the value of said main-

To the  
Auditor.  
1922  
October 27.

tenance, and, if so, whether the amount should be the same in all cases.

I assume that the purpose of your question is to ascertain whether or not it is your duty to approve vouchers of the Department of Industrial Accidents which disclose that said additions have been made or allowed in connection with payments under the provisions of G. L., c. 152. It would seem that your query is divisible into two parts, viz.: First, is the Department of Industrial Accidents justified, under the provisions of St. 1922, c. 341, in adding the sum of \$5 per week to the weekly wage of an institution employee who becomes injured, when determining the basis of compensation under the provisions of G. L., c. 152? Second, has the Department of Industrial Accidents the right to compute the value of maintenance where the same is allowed to such institution employee and include it when determining the basis of said compensation?

1. St. 1922, c. 341, § 2, provides as follows: —

Section three of said chapter thirty-two is hereby amended by inserting after the word "limits" in the fourteenth line the following: — It shall add to the cash payment for regular services, in cases where an employee of a state institution receives a non-cash allowance to cover compensation in the form of full or complete boarding and housing in accordance with the practice in such state institution, an amount at the rate of five dollars per week, which amount added to said cash payment shall be the basis upon which annuity contributions shall be made; and the foregoing provision shall also apply in computing pensions based upon prior service, — so that paragraph (4) will read as follows: — (4) It shall determine the percentage of wages or salary that employees shall contribute to the fund, subject to the minimum and maximum percentages, and may classify employees for the purposes of the system and establish different rates of contribution for different classes within the prescribed limits. It shall add to the cash payment for regular services, in cases where an employee of a state institution receives a non-cash allowance to cover compensation in the form of full or complete boarding and housing in accordance with the practice in such state institution, an amount at the rate of five dollars per week, which amount added to said cash payment shall be the basis upon which annuity contributions shall be made; and the foregoing provision shall also apply in computing pensions based upon prior service.

It is to be observed that this amends G. L., c. 32, which provides for retirement systems and pensions only. G. L., c. 152, embodies the workmen's compensation law and defines what shall be the basis of computation for compensation, namely, the average weekly wages of the injured employee. Section 1, paragraph (1), thereof defines "average weekly wages" as follows:—

(1) "Average weekly wages," the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

In *Gagnon's Case*, 228 Mass. 334, 338, the Supreme Court has defined "wages" in this connection in the following language:—

"Wages" as used in the statute must be taken to refer to the only wages referred to anywhere in the act (with the exception noted), namely, the wages earned in the particular employment out of which the injury arose. If any exception to this rule were intended, doubtless it would have been stated with the same explicitness with which the only exception in the definition is set forth.

It is significant that St. 1922, c. 341, does not in terms refer to or amend the provisions of G. L., c. 152, and it is fair to assume that if the Legislature had intended to amend the workmen's compensation law in this connection it would have done so expressly.

I am accordingly of the opinion that St. 1922, c. 341, providing for the addition of \$5 per week, in certain instances, to the cash

payment for regular services, concerns only the basis upon which annuity contributions and computation of pensions based upon prior service are to be made under the retirement and pension system outlined in G. L., c. 32, and, consequently, should not enter into the basis of the computation of awards made to injured employees under the workmen's compensation law.

2. The above considerations determine the answer to the second question as well, and it is accordingly my opinion that wherever an employee is provided with board, in accordance with the practice in a State institution, the same is in the nature of a perquisite, which is not to be included in determining "average weekly wages" under G. L., c. 152.

I therefore answer each of the above questions in the negative, and advise you that you are not required to approve vouchers for awards made by the Department of Industrial Accidents under the provisions of G. L., c. 152, if it appears that the \$5 addition granted under said chapter 341 and the value of maintenance have been included in the basis of computation of said awards.

---

#### CIVIL AND MILITARY SETTLEMENTS — MILITARY AID AND SOLDIERS' RELIEF — DEPENDENTS.

An existing civil settlement of a soldier or sailor who served in the Spanish War, Philippine Insurrection or World War is not defeated by the provisions of St. 1922, c. 177.

While St. 1922, c. 177, is retroactive, and the military settlement is acquired as of the date of the entry of the soldier or sailor into the service, and not as of the date when the act takes effect, such settlement may be defeated or changed in any of the ways provided by law.

Dependents of a soldier or sailor who died prior to June 17, 1922, the date upon which St. 1922, c. 177, took effect, acquire the same military settlement as the soldier or sailor would have acquired had he lived.

Dependents eligible to receive soldiers' relief under G. L., c. 115, and amendments thereof, may receive it in the place where the soldier or sailor had acquired a civil settlement, if such settlement has not been lost; otherwise, from the city or town in which such dependents are deemed to have acquired a military settlement, unless such military settlement has been lost.

You have asked my opinion with respect to the proper interpretation to be given to St. 1922, c. 177, amending the settlement law, with reference to men who served in the Spanish War, Philippine Insurrection and World War, and which became effective on

June 17, 1922. More specifically you ask, first, whether said chapter 177 defeats the existing civil settlement of a soldier, thus obliging him and certain dependents to apply for military aid or soldiers' relief in the city or town of his residence at the time of his acceptance into the United States service; and second, whether the dependents of a soldier who died prior to June 17, 1922, the date when said chapter became effective, will be eligible to receive soldiers' relief under G. L., c. 115, §§ 17 and 18, as amended by St. 1921, c. 222, in the place where the soldier had acquired a civil settlement by continuous residence, or will the dependents be obliged to apply to the city or town of the soldier's residence at the time of his enlistment or draft.

The statute involved, while amendatory of section 1 of G. L., c. 116, which is the chapter relating to settlement of paupers, with respect to the questions here raised effected no change material to our present inquiry. Said St. 1922, c. 177, is entitled "An Act relative to the acquisition of settlements by soldiers and sailors," and provides as follows:—

Section one of chapter one hundred and sixteen of the General Laws is hereby amended by striking out all after the word "town" in the twenty-seventh line down to and including the word "enemy" in the thirtieth line, by inserting after the word "not" in the thirty-ninth line the words:—, or who enlisted and served in said forces during the Philippine insurrection, — and by striking out, in the fortieth line the words " , subject to the same proviso," — so that clause Fifth will read as follows:— *Fifth*, A person who enlisted and was mustered into the military or naval service of the United States, as a part of the quota of a town in the commonwealth under any call of the president of the United States during the war of the rebellion or any war between the United States and any foreign power, or who was assigned as a part of the quota thereof after having enlisted and been mustered into said service, and his wife or widow and minor children, shall be deemed thereby to have acquired a settlement in such town; and any person who would otherwise be entitled to a settlement under this clause, but who was not a part of the quota of any town, shall, if he served as a part of the quota of the commonwealth, be deemed to have acquired a settlement, for himself, his wife or widow and minor children, in the place where he actually resided at the time of his enlistment. Any person who was inducted into the military or naval forces of the United States under the federal selective service act, or who enlisted in said forces

in time of war between the United States and any foreign power, whether he served as a part of the quota of the commonwealth or not, or who enlisted and served in said forces during the Philippine insurrection, and his wife or widow and minor children shall be deemed to have acquired a settlement in the place where he actually resided in this commonwealth at the time of his induction or enlistment. But these provisions shall not apply to any person who enlisted and received a bounty for such enlistment in more than one place unless the second enlistment was made after an honorable discharge from the first term of service, nor to any person who has been proved guilty of wilful desertion, or who left the service otherwise than by reason of disability or an honorable discharge.

1. A statute will not be held to be retroactive in the absence of a plainly expressed intention that it shall be so. *Martin L. Hall Co. v. Commonwealth*, 215 Mass. 326, 329. This statute does plainly express the intention that it shall be retroactive. In *Boston v. Warwick*, 132 Mass. 519, 520, the court, in construing a similar statute, said: —

The pauper to whom it [the statute] applies is to be “deemed to have acquired a settlement” by his service for a term not less than one year as a part of the quota of the town. The settlement conferred upon him is not a settlement acquired at the time of the passage of the statute, but, by virtue of the retroactive force of the statute, is to be treated in all respects as a settlement acquired by him at the expiration of his service for a term not less than a year. *Worcester v. Springfield*, 127 Mass. 540.

. . . There is nothing in the statutes to prevent his changing this settlement and acquiring a new one in any of the modes provided by law. . . . It was intended for the benefit of the soldier, and not to disable him from gaining a settlement after he left the service in any of the modes provided by statute, as any other person might.

In view of this decision, it is plain that the present act is retroactive, that the settlement is, by virtue of the statute, acquired as of the time of enlistment or induction into the service and not as of the date when the act takes effect, and that such settlement may be defeated or changed in any of the modes provided by law. I am of the opinion that the act neither prevents a soldier from acquiring a subsequent settlement in some other city or

town nor defeats a subsequent settlement so obtained, and therefore answer your first question in the negative.

2. With respect to your second inquiry, the answer is to be arrived at in understanding the purpose of the act, and I believe that to be, not to give the widow or children more than the soldier or sailor himself would have been entitled to, but to put them in the same position he would have been in had he lived. The phraseology of the statute, that the persons enumerated "shall be deemed to have acquired a settlement," clearly shows that it is retroactive in its purpose. Consequently, the widow or minor children of a soldier or sailor who has died prior to June 17, 1922, acquire the same military settlement which the husband or father would have acquired had he lived; but, just as the soldier or sailor might have lost this military settlement, so too, if the widow or minor children have moved from the city of whose quota the soldier formed a part, this military settlement may be lost by them. I am consequently of opinion that the dependents eligible to receive soldiers' relief under G. L., c. 115, and amendments thereof, may receive it in the place where the soldier or sailor had acquired a civil settlement, if said settlement has not been abandoned or lost; otherwise, from the city in which the dependent is deemed to have acquired a military settlement, unless said military settlement has been abandoned or lost.

DIVISION OF FISHERIES AND GAME — ACCEPTANCE OF UNCONDI-  
TIONAL GIFTS — TRUST.

In the absence of any express prohibition in the Constitution or statutes of the Commonwealth, the Division of Fisheries and Game, as a part of the Department of Conservation, is entitled to receive unconditional gifts of chattels, the title to which, however, vests in the Commonwealth, but any sums of money which may be offered to the Division of Fisheries and Game by way of absolute and unconditional gift to the Commonwealth must be deposited in the treasury of the Commonwealth, in accordance with Mass. Const., pt. 2d, c. II, § I, Art. XI, and G. L., c. 30, § 27, and can only be withdrawn from the treasury in accordance with the method provided by law. On the other hand, the Department of Conservation has no authority to receive and accept any gift of money charged with any form of trust for the purpose of carrying on local activities of the Division of Fisheries and Game.

To the Com-  
missioner of  
Conservation.  
1922  
November 10.

You ask my opinion on the following facts: —

The Division of Fisheries and Game is about to receive as a gift an automobile as an addition to its law-enforcement equipment. The deed is an out and out gift, with no conditions attached.

There is a movement on foot among certain clubs in the western part of the State to supply the funds with which to build a camp at the Montague Rearing Station, for housing the superintendent during a portion of the year.

It is likely that sums of money may be offered to the Division from time to time to help defray the cost of extending the rearing facilities at some of the fish hatcheries and bird farms.

Is there any statutory provision which would prevent this Division from accepting gifts of money or materials to assist in carrying on its work, provided that these are unconditional gifts and are not to be construed in any sense as the creation of trusts or as giving the donors any right to follow the property or the funds and have a voice in their handling or expenditure?

Your question is properly divisible into two parts: first, has the Division of Fisheries and Game the right to receive and hold chattels by unconditional gift; and second, has said division the right to receive money by unconditional gift?

The Division of Fisheries and Game forms a part of the Department of Conservation. G. L., c. 21, § 1. As such it is a branch of the administration of government of the Commonwealth. In and of itself it is not an entity. It would accordingly follow that the donee should be the Commonwealth of Massachusetts.



The right of the Commonwealth to acquire and hold property may be thus generally stated (36 Cyc. 869, and cases cited):—

A state has in general the same rights and powers in respect to property as an individual. It may acquire property, real or personal by conveyance, will, or otherwise, and hold or dispose of the same or apply it to any purpose, public or private, as it sees fit.

In the absence, therefore, of any express prohibition in the Constitution or statutes of the Commonwealth, it is my opinion that the Division of Fisheries and Game is entitled to receive unconditionally gifts of chattels, the title to which, however, vests in the Commonwealth.

In this connection I desire to point out that the expenditure for operation of such chattels, for example, an automobile, might raise a different question involving consideration of other principles.

Mass. Const. Amend. LXIII, § 1, provides as follows:—

*Collection of Revenue.*—All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof.

The Constitution of Massachusetts also provides in pt. 2d, c. II, § I, art. XI:—

No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

G. L., c. 30, § 27, provides:—

All fees or other money received on account of the commonwealth shall be paid into the treasury thereof and such payments shall, except as otherwise expressly provided, be made at least once in each month.

See also *Opinion of the Justices*, 13 Allen, 593, and VI Op. Atty.-Gen., 273.

It is accordingly my opinion that any sums of money which may be offered to the Division of Fisheries and Game from time to time by way of absolute and unconditional gift to the Commonwealth must be deposited in the treasury of the Commonwealth, in accordance with the foregoing provisions of the Constitution and acts of the Legislature, and can only be drawn therefrom in accordance with the method provided by law.

Inasmuch as you state that the proposed gifts to the division are to be devoted "to assist in carrying on its work," it may be well to point out that such a gift would unquestionably constitute a trust, regardless of the fact that such gifts "are not to be construed in any sense as the creation of trusts or as giving the donors any right to follow the property or the funds and have a voice in their handling or expenditure." There is nothing to prevent the Commonwealth of Massachusetts, as a sovereign, from sustaining the character of a trustee for such a purpose as that under consideration, but in such case the money would have to be received and accepted by some officer, commission or department of the Commonwealth, duly authorized by statute to receive the money, in trust for the designated purpose, as, for example, the Department of Education, G. L., c. 69, § 3. See also G. L., c. 45, §§ 3 and 14, relating to powers of boards of park commissioners; G. L., c. 114, §§ 20 and 21, relative to care of cemeteries and cemetery lots; G. L., c. 45, § 19, relative to public domain. I find no statute authorizing the Department of Conservation or the Division of Fisheries and Game to receive money in trust for the purpose of expanding or carrying on the work of that department or division.

I am therefore of the opinion that your department has no authority to receive money on behalf of the Commonwealth in trust for the purpose of carrying on lawful activities of the Division of Fisheries and Game. I am accordingly constrained to advise you that while your department may receive and deposit in the treasury an absolutely unconditional gift of money, your department has no authority to accept any gift of money charged with any form of trust.

AUDITOR OF THE COMMONWEALTH — INSPECTION OF INCOME  
TAX RETURNS.

St. 1922, c. 545, § 27, when construed with G. L., c. 62, §§ 32 and 58, does not authorize the Auditor of the Commonwealth to inspect income tax returns in making an audit of the Income Tax Division.

G. L., c. 62, § 32, provides, in part: —

To the  
Auditor.  
1922  
November 13.

Returns shall be open to the inspection of the commissioner, and his deputies, assistants and clerks when acting under his authority, and the income tax assessors, and their deputies, assistants and clerks when acting under their authority. The books, accounts and other records in the hands of the commissioner, except returns, shall be open to the inspection of the state auditor, and his deputies, assistants and clerks when acting under his authority for the purpose of auditing the accounts of the commissioner. . . .

Section 35 of said chapter provides: —

The commissioner shall determine from the returns required by this chapter, or in any other manner, the income of every person taxable thereunder, and shall assess thereon the tax hereby provided; but he shall not determine the income of a person who has filed a return in accordance with sections twenty-two to twenty-five, inclusive, within the time prescribed by law, to be in excess of that disclosed by such return, without notifying such person and giving him an opportunity to explain the apparent incorrectness of his return.

Section 58 of said chapter provides: —

The disclosure by the commissioner or by the state auditor, or by any deputy, assistant, clerk or assessor, or other employee of the commonwealth or of any city or town therein, to any person but the taxpayer or his agent, of any information whatever contained in or set forth by any return filed under this chapter, other than the name and address of the person filing it, except in proceedings to collect the tax or by proper judicial order, or for the purpose of criminal prosecution under this chapter, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment for not more than six months, or both, and by disqualification from holding office for such period, not exceeding three years, as the court determines.

St. 1922, c. 545, § 27, provides, in part: —

The department of the state auditor shall annually make a careful audit of the accounts of all departments and activities of the commonwealth, including those of the income tax division of the department of corporations and taxation, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such accounts at reasonable times. Said department shall keep no books or records except records of such audits, and its annual report shall relate only to such audits. . . .

You inquire whether, under these provisions of law, you have a right to inspect income tax returns for the purpose of making an audit of the Department of Corporations and Taxation.

In an opinion rendered to the Tax Commissioner on May 3, 1918, the Attorney General advised that, under Gen. St. 1916, c. 269, § 16, the Auditor could not lawfully inspect the books or cards which set forth in detail the name and address of each taxpayer, the amount of the tax and penalty, the amount of abatement, if any, the additional charges for costs and interest, and the final balance paid or unpaid. At that time the statute forbade the disclosure of any information contained in the return of each taxpayer, and there was no act which authorized the Auditor and his deputies, assistants and clerks to inspect the books, accounts and other records in the hands of the Commissioner, except returns, for the purpose of making an audit. The latter authority, with an express exception as to returns, was conferred by Gen. St. 1919, c. 117, which is now codified as G. L., c. 62, § 32. Under that act, therefore, the Auditor and his deputies, assistants and clerks may inspect "the books, accounts and other records of the tax commissioner, *except returns*," in order to make an audit.

I find nothing in St. 1922, c. 545, which enlarges the authority of the Auditor in this respect. That act establishes a Commission on Administration and Finance. Section 1 of that act transfers to said commission "all the rights, powers, duties and obligations . . . of the state auditor except such as relate to the auditing of accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of

such audits." Section 27 simply reaffirms the existing duty to "make a careful audit," a duty which already rested upon the Auditor under the powers and obligations reserved to him by section 1. If the Legislature had intended to abolish the express exception as to inspection of income tax returns, it would probably have done so by words equally clear and unambiguous. When section 27 is construed with section 1, I am unable to discover any intention to enlarge the powers of the Auditor.

I am confirmed in this conclusion by the consideration that inspection of the returns is unnecessary in order to make a careful audit. The tax is assessed by the Commissioner upon the basis of those returns (and possibly supplementary information), but until that assessment is made, no money obligation to the Commonwealth arises. I can discover no intention in this act to make the Auditor a reviewing officer charged with the duty to determine whether the Commissioner is assessing income taxes according to law. If the Auditor is permitted to see the books, accounts and other records, except returns, which show the amount of the tax as assessed, any abatement of it, any charges for costs or interest, and the final balance paid or unpaid, he has before him all the financial history of that money obligation from the time when that obligation comes into existence. A careful audit does not require the Auditor to go behind the assessment of the tax. I am therefore of opinion that St. 1922, c. 545, § 27, does not confer power to inspect the returns.

---

OPTOMETRY — EXAMINATION AND REGISTRATION OF APPLICANTS  
— APPROVAL OF SCHOOLS.

G. L., c. 112, § 68, giving to the Board of Registration in Optometry power to approve schools of optometry whose graduates may apply for examination, is a valid exercise of the police power, and is constitutional.

You ask my opinion on points relative to the optometry law. Your first question is whether, under G. L., c. 112, § 68, the Board has a right to approve schools of recognized standing and reject those of questionable character and standing, and whether

To the Commissioner of  
Civil Service.  
1922  
November 14.

the clause of that section which relates to qualifications of applicants for examination will stand the test of constitutionality.

G. L., c. 112, § 68, is, in part, as follows: —

No person, except as otherwise provided in this section, shall practice optometry until he shall have passed an examination conducted by the board in theoretic, practical and physiological optics, theoretic and practical optometry, and in the anatomy and physiology of the eye, and shall have been registered and shall have received a certificate of registration which shall have conspicuously printed on its face the definition of optometry set forth in section sixty-six. Every applicant for examination shall present satisfactory evidence, in the form of affidavits properly sworn to, that he is over twenty-one, of good moral character, that he has studied the subjects herein prescribed for at least three years in a registered optometrist's office or has graduated from a school of optometry, approved by the board, maintaining a course of study of not less than two years with a minimum requirement of one thousand attendance hours and that he has graduated from a high school approved by the board or has had a preliminary education equivalent to at least four years in a public high school; provided, that if he is unable to prove graduation from, or four years' actual attendance at, a high school the board shall determine his qualifications by proper preliminary examination, the fee for which shall be five dollars to be paid by the applicant. . . .

The case of *Commonwealth v. Houtenbrink*, 235 Mass. 320, 323, to which you refer in your letter, holds directly that St. 1912, c. 706, re-enacted in G. L., c. 112, §§ 66-73, is a valid exercise of the police power, and is constitutional. In that case section 5 of the statute, re-enacted in G. L., c. 112, § 68, is expressly referred to. In G. L., c. 112, § 2, there is a corresponding provision requiring an applicant for registration as a qualified physician to furnish satisfactory proof that he has received the degree of doctor of medicine, or its equivalent, from a legally chartered medical school having the power to confer degrees in medicine. The constitutionality of such a provision relating to physicians is settled by numerous decisions. *Hewitt v. Charier*, 16 Pick. 353; *Dent v. West Virginia*, 129 U. S. 114; *Collins v. Texas*, 223 U. S. 288. Cf. *Commonwealth v. Pora*, 196 Mass. 326; *Commonwealth v. Zimmerman*, 221 Mass. 184. I have no doubt that the requirements to which you refer are not in violation of any constitutional provision.

Section 68, in the part quoted above, gives the Board power, where an applicant has graduated from a school of optometry maintaining certain standards, to approve or disapprove that school, as a condition of registration. The discretion which the Board is thus called upon to exercise cannot be reviewed unless the exercise is arbitrary or unreasonable. See *Chelsea v. Treasurer and Receiver-General*, 237 Mass. 422.

---

GIFTS TO THE COMMONWEALTH — ACCEPTANCE — DELEGATION  
OF LEGISLATIVE AUTHORITY — DEPARTMENT OF EDUCATION,  
DIVISION OF THE BLIND.

Authority to accept a gift to the Commonwealth is in the Legislature unless the Legislature has delegated such authority.

The Department of Education is authorized by G. L., c. 69, § 3, to receive "in trust for the Commonwealth . . . any gift or bequest of personal property for educational purposes, and therefore may receive a legacy of \$2,000 "to the Massachusetts Commission for the Blind."

You have asked my opinion as to whether the Commission for the Blind, known as the Division of the Blind, Department of Education, may receive a legacy of \$2,000. The will containing the bequest was executed Sept. 9, 1914, and by the seventh clause thereof the testator requested his executor to pay, among other legacies, the following: "Two thousand dollars to Massachusetts Commission for the Blind." By a codicil executed March 25, 1916, the testator provided that one-third of the principal of his estate theretofore undisposed of should go "to the Massachusetts Commission for the Blind of said Boston to help in its work for the adult blind."

To the Com-  
missioner of  
Education.  
1922  
November 14.

As a general proposition, authority to accept a gift to the Commonwealth is in the Legislature unless the Legislature has delegated such authority. G. L., c. 69, § 3, provides as follows:—

The department of education, in this chapter called the department, may receive, in trust for the commonwealth, any grant or devise of land or any gift or bequest of personal property for educational purposes, and shall forthwith transfer the same to the state treasurer, who shall administer it as provided in section sixteen of chapter ten.

This section is a re-enactment of a similar provision coming down from St. 1850, c. 88.

The Legislature has, then, delegated to the Department of Education authority to accept gifts for educational purposes, so that the question in the present case turns upon whether or not this legacy comes within the scope of said section. In this connection it is material to review briefly the establishment of the Massachusetts Commission for the Blind and its functions as a subdivision of said department.

St. 1906, c. 385, established a State board to be known as the Massachusetts Commission for the Blind, and enumerated among its functions that of acting as a bureau of information and industrial aid for the purpose of aiding the blind in finding employment and developing home industries for them, giving to the commission authority to furnish materials and tools to any blind person, and to assist such blind persons as are engaged in home industries in marketing their products. Said chapter also authorized the commission to establish, equip and maintain one or more schools for industrial training. It is quite evident, then, from the law originally establishing such a commission, that one of the primary purposes was to aid and assist the blind by education and training to make themselves self-supporting, or as nearly so as possible. The provisions of the original statute were, in substance, re-enacted in Gen. St. 1918, c. 266, and in turn incorporated in G. L., c. 69, §§ 12-25.

The duties of the Division of the Blind are prescribed by section 12 of said chapter 69, which is as follows:—

The division of the blind shall make its own by-laws and adopt all necessary rules and regulations, and shall act in an advisory capacity with respect to the administration and execution of the laws by the director and shall visit all schools and workshops established under its authority.

In thus incorporating this Division within the Department of Education our Legislature gave tangible recognition to the modern and broad scope which education to-day embraces. As was said by Knowlton, J., in *Mouut Hermon Boys' School v. Gill*, 145 Mass. 139, 146:—



Education is a broad and comprehensive term. It has been defined as "the process of developing and training the powers and capabilities of human beings." To educate, according to one of Webster's definitions, is "to prepare and fit for any calling or business, or for activity and usefulness in life." Education may be particularly directed to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it relates to them all.

Having in mind, then, the legislation which has led up to the establishment of a commission for the blind, its incorporation within the Department of Education and its defined duty and authority to establish schools for the aid and advancement of the blind, I am of opinion that the gift above referred to may properly be received by the Massachusetts Commission for the Blind, now known as the Division of the Blind, to be administered in accordance with such rules and regulations as said division may deem necessary to adopt under said section 12, and in conformity with G. L., c. 10, § 16.

---

#### SAVINGS BANKS — BUSINESS OF RECEIVING DEPOSITS — AUTOMATIC RECEIVING-TELLER MACHINES.

Automatic receiving-teller machines installed by savings banks for receiving deposits of small coins may properly be regarded as depots, within G. L., c. 168, § 25.

Under G. L., c. 168, § 25, automatic receiving-teller machines may be maintained and established by a savings bank, with the written permission of, and under regulations approved by, the Commissioner of Banks.

You state that automatic receiving-teller machines have been installed by certain savings banks in department stores, factories, etc., that these machines are of the slot machine type and are arranged for the depositing of small coins, stamps being received in return, which may be attached to cards and later taken to the savings banks and redeemed or credited to depositors' accounts, and that no persons are in attendance, no withdrawals can be made, and no offices are maintained by the banks at the places where the machines are located. You ask whether there is any authority for the conduct of this form of business by savings banks.

To the Com-  
missioner  
of Banks.  
1922  
November 15.

G. L., c. 168, § 25, provides, in part, as follows:—

Such corporation shall carry on its usual business at its banking house only, and a deposit shall not be received or payment on account of deposits be made by the corporation or by a person on its account in any other place than at its banking house, which shall be in the town where the corporation is established; except that the corporation may, with the written permission of and under regulations approved by the commissioner, maintain and establish one or more branch offices or depots in the town where its banking house is located, or in towns not more than fifteen miles distant therefrom where there is no savings bank at the time when such permission is given; . . .

The remainder of the section deals with the collection of savings from school children, and with the holding of meetings.

In my judgment, the business which you have described comes within the excepting clause in section 25, quoted above. While, clearly, a slot machine such as you have described is not a branch office, it seems to me that it may properly be regarded as a depot. The primary meaning of the word "depot" is "a place of deposit" (Century Dictionary). Other definitions, such as "warehouse" or "railroad station," would seem to be wholly inapplicable. It is not, I think, an unreasonable construction of the word "depot," as used in section 25, to hold that it includes slot machines installed in a particular place for the purpose of receiving deposits. It follows that, with the written permission of, and under regulations approved by, the Commissioner, such machines may be maintained and established by a savings bank in the town where its banking house is located, or in towns not more than fifteen miles distant therefrom where there is no savings bank at the time when such permission is given.

LICENSE — DIVISION OF WATERWAYS AND PUBLIC LANDS —  
DATE.

A license which requires the approval of the Governor and Council takes effect when so approved, and its date is the date of such approval.

You write me stating that "a question has arisen as to whether or not a license which was issued by the Department of Public Works, Division of Waterways and Public Lands, requiring the approval of the Governor and Council, and bearing the date of Oct. 3, 1921, immediately preceding the signatures of the Associate Commissioners and the date of approval by the Governor and Council, Oct. 19, 1921, is void, in view of the fact that said license and the accompanying plans were filed in the registry of deeds Oct. 17, 1922."

To the Com-  
missioner of  
Public Works.  
1922  
November 16.

G. L., c. 91, § 18, in respect to such licenses says, in part: —

. . . Such license shall be void unless, within one year after its date, it and the accompanying plan are recorded in the registry of deeds for the county or district where the work is to be performed.

I assume that Oct. 3, 1921, is the actual date of the signing by the Commissioners, and Oct. 19, 1921, the actual date of approval by the Governor and Council. The instrument did not become effective as a license until the approval of the Governor and Council, and could not be filed in the registry of deeds before that date.

I am therefore of opinion that Oct. 19, 1921, is the date of the instrument, and as it was recorded Oct. 17, 1922, the requirement of the statute has been met. See *Old Colony Trust Co. v. Medfield & Medway St. Ry. Co.*, 215 Mass. 156.

CONSTITUTIONAL LAW — “ANTI-AID” AMENDMENT — STATE SCHOLARSHIPS IN INSTITUTIONS NOT UNDER PUBLIC CONTROL — ATTORNEY GENERAL.

The Attorney General does not advise officers, boards or commissions which are subordinate to the Legislature upon constitutional questions, unless such advice is clearly required in order to enable such officers, boards or commissions to discharge the duties required of them by law.

Mass. Const. Amend. XVIII did not forbid payment of public money to colleges or universities not under public control.

Mass. Const. Amend. XVIII did forbid an appropriation of public money to aid a private school or to pay the tuition of scholars therein or to reimburse parents for tuition paid by them to such academy, even though such appropriation is made from moneys other than those raised by taxation for the support of common schools.

Mass. Const. Amend. XLVI, § 2, which superseded Amend. XVIII but re-enacted and reaffirmed the prohibitions contained therein, forbids an appropriation of public money to aid a school not under public control or to pay the tuition of scholars therein, or to reimburse parents for tuition so paid by them, but subject, nevertheless, to the exception made by section 3.

Mass. Const. Amend. XLVI forbids an appropriation of public money for the purpose of founding, aiding or maintaining a college or university not under public control.

If the effect of paying the tuition of a student at a privately controlled college or university is to aid the institution, such payment is forbidden by Mass. Const. Amend. XLVI, § 2, even though the payment be made to the student instead of directly to the institution.

The scope of the prohibitions made by Mass. Const. Amend. XLVI, § 2, may be measured by the exception made by section 3.

If the payment of public money to a student at a privately controlled college or university is in effect a private gratuity which does not directly accomplish some public purpose, such payment would take the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

The promotion of popular education is a public purpose.

A statute has no magic to alter facts, nor can constitutional restrictions be brushed aside by a descriptive phrase.

You inquire, in substance, whether a law providing for the payment out of public funds of scholarships to individuals, to be classified as “Massachusetts State University students,” in order to assist such students in attending some approved university or college within the Commonwealth, could be drafted without infringing Mass. Const. Amend. XLVI, commonly known as the “anti-aid” amendment. Your inquiry does not relate to the powers and duties vested in your commission by Res. 1922,

c. 33. It draws in question the powers vested by the people in the General Court, to which your commission owes its existence.

While the Legislature, or either house thereof, or a committee of either house, or the Governor, may properly inquire whether a proposed bill would be constitutional, if enacted, the Attorney General does not advise officers, boards or commissions upon constitutional questions unless such advice is clearly required to enable such officers, boards or commissions to discharge the duties required of them by law. This principle is so far applicable to the present case that I feel that I ought not to attempt to advise you whether a bill which has yet to be drawn would be beyond the power of the General Court. On the other hand, the nature of the duties imposed upon your commission by Res. 1922, c. 33, renders it proper, in my opinion, to advise you as to the general principles which you should take into consideration if you deem it expedient to draft a bill.

On May 23, 1855, the people ratified the eighteenth amendment to the Massachusetts Constitution, which provided 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 money shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school.

This amendment was confined to expenditures for public or common schools. It did not forbid payment of public money to higher institutions of learning, such as colleges or universities. *Merrick v. Amherst*, 12 Allen, 500; *Opinion of the Justices*, 214 Mass. 599, 601. But as applied to expenditures by cities or towns on account of education similar to that given in common schools, this amendment has been so construed as to give full effect to the prohibition.

The Supreme Judicial Court has decided that the Legislature has no power to authorize a town to appropriate money to aid in maintaining, as a high school, a free academy founded by a private benefactor, which was under private superintendence and control. *Jenkins v. Andover*, 103 Mass. 94. Three Attorneys General have advised that the prohibition cannot be evaded by appropriating the money to pay the tuition of the children, instead of appropriating it directly for the maintenance of the private academy as a high school. I Op. Atty.-Gen. 319; V Op. Atty.-Gen. 204; V Op. Atty.-Gen. 711; VI Op. Atty.-Gen. 448. An appropriation to reimburse parents for tuition paid by them to the academy is equally forbidden, "since the substance, not the mere form of the transaction must be considered." V Op. Atty.-Gen. 204, 205. So, also, it is of no consequence that the appropriation is made from moneys other than those raised by taxation for the support of common schools. I Op. Atty.-Gen. 315, 321. The guiding principle was thus declared by Attorney General Knowlton in 1896 (I Op. Atty.-Gen. 315, 321, 322):—

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 institution, 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 taxpayers 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.

An executive construction of Mass. Const. Amend. XVIII, which has been approved and followed for over thirty years (see V Op. Atty.-Gen. 711, 713), is entitled to great weight, even though it may not be, perhaps, conclusive. *Costley v. Commonwealth*, 118 Mass. 1, 36; *Commonwealth v. Lockwood*, 109 Mass. 323, 339.

On Nov. 6, 1917, the people ratified Amendment XLVI, commonly known as the "anti-aid" amendment, of which sections 2 and 3 provide:—

SECTION 2. 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 commonwealth 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 expended; and no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, except that appropriations may be made for the maintenance and support of the Soldiers' Home in Massachusetts and for free public libraries in any city or town, and to carry out legal obligations, if any, already entered into; and no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.

SECTION 3. Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished by such hospitals, infirmaries or institutions to such persons as may be in whole or in part unable to support or care for themselves.

This amendment superseded Amendment XVIII. It will be observed, however, that the first clause of section 2 (*supra*) is in

effect a re-enactment of Amendment XVIII. So far, therefore, from weakening or in any way qualifying Amendment XVIII, Amendment XLVI reaffirms it, presumably with the construction placed thereon during the past thirty years. Indeed, Amendment XLVI contains further prohibitions which were not included in Amendment XVIII.

There can be no question that Amendment XLVI embraces colleges and other higher institutions of learning. Section 2 expressly forbids any use of public money, property or credit —

*for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated, or any other school, or any college . . . institution, or educational . . . undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both. . . .* (Italics ours.)

In view of these prohibitions, a former Attorney General advised that payments which had theretofore been made by the Commonwealth for the purpose of aiding or maintaining educational institutions under private control, such as the Perkins Institution for the Blind, were no longer lawful. Opinion, Attorney General to Joint Special Committee on Finance, Dec. 28, 1917; V Op. Atty.-Gen. 315. On the other hand, the opinion of Dec. 28, 1917, advised that payments to the Massachusetts Agricultural College would be lawful because that institution was owned by the Commonwealth and under exclusive public control. It seems clear, therefore, that, in view of the express language of the amendment, the use of public money or public property or public credit "for the purpose of founding, maintaining or aiding" any college or university not owned by the Commonwealth and under exclusive public control is now forbidden, and further, that even public ownership and control cannot avail if any denominational doctrine is inculcated by such university or college.

It may be suggested, however, that a payment of the scholarship money to the individual, to enable him to obtain a college education at some approved institution to be selected by him,



could be found not to be made for the purpose of aiding or maintaining the institution that he elects to attend. That suggestion presents a question which cannot be determined with certainty until the precise plan be cast in the form of a bill. We may assume, however, that any plan must be subjected to the test of substance rather than to a mere test of form. A payment of tuition, whether directly to the private institution (VI Op. Atty.-Gen. 356) or to the scholar under such conditions that in effect it is a payment to the institution, if the effect of it is to aid the institution, would seem to achieve the forbidden result by indirection. See I Op. Atty.-Gen. 319; V Op. Atty.-Gen. 204 and 711.

The shadow cast by section 2 upon payments in either of these forms is deepened by section 3. It may be that the scope of the prohibition in the second section is measured by the exception made by the third section. That section, by way of exception, permits payments to privately controlled institutions for the deaf, dumb or blind of not more than reasonable compensation for care or support rendered to such persons who are unable in whole or in part to care for themselves. VI Op. Atty.-Gen. 415. The exception thus expressly made may exclude similar payments for the benefit of those who are not deaf, dumb or blind, and who, therefore, do not come within the terms of the third section. VI Op. Atty.-Gen., *supra*. Thus, the third section would appear to emphasize the doubt whether the Commonwealth may, directly or indirectly, pay the tuition, in whole or in part, of normal persons who attend colleges or institutions not owned by the Commonwealth and not under exclusive public superintendence and control.

If the scholarship payment be made outright to the individual, without restriction upon its use for tuition fees, in order to aid him in obtaining a college education, a different problem is presented. It is too well settled to require discussion that public money cannot be spent for a private purpose. *Opinion of the Justices*, 136 N. E. 157; *Whittaker v. Salem*, 216 Mass. 483; *Lowell v. Boston*, 111 Mass. 454; VI Op. Atty.-Gen. 530; VI Op. Atty.-Gen. 474; VI Op. Atty.-Gen. 478; see also Mass. Const.

Amend. LXII, § 1. With minor exceptions, public money is raised by taxation. To tax A in order to make a private gift to B takes A's property without due process of law. It is true that public money may be appropriated to one who has no legal claim to it, if a public purpose is thereby directly achieved. *Opinion of the Justices*, 136 N. E. 157. But an ostensible public purpose cannot be made the cover and excuse for a private gratuity. *Lowell v. Boston*, 111 Mass. 454; *Whittaker v. Salem*, 216 Mass. 483; VI Op. Atty.-Gen. 530. While I am not unmindful that the promotion of popular education constitutes a public purpose for which public money may constitutionally be spent (*Knights v. Treasurer and Receiver-General*, 237 Mass. 493, 496), that public purpose cannot be made a cloak for a mere gift which is essentially private in character. In seeking to avoid the prohibition upon expending public funds in order to aid or maintain colleges or universities not under public control, care must be exercised to avoid the prohibition upon giving away public money for a private purpose. To formulate a bill which will avoid both this *Seylla* and that *Charybdis* will require no little skill.

The suggestion that the difficulty may be met by calling the recipients of the scholarships "Massachusetts State University students" is of no avail. To attach that title to the holders of the scholarships will not affect the situation nor legalize a payment if such payment is forbidden by the Constitution. A statute may provide that certain things shall be done or not done, but it has no magic to alter facts. VI Op. Atty.-Gen. 117. Constitutional restrictions cannot be brushed aside by a descriptive phrase. The constitutionality of the bill, when drafted, will depend upon whether the money is spent in a manner and for a purpose permitted by the Constitution.

## TAXATION — LEGACY AND SUCCESSION TAX.

Under St. 1922, c. 403, stock of Massachusetts corporations, the property of a resident who died intestate, is not subject to a succession tax on the death of a non-resident next-of-kin, before distribution of the estate of the resident decedent, as property of the non-resident decedent.

The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death.

You request my opinion in regard to the application of St. 1922, c. 403, to the following facts:— A resident of the Commonwealth died, without leaving a will, owning stock of Massachusetts corporations. Before any distribution of his estate was made, and subsequent to the effective date of the act, one of his next-of-kin died, a non-resident of Massachusetts. You ask whether under these circumstances the non-resident decedent has such an ownership in the stock referred to that said stock is subject to a succession tax under said St. 1922, c. 403.

To the Commissioner of  
Corporations,  
and Taxation,  
1922  
December 6.

St. 1922, c. 403, amends G. L., c. 65, § 1, so as to read, in part, as follows:—

All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth or any interest therein and all stock in any national bank situated in this commonwealth or in any corporation organized under the laws of this commonwealth belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by laws regulating intestate succession, . . . shall be subject to a tax at the percentage rates fixed by the following table: . . .

Under this law *all* property of a non-resident decedent which is within the jurisdiction is no longer subjected to inheritance tax. Broadly speaking, the inheritance tax upon non-resident decedents is now confined to three classes of property, — namely, (a) real estate and any interest therein, (b) stock in any national bank situated in the Commonwealth, and (c) stock in any corporation organized under the laws of this Commonwealth. Under the facts disclosed by your present inquiry no inheritance tax accrues upon the stock in Massachusetts corporations to which

you refer unless the non-resident was at the time of his death the owner of such stock.

The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death. *Dawes v. Boylston*, 9 Mass. 337, 352; *Lawrence v. Wright*, 23 Pick. 128; *Hutehins v. State Bank*, 12 Met. 421, 425; *Pritchard v. Norwood*, 155 Mass. 539; *Flynn v. Flynn*, 183 Mass. 365; *Lathrop v. Merrill*, 207 Mass. 6, 10; 24 C. J. 204. I know of no exception to this rule except, perhaps, in the case of personal property which is the subject of a specific legacy. 24 C. J. 205, 208. *Cf. Duffy v. Bourneuf*, 227 Mass. 513, 517. With that possible exception, an executor or administrator has absolute power to sell personal property of the estate, and can pass good title to a purchaser. *Clark v. Blackington*, 110 Mass. 369; 24 C. J. 207, 208. But if he sells for less than the appraised value of the property he is allowed for the loss only if the court finds that the sale was expedient and for the interest of all concerned. G. L., c. 206, § 5; *Dudley v. Sanborn*, 159 Mass. 185. *Cf. G. L., c. 206, § 21.* As against an administrator, the rights of persons entitled to distribution are fixed by, and can be enforced only pursuant to, a decree for distribution in the probate court. G. L., c. 197, § 24; *Norton v. Lilly*, 210 Mass. 214, 217; *Case v. Clark*, 220 Mass. 344. *Cf. Rhines v. Wentworth*, 209 Mass. 585. As against an executor, prior to Gen. St. 1915, c. 151, a legatee could recover his legacy only in an action at law. *Lathrop v. Merrill*, 207 Mass. 6, 10; R. L., c. 141, § 19. By section 1 of Gen. St. 1915, c. 151 (G. L., c. 197, § 19), it was provided that a legatee might recover his legacy by proceedings in equity in the probate court, and that no action at law should be brought against the estate of the testator for such recovery; but this provision merely changes the remedy. It does not give to a legatee a right in the personal property held by the executor.

My conclusion is, therefore, that the non-resident decedent did not have such an ownership in the stock of Massachusetts corporations belonging to the deceased resident of this Commonwealth as to make that property subject to an inheritance tax on the death of the non-resident.

TRUST COMPANY — SCHOOL SAVINGS SYSTEM.

The powers of trust companies with respect to receiving deposits are defined by G. L., c. 172, § 31, and are not limited in that respect by laws regulating the receiving of deposits by savings banks.

G. L., c. 172, §§ 60 and 61, are not a limitation of the powers of trust companies with respect to receiving deposits.

G. L., c. 168, § 25, containing provisions authorizing savings banks to arrange for the collection of savings from school children, applies only to savings banks.

A certain described plan for a school savings system, introduced by a trust company, is held not to be in violation of law.

You state that a trust company has introduced a school savings system in neighboring public schools under a plan substantially as follows: —

To the Commissioner  
of Banks.  
1922  
December 6.

The pupil makes his deposits with the teacher, who enters the amount in a receipt book. A carbon copy of the entry and the money deposited are enclosed in an envelope, which is taken to the trust company by the principal of the school. No withdrawals are made at the school. After a sufficient sum is accumulated by a pupil, the amount is transferred to a regular pass book, entries in which are made only at the trust company.

You ask my opinion whether a trust company, through its savings department, may solicit and receive deposits from pupils at schools under the plan as outlined above.

The powers of trust companies with respect to receiving deposits are defined by G. L., c. 172, § 31, which is substantially a re-enactment of St. 1888, c. 413, § 6. Said section 31 is, in part, as follows: —

Such corporation may receive on deposit, storage or otherwise, money, government securities, stocks, bonds, coin, jewelry, plate, valuable papers and documents, evidences of debt, and other property of any kind, upon terms or conditions to be agreed upon, and at the request of the depositor may collect and disburse the interest or income, if any, upon said property received on deposit and collect and disburse the principal of such of said property as produces interest or income when it becomes due, upon terms to be prescribed by the corporation. Such deposits shall be general deposits, and may be made by corporations and persons acting individually or in any fiduciary capacity. . . .

G. L., c. 172, §§ 60 and 61, are, in part, as follows: —

SECTION 60. Every such corporation soliciting or receiving deposits (a) which may be withdrawn only on presentation of the pass book or other similar form of receipt which permits successive deposits or withdrawals to be entered thereon, or (b) which at the option of such corporation may be withdrawn only at the expiration of a stated period after notice of intention to withdraw has been given, or (c) in any other way which might lead the public to believe that such deposits are received or invested under the same conditions or in the same manner as deposits in savings banks, shall have a savings department in which all business relating to such deposits shall be transacted. . . .

SECTION 61. All such deposits shall be special deposits and shall be placed in said savings department, and all loans or investments thereof shall be made in accordance with the law governing the investment of deposits in savings banks. . . .

These provisions of sections 60 and 61 were first enacted by St. 1908, c. 520. They are not a limitation of the powers of trust companies with respect to receiving deposits. Their purpose and effect is merely to require that the deposits defined in section 60 shall be special deposits, to be placed in a savings department and to be safeguarded by the same restrictions on their investment which are imposed with respect to deposits in savings banks. *Cf. J. S. Lang Engineering Co. v. Commonwealth*, 231 Mass. 367.

In my opinion, the powers of trust companies to receive deposits in their savings departments are the powers granted by G. L., c. 172, § 31, except in so far as those powers may be curtailed by provisions of other statutes, and are not limited in that respect by the laws regulating the receiving of deposits by savings banks. Otherwise, the limitation of the amount which a savings bank may receive on deposit from any person, fixed by G. L., c. 168, § 31, at \$2,000, would apply to trust companies in their savings departments. In fact, however, the amount which may be so deposited is not limited. *J. S. Lang Engineering Co. v. Commonwealth*, 231 Mass. 367, 370. Where, in any statutory provisions affecting deposits in savings banks, trust companies in their savings departments are intended to be included, they are

expressly mentioned, as in G. L., c. 167, § 16, concerning deposits at intervals. It should be noted that that statute, as originally enacted (Gen. St. 1919, c. 37), provided in section 2 that "nothing herein contained shall be construed to abridge the powers of trust companies under general or special laws." See also *Bachrach v. Commissioner of Banks*, 239 Mass. 272, 274.

G. L., c. 168, § 25, relating to the business of savings banks, contains provisions authorizing a savings bank to arrange for the collection of savings from school children under conditions with which the plan which you have outlined does not comply. But this section in its terms applies only to savings banks, and, for the reasons which I have stated, is not, in my judgment, intended to cover the business of receiving deposits in the savings departments of trust companies. That business, as I have said, is governed by G. L., c. 172, § 31, subject to such restrictions as are imposed by other statutes.

It remains to be considered whether, in receiving deposits under the plan which you have described, there is any violation of any other statute. I find no statute which seems to have any application, other than G. L., c. 172, § 45. That section forbids a trust company to maintain a branch office, with certain exceptions not here material. You suggest that under the plan stated, by which the teacher receipts for money received from pupils, it might be held that the teacher acts as an agent for the trust company, and might therefore be considered to be conducting a branch office in violation of the statute. Whether the teacher under that plan is actually acting as agent for the pupil or as agent for the trust company is largely a question of fact. Assuming, but by no means deciding, that the teacher acts as agent for the trust company, while it would follow that the trust company was doing business in the schoolroom, it would not follow that it was maintaining a branch office in the schoolroom in violation of G. L., c. 172, § 45. It should be observed that while a savings bank, by G. L., c. 168, § 25, is required to carry on its usual business at its banking house only, and is forbidden to receive deposits elsewhere, with certain exceptions, there is no such provision applicable to trust companies.

An office is defined as "the place where a particular kind of business or service for others is transacted" (Webster's Dictionary). It is, in short, a place for the transaction of business. A passenger room in a railway station, although having within it a separate enclosed room where books were kept and tickets sold, has been held not to be an office within the meaning of a criminal statute. *Commonwealth v. White*, 6 Cush. 181. The fact, if it is so found, that the teacher in receiving deposits from the pupil is to be regarded as the agent of the trust company, and in that respect is carrying on the business of the trust company, it seems to me, does not lead to the consequence that the schoolroom in which such deposits are received is therefore to be regarded as a branch office of the trust company. In my opinion, therefore, in the system which you have stated there is no violation of G. L., c. 172, § 45.

There is, however, one aspect of the plan which you ought to consider in the exercise of the general powers vested in you as Commissioner of Banks. You state that the bank considers the teacher to be the agent of the pupil and not of the bank. I do not determine whether this intention has been accomplished by the receipt book and other documents which are attached to your request. I am, however, of the opinion that this intention is not sufficiently declared and brought to the attention of the prospective depositors. The receipt book, particularly, might well lead the depositor to believe that the deposit with the teacher was a deposit with the bank.

A plan which misleads the depositors conceivably might be found to constitute conducting the business "in an unsafe and unauthorized manner," within the meaning of G. L., c. 167, § 22. See V Op. Atty.-Gen. 726. This difficulty may, of course, be met by making the teacher the agent of the bank or by declaring clearly and unequivocally, in such a manner that the depositor cannot overlook it, that the teacher is the agent of the pupil. This matter is one within your discretion. That discretion I cannot and ought not to control. But I feel that the matter should be brought to your consideration for such action as you may see fit to take in the premises.



STATE OFFICERS — POWERS AND DUTIES OF THE AUDITOR OF THE COMMONWEALTH.

Under St. 1922, c. 545, all the powers and duties of the Auditor of the Commonwealth, existing before Dec. 1, 1922, are to continue until the appointment and qualification of the commissioners whose offices are created by that act.

You ask my opinion whether, under the provisions of St. 1922, c. 545, the powers and duties of the Auditor with respect to the work of the 1923 fiscal year cease on Dec. 1, 1922, or whether they continue until the new Commissioners on Administration and Finance are appointed and qualified.

To the Auditor,  
1922  
December 7.

Section 1 of said act is as follows: —

The office of supervisor of administration existing under authority of section one of chapter seven of the General Laws is hereby abolished. All the rights, powers, duties and obligations of said office, and those of the state treasurer relative to bookkeeping and accounting functions not necessarily connected with the cash and funds which he handles, those of the state auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits, those of the state secretary relative to the purchase of paper for printing and general use and those of the superintendent of buildings relative to purchasing and storeroom functions, are hereby transferred to, and shall hereafter be exercised and performed by, the commission on administration and finance established by this act, which shall be the lawful successor of said office, and of the state treasurer, state auditor, state secretary and superintendent of buildings with respect to said rights, powers, duties and obligations.

Section 2 provides for the establishment of a Commission on Administration and Finance, to serve directly under the Governor and Council and to be appointed by the Governor, with the advice and consent of the Council.

Section 29 of said act is as follows: —

So much of this act as authorizes appointments by the governor and council shall take effect on September fifteenth, nineteen hundred and twenty-two. So much as relates to the commission on administration and finance shall take effect upon the appointment and qualification of

the commissioners thereof, but not before December first, nineteen hundred and twenty-two. All other provisions of this act shall take effect on said December first, provided that the state auditor shall retain such of his existing powers and duties as may be necessary to enable him to close up, prior to January first, nineteen hundred and twenty-three, the accounts of the current fiscal year.

Section 1, providing for the transfer to the Commission on Administration and Finance of certain rights, powers, duties and obligations of certain offices, including the Auditor, is clearly one of the provisions which relate to the Commission on Administration and Finance, and therefore, by section 29, is to take effect upon the appointment and qualification of the commissioners thereof. Before the appointment and qualification of such commissioners there can be no commission to which said rights, powers, duties and obligations can be transferred. I advise you, therefore, that all the powers and duties of the Auditor existing before Dec. 1, 1922, are to continue until the appointment and qualification of said commissioners.

---

LICENSE — INTOXICATING LIQUOR — PAYMENT OF REQUIRED  
FEE.

Under G. L., c. 13S, § 19, the fee for a license of the fourth class must be not less than \$250, and no valid license may be issued by the licensing authorities upon payment of a fee fixed by them at a lesser figure.

I have your request for my opinion as to the action of the license commissioners of the city of Springfield in relation to the fee charged for a certain license issued by them under G. L., c. 13S, § 11. You state that the license in question is a license of the fourth class, as described in section 18 of the same chapter. You also state that the return filed with you by the city clerk, in accordance with section 11, above referred to, shows that the fee charged for the fourth class license in question was \$2; that you sent back the return to the city clerk, calling his attention to G. L., c. 13S, § 19. You further state that he has informed you that the license commissioners are of the opinion that they may charge what they see fit for a license.

To the  
Secretary,  
1922  
December 13.

You state a case in which the Commonwealth has a definite interest. The license commissioners issue these licenses as public officers under the authority of the Commonwealth, not as agents of the city of Springfield. *Brown v. Nahant*, 213 Mass. 271. Furthermore, the Commonwealth is entitled to one-fourth of the money received for licenses of this class. G. L., c. 138, § 46.

G. L., c. 138, § 19, states, in part:—

The fees for licenses shall be as follows:

For a license of the first, second or fourth class, not less than two hundred and fifty dollars. . . .

It seems clear, therefore, that the license commissioners should have charged at least \$250 for this license, and the city treasurer should have remitted one-fourth of that sum to the Treasurer and Receiver-General.

Furthermore, G. L., c. 138, § 43, says, in part:—

A license shall not be issued until the license fee has been paid to the treasurer of the city or town by which it is to be issued. . . .

In this case the fee required by statute has not been paid, and I am of the opinion that the license under discussion is void and of no effect. *Howes v. Maxwell*, 157 Mass. 333; *Taber v. New Bedford*, 177 Mass. 197.

---

REGISTRATION OF MOTOR VEHICLES — OPERATOR'S LICENSE —  
MOTOR TRUCKS USED BY NATIONAL GUARD.

Motor trucks furnished by the United States for the use of the National Guard do not have to be registered, nor are the operators of them required to be licensed.

You ask my opinion whether, as a matter of law, it is necessary to register certain motor vehicles used by the National Guard, paying the registration fee therefor, with the Department of Public Works, Division of Highways, and also whether it is necessary for the operators of such vehicles to procure a license from the same division.

To the Adjutant General.  
1922  
December 19.

As to your first question you say:—

I beg to advise you that the motor vehicles in question are not the property of the Commonwealth of Massachusetts, but they are the property of the United States of America, which are issued to the National Guard the same as all other items of equipment. They are used only for military purposes, and are used by members of the National Guard, who are drawing Federal pay, for their drills and for their tours of duty which make necessary the use of the motor vehicles.

As to your second question you say:—

The operators of the motor vehicles in question are all enlisted men in the National Guard who are operating these vehicles while on duty, either at drill or camp, under enlistment contract, under orders and under pay from the Federal government.

You further advise me that the Registrar of Motor Vehicles feels that this registration is necessary. You also state that "the present forces, while raised by the State, are disciplined, paid and controlled by the Federal government."

It seems plain that the National Guard as at present constituted is an instrumentality of the Federal government. U. S. Stat. at L. 1916, c. 134; G. L., c. 33. The Commonwealth of Massachusetts, therefore, may not require these motor vehicles to be registered nor the enlisted men who drive them to be licensed. III Op. Atty.-Gen. 318; V Op. Atty.-Gen. 49; *Johnson v. Maryland*, 254 U. S. 51.

---

AUDITOR OF THE COMMONWEALTH — TAXATION — MEMBERSHIP  
ON BOARD OF APPEAL.

St. 1922, c. 545, does not transfer from the Auditor of the Commonwealth to the Comptroller membership upon the Board of Appeal for which G. L., c. 6, § 21, provides.

To the  
Auditor,  
1922  
December 20.

You inquire whether, under St. 1922, c. 545, the Auditor remains a member of the Board of Appeal, as provided in G. L., c. 6, § 21, or whether that function is transferred to the Comptroller created by St. 1922, c. 545, §§ 2, 3 and 5.

G. L., c. 6, § 21, provides:—

The state treasurer, the state auditor and a member of the council designated by the governor, shall constitute the board of appeal from decisions of the commissioner of corporations and taxation.

St. 1922, c. 545, § 1, provides:—

The office of supervisor of administration existing under authority of section one of chapter seven of the General Laws is hereby abolished. All the rights, powers, duties and obligations of said office, and those of the state treasurer relative to bookkeeping and accounting functions not necessarily connected with the cash and funds which he handles, those of the state auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits, those of the state secretary relative to the purchase of paper for printing and general use and those of the superintendent of buildings relative to purchasing and storeroom functions, are hereby transferred to, and shall hereafter be exercised and performed by, the commission on administration and finance established by this act, which shall be the lawful successor of said office, and of the state treasurer, state auditor, state secretary and superintendent of buildings with respect to said rights, powers, duties and obligations.

Section 2 of said act establishes a Commission on Administration and Finance, to consist of four members appointed by the Governor, with the advice and consent of the Council, which serves directly under the Governor and Council, within the meaning of Mass. Const. Amend. LXVI. Section 3 of said act provides:—

Said commission shall be organized in three bureaus, namely: a comptroller's bureau, a budget bureau and a purchasing bureau. Each bureau shall be in charge of a commissioner of the commission to be designated by the governor, with the advice and consent of the council, and to be known, respectively, as the comptroller, budget commissioner and state purchasing agent. Any commissioner so designated shall be a person of ability and extended experience in the line of work required in his bureau.

Section 5 of said statute provides, in part:—

The comptroller's bureau shall include those functions heretofore exercised by the state treasurer and state auditor and hereinbefore transferred to the commission on administration and finance.

The rights and duties of said bureau shall in general be as follows:

To perform all the accounting duties hereinbefore transferred from the department of the state auditor, and all the accounting duties hereinbefore transferred from the department of the state treasurer.

St. 1922, c. 545, does not in express and specific words prescribe that the duties imposed upon the Auditor by G. L., c. 6, § 21, shall either be transferred or retained. St. 1922, c. 545, § 1, provides that "those [rights, powers, duties and obligations] of the state auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits . . . are hereby transferred to, and shall hereafter be exercised and performed by, the commission on administration and finance established by this act. . . ." Taken alone, the description of the duties transferred might be broad enough to include membership upon the Board of Appeal. But the broad words of section 1 are somewhat narrowed by section 5, which refers to the duties transferred as "accounting duties." Manifestly, the duty to sit upon the Board of Appeal is not aptly described by the words "accounting duty." Moreover, the duties transferred are transferred to and are to be exercised by the commission. As the Board of Appeal consists of three members, it is plain that the Legislature did not intend that all four members of the commission should succeed the Auditor upon that Board.

If the Legislature had intended to transfer this duty from the Auditor to the Comptroller, it would have been easy to have so prescribed clearly and unambiguously. This the Legislature has not done. Indeed, the provisions relative to the Comptroller do not naturally bear this construction. Under section 3 he is in charge of the Comptroller's bureau. The "accounting duties" transferred from the Auditor are, under section 5, to be performed by that bureau. They are not in terms transferred to or to be performed by the Comptroller. The bureau cannot sit upon the Board of Appeal. To infer, from the fact that the "account-

ing duties" of the Auditor are to be performed by the bureau, that the head of that bureau shall succeed the Auditor upon the Board of Appeal adds by implication something which the Legislature has failed to enact in express words. While no one of the provisions of these statutes, taken alone, is decisive, when they are considered in their relation to each other I am of opinion that the more probable construction of the act is that the Auditor still retains his position upon the Board of Appeal.

I am confirmed in this opinion when the question which you have submitted is viewed from a different aspect. Membership on the Board of Appeal may well be regarded as an independent position, with duties separate and apart from the respective duties of the three members in their constitutional offices of Treasurer, Auditor and member of the Governor's Council. On this aspect of the case it would seem that the persons holding from time to time the offices of Treasurer, Auditor and the member of the Council designated by the Governor hold their membership upon the Board of Appeal during incumbency in their respective offices, without regard to any duties which may devolve upon such offices.

---

#### METROPOLITAN WATER WORKS — STATUTE — CONSTRUCTION.

Under St. 1897, cc. 445 and 467, requiring annual payments to be made by the Commonwealth to certain towns on lands taken or acquired for the metropolitan water works, in amounts equal to the previously assessed value of such land, so long as the land shall remain the property of the Commonwealth, no deduction from the amounts of such payments may be made on account of the subsequent removal or destruction of buildings on the land when assessed.

You request my opinion in regard to a matter of construction of St. 1897, cc. 445 and 467.

St. 1897, c. 445, § 2, is as follows: —

The treasurer of the Commonwealth shall pay hereafter as a part of the expenses of the metropolitan water works annually on or before the thirty-first day of December to the town of Sterling an amount equal to the assessment made by the assessors of the town of Sterling as of the first day of May in the year eighteen hundred and ninety-four, on

To the Metro-  
politan District  
Commission.  
1922  
December 21.

all real estate taken or acquired, and held by the metropolitan water board on the first day of May in each year, under authority of said chapter four hundred and eighty-eight of the acts of the year eighteen hundred and ninety-five and acts in amendment thereof, so long as said property is held by said metropolitan water board, such payment to be in place of taxes and any other payment required by law upon such property.

St. 1897, c. 467, amends St. 1895, c. 488, § 16, so as to read, in part, as follows: —

. . . *provided, however,* that the Commonwealth shall pay annually, on or before the thirty-first day of December, to the towns of West Boylston and Boylston, until such time as the payments to said towns hereinbefore set forth become due and payable, an amount equal to the assessment made by the assessors of each of said towns as of the first day of May in the year eighteen hundred and ninety-four, on all property in their towns taken or acquired on or before the first day of May in such year, under the authority of this act; and shall pay to said towns annually, on or before the thirty-first day of December, an amount equal to the assessment made as aforesaid on all real estate in their towns so taken or acquired on or before the first day of May in each year by the Commonwealth, outside the limits of said proposed reservoir, so long as the same shall remain the property of the Commonwealth; . . .

You state that various houses and barns which were taken or acquired by the Metropolitan Water Board in Sterling, West Boylston and Boylston have been torn down, removed or burned down since they were taken or acquired. You ask whether the Commonwealth is required to pay for all time sums in lieu of taxes on the buildings which no longer exist, or whether the Commonwealth may deduct an amount equal to the assessment as of the first day of May, 1894, on such houses, barns or other buildings as may no longer exist.

The statutes quoted above are explicit. They provide for payment by the Commonwealth to the towns concerned of certain sums of money, in lieu of taxes, for real estate taken, equal in amount to assessments already made on such real estate, so long as said property is held by the Commonwealth. These amounts were then definitely determined and were identified by the statutes. To rule that the Commonwealth might pay any



less sum than the sums there stated would change the terms of the statutes themselves; and that the Legislature alone can do.

I must advise you, therefore, that under the statutes as they now stand no deduction can be made on account of the removal or destruction of buildings, the value of which was included in the amount of the assessments on real estate taken under these acts.

---

TRADING WITH THE ENEMY ACT — LICENSE — ROYALTIES —  
REPAYMENT.

Under the provisions of the Trading with the Enemy Act, the royalties paid under a license to manufacture processes under any patent owned or controlled by an enemy or ally of an enemy are deposited in the treasury of the United States as a trust fund for the benefit of the licensee and the owner of the patent.

The sole reason for the requirement of the payment of royalties is to secure the owner of the patent in the event that he brings suit within the statutory period.

If the owner of the patent does not bring suit within the statutory period, further royalties need not be paid, and the sums already paid in are to be returned to the licensee.

You request my opinion as to whether your department should continue to pay a royalty under the arsphenamine license issued to the department by the Federal Trade Commission. The facts, as submitted by you, are as follows: —

On March 21, 1919, a license was issued by the Federal Trade Commission "under authority of and in conformity with the Trading with the Enemy Act and with the Executive Order of Oct. 12, 1917," to the Department of Public Health, to make, use and vend, within a certain area, "Salvarsan" or "606," now designated as "arsphenamine." The license determines the aggregate royalty to be paid, and is "for the term of the patent unless sooner terminated." The Federal Trade Commission has advised you that "it is believed" that royalties accruing after July 2, 1922, need not be paid. No suit has been brought by the owner of the patent within the time limit prescribed by statute.

Section 10 (c) of the Federal Act of Oct. 6, 1917, known as the Trading with the Enemy Act, gives the President of the United

To the Com-  
missioner of  
Public Health.  
1922  
December 29.

States authority to grant licenses to manufacture processes under any patent owned or controlled by an enemy or ally of an enemy, and to prescribe the conditions of the license. Subsection (*d*) provides, in part, that the licensee shall pay royalties fixed by the President to the Alien Property Custodian, and that the "sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund" for the said licensee and for the owner of the said patent. Subsection (*e*) provides, in part, that "upon violation by the licensee of any of the provisions of this Act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him." Subsection (*f*) provides that the owner of any patent under which a license is granted may, "after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, . . . for recovery from the said licensee for all use and enjoyment of the said patented invention"; that the amount of any judgment and decree obtained shall be paid to the owner of the patent from the fund deposited by the licensee, and that the balance, if any, shall be repaid to the licensee on order of the Alien Property Custodian; that "if no suit is brought within one year after the end of the war, . . . then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian."

Under the terms of the statute, therefore, the sole reason for the requirement of payment of royalties under the license is to secure the owner of the patent in the event that he brings suit within the period prescribed by the statute. If the owner of the patent fails to bring suit within that period, further royalties need not be paid, and the sums already paid in are to be returned to the licensee. Since no suit was brought by the owner of the patent under which the license was granted to the Department of Public Health, within the statutory period of limitations, I am of the opinion that under the terms of the statute there is no obligation to pay royalties accruing after July 2, 1922, one year after the termination of the war.

TAXATION — EXEMPTION OF PROPERTY OF UNITED STATES  
HOUSING CORPORATION.

The property of an agency of the Federal government is exempt from State taxation which obstructs the operations of the government through that agency; but not otherwise, unless Congress has indicated an intention that it shall be exempt.

Whether real estate held by the United States Housing Corporation after the close of the war was subject to local taxation, on the facts presented, is uncertain.

You ask my opinion on a question submitted by the assessors of Quincy relating to the assessment of taxes on real estate at one time owned by the United States Housing Corporation. This opinion I am required to give to you, upon request, under the provisions of G. L., c. 58, § 1.

To the Commissioner of  
Corporations  
and Taxation.  
1923  
January 2.

The facts stated in the letter from the assessors to you may be summarized in a general way as follows.

The United States Housing Corporation is a New York corporation, all of whose stock is owned by the United States government. A few years ago it acquired a considerable area of real estate at Quincy Point, Quincy. This property is now divided into small lots of land, on which approximately two hundred and fifty dwelling houses have been erected.

In 1919 the question arose whether this property was subject to taxation, and an agreement was made between the city and the Housing Corporation, by which the city agreed to recognize the property as exempt from taxation, and the corporation agreed to pay each year, in lieu of taxes, an amount equal to the amount for which the property should have been assessed, if subject to taxation. Subsequently, in May, 1922, another agreement was made by which the amount to be paid the city for the years 1920 and 1921 was adjusted, and the 1919 contract was rescinded.

At some time prior to April 1, 1922, contracts were executed by the Housing Corporation for the sale of some or all of the lots above mentioned to persons then occupying the same or to others. In this respect the facts are not definitely stated in the assessors' letter.

In 1922 this property was assessed by the assessors to those persons who were occupying lots on April first, either with or without contracts for the purchase of them, and apparently also to such persons as held contracts from the corporation for the purchase of lots which were unoccupied, if there were any such.

The persons to whom the property was assessed object to paying taxes thereon, claiming that the legal title was in the Housing Corporation, that the corporation was an agency of the United States government, that therefore property belonging to it was exempt from taxation and the occupier could not be taxed therefor, and, where there were contracts for the purchase of lots, that such contracts did not subject them to tax.

Since April first the Housing Corporation has given to most of the persons occupying lots quitclaim deeds of the premises, in almost every instance taking back a mortgage running directly to the United States government.

The assessors ask whether they should abate the assessments made by them in 1922 as having been illegally made.

By virtue of G. L., c. 59, § 11, the property referred to was assessable only to the Housing Corporation as owner or to the persons in possession thereof on April first. It was not assessable to those, not occupying the premises, who held contracts from the Housing Corporation for the purchase and sale of the same, even although those contracts contained provisions for the payment of such taxes or any portion thereof. V Op. Atty.-Gen. 714.

Furthermore, the property was not assessable at all if it was on April first the property of the United States. Such property is expressly exempted from taxation by our statutes, G. L., c. 59, § 5, cl. First, and also by the Constitution of the United States. *Van Brocklin v. Tennessee*, 117 U. S. 151; *Wisconsin Central R.R. Co. v. Price Co.*, 133 U. S. 496, 504.

The Federal inhibition against the exercise of the taxing power of a State extends not only to the levying of taxes on the property of the United States, but also to the taxing of the agencies and instrumentalities of the Federal government in such a way as to obstruct its operations in the execution of its powers. *M'Culloch v. Maryland*, 4 Wheat. 316, 425-431, 436; *Osborn v.*

*Bank of United States*, 9 Wheat. 738, 859-868; *Williams v. Talladega*, 226 U. S. 404, 419.

On the other hand, the property of a Federal agency may be taxed by a State where the tax does not interfere with the operations of the Federal government and is levied under a law which is general and non-discriminatory in its application, and where Congress has not by legislation indicated an intention that it shall be exempt. The validity of such a tax depends largely on its effect. *M'Culloch v. Maryland*, 4 Wheat. 316, 436; *Osborn v. Bank of United States*, 9 Wheat. 738, 867; *Thomson v. Pacific R.R.*, 9 Wall. 579, 590; *Railroad Co. v. Peniston*, 18 Wall. 5, 36, 37; *Central Pacific R.R. Co. v. California*, 162 U. S. 91; *Large Oil Co. v. Howard*, 163 Pac. Rep. 537.

It is necessary now to consider the application of the rules and principles just stated to the assessments in question.

The United States Housing Corporation was incorporated under the authority of Act of May 16, 1918, c. 74 (40 Stat. 550), as amended by Act of June 4, 1918, c. 92 (40 Stat. 594, 595), and by Act of July 19, 1919, c. 24 (41 Stat. 163, 224).

Said Act of May 16, 1918, c. 74, is, in part, as follows: —

CHAP. 74. — AN ACT TO AUTHORIZE THE PRESIDENT TO PROVIDE HOUSING FOR WAR NEEDS.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President, for the purposes of providing housing, local transportation and other general community utilities for such industrial workers as are engaged in arsenals and navy yards of the United States and in industries connected with and essential to the national defense, and their families, and also employees of the United States whose duties require them to reside in the District of Columbia, and whose services are essential to war needs, and their families, only during the continuation of the existing war, is hereby authorized and empowered, within the limits of the amounts herein authorized —

(a) To purchase, acquire by lease, construct, requisition, or acquire by condemnation or by gift such houses, buildings, furnishings, improvements, local transportation and other general community utilities and parts thereof as he may determine to be necessary for the proper conduct of the existing war.

(b) To purchase, lease, requisition, or acquire by condemnation or by

gift any improved or unimproved land, or any right, title, or interest therein on which such houses, buildings, improvements, local transportation and other general community utilities and parts thereof have been or may be constructed: . . .

(c) To equip, manage, maintain, alter, rent, lease, exchange, sell, and convey such lands, or any right, title, or interest therein, houses, buildings, improvements, local transportation and other general community utilities, parts thereof, and equipment upon such terms and conditions as he may determine: . . .

The President may exercise any power or discretion herein granted, and may enter into any arrangement or contract incidental thereto, through such agency or agencies as he may create or designate: . . .

SEC. 5. That the power and authority granted herein shall cease with the termination of the present war, except the power and authority to care for, sell, or rent such property as remains undisposed of and to conclude and execute contracts for the sale of property made during the war. Such property shall be sold as soon after the conclusion of the war as it can be advantageously done: *Provided*, That before any sale is consummated the same must be authorized by Congress.

Said Act of June 4, 1918, contains the following provision: —

The President, if in his judgment such action is deemed necessary or advantageous, may authorize the creation of a corporation or corporations for the purpose of carrying out the Act entitled "An Act to authorize the President to provide housing for war needs," approved May sixteenth, nineteen hundred and eighteen, such corporation or corporations to have or obtain all powers necessary or appropriate therefor. The total capital stock of the corporation or corporations authorized hereunder shall not exceed \$60,000,000: *Provided*, That where such corporation or corporations are created by authority of the President, representatives appointed by the President, or by such agency as he may designate to carry out the purposes of the said Act, shall subscribe to, own, and vote the capital stock thereof for and on behalf of the United States, and shall do all other things in regard thereto necessary to protect the interests of the United States and to carry out the provisions of the said Act: . . .

By said Act of July 19, 1919, c. 24, section 5 of the Act of May 16, 1918, c. 74, was amended so as to read as follows: —

That the power and authority granted herein shall cease with the termination of the present war as formally proclaimed by the President, except the power and authority to care for, rent, operate, and sell such property as remains undisposed of; to conclude and execute contracts or other obligations made or incurred during the war or in carrying out the provisions of this section; to collect the principal and interest of loans made or other sums due under obligations entered into under this Act; and to take such other steps as are necessary to protect the interests of the Government and to fulfill the obligations duly incurred in carrying out the powers granted by said Act. All property shall be sold at its fair market value as soon as can be advantageously done, and a reasonable effort shall be made to sell the houses direct to prospective individual home owners for their own occupancy before they are offered for sale in bulk or to speculative investors. Full power and authority is hereby given to sell and convey all such property remaining undisposed of after the termination of the present war. All deeds, contracts, or other instruments of conveyance executed by the United States Housing Corporation by its duly authorized officer or officers where the legal title to the property in question is in the name of said corporation, and by the United States of America by the Secretary of Labor where the title to the property in question is in the name of the United States of America, shall be conclusive evidence of the transfer of title to the property in question according to the purport of such deeds, contracts, or other instruments of conveyance, and in no case shall any purchaser or grantee thereunder be required to see to the application of any purchase money: *Provided, however,* That no sale or conveyance shall be made hereunder on credit without reserving a first lien on such property for the unpaid purchase money: *Provided further,* That in no case shall any such property be given away; nor shall rents be furnished free, but the rental charges shall be reasonable and just as between the tenants and the Government. The United States Housing Corporation (a corporation organized by authority of the President of the United States, pursuant to the provisions of an Act approved May 16, 1918, entitled "An Act to authorize the President to provide housing for war needs," and an Act approved June 4, 1918, entitled "An Act making appropriations to supply additional urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, on account of war expenses, and for other purposes") shall wind up its affairs and dissolve as soon as it has disposed of said property and performed the duties and obligations herein set forth: *Provided,* That the corporation shall report to Congress on December 31, 1919, and on June 30, 1920, all sales made and the amounts received therefrom together with a detailed statement of receipts and expenditures on account of the other activities authorized by law.

In *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 546, the Supreme Court of the United States has recently made a decision relating to the rights and status of the Fleet Corporation which has considerable application to the question under discussion. The decision was in three cases involving the question of the liability of that corporation to be sued, and its right to claim priority in bankruptcy proceedings. It appears from the opinion that the Fleet Corporation was formed by virtue of authority given by the Shipping Act of September 7, 1916, c. 451 (39 Stat. 728), which established the United States Shipping Board and gave it power to form a corporation under the laws of the District of Columbia for the purchase, construction and operation of merchant vessels and to purchase not less than a majority of the stock. The corporation was organized on April 16, 1917, war having been declared on April sixth of that year. The United States took all the stock of the company. Subsequently the powers of the corporation were greatly enlarged. A majority of the court held that the Fleet Corporation, notwithstanding the enormous powers ultimately given to it, was not so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows, and that the claim of the Fleet Corporation of priority in bankruptcy was properly denied on the ground that the Fleet Corporation was a distinct entity, which stood like other creditors and was not to be preferred. Chief Justice Taft and Justices Van Devanter and Clarke dissented from the decision that the corporation was subject to suit, expressing the opinion that Congress intended that the corporation, as an agent of the government, should have the same immunity from suit as its principal, and that the suits were in fact against the United States.

In the previous case of *United States v. Strang*, 254 U. S. 491, the court held that the Fleet Corporation must be regarded as a separate entity, notwithstanding that all its stock was owned by the United States, and that an employee of the corporation was not an agent of the United States.

The proposition that the Fleet Corporation was not entitled



to priority of payment in bankruptcy was held also by the Circuit Court of Appeals for the Second Circuit in the case of *In re Eastern Shore Shipbuilding Corp.*, 274 Fed. 893, the basis of the decision being that the debt due the corporation was not a debt due to the United States.

By reason of the similarity of the Housing Corporation to the Fleet Corporation, it follows from these decisions, in my judgment, that the Housing Corporation is a separate entity, and that property of which the title is in the Housing Corporation is not property of the United States. It does not, however, follow that such property is not exempt from State taxation. It will be exempt if the tax attempted to be levied obstructs the operations of the United States government through the Housing Corporation as its agent.

With respect to the Fleet Corporation, there are decisions in two Federal cases that property standing in its name was exempt from State taxation. *United States v. Coghlan*, 261 Fed. 425; *King County, Wash., v. United States Shipping Board E. F. Corp.*, 282 Fed. 950. The same has been held with respect to the United States Spruce Production Corporation, a corporation organized to expedite the production of airplanes for war purposes, all of whose shares were owned by the United States. *United States v. Clallam County, Wash.*, 283 Fed. 645. In *United States Housing Corp. v. Watertown*, 113 Misc. Rep. (N. Y.) 679, it was held that property of the Housing Corporation was exempt.

In the Coghlan case the tax assessed was for the year 1919 on land which had been improved by the Fleet Corporation. The court based its decision on the proposition that the Fleet Corporation "is a governmental agency, exclusively employed in governmental work, and as such its property is not subject to State taxation."

In the King County case, taxes levied were for the years 1919 and 1921 upon shipyard property belonging to the Fleet Corporation. This decision was subsequent to the Sloan Shipyards Corporation case. The court expressed the view that the question was not foreclosed by the Sloan Shipyards decision, since ex-

emption from suit and exemption from taxation are distinct prerogatives. They pointed out that the property was acquired with public funds and was to be used exclusively for public purposes. They held that since it was clearly in the power of Congress to exempt from taxation property so acquired and held, the question was one of legislative intent, that the taxable character of the property was to be referred to the status of the real rather than of the nominal owner, and that with the unparalleled burdens of war it seemed plain that Congress did not intend to grant permission to tax the property.

In the Clallam County case, the tax levied was for the years 1919, 1920 and 1921 upon a railroad acquired and built with government funds. The court distinguished the Sloan Shipyards Corporation case as inapplicable. It held that the property was exempt, as the property of the government administered through a corporation in executing a wholly Federal employment, and as itself the only means and instrumentality by which the purposes and employment could be carried out.

In the Housing Corporation case, the tax was assessed on a large tract of land in the city of Watertown which had been acquired by the corporation and on which the corporation had constructed a large number of dwellings. This case was in the Supreme Court of New York. The court held that the property assessed was itself the only means and instrumentality by which the Federal purpose could be carried out, that to tax the property would be to tax an agency solely engaged in carrying out the constitutional duties of the general government, that the tax would be on the means employed to carry out a Federal power, and that the tax was wrongfully levied.

In the instant case the property assessed was real estate which presumably had been taxed by the city of Quincy, prior to its acquisition by the Housing Corporation, for many years. The extent to which, if any, the property was improved and the assessed value augmented by the use of Federal funds during the period of its ownership by the Housing Corporation is not stated. The war having ended, the only power remaining in the Housing Corporation under the acts of Congress cited above

with respect to this property was to sell it, and to maintain and rent it before it could be advantageously sold. The property was not to be used in the meantime as an instrumentality for the fulfilment of any governmental purpose.

The question asked by the assessors cannot be answered with any degree of certainty as to what would be the decision of a court of last resort if the question were brought to the test of judicial proceedings. The uncertainty is increased because in some important respects the facts are not made definite. The taxes assessed cannot interfere with the operations of the Federal government except as they may render it more difficult for the Housing Corporation to dispose of the property. Whether they have had or will have that effect I cannot determine from the facts as presented. On the other hand, if the assessment is not valid the city of Quincy will lose the customary return from taxes on a considerable area of real estate within its limits. My conclusion is that I cannot advise you that the assessors should abate the assessments as having been illegally made.

The assessors state in their request for advice that in almost every instance where lots have been conveyed since April 1, 1922, to persons occupying them, a mortgage has been given back to the United States government direct. It may be desirable to point out that such property is, nevertheless, properly taxable in subsequent years to the mortgagor under G. L., c. 59, § 11, the following provisions in sections 12 to 14 not being applicable to a case where a mortgagee is exempt from taxation under section 5.

---

#### STATE OFFICERS — SUPERVISOR OF ACCOUNTS.

The Legislature has power to change or abolish an office created by it. St. 1922, c. 545, abolishing the office of the Supervisor of Accounts, is constitutional and valid.

You ask my opinion "as to the legality of the proposed abolition by St. 1922, c. 545, of the office of the Supervisor of Accounts," established by St. 1908, c. 597, §§ 3 and 4, which has been filled from the time of the passage of the act by a veteran

To the  
Auditor.  
1923  
January 2.

of the Civil War, in view of R. L., c. 19, § 23 (G. L., c. 31, § 26). You state that no notice of any kind has ever been served as required by the statute.

St. 1908, c. 597, § 3, which creates the office of Supervisor of Accounts, is as follows:—

The auditor, with the consent of the governor and council, shall appoint a supervisor of accounts, whose salary shall be fixed by him, with the approval of the governor and council, and whom he may remove from office for cause at any time with the consent of the governor and council.

Section 4 prescribes the powers and duties of the Supervisor of Accounts.

St. 1922, c. 545, § 27, provides, in part, as follows:—

The offices of the second deputy, of the supervisor of accounts and of the assistant supervisor of accounts in the department of the state auditor are hereby abolished.

R. L., c. 19, § 23, as amended by St. 1905, c. 150, § 1, is as follows:—

No veteran who holds an office or employment in the public service of the Commonwealth, or of any city or town therein, shall be removed or suspended, or shall, without his consent, be transferred from such office or employment, nor shall his office be abolished, nor shall he be lowered in rank or compensation, except after a full hearing of which he shall have at least seventy-two hours' written notice, with a statement of the reasons for the contemplated removal, suspension, transfer, lowering in rank or compensation, or abolition. The hearing shall be before the state board of conciliation and arbitration, if the veteran is a state employee, or before the mayor of the city or selectmen of the town, of which he is an employee, and the veteran shall have the right to be present and to be represented by counsel. Such removal, suspension or transfer, lowering in rank or compensation, or such abolition of an office, shall be made only upon a written order stating fully and specifically the cause or causes therefor, and signed by said board, mayor or selectmen, after a hearing as aforesaid.

This provision appears without changes material to the present inquiry in G. L., c. 31, § 26.

It is well established that a law which abolishes an office by repealing a former act by which the office was created does not impair the obligation of any contract, and that there is no vested interest or property right in such an office. *Butler v. Pennsylvania*, 10 How. 402; *Crenshaw v. United States*, 134 U. S. 99; *Taylor v. Beckham*, 178 U. S. 548; *Taft v. Adams*, 3 Gray, 126; *Russell v. Howe*, 12 Gray, 147; *Opinion of the Justices*, 117 Mass. 603. *Attorney General v. Pelletier*, 240 Mass. 264, 296. Moreover, it is established that a Legislature cannot create an office which may not be abolished, or pass a law which shall prevent a subsequent Legislature from abolishing such an office. This is a corollary of the general principle that one Legislature may not restrict or limit the power of its successors, and particularly the power to amend or repeal legislation, unless thereby the obligation of a contract is impaired. *Crenshaw v. United States*, 134 U. S. 99; *People v. Coler*, 173 N. Y. 103; 12 C. J. 806.

By the Constitution of Massachusetts the General Court is empowered to legislate concerning offices which are not provided for in the Constitution. Mass. Const., c. I, § I, art. IV, gives full power and authority to the General Court "to name and settle annually, or provide by fixed laws for the naming and settling, all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth." The power to create such offices includes the power to change or abolish them. *Taft v. Adams*, 3 Gray, 126, 128; *Opinion of the Justices*, 216 Mass. 605; *Attorney General v. Tufts*, 239 Mass. 458, 479; *Attorney General v. Pelletier*, 240 Mass. 264, 295.

If, therefore, the Legislature had intended by R. L., c. 19, § 23, as amended, to attempt to prohibit any future Legislature from abolishing any office occupied by a veteran, in my judgment, the attempted prohibition would have been wholly ineffective. But, in my opinion, the language of the provision does not indicate any such intention. Whatever the Legislature may have meant, it surely did not mean to make the signing of a written order by

the State Board of Conciliation and Arbitration, or by the mayor of a city or the selectmen of a town, a condition precedent to the right of a subsequent Legislature to abolish an office held by a veteran. I must advise you, therefore, that St. 1922, c. 545, is constitutional and valid.

---

FEES — INSPECTORS OF SLAUGHTERING — CHARGE FOR SERVICES.

Inspectors of slaughtering, appointed under G. L., c. 94, §§ 118-139, have no right to demand or receive any fees from butchers for the performance of their duties.

To the Com-  
missioner of  
Public Health  
1923  
January 9.

I have the honor to acknowledge your communication in which you request my opinion as to whether or not it is proper for inspectors of slaughtering to demand and receive fees, for the performance of their duties, from butchers.

Inspectors of slaughtering are appointed under G. L., c. 94, § 128, which provides as follows:—

For the purposes of sections one hundred and nineteen, one hundred and twenty-five to one hundred and twenty-seven, inclusive, and one hundred and forty-seven, said inspectors shall be appointed and compensated, and may be removed, in the manner provided for inspectors of animals, under sections fifteen to seventeen, inclusive, of chapter one hundred and twenty-nine, except that in respect to such first named inspectors, local boards of health and the department of public health shall perform the duties and exercise the authority imposed by said sections upon the aldermen or selectmen and upon the director of animal industry, respectively, as to inspectors of animals.

This section provides that said inspectors shall be compensated in the manner provided for inspectors of animals under G. L., c. 129, §§ 15-17. G. L., c. 129, § 17, provides as follows:—

Each inspector shall be sworn to the faithful performance of his official duties, and shall receive from the town for which he is appointed reasonable compensation, if appointed by the town, or such compensation as shall be fixed by the director, but not in excess of five hundred dollars a year, if appointed by the director. Towns having a valuation of less than two and one half million dollars shall be reimbursed by the commonwealth for one half of such compensation, not exceeding two hundred and fifty dollars for each inspector in any one year.

The language of the statute is explicit. It expressly provides that each inspector shall receive his compensation "from the town." Obviously, the purpose of the Legislature is that the salary or compensation paid by the town shall be in full payment of all services which they may render in their official capacities.

Apparently the only statutory provision for the payment of fees by persons carrying on the business of slaughtering neat cattle, sheep or swine is found in G. L., c. 94, §§ 119 and 120, which provide for payment of a license fee by persons engaged in said business.

It follows that inspectors of slaughtering have no right to demand or receive any fees from butchers for the performance of their duties. I am accordingly of the opinion that the system of collecting fees referred to in your communication is improper and illegal.

The Director of Animal Industry may undoubtedly remove an offending inspector by virtue of the authority conferred in the second paragraph of section 16 of G. L., c. 129, namely:—

. . . The director . . . may remove an inspector who refuses or neglects to be sworn or who, in the opinion of the director, does not properly perform the duties of his office and may appoint another inspector for the residue of his term.

There is also an added safeguard in the provisions of G. L., c. 129, § 15, as follows:—

The mayor in cities, except Boston, and the selectmen in towns shall annually, in March, nominate one or more inspectors of animals, and before April first shall send to the director the name, address and occupation of each nominee. Such nominee shall not be appointed until approved by the director. In cities at least one such inspector shall be a registered veterinary surgeon.

The power of appointment and removal thus conferred applies also to inspectors of slaughtering by virtue of the provisions of G. L., c. 94, § 128, *supra*.





# INDEX-DIGEST.

- ABATEMENT** — Taxes — Statutory  
Remedy Exclusive . . . . . 28  
*See TAXES.* 1.
2. — Whether Tax correctly assessed upon the Basis of an Erroneous Return is illegally exacted . . . . . 386  
*See TAXATION.* 13.
3. — Effect of Failure to apply for Abatement within Thirty Days after Notice . . . . . 388  
*See TAXATION.* 14.
4. — State Tax — Interest . . . . . 389  
*See TOWNS.* 2.
- ABUTTER** — A Parcel of Land does not abut upon Another unless it touches it . . . . . 37  
*See GARAGE.* 1.
- ACADEMY** — Appropriation of Public Money to pay for High School Instruction — Exemption of Town . . . . . 448  
*See CONSTITUTIONAL LAW.* 30.
- ADJUTANT GENERAL** — Armories — Office Furniture and Equipment . . . . . 373  
*See ARMORY.* 2.
2. — Volunteer Militia — Armory — Cities and Towns — Grounds for Parade . . . . . 428  
*See VOLUNTEER MILITIA.* 1.
3. — Armories — Public Purpose . . . . . 538  
*See ARMORY.* 3.
4. — Public Park — Change of Use . . . . . 560  
*See PUBLIC PARK.* 1.
- AGRICULTURAL SOCIETY** — Fairs — Licenses . . . . . 204  
Under G. L., c. 140, §§ 181 and 182, an agricultural society, in order to hold a fair, must obtain a license from the mayor or selectmen.  
It is not necessary for the society, or one holding a concession, to obtain a common victualer's license, under G. L., c. 140, §§ 2-21, in order to furnish food to patrons of a fair.
- AIRCRAFT** — Establishment of Landing Places — Great Ponds . . . . . 191  
The provisions of G. L., c. 90, § 40, relative to the establishment of landing places for aircraft, do not apply to the great ponds of the Commonwealth.  
The provisions of the statute are limited to the landing of aircraft on the land and ground of the Commonwealth.
- ALIEN** — Fisheries and Game — License — Lobster Fishing . . . . . 286  
*See FISHERIES AND GAME.* 2.
- "ANTI-AID" AMENDMENT** — Appropriations — Zoölogical Society under Private Control . . . . . 117  
*See CONSTITUTIONAL LAW.* 7.
2. — Payment to Private Hospital of Compensation for Support . . . . . 415  
*See CONSTITUTIONAL LAW.* 26.
3. — Appropriation of Public Funds — State Vocational Education — Private Teaching Agencies . . . . . 356  
*See CONSTITUTIONAL LAW.* 18.
4. — Appropriation of Public Money to a Private Academy — Exemption of Town from maintaining a High School . . . . . 448  
*See CONSTITUTIONAL LAW.* 30.
5. — State Scholarships in Institutions not under Public Control . . . . . 648  
*See CONSTITUTIONAL LAW.* 38.
- APPEAL** — Director of Standards — Appeal from Ruling — Standard Clinical Thermometers . . . . . 489  
A person aggrieved by a ruling of the Director of Standards under G. L., c. 98, §§ 9-14, has no right of appeal from such ruling to the Commissioner of Labor and Industries, as the head of the department, or to the full board.  
As to whether the Commissioner of Labor and Industries, of his own motion, may review the decisions of the Director of Standards, quare.  
A third party cannot raise a question of conflict of jurisdiction or powers between executive and administrative departments, or officers or boards thereof, so as to bring a situation within the provisions of G. L., c. 30, § 5, where no conflict actually exists between such departments.
- APPROPRIATION** — Municipal Finance — Vote — Rescission . . . . . 515  
*See TOWN MEETING.* 1.
- ARMORY** — Use of, for Public Ball . . . . . 72  
Under G. L., c. 33, § 52, use of an armory for a public ball, the proceeds of which are to be devoted to a public hospital, is authorized if the ball is incidental to the charity; but if the charity is incidental to the ball, such use is not authorized.

**ARMORY** — *Continued.*

2. — Office Furniture and Equipment  
— Chief Quartermaster — Super-  
intendent of Buildings . . . 373

Under G. L., c. 33, § 44, the care and maintenance of all armories belonging to the Commonwealth, including the purchase of furniture and equipment therefor, devolves upon the chief quartermaster.

3. — Use for a "Business Pageant" —  
Public Purpose . . . 538

Under G. L., c. 33, § 52, armories may be used for certain public purposes therein defined.

Whether an entertainment to be given in an armory and designed to raise funds for a purpose authorized by G. L., c. 33, § 52, is a "meeting," within the meaning of the statute, is a mixed question of law and fact, to be determined by the Adjutant General.

4. — Public Park — Change of Use . . . 560  
*See PUBLIC PARK.* 1.

**ASSETS** — Domestic Corporation — Liability of Corporation not engaged in Business . . . 93  
*See TAXATION.* 4.

**ATTORNEY-GENERAL** — Travel outside Commonwealth — Expenses 138  
St. 1920, c. 253, does not apply to the Attorney-General.

In view of the duties imposed by law upon the Attorney-General, he is not required by St. 1920, c. 253, to obtain the authority of the Governor to travel at public expense upon public business outside the Commonwealth or to specify the places to be visited and the probable duration of his absence.

2. — Duty to advise . . . 438

As the Attorney-General is an executive, not a judicial, officer, who cannot exercise judicial power, he will not give an advisory opinion upon a justiciable controversy pending between third parties.

3. — Power to compromise Claims —  
Power to compromise a Pending  
Case . . . 169  
*See CLAIMS.* 1.

4. — Boards of Health — Regulations  
— Approval of . . . 280  
*See BOARDS OF HEALTH.* 1.

5. — Review of Decision of District  
Court . . . 430  
*See FISHERIES AND GAME.* 4.

6. — Advice to Officers and Boards on  
Constitutional Questions . . . 648  
*See CONSTITUTIONAL LAW.* 38.

**ATTORNEYS AT LAW** — Citizenship as Requirement for Admission to Bar . . . 135  
*See CONSTITUTIONAL LAW.* 8.

**AUDITOR** — Inspection of Income Tax Returns . . . 639  
St. 1922, c. 545, § 27, when construed with G. L., c. 62, §§ 32 and 58, does not authorize the Auditor of the Commonwealth to inspect income tax returns in making an audit of the Income Tax Division.

2. — Powers and Duties of the Auditor of the Commonwealth . . . 661

Under St. 1922, c. 545, all the powers and duties of the Auditor of the Commonwealth, existing before Dec. 1, 1922, are to continue until the appointment and qualification of the commissioners whose offices are created by that act.

3. — Membership on Board of Appeal . . . 664  
St. 1922, c. 545, does not transfer from the Auditor of the Commonwealth to the Comptroller membership upon the Board of Appeal for which G. L., c. 6, § 21, provides.

4. — Accounts of Institutions — Ap-  
proval by Trustees . . . 164  
*See INSTITUTIONS.* 1.

5. — Statute — Construction . . . 209  
*See STATUTE.* 2.

6. — Representative to the General  
Court — Appointment to Position  
in the State Service — Sal-  
ary . . . 220  
*See SALARY.* 3.

7. — State Employees — Medical Ser-  
vices . . . 529  
*See WORKMEN'S COMPENSA-  
TION.* 2.

8. — Pension Deduction . . . 629  
*See STATE EMPLOYEE.* 1.

**AUTOMOBILE** — Second-hand — Sale by Sheriff under Execution — Notice to Registrar of Motor Vehicles and Chief of Police . . . 77

A sheriff, who by force of an execution is obliged to sell a second-hand automobile, is not required to give notice to the registrar of motor vehicles and the chief of police of the city or town where the sale is to be made, under G. L., c. 140, § 65.

2. — Operation — Lights . . . 177  
An automobile parked on a highway, with no one in charge, is being "operated," within the purview of G. L., c. 90, § 7.

The display by such automobile of a single white light during the period from one-half an hour after sunset to one-half an hour before sunrise does not comply with the statute.

**BACK BAY LANDS** — Enforcement of Restrictions . . . 578

Even though the Commonwealth has sold all of its lands in the Back Bay (Boston), it may, in its sovereign capacity, enforce restrictions

**BACK BAY LANDS** — *Continued.*  
 imposed by it in the deeds conveying such lands.

Under G. L., c. 91, § 37, grantees of the Commonwealth may enforce in equity, in the manner and under the conditions defined in that section, restrictions imposed upon lands in the Back Bay by the Commonwealth.

Unless a public interest in enforcing such restrictions is disclosed, the Commonwealth should leave its grantees to the remedy provided by G. L., c. 91, § 37.

**BANKERS** — Private Bankers — Surrender of License — Bond . . . 81

Where an association licensed to do business under G. L., c. 169, § 3, voluntarily surrenders its license, the Treasurer and Receiver-General may, in his discretion, return the bond and the money and securities filed and deposited with him under G. L., c. 169, §§ 2 and 3, before the expiration of the period of one year referred to in said section 3.

**BANKS** — Private Banks — Possession by Commissioner of Banks . . . 40

Concerns known as private banks, which are engaged in the business of taking deposits of money and making loans therefrom, as described in G. L., c. 169, § 1, are doing a banking business.

A concern engaged in such business is a "bank," within the definition of G. L., c. 167, § 1, and if it has violated the law, the Commissioner of Banks may take possession of its property and business, under G. L., c. 167, § 22.

2. — Bond and Investment Companies 554

The business of selling foreign currency on the instalment plan and issuing certificates therefor is not the business of receiving deposits of money for transmission abroad, under G. L., c. 169, § 1, but is the business of issuing, negotiating or selling bonds, certificates or obligations on the instalment plan, and is subject to the requirements of G. L., c. 174.

**BANKS AND BANKING** — Property of Insolvent Private Banker in Possession of Commissioner of Banks — Right of Administrator to administer . . . 569  
*See PRIVATE BANKERS.* 2.

**BETTERMENTS** — Assessment — Collection — Salisbury Beach Road 264

Assessments made under St. 1914, c. 659, § 1, authorizing the Massachusetts Highway Commission to lay out a highway and to assess a proportionate share of the cost upon the real estate especially benefited, are not collectible, since no method for collection is provided by statute.

**BILLBOARD ADVERTISING** — Rules and Regulations of the Division of Highways — Public Ways — Permit . . . 375

**BILLBOARD ADVERTISING** — *Continued.*

Where outdoor advertising signs and devices project into or over public ways in any city or town, the duty of granting permits for the placing and maintenance of such signs rests with the municipal board or officer having charge of the laying out of public ways.

**BILLS** — Accounts of Institutions — Approval by Trustees or Commissioner of Department — Auditor 164  
*See INSTITUTIONS.* 1.

**BIRTHS** — Illegitimate Children . . . 207

Where a child is born in wedlock there is a presumption of legitimacy, which can be rebutted only by evidence showing beyond reasonable doubt that the husband was not the father; and the declarations of either parent are not competent to prove illegitimacy.

Under G. L., c. 46, § 1, in recording births the term "illegitimate" should not be used unless the illegitimacy has been legally determined, or has been admitted by a sworn statement of both father and mother.

A legitimate child bears the surname of the parents, and the name should be so recorded. Illegitimate children have no family names, and take the names which they have gained by reputation.

Under G. L., c. 46, § 3, if a child is illegitimate the name of the father should not be recorded, except on the written request of both father and mother.

**BIRTHS, MARRIAGES AND DEATHS**

— Illegitimate Children . . . 619

Marriage of the parents of a child born out of wedlock does not operate to change the name of the child.

G. L., c. 46, § 13, does not provide for the making of any change in the record of birth, upon the marriage of the parents of a child born out of wedlock.

The recording of the name of the father of an illegitimate child, on the written request of both father and mother, as authorized by G. L., c. 46, § 1, does not change the rule that illegitimate children have no family names and take the names they have gained by reputation.

Under G. L., c. 46, § 13, the record of a birth, marriage or death can be corrected only to conform with the facts as they existed at the time of the birth, marriage or death to which the record relates.

**BLIND AND DEAF** — "Anti-aid" Amendment — Payment to Private Hospital of Compensation for Support . . . 415  
*See CONSTITUTIONAL LAW.* 26.

**BLUE BOOK** — Rearrangement of the Constitution — Expenditure of Public Money . . . 524  
*See CONSTITUTION.* 1.

- BOARD OF APPEAL** — Auditor of the Commonwealth — Taxation — Membership . . . . . 664  
*See* AUDITOR. 3.
- BOARD OF HEALTH** — Regulations — Approval of Attorney-General . . . 280  
 G. L., c. 111, § 31, is applicable to all regulations made by local boards of health.  
 Under G. L., c. 111, § 31, the approval of the Attorney-General is required only when regulations made thereunder themselves provide a penalty, and not where the penalty is provided by statute.  
 In St. 1921, c. 303, a penalty is provided by the statute, and therefore regulations made thereunder need not be approved by the Attorney-General.
2. — Public Funds — Appropriation — Emergency . . . . . 572  
 The failure on the part of a town to appropriate a reasonable sum of money for board of health work does not constitute an emergency, within the meaning of G. L., c. 44, § 31, but if a case of extreme emergency, as therein defined, should arise, the selectmen of a town, who act as a board of health, could incur liability in excess of the appropriation made for the use of such department to the extent of adequately caring for the emergency existing.
- BOND** — Registers of Probate — Premiums . . . . . 3  
*See* REGISTERS OF PROBATE. 1.
2. — Private Bankers — Surrender of License . . . . . 130  
*See* PRIVATE BANKERS. 1.
- BOND AND INVESTMENT COMPANIES** . . . . . 554  
*See* BANKS. 2.
- BOSTON ELEVATED RAILWAY COMPANY** — Impairment of Contract — Eastern Massachusetts Street Railway Company . . . 396  
*See* CONSTITUTIONAL LAW. 23.
2. — Impairment of Contract — Change of Remedy . . . . . 410  
*See* CONSTITUTIONAL LAW. 25.
3. — Constitutional Law — Contract made by Statute — Review of Question . . . . . 519  
*See* LEGISLATURE. 1.
- BOSTON PUBLIC SCHOOL TEACHERS** — Retirement Association — Termination of Membership — Part-Time Employment . . . 624  
*See* TEACHERS' RETIREMENT ASSOCIATION. 1.
- BOSTON STREET COMMISSIONERS** — License to store Gasoline — Permit to erect a Garage — Fire Marshal . . . . . 580  
*See* GASOLINE. 1.
- BOXING** — Payment to the Commonwealth . . . . . 21  
 The words "total gross receipts" in G. L., c. 147, § 40, mean the total amount actually received and retained, and in determining that amount sums refunded on account of the illness of a boxer should be deducted.
2. — Surrender of License — Refund of License Fee . . . . . 111  
 A license issued under the provisions of G. L., c. 147, §§ 32-51, does not give rise to a contract between the Commonwealth and the holder. If the licensee prefers not to exercise the privilege, he may forbear to do so, but there is no legislative authority to refund all or a part of the fee paid therefor.
- BRANCH OFFICE** — Additional Bond 17  
*See* COLLECTION AGENCY. 1.
- BREAD** — Minimum Resale Prices . . . 541  
*See* RESTRAINT OF TRADE. 1.
- BRIDGE** — Highway — Payment of Damages . . . . . 52  
*See* CONSTITUTIONAL LAW. 1.
- BROKER** — Sale of Securities — Registration . . . . . 245  
*See* SECURITIES. 1.
- BY-LAWS** — Hawkers and Pedlers . . . 574  
*See* ORDINANCES. 1.
- CAPITAL STOCK** — Sale of Shares of — Word "Certificate" — H. V. Greene Company . . . . . 298  
 The provisions of G. L., c. 174, do not apply to the sale of shares of the capital stock of corporations on the partial payment or instalment plan.
- CENSUS** — Apportionment of Senators and Representatives — Census of Legal Voters — Substitution of Apportionment based on Local Enumeration for Constitutional Census — Executive Construction of Constitution . . . . . 344  
*See* CONSTITUTIONAL LAW. 16.
- CERTIFIED PUBLIC ACCOUNTANT** — Right of Certified Public Accountant registered in Another State to hold Himself out as Such in this Commonwealth . . . . . 590  
 A person registered as a certified public accountant in another State is forbidden, by G. L., c. 93, § 39, as amended by St. 1922, c. 395, § 2, to designate himself as a certified public accountant, either with or without letters indicating the State in which he is registered, if he is not registered in this Commonwealth under G. L., c. 93, § 37.  
 A foreign certified public accountant is not forbidden to do business as such in Massachusetts if he does not designate or hold himself out as a certified public accountant, in violation of G. L., c. 93, § 39, as amended by St. 1922, c. 395, § 2.

**CHARITABLE TRUST** — Religious Society — Power of Legislature to terminate Trust . . . . . 90

The Legislature has no power to terminate a charitable trust under which the legal title to certain land and a meeting house was vested in trustees for the concurrent use and benefit of a church and a religious society.

Certain property having been left to trustees for public charitable purposes, and the particular mode of administration having been prescribed by the donor, the donee, by accepting the property, bound itself to administer the trust in the manner prescribed. The Legislature cannot interfere to control or change the method.

2. — Taxation — Gift to Individual in Trust for Charitable Purposes . . . . . 258  
See TAXATION. 9.

**CHARTER** — Trust Company — Right of Purchaser after Liquidation . . . . . 239  
See TRUST COMPANY. 5.

**CHAUFFEURS** . . . . . 7  
See MOTOR VEHICLES. 1.

**CHECK** — Commonwealth — Payment by Check — Mailing — Duplicate Check . . . . . 171

The mailing of a letter containing a check to the person entitled to receive it does not constitute payment, unless by the payee's express direction or assent, the usual course of dealing between the parties, or through facts from which such direction or assent may be inferred, the payee has authorized the money to be thus delivered to him.

Where the Treasurer and Receiver-General mailed a check to the payee without express or inferred authority, and the payee, whose endorsement was forged, was not negligent in giving notice of the forgery, or, if negligent, the Commonwealth was not injured by such negligence, a duplicate check should be issued.

Such checks can be issued only on warrant in the usual manner.

**CITIES AND TOWNS** — Domicil — Reimbursement . . . . . 407  
See SETTLEMENT. 3.

2. — Payment of Unearned Salary to Dependents of Deceased Officer or Employee of a City or Town . . . . . 474  
See CONSTITUTIONAL LAW. 32.

3. — Appropriation of Public Money for Private Purpose — Authority of Town to reimburse the Victims of a Powder Explosion . . . . . 478  
See CONSTITUTIONAL LAW. 33.

**CITIZEN** — Physicians and Dentists — Citizenship as Requirement for Registration . . . . . 141  
See CONSTITUTIONAL LAW. 9.

**CITIZEN** — *Continued.*

2. — Hunting or Fishing License — Unnaturalized Foreign-born Resident . . . . . 381  
See HUNTING OR FISHING LICENSE. 1.

**CIVIL SERVICE** — Supervisor and Assistant Supervisor of Accounts — Officers — Approval of Governor and Council . . . . . 1

The supervisor and assistant supervisor of accounts are officers, within the meaning of R. L., c. 19, § 9, since their duties are public and not merely clerical, and involve in their performance the exercise of some portion of the sovereign power.

They are also officers whose appointment is subject to confirmation by the Executive Council, within the meaning of R. L., c. 19, § 9, and therefore they may be appointed without compliance with the civil service law and rules.

2. — Assignment to Special Duty — Necessity for Examination . . . . . 31

A person designated by the Commissioner of Public Safety to investigate into the causes of fires, pursuant to G. L., c. 148, § 4, need not take a civil service examination, since such designation is an assignment to special duty rather than an appointment or promotion.

3. — Conviction for Violation of Automobile Laws . . . . . 62

Conviction for violation of the automobile laws, as affecting appointment, employment or retention in the service of the Commonwealth, is within the meaning of the words "conviction of crime against the laws of the Commonwealth," as used in G. L., c. 31, § 17.

4. — Chief Matron and Assistant Chief Matron — House of Detention in Boston . . . . . 152

Appointments to the positions of chief matron and assistant chief matron at the house of detention in the city of Boston, created by St. 1887, c. 234, § 3, are not subject to civil service rules and regulations.

5. — Assistant Registers of Probate — Clerks in the Registries of Probate for Suffolk and Middlesex Counties — Stenographers — Clerical Assistants . . . . . 334

Appointments to the positions of assistant registers in the several registries of probate are not to be made under the regulations of the Department of Civil Service.

The position of clerk of the Suffolk registry of probate, under the provisions of G. L., c. 217, § 28, is not to be filled under civil service regulations.

The position of clerk of the Middlesex registry of probate, under G. L., c. 217, § 29, is to be filled under civil service regulations.

**CIVIL SERVICE** — *Continued.*

The Commonwealth, under St. 1921, c. 42, having assumed the payment of the salaries of certain stenographers and other clerical assistants in the several registries of probate, appointments to these positions, in the future, must be made in accordance with civil service rules and regulations.

6. — Fire Department — Appointment and Removal — Plymouth . . . 476

Acceptance of G. L., c. 31, § 48, applying the civil service classification to the permanent members of the Plymouth fire department, does not conflict with Spec. St. 1916, c. 84, § 1, authorizing said town to establish a fire department to be under the control and direction of one fire commissioner appointed by the selectmen.

7. — Veteran — Reappointment within Two Years after Honorable Discharge or Release from Active Duty . . . 528

A person who is employed in the classified public service of the Commonwealth, or of any city or town therein, and who leaves such employment for the purpose of serving in the military or naval service of the United States, is entitled, under G. L., c. 31, § 27, within two years from the date of the receipt of his honorable discharge or release from active duty, whichever is granted first, to be reinstated in his former position.

8. — Veterans — Inspectors of Plumbing — Qualifications — Interpretation of the Word "Continuously" . . . 548

Whether persons, otherwise eligible, would be precluded from taking the civil service examination for plumbing inspectors because, by reason of having served in the military or naval service during the past five years, they have not had "practical experience . . . continuously," as required by G. L., c. 142, § 11, is a mixed question of law and fact, the decision of which rests upon the official who passes upon the qualifications of applicants for examination.

9. — Veterans' Preference — Disabled Veterans — Established Lists . . . 598

The special preference accorded to disabled veterans by St. 1922, c. 463, applies to disabled veterans upon eligible lists already established.

10. — Veterans' Preference — Creation of Office of Controller — Continuation Schools . . . 349  
*See* CONSTITUTIONAL LAW. 17.

**CLAIMS** — Power to compromise a Claim due to the Commonwealth — Treasurer and Receiver-General — Power of Attorney-General to compromise a Pending Case . . . 169

**CLAIMS** — *Continued.*

Authority to compromise a claim due to the Commonwealth is not ordinarily incident to the power of an executive officer.

The Treasurer and Receiver-General has no power to compromise claims due to the Commonwealth.

Under G. L., c. 12, § 3, the Attorney-General has incidental power, in the exercise of a sound discretion, to compromise a civil proceeding in which the Commonwealth is a party or is interested.

**CLASSIFICATION** — Salaries of Officers and Employees of the Commonwealth . . . 601  
*See* METROPOLITAN DISTRICT COMMISSION. 1.

**COLLECTION AGENCY** — Branch Office — Additional Bond . . . 17

A person who conducts a collection agency and who has filed with the Treasurer and Receiver-General a bond in compliance with G. L., c. 93, § 24, is not required, upon opening a branch office, to file an additional bond.

**COMMISSIONER OF AGRICULTURE** — Drainage Law — Meaning of the Words "the Determination of the Board thereon" . . . 426

The words "the determination of the board thereon," in G. L., c. 252, § 7, refer to the action of the Drainage Board pursuant to the provisions of G. L., c. 252, § 5.

The Attorney General cannot be required to discharge his duty to advise a department within any fixed time.

**COMMISSIONER OF BANKS** — Obligations Redeemable in Numerical Order — Co-operative Banks — Loan and Home Purchasing Contracts . . . 49

The business of issuing contracts in series, by the terms of which contract holders are to make payments in instalments and have the privilege of securing loans in the numerical order of their contracts, is in violation of G. L., c. 107, § 7.

A foreign organization doing such business in this Commonwealth may be enjoined, under G. L., c. 107, § 8, from further continuing its business in the Commonwealth.

The doing of such business is not doing business in the manner of a co-operative bank, within the prohibition of G. L., c. 170, § 48.

2. — Possession of Trust Company — Public Officer — Advice by Attorney-General or Special Counsel . . . 312

When the Commissioner of Banks takes possession of a trust company under the authority conferred by St. 1910, c. 399 (now G. L., c. 167, §§ 22 to 36), he acts as a public officer, and may request advice of the Attorney-

**COMMISSIONER OF BANKS** — *Continued.*

General as to the discharge of duties imposed upon him by law.

Under St. 1910, c. 399, §§ 6 and 10 (now G. L., c. 167, §§ 26 and 30), the Commissioner of Banks may procure expert assistance and advice in the liquidation of the assets of such bank, including the advice and assistance of counsel, the compensation for such service to be fixed by the Commissioner, subject to the approval of the Supreme Judicial Court for the proper county, and paid out of the assets of the bank in his hands.

It is not expedient to attempt to define in advance under what circumstances the Commissioner should rely upon the Attorney-General, and under what circumstances he may properly retain counsel; each case must rest upon its own facts.

3. — Power of Commissioner to authorize a Boston Trust Company which is a Member of the Federal Reserve System to act as a Reserve Agent for Other Trust Companies . . . . . 96  
*See TRUST COMPANY.* 2.

4. — Power to require the Commissioner of Banks to furnish Information 120  
*See GOVERNOR AND COUNCIL.* 1.

**COMMISSIONER OF LABOR AND INDUSTRIES** — Appeal from Ruling of Director of Standards 489

**COMMISSIONER OF PUBLIC HEALTH** — Regulations and Standards for the Manufacture, Sale or Transportation of Foods, Drugs, Medicines and Liquors — Eighteenth Amendment . . . . . 391

Under G. L., c. 94, § 192, the Legislature has imposed upon the Department of Public Health the power and duty of making certain rules and regulations which shall conform to certain standards set forth in the statute, which standards may be changed from time to time, in which event the rules and regulations must be changed to conform therewith.

**CONGRESS** — Eligibility of Women . . . . . 383  
*See CONSTITUTIONAL LAW.* 22.

**CONSTABLE** — Private Detective — Effect of License . . . . . 605  
*See PRIVATE DETECTIVE.* 1.

**CONSTITUTION** — Rearrangement of — Printing of Rearrangement in Blue Book — Expenditure of Public Money . . . . . 524

Under Mass. Const., pt. 2d, c. I, § 1, art. IV, and c. II, § I, art. XI, authority to expend public money must be conferred by an act or resolve.

G. L., c. 5, § 2, does not authorize the printing of the Rearrangement of the Constitution

**CONSTITUTION** — *Continued.*  
in the annual laws (Blue Book), since that rearrangement is neither a constitution nor an act or resolve.

As the rearrangement is neither a constitution nor an act or resolve, it can itself confer no authority to expend public money to print the same as a part of the annual laws (Blue Book).

**CONSTITUTIONAL LAW** — Bridge over Highway — Payment of Damages by Private Person or Municipality . . . . . 52

In authorizing the construction of a bridge over a highway in order to connect lands on opposite sides of it, the legislature has no power to provide that the damages thereby caused shall be paid by a private person, since this does not adequately secure the payment of compensation to those who may be entitled thereto under the Constitution.

A city cannot be required to pay compensation for the erection of a bridge over a highway for the benefit of private persons, since this involves expenditure of public money for a private purpose.

2. — Police Power — Delegation of Legislative Power — Smoke and Cinders . . . . . 54

An act authorizing a city to make ordinances for the control or prevention of harmful smoke and cinders is not unconstitutional either as a forbidden delegation of legislative power or as beyond the limits of the police power.

3. — Federal Constitution — Contract Clause — Repeal of Charter of a Religious Corporation granted without Reservation of the Right to Appeal . . . . . 58

A charter granted to a religious corporation is a contract, within the meaning of U. S. Const., art. I, § 10, which cannot be repealed by the Legislature without the consent of the corporation, where no power so to do was reserved.

Where a corporate charter was granted to a religious corporation without any reservation of power to alter, amend or repeal it, acceptance by the corporation of an amendment to said charter, which amendment was made after the Legislature has reserved power to alter, amend or repeal corporate charters, does not subject the original charter to such reserved power where the amendment was not granted upon that condition.

4. — Federal Constitution — Contract Clause — Public Charity — Legislative Relief — *Cy Frès* . . . . . 66

A corporate charter is a contract within the meaning of U. S. Const., art. I, § 10, and cannot be altered, amended or repealed by the Legislature without the consent of the corporation unless power so to do was either reserved by the Legislature or has since been acquired.

**CONSTITUTIONAL LAW** — *Continued.*

Corporate charters granted prior to March 11, 1831, cannot be altered by the Legislature without the consent of the corporation unless power so to do was reserved in such charter.

A power to alter, amend or repeal corporate charters does not authorize the Legislature to impair contracts lawfully made by such corporation with third parties.

When the donee of property given for a public charitable purpose accepts the gift, he contracts to use such property for the designated purpose in the manner prescribed by the donor, and this contract is within the protection of U. S. Const., art. I, § 10.

The Legislature has no power to authorize the execution of a public charity *cy près*.

Where a corporate charter granted to a church in 1825, without reservation of any power to alter, amend or repeal such charter, vests the control of the corporation in the pewholders of said church, the Legislature has no power to modify the electorate of said church by including non-pewholders therein.

5. — Federal Constitution — Contract Clause — Repeal of Corporate Charter for Misuser where no Power to amend or repeal was reserved . . . . . 98

Where a corporate charter was granted without reserving any right to alter, amend or repeal the same, the Legislature cannot acquire power to repeal such charter by adding the words "for misuser" to the repealing clause.

If a ground for forfeiting an irrevocable corporate charter exists, such forfeiture must be established by a competent court.

6. — Taxation — Appropriations — Public Purpose . . . . . 112

The Legislature has no power to authorize cities and towns to expend money to procure headquarters for a camp of the United Spanish War Veterans, since such expenditure is not for a public purpose.

7. — "Anti-Aid" Amendment — Appropriations — Zoological Society under Private Control . . . . . 117

A corporation chartered to hold and manage a public aquarium and zoological park is an educational and charitable undertaking, within the meaning of the Forty-sixth ("Anti-Aid") Amendment.

Where the charter of a corporation organized to hold and manage a public aquarium and zoological park provides that five of the seven directors shall be selected by the members of the corporation, who are private citizens, the society is not "under the exclusive control, order and superintendence of public officers or public agents," within the meaning of the Forty-sixth ("Anti-Aid") Amendment, even though the other two directors are the mayor of Boston and chairman of the park department *ex officio*, and the corporation itself is described as a public agent or public trustee.

Under the provisions of the Forty-sixth

**CONSTITUTIONAL LAW** — *Continued.*

("Anti-Aid") Amendment, the Legislature has no power to authorize the city of Boston to convey a public aquarium and zoological park to a corporation so organized, and to provide further that such park may be maintained out of public funds, even though the bill describes the corporation as a trustee or agent for the city.

8. — Attorneys at Law — Citizenship as Requirement for Admission to Bar . . . . . 135

The Legislature may constitutionally require that applicants for admission as attorneys at law be citizens of the United States.

A State may deny to non-citizens the privilege of being its officers or employees.

9. — Physicians and Dentists — Citizenship as Requirement for Registration — Reasonable Regulations for Public Health . . . . . 141

Reasonable regulations and rational means designed to protect the public health are constitutional.

The power to make regulations cannot be used arbitrarily or unreasonably.

The purpose of a statute must be found in its natural operation and effect.

An act requiring that applicants for registration as physicians or dentists be citizens of the United States or aliens who have made the primary declaration of intention to become citizens, and that the registration of aliens be canceled unless they become citizens within seven years from the date of their registration, is so arbitrary and unreasonable as to be unconstitutional.

10. — Impairment of Contract — Eastern Massachusetts Street Railway Company . . . . . 147

Spec. St. 1918, c. 188, constitutes a contract between the Commonwealth and the Eastern Massachusetts Street Railway Company, giving to the trustees appointed thereunder the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished, and giving to the directors the right to pass upon contracts for the construction and operation of additional lines.

St. 1920, c. 613, as amended by St. 1920, c. 637, which contains provisions directing the trustees to construct additional lines and regulating rates of fare, is an impairment of the contract contained in Spec. St. 1918, c. 188, and is therefore unconstitutional.

Consequently, a bill to provide further for the carrying into effect of said 1920, c. 613, as amended, if enacted, would also be unconstitutional.

11. — Power of Legislature to ratify Acts of City Officials done under an Unconstitutional Charter — When a Local Act may be limited to take Effect under the Forty-eighth Amendment . . . . . 175



**CONSTITUTIONAL LAW** — *Continued.*

The Legislature may properly repeal a city charter which is void because of failure to comply with the Second Amendment.

An act which purports to ratify acts done by city officials under a void city charter should expressly limit such ratification to matters within the constitutional power of the Legislature.

A bill whose operation is restricted to a particular town, city or other political subdivision may be made to take effect upon its passage, since it is not subject to a referendum under Amend. XLVIII. The Referendum, pt. III, § 2.

12. — Delegation of Legislative Power — Act which automatically changes to conform to Subsequent Federal Legislation — Eighteenth Amendment . . . . . 179

Power to enact laws cannot be delegated by the Legislature.

The Legislature may confer upon municipal corporations power to enact local ordinances or by-laws.

The Legislature may confer upon the Executive power to make administrative regulations in execution of a general law.

Within limits the Legislature may enact contingent legislation.

The "concurrent power" conferred upon or reserved to the States by the Eighteenth Amendment to the Federal Constitution does not authorize the Legislature to delegate to Congress any of the legislative power so conferred or reserved.

The Legislature has no power to provide that an act passed to execute the Eighteenth Amendment to the Federal Constitution shall automatically change so as to conform to legislation which may hereafter be passed by Congress in order to execute said amendment.

The Legislature has no power to provide that liquor for non-beverage purposes may be manufactured, purchased, delivered or possessed, "but only as provided by the laws of the United States and the regulations made thereunder," since, under such a provision, the law of this Commonwealth would automatically change to conform to such Federal laws and regulations.

The Legislature may provide that a carrier shall not deliver liquor except to persons who present a verified copy of a permit required by the laws of the United States, since this imposes a condition precedent to such delivery which involves no delegation of legislative power to Congress.

13. — Acts making Unenforceable Provisions in Leases . . . . . 194

The provisions of St. 1920, c. 578, making unenforceable increases of rent so great as to be unjust, unreasonable and oppressive, and of a bill to amend said act by providing that stipulations or conditions which operate to raise the rents of lessees in case of the birth or adoption of children shall be deemed unreason-

**CONSTITUTIONAL LAW** — *Continued.*

able and oppressive, are not unconstitutional, either because they impair the obligation of contracts or because they are not due process of law.

14. — Justice of the Peace — Right of Women to Appointment . . . . . 247

The office of justice of the peace, being a judicial office, is one from which women are excluded by the State Constitution.

St. 1921, c. 449, § 3, does not purport to make women eligible to hold the office of justice of the peace.

15. — Searches and Seizures — Searches for Game or Fish — Powers of Inspector of Fish . . . . . 288

Under Mass. Const., pt. 1st, art. XIV, searches and seizures are not unreasonable if they relate to contraband, illicit or stolen property, and if they are conducted under a warrant which meets the constitutional requirements.

Under Mass. Const., pt. 1st, art. XIV, an arrest without a warrant may be made of a person in the act of committing a crime or upon reasonable suspicion of having committed a felony, and doors may be broken without a warrant where there is a breach of the peace or reasonable ground to believe a felony has been committed, to apprehend the felon; but a search of a dwelling for contraband, illicit or stolen property without a warrant cannot lawfully be made without the consent of the owner; and the constitutional protection extends as well to a man's person, his papers and all his possessions.

The prohibition against unreasonable searches includes all searches without a warrant, with the exceptions noted, whether or not the search is conducted in a dwelling house.

Right of search is to be distinguished from right of inspection, authorized by statutes in numerous cases and upheld as a valid exercise of the police power.

G. L., c. 130, § 6, purporting to authorize searches without a warrant of suspected places, for game or fish unlawfully taken or held, is unconstitutional.

The State Inspector of Fish and his deputy inspectors, authorized by G. L., c. 94, § 1, to enforce the provisions of G. L., c. 94, §§ 74-80, inclusive, are not authorized to make arrests or to serve warrants, and they are not authorized to exercise any of the powers conferred by G. L., cc. 130 and 131.

16. — Apportionment of Senators and Representatives — Census of Legal Voters — Substitution of Apportionment based on Local Enumeration for Constitutional Census — Date of Census — Executive Construction of Constitution — "Legal Voter" . . . . . 344

Under Mass. Const. Amend. XXI and XXII, a statute which provides that an enumeration of legal voters made by local authorities shall

**CONSTITUTIONAL LAW — Continued.**

be substituted for the enumeration required by those amendments would be unconstitutional.

A statute which provides that the State census shall be taken in the same year as the Federal census would be unconstitutional because in conflict with the requirement of Mass. Const. Amend. XXI and XXII, that the State census be taken in 1865 and "of every tenth year thereafter."

The constitutional apportionment of senators and representatives cannot be based upon those persons who have complied with the registration statute.

The words "legal voter" embrace all who possess the constitutional qualifications for the ballot, whether registered or not.

While an executive construction of a constitution or statute cannot control the plain meaning of the words employed, it is of weight in determining the meaning of a doubtful phrase if long continued and acquiesced in.

17. — Civil Service — Veterans' Preference — Creation of Office of Controller — Delegation of Delegated Power — Continuation Schools . . . . . 349

G. L., c. 31, §§ 21-28, providing for veterans' preference in the civil service, are constitutional.

The Legislature has power to create a new administrative office, such as that of controller, to which certain of the duties of the Auditor and the Treasurer and Receiver-General may be transferred.

The commission appointed by the Legislature to care for the welfare of soldiers cannot delegate their powers and duties to the American Legion.

G. L., c. 71, § 24, providing for State reimbursement for continuation schools, is constitutional.

18. — "Anti-Aid" Amendment — Appropriation of Public Funds — State Vocational Education — Contracts with Private Teaching Agencies . . . . . 356

Mass. Const. Amend. XLVI, the so-called "anti-aid" amendment, acts as a bar to the State Board of Vocational Education contracting with private institutions and persons for the furnishing of vocational instruction, if thereby there is involved the payment of any of the moneys appropriated by the Legislature for the use of said board.

19. — House of Representatives — Incompatible Offices — Effect of accepting Incompatible Office — Power to determine Disqualification — Right of *De Facto* Member to Salary . . . . . 358

Under Mass. Const. Amend. VIII, the office of Deputy Collector of Internal Revenue of the United States is incompatible with the office of representative to the General Court.

**CONSTITUTIONAL LAW — Continued.**

Where a member of the House of Representatives of Massachusetts accepts the incompatible office of Deputy Collector of Internal Revenue of the United States, he ceases to be a *de jure* member of the House, but remains a *de facto* member until the House either accepts the resignation or declares the seat vacant.

While the House of Representatives is the exclusive judge of the qualifications of the members thereof, it has been accustomed in such cases to follow the rules of law.

A *de facto* officer is not entitled to salary or compensation.

20. — Appropriation of Public Funds — Public Purpose — State House — Assignment of Location — Veterans of Foreign Wars — Furnishings . . . . . 362

The temporary locations for the Massachusetts Department of the Veterans of Foreign Wars assigned, under G. L., c. 8, § 17, as amended by St. 1921, c. 459, by the Superintendent of Buildings, are to be furnished by the Superintendent.

The statute providing for the assignment of a location in the State House for the free use of the Veterans of Foreign Wars is constitutional, for the assignment of the space for the preservation of relics and records of war is for a public purpose.

21. — Vacancy in the Executive Council — Selection of Successor . . . . . 377

Where a member of the Executive Council dies upon the day that the General Court convenes, but some hours before the General Court does in fact convene, and such vacancy is not filled by the Governor and Council before the Legislature comes into session, such vacancy is to be filled by concurrent vote of the Senate and House of Representatives in the manner prescribed by Mass. Const. Amend. XXV.

22. — Eligibility of Women to be elected to Congress . . . . . 383

Under U. S. Const., art. I, §§ 2 and 5, a woman is eligible to be elected as a representative to Congress.

23. — Impairment of Contract — Boston Elevated Railway Company — Eastern Massachusetts Street Railway Company . . . . . 396

Spec. St. 1918, c. 159 and 188, providing for the public operation of the street railway systems of the Boston Elevated Railway Company and the Eastern Massachusetts Street Railway Company, respectively, for a term of years by trustees to be appointed by the Governor, with exclusive authority to fix fares and to determine the character of the service, having been accepted by the companies, constitute contracts between the Commonwealth and said companies with respect to the management and operation thereof.

**CONSTITUTIONAL LAW — Continued.**

Certain proposed bills, if enacted, would be unconstitutional, for the reason that they would impair one or more of the provisions in Spec. St. 1918, cc. 159 and 188, giving the trustees the right to regulate and fix fares and to determine the character and extent of the service and facilities to be furnished.

A bill repealing Spec. St. 1918, c. 159, but providing that the act should take effect on its acceptance by the directors of the Boston Elevated Railway Company before a certain date, if enacted, would be unconstitutional, since the directors of the company cannot exercise the power attempted to be conferred upon them to abrogate the contractual obligations contained in said statute.

24. — Unregistered Co-partners and Stockholders in Retail Drug Corporations . . . . . 402

The classification made by House Bill No. 124, forbidding unregistered co-partners or unregistered stockholders in a corporation doing a retail drug business from actively engaging in the drug business, with the exceptions noted, is arbitrary and unreasonable, and would render the bill unconstitutional, if enacted.

25. — Impairment of Contract — Change of Remedy . . . . . 410

The Legislature can impose conditions on which a particular use of property will be authorized.

Where an obligation or liability exists, the Legislature can change the remedy by which it is to be enforced.

St. 1921, c. 386, § 5, providing for compensation for diminution of value of property suffered by reason of the use of a tract of land taken by eminent domain by the Boston Elevated Railway Company, to be determined by the court without a jury, may be amended by substituting the word "with" for the word "without," since a valid obligation was thereby imposed, and the proposed amendment merely changes the remedy for its enforcement.

26. — "Anti-aid" Amendment — Payment to Privately Controlled Hospital for Deaf, Dumb or Blind of Reasonable Compensation for Support rendered to Such Persons . . . . . 415

Mass. Const. Amend. XLVI, § 2, forbids the use of public credit, public property or public funds "for the purpose of founding, maintaining or aiding" any privately controlled institution as defined in that section.

A bill which authorizes payment out of public funds to privately controlled hospitals or infirmaries for the treatment of the eye and ear, of not more than reasonable compensation for care rendered to persons suffering from diseases of the eye or ear, who are in whole or in part unable to care for themselves, to the extent that such persons are unable to care for

**CONSTITUTIONAL LAW — Continued.**

themselves, is within the exception made by Mass. Const. Amend. XLVI, § 3, and would not be unconstitutional.

27. — Referendum Petition — Law subject to Referendum Petition . . . . . 435

Under Mass. Const. Amend. XLVIII, The Referendum, pt. III, § 2, a law, "the operation of which is restricted to a particular town, city or other political subdivision or to particular districts or localities of the commonwealth," is not subject to a referendum petition.

St. 1922, c. 161, which regulates the granting of licenses to take lobsters from the waters of the Commonwealth within three miles of the shore of the nine seacoast counties of the Commonwealth is subject to a referendum petition, since it is a general regulation of the lobster fishery of the Commonwealth, even though the nine counties to which a general law could physically apply are expressly enumerated.

28. — Police Power — Garage — School, Hospital or Church — Property Rights . . . . . 439

The Legislature, in the exercise of the police power, may regulate and limit rights of property in the interest of public health, public morals and public safety.

A statute providing that no permit shall be issued for the erection, maintenance or use of a building as a garage for more than two cars on the same street as, and within 500 feet of, a school, hospital or church, is not an unreasonable exercise of the police power.

29. — Theatres — Regulation of Price charged for Admission — Regulation by Condition inserted in the License . . . . . 445

As a theatre is not a business affected with a public use, a statute fixing the rates of admission to be charged, or forbidding an increased price upon Saturdays or holidays, would not be constitutional.

As a statute directly forbidding theatres to charge an increased admission upon Saturdays or holidays would not be constitutional, a statute which requires that condition to be inserted in the theatre license is equally unconstitutional.

30. — "Anti-aid" Amendment — Appropriation of Public Money to a Private Academy to pay for High School Instruction — Exemption of Town from Statutory Duty to maintain a High School . . . . . 448

The Department of Education has no power, under G. L., c. 71, § 4, to exempt a town from the statutory duty to maintain a high school, because such town, in violation of Mass. Const. Amend. XLVI, § 2, is appropriating money to pay for high school instruction to children resident in such town at a private academy located therein.

**CONSTITUTIONAL LAW — Continued.**

31. — Elections — Municipal Primaries  
— Freedom of Elections . . . 462

G. L., c. 43, § 44G (added by St. 1922, c. 282, § 1), is not in conflict with the Bill of Rights, art. IX.

32. — Taxation — Due Process of Law  
— Appropriation of Public  
Money for Private Purpose —  
Payment of Unearned Salary to  
Dependents of Deceased Officer  
or Employee of a City or Town 474

An appropriation of public money to a private purpose takes the property of the taxpayer without due process of law, in violation both of the State Constitution and of the Fourteenth Amendment.

In the absence of any showing that a public purpose is thereby accomplished, the Legislature has no power to authorize cities and towns to pay to the widow or dependents of a deceased officer or employee the salary which such person would have received during a stated period after his decease.

33. — Taxation — Due Process of Law  
— Appropriation of Public  
Money for Private Purpose —  
Authority of Town to reimburse  
the Victims of a Powder Explo-  
sion . . . 478

An appropriation of public money for a private purpose takes the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

The General Court cannot authorize a city or town to expend public money for a private purpose.

An incidental advantage to the public will not sustain a gift of public money for a purpose primarily private.

The General Court cannot constitutionally authorize a town to reimburse the victims of an explosion of a fireworks factory not caused by any act or default of the town.

Since article XXX of the Bill of Rights forbids the General Court to exercise judicial power, a recital in the bill that a fireworks factory was "illegally licensed by said town" is an expression of legislative opinion and not a determination that such was the case.

A bill authorizing a town to reimburse the victims of an explosion of a fireworks factory, "in consideration of the fact that said factory was illegally licensed by said town," would be unconstitutional in that it neither primarily promotes a public purpose nor discharges any moral but unenforceable obligation of the town, since the responsibility for the explosion (if any) rests upon those who caused it and not upon the town.

34. — Police Power — Statute forbid-  
ding One who deals in Refined  
Petroleum Products to sell or  
lease Distributing Apparatus  
upon Condition that it be used  
exclusively for his Own Products 483

**CONSTITUTIONAL LAW — Continued.**

A statute which forbids a person engaged in producing or selling refined petroleum products to sell or convey distributing apparatus upon condition that it be used exclusively for the distribution of his own products would be constitutional.

A statute which forbids a person engaged in producing or selling refined petroleum products to lease or loan distributing apparatus upon condition that it be used exclusively for the distribution of his own products would conflict both with the Constitution of this State and with the Fourteenth Amendment.

As the manufacture and sale of refined petroleum products is a private business not affected with a public use, one engaged therein cannot constitutionally be compelled to permit distributing apparatus leased or loaned by him to a retailer to be used to distribute the products of competitors, either with or without compensation.

Good will is property, within the meaning of those constitutional guaranties which forbid the taking of property without due process of law.

Reasonable agreements for the protection of goodwill are within that liberty of contract guaranteed by the Constitution.

35. — Sheppard-Towner Maternity and  
Infancy Act — Extent of Gen-  
eral Welfare Clause of Federal  
Constitution — Violation of  
Rights reserved to States —  
Right of State to bring Suit . . . 492

The purpose and effect of the Federal Constitution was to secure a Federal government with limited and enumerated powers, for national purposes, reserving all other powers to the States and the people.

The power of local self-government, commonly called the police power, was reserved to the States by the Tenth Amendment.

The so-called "general welfare" clause of the Federal Constitution (art. I, § 8) is not a substantive grant of power but a qualification of the power "to lay and collect taxes, duties, imposts and excises."

The act of Congress approved Nov. 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," commonly known as the Sheppard-Towner Act, purporting to establish a system by which States desiring to secure the benefits of promised appropriations are required to submit plans for carrying out the provisions of the act, to make appropriations to match Federal appropriations and to co-operate with Federal authorities in the administration of the act, is an incursion into the field of the local police power reserved to the States by the Tenth Amendment, and is unconstitutional.

The power to declare an act unconstitutional can be exercised only when proper parties are before the court, in an actual controversy, involving the constitutional question in the determination of the rights of litigants.

**CONSTITUTIONAL LAW** — *Continued.*

It seems probable that the Commonwealth may maintain a suit in equity in the Supreme Court of the United States to test the constitutionality of the Sheppard-Towner Act, on the ground either that its own rights or those of its taxpaying citizens are invaded, the issue being plainly justiciable.

In such case Federal officials charged with the duty of administering the act may properly be made defendants, and an injunction may be sought against them.

The passage of an act by the General Court accepting the provisions of the Sheppard-Towner Act would place the Commonwealth in a less favorable position to contest its validity.

36. — Eminent Domain — Taking of Picture exhibited in a Public Library upon a Public Charitable Trust — Public or Private Purpose . . . . . 508

The power to take private property for public use, upon payment of reasonable compensation, extends to all property within the jurisdiction of the Commonwealth, including personal property, and can neither be bargained away by statute nor defeated by private contract.

A "taking" by eminent domain of private property which is subject to a contract does not "impair" that contract, within the meaning of U. S. Const., art. I, § 10, even though further performance of that contract is defeated by such "taking."

Private property cannot be "taken" by eminent domain for a private purpose, even upon payment of reasonable compensation.

A statute which authorizes a "taking" by eminent domain for a public purpose or for a private purpose is unconstitutional.

A picture held and publicly exhibited in a public library upon a public charitable trust cannot be "taken" by eminent domain in order to remove it from exhibition in said library, since such a taking is not for a public purpose.

A "taking" by eminent domain of property already devoted to a public purpose is unconstitutional if the taking may or does work a mere change of control without change of use.

A picture held and publicly exhibited in a public library upon a public charitable trust cannot be "taken" by the Department of Education by eminent domain under a statute which would permit the use of the picture by the department for the same public purpose to which it is now devoted, since such a taking would work a mere change in control without change of use.

37. — Taxation — Due Process of Law — Appropriation of Public Money for a Private Purpose — Payment of Unearned Salary of Deceased Representative to his Widow . . . . . 530

An appropriation of public money for a

**CONSTITUTIONAL LAW** — *Continued.*

private purpose takes the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

A payment of public money as a reward for conspicuous public service, in order to stimulate others to render similar service, may be found to promote the public welfare and to be constitutional even though the recipient has no right to the money in law or in equity.

Public money cannot constitutionally be given away as a mere gratuity.

In the absence of any showing by recital in the resolve or otherwise that a deceased representative to the General Court has rendered such conspicuous public service that a payment of the unearned balance of his salary to his widow will primarily promote a public purpose, such resolve violates both the Constitution of this Commonwealth and the Fourteenth Amendment.

38. — "Anti-aid" Amendment — State Scholarships in Institutions not under Public Control — Attorney-General . . . . . 648

The Attorney-General does not advise officers, boards or commissions which are subordinate to the Legislature upon constitutional questions, unless such advice is clearly required in order to enable such officers, boards or commissions to discharge the duties required of them by law.

Mass. Const. Amend. XVIII did not forbid payment of public money to colleges or universities not under public control.

Mass. Const. Amend. XVIII did forbid an appropriation of public money to aid a private school or to pay the tuition of scholars therein or to reimburse parents for tuition paid by them to such academy, even though such appropriation is made from moneys other than those raised by taxation for the support of common schools.

Mass. Const. Amend. XLVI, § 2, which superseded Amend. XVIII but re-enacted and reaffirmed the prohibitions contained therein, forbids an appropriation of public money to aid a school not under public control or to pay the tuition of scholars therein, or to reimburse parents for tuition so paid by them, but subject, nevertheless, to the exception made by section 3.

Mass. Const. Amend. XLVI forbids an appropriation of public money for the purpose of founding, aiding or maintaining a college or university not under public control.

If the effect of paying the tuition of a student at a privately controlled college or university is to aid the institution, such payment is forbidden by Mass. Const. Amend. XLVI, § 2, even though the payment be made to the student instead of directly to the institution.

The scope of the prohibitions made by Mass. Const. Amend. XLVI, § 2, may be measured by the exception made by section 3.

If the payment of public money to a student at a privately controlled college or university

**CONSTITUTIONAL LAW** — *Continued.*

is in effect a private gratuity which does not directly accomplish some public purpose, such payment would take the property of the taxpayer without due process of law, in violation of both the State Constitution and the Fourteenth Amendment.

The promotion of popular education is a public purpose.

A statute has no magic to alter facts, nor can constitutional restrictions be brushed aside by a descriptive phrase.

39. — District Attorneys — Members of the Bar . . . . . 423  
See DISTRICT ATTORNEYS. 1.

40. — Contract made by Statute — Review . . . . . 519  
See LEGISLATURE. 1.

41. — Rearrangement of the Constitution — Expenditure of Public Money . . . . . 524  
See CONSTITUTION. 1.

42. — Women — Eligibility to be Justice of the Peace . . . . . 527  
See JUSTICE OF THE PEACE. 2.

43. — Legal Obligations — High School . . . . . 565  
See HIGH SCHOOL. 2.

"CONTINUOUSLY" — Interpretation . . . . . 548  
See CIVIL SERVICE. 8.

**CONTRACT** — Impairment — Eastern Massachusetts Street Railway Company . . . . . 147  
See CONSTITUTIONAL LAW. 10.

2. — Impairment of — Boston Elevated Railway Company . . . . . 396  
See CONSTITUTIONAL LAW. 23.

3. — Impairment of — Change of Remedy . . . . . 410  
See CONSTITUTIONAL LAW. 25.

**CONVICTION** — Violation of Automobile Laws . . . . . 62  
See CIVIL SERVICE. 3.

**CO-OPERATIVE BANKS** — Classes of Shares — Loans on Shares . . . . . 83  
Co-operative banks, with respect to loans made by them, are restricted to loans specifically authorized by statute.

Authority to make loans upon any other security than that specifically authorized cannot be implied.

2. — Obligations Redeemable in Numerical Order — Co-operative Banks — Loan and Home Purchasing Contracts . . . . . 49  
See COMMISSIONER OF BANKS. 1.

**CO-OPERATIVE LEAGUE** — Obligations Redeemable in Numerical Order — Co-operative Banks — Loan and Home Purchasing Contracts . . . . . 49  
See COMMISSIONER OF BANKS. 1.

**CORPORATIONS** — Issue of Stock — Consideration . . . . . 263

Under G. L., c. 156, §§ 15 and 16, capital stock of a domestic business corporation may not be issued for executory contracts to convey or supply property or to render services to the corporation.

2. — Distribution of Capital of Domestic Corporation in Liquidation — Income Tax . . . . . 15  
See TAXATION. 1.

3. — Foreign — Doing Business — Appointment of Unregistered Foreign Trust Company as Trustee of Real Estate under a Will . . . . . 35  
See TRUST COMPANY. 1.

4. — Taxation — Domestic Corporation — Liability of Corporation not engaged in Business . . . . . 93  
See TAXATION. 4.

5. — Taxation — Domestic Business Corporation — Return to Federal Government — Application for Abatement . . . . . 223  
See TAXATION. 7.

6. — Trust Company — Charter — Right of Purchaser after Liquidation . . . . . 239  
See TRUST COMPANY. 5.

7. — Sale by Corporation of its Own Securities — Registration . . . . . 261  
See SECURITIES. 2.

**CORRUPT PRACTICES** — Elections — Expenditures by or on Behalf of Candidates for City Offices . . . . . 242  
See ELECTIONS. 2.

**COUNTY ACCOUNTS** — Additional Compensation to Persons receiving Salaries from Counties . . . . . 315  
See SALARY. 4.

**CREDIT CLEARING HOUSE** — Agreement by Company guaranteeing Credit Report as True Statement of Facts set forth — Contract of Insurance . . . . . 11  
See INSURANCE. 1.

**CREDIT UNIONS** — Right to purchase and own Real Estate — Office Accommodations . . . . . 78

Though the power to transact business carries the power to provide a suitable place for the transaction of business, investment of

**CREDIT UNIONS** — *Continued.*  
 their capital by credit unions in real estate would materially interfere with their primary functions. They may, however, lease real estate for office purposes.

**CRIMINAL LAW** — District Courts —  
 Double Trials. . . . . 425

If a criminal case has been tried upon the merits in a district court or before a trial justice, G. L., c. 263, § 8A, prohibits a retrial of said case in said court or before said justice, even though the case is disposed of upon appeal otherwise than upon the merits.

**CULVERT** — State Highway — Artificial Stream — Easement by Prescription . . . . . 156  
*See STATE HIGHWAY.* 1.

**CY PRÈS** — Constitutional Law — Federal Constitution — Contract Clause — Public Charity — Legislative Relief . . . . . 66  
*See CONSTITUTIONAL LAW.* 4.

**DECLARATION OF TRUST** — Partnership — Broker's License . . . . . 614  
*See INSURANCE.* 5.

**DEERFIELD ACADEMY** . . . . . 565  
*See HIGH SCHOOL.* 2.

**DENTAL EXAMINERS** — Determination whether Applicant for Registration has received a Diploma from a Reputable Dental College — Attorney General . . . . . 604

Under G. L., c. 112, §§ 45 and 46, the Board of Dental Examiners, in the exercise of a sound discretion, should determine whether an applicant for registration has furnished "satisfactory proof," under section 45, that he has attended a "reputable dental college," within the meaning of section 46, and in so determining the board is not, as matter of law, bound to accept the affidavit of the applicant.

The Attorney General neither decides questions of fact nor substitutes his discretion for the discretion vested by law in another officer or board.

**DENTISTS** — Reciprocity Certificates . 338  
 G. L., c. 112, § 48, providing for registration, without examination, of dentists who have been lawfully in practice in another State, applies only to dentists registered in the individual States of the United States of America, and does not include dentists registered in a foreign country.

**DICKINSON HIGH SCHOOL** . . . . . 565  
*See HIGH SCHOOL.* 2.

**DISASTERS** — Due Process of Law — Appropriation of Public Money to reimburse the Victims of . . . . . 478  
*See CONSTITUTIONAL LAW.* 33.

**DISEASES** — Penal Institution — Inmate afflicted with — Treatment and Discharge . . . . . 99  
*See PENAL INSTITUTION.* 1.

2. — Public Health — Dangerous Diseases — Overseers of the Poor . . . . . 433  
*See PUBLIC HEALTH.* 4.

**DISPENSARY** — Last National Census — Cities and Towns . . . . . 30  
*See PUBLIC HEALTH.* 1.

**DISTRICT ATTORNEYS** — Members of the Bar — Constitutional Law 423  
 An act requiring that district attorneys shall be members of the bar is constitutional.

A district attorney is not an officer created by or provided for in the Constitution.

The Legislature may constitutionally require that such officers shall possess certain qualifications, provided that the qualifications required bear a reasonable relation to the duties of the office and may be acquired by any person.

**DISTRICT COURTS** — Double Trials — Statute . . . . . 425  
*See CRIMINAL LAW.* 1.

**DOMICIL** — Settlement — Reimbursement of Cities and Towns . . . . . 407  
*See SETTLEMENT.* 3.

2. — Settlement — Married Woman . . . . . 437  
*See SETTLEMENT.* 4.

3. — Local Taxation of Intangible Personal Property . . . . . 607  
*See INCOME TAX.* 1.

**DRAINAGE LAW** — Land owned by Two Proprietors — Meaning of Word "Several" . . . . . 514

Under G. L., c. 252, §§ 1 and 5, improvements of low land can be made on petition to the Drainage Board only when such land is owned by more than two proprietors.

The word "several," in relation to number, means more than two, but not very many.

2. — Jurisdiction of Drainage Board . 622  
 Under G. L., c. 252, § 5, as amended by St. 1922, c. 349, § 4, the question whether the petitioners hold an interest sufficient to authorize them to petition the Drainage Board is a jurisdictional question, for the Board to determine.

3. — Meaning of the Words "the Determination of the Board thereon" 426  
*See COMMISSIONER OF AGRICULTURE.* 1.

4. — Application of Amendatory Statute to Pending Proceedings . . . . . 545  
*See STATUTE.* 3.

**DRUG CORPORATION** — Unregistered Co-partners and Stockholders . 402  
*See CONSTITUTIONAL LAW.* 24.

**DRUGGIST** — License — Federal Permit — Board of Registration in Pharmacy — Intoxicating Liquor 627

The revocation of the Federal permit issued to a druggist, authorizing him to have intoxicating liquor in his store, is not a judgment which establishes a violation of law, and it is the duty of the Board of Registration in Pharmacy to give a hearing, as required by G. L., c. 112, § 40, and decide for itself, upon the evidence, whether or not a violation of law has occurred which would justify the Board in suspending or revoking the registration of such druggist.

The Attorney General does not decide questions of fact or substitute his judgment for the judgment of the officer or Board to which the decision of such questions is committed by law.

2. — Unregistered Co-partners and Stockholders in Retail Drug Corporations 402  
*See CONSTITUTIONAL LAW.* 24.

**EASTERN MASSACHUSETTS STREET RAILWAY COMPANY** — Impairment of Contract — Boston Elevated Railway Company 147, 396  
*See CONSTITUTIONAL LAW.* 10, 23.

**EDUCATION** — "Anti-aid" Amendment — State Scholarships 648  
*See CONSTITUTIONAL LAW.* 38.

**EIGHTEENTH AMENDMENT** — Constitutional Law — Delegation of Legislative Power — Act which automatically changes to conform to Subsequent Federal Legislation 179  
*See CONSTITUTIONAL LAW.* 12.

2. — Regulations and Standards for the Manufacture, Sale or Transportation of Foods, Drugs, Medicines and Liquors 391  
*See COMMISSIONER OF PUBLIC HEALTH.* 1.

**ELECTIONS** — House of Representatives — Special Election — Order and Precept for Special Election — Decision of the House as to the Validity of an Election 214

Under G. L., c. 54, § 141, a special precept issued by the Speaker of the House of Representatives, pursuant to an order of said House fixing the time for a special election to fill a vacancy in said House, is essential to the validity of such special election.

An order of the House of Representatives fixing the time for a special election to fill a vacancy in said House is a condition precedent to the issue of a precept for such election by the Speaker of the House.

**ELECTIONS** — *Continued.*

Although the decision of the House of Representatives as to the validity of an election to the House cannot be reviewed by any other tribunal, the House has been accustomed to follow the rules of law.

2. — Expenditures by or on Behalf of Candidates for City Offices 242

Under G. L., c. 55, § 1, the amount which a candidate may spend for a city office is determined by the number of registered voters qualified to vote at the next preceding election, whether State or city.

3. — Tenure of Office — President of the Senate — Speaker of the House — Biennial Elections 199  
*See TENURE OF OFFICE.* 1.

4. — Municipal Primaries — Freedom of Elections 462  
*See CONSTITUTIONAL LAW.* 31.

**EMINENT DOMAIN** — State Highways — Certificate of Layout — Order of Taking — Land outside Existing Public Way — Statutory Notice — Indemnification of the Commonwealth 22

The preliminary requirements referred to in G. L., c. 79, § 4, in the case of the laying out of State highways, are found in G. L., c. 81, § 5.

There is no objection to incorporating the order of taking in the certificate required in laying out a State highway, if it is necessary to take land for the purposes of a State highway outside the limits of an existing public way.

In cases where it is necessary to take land outside the limits of an existing public way, notice should be given in compliance with G. L., c. 79, § 8; in such cases, also, the provisions as to the indemnification of the Commonwealth are found in G. L., c. 81, § 7.

2. — State Highway — County Commissioners — Entry within Two Years 450

Under G. L., c. 82, § 11, county commissioners are authorized to take land by eminent domain for the purpose of relocating a State highway.

Where an order of taking for highway purposes has been adopted, in accordance with the provisions of G. L., c. 79, § 3, entry must be made or possession taken within two years from the date of the order.

3. — Taking of Picture exhibited in a Public Library 508, 539  
*See CONSTITUTIONAL LAW.* 36.

4. — *See MASSACHUSETTS INSTITUTE OF TECHNOLOGY.* 1.

**EMPLOYEE** — Compensation — Federal Board of Vocational Education 378  
*See FISHERIES AND GAME.* 3.



**EMPLOYMENT** — Women and Children  
— Employment in Certain Kinds  
of Business — "In Laboring" . 306  
*See WOMEN AND CHILDREN.* 1.

**ENTRY** — State Highway — Taking by  
Eminent Domain . . . . . 450  
*See EMINENT DOMAIN.* 2.

**EXECUTIVE COUNCIL** — Constitutional  
Law — Vacancy in the  
Executive Council — Selection  
of Successor . . . . . 377  
*See CONSTITUTIONAL LAW.* 21.

**EXPENDITURES** — Commission ap-  
pointed by the General Court —  
Report . . . . . 8  
*See GENERAL COURT.* 1.

**FAIRS** — Agricultural Societies — Li-  
censes . . . . . 204  
*See AGRICULTURAL SOCIETY.* 1.

**FEDERAL CONSTITUTION** — Con-  
tract Clause — Repeal of Charter  
of a Religious Corporation . . . . . 58  
*See CONSTITUTIONAL LAW.* 3.

2. — Contract Clause — Public Charity  
— Legislative Relief — *Cy L'ès* . . . . . 66  
*See CONSTITUTIONAL LAW.* 4.

3. — Contract Clause — Repeal of Cor-  
porate Charter for Misuser . . . . . 98  
*See CONSTITUTIONAL LAW.* 5.

**FEDERAL PROPERTY** — Taxation . 671  
*See TAXATION.* 19.

**FEDERAL RESERVATION** — High  
School — State Reimbursement 593  
*See PUBLIC SCHOOLS.* 3.

**FEDERAL RESERVE SYSTEM** —  
Power of Commissioner to  
authorize a Boston Trust Com-  
pany which is a Member of the  
Federal Reserve System to act  
as a Reserve Agent for Other  
Trust Companies . . . . . 96  
*See TRUST COMPANY.* 2.

**FEES** — Inspectors of Slaughtering —  
Charge for Services . . . . . 682  
Inspectors of slaughtering, appointed under  
G. L., c. 94, §§ 118-139, have no right to de-  
mand or receive any fees from butchers for  
the performance of their duties.

2. — Boxing Matches — Surrender of  
License — Refund . . . . . 111  
*See BOXING.* 2.

3. — County Accounts — Additional  
Compensation to Persons re-  
ceiving Salaries from Counties . 315  
*See SALARY.* 4.

4. — Payment of . . . . . 662  
*See LICENSE.* 2.

**FIRE INSURANCE COMPANY** — Ad-  
mission — Requirement — Fixing  
Contingent Mutual Liability . . 45  
*See INSURANCE.* 2.

**FIRE INVESTIGATOR** — Civil Service  
— Assignment to Special Duty  
— Necessity for Examination . 31  
*See CIVIL SERVICE.* 2.

**FIRE MARSHAL** — Garages — Gaso-  
line — Permits — City of Boston 329  
*See GARAGES.* 2.

**FIRE PREVENTION** — Rules and  
Regulations — Metropolitan Dis-  
trict . . . . . 229  
Statement of successive steps necessary to  
be taken under G. L., c. 148, §§ 30, 39, 40 and  
11, and c. 30, § 37, for the establishment of  
rules and regulations relating to fire prevention  
in the metropolitan district.

2. — Removal of Slash after cutting  
Timber . . . . . 464  
Under G. L., c. 48, § 16, both the owner of  
lands, as therein defined, and the owner of  
standing timber thereon, who cuts or permits  
the cutting of brush, wood or timber, under  
the circumstances therein defined, may be  
liable to the penalty prescribed by section 20  
if he fails to dispose of the slash in the manner  
prescribed in said section 16.

The purchaser of timberland after the tim-  
ber has been cut but before the slash is disposed  
of, who fails to dispose of such slash in the  
manner prescribed by G. L., c. 48, § 16, is not  
liable to the penalty prescribed by section 20,  
since he has neither cut such timber nor per-  
mitted the cutting of such timber.

**FIREMEN** — Fire Department — Ap-  
pointment and Removal . . . . . 476  
*See CIVIL SERVICE.* 6.

**FISHERIES AND GAME** — Right of  
Property — Extension of Privi-  
lege to use Fisheries . . . . . 176  
The State exercises not only the right of  
sovereignty, but also the right of property,  
as to its fisheries and game.  
A State may prohibit the citizens of another  
State from using its fisheries.  
An act extending the privilege of using  
fisheries to aliens who meet certain require-  
ments is constitutional.

2. — Alien — Actually engaged in Lob-  
ster Fishing for Five Years pre-  
ceding Date of License . . . . . 286  
In the matter of granting a license to an  
alien to catch or take lobsters under St. 1921,  
c. 116, the determination as to whether or not  
the alien in question has actually been engaged  
in lobster fishing in the county for five years  
next preceding the date of the license is for the  
official upon whom the responsibility rests in  
a given case.

**FISHERIES AND GAME** — *Continued.*

In determining the question, the intent of the applicant with respect to his occupation during the period as well as the facts respecting his employment are to be taken into consideration.

3. — Employee — Compensation — Federal Board of Vocational Education . . . . . 378

Under G. L., c. 29, § 27, the Commissioner of Conservation has no right to employ in the Division of Fisheries and Game a deputy inspector of fish when there are no funds available for the salary thereof, although the Federal Board of Vocational Education agrees to pay such salary and necessary traveling expenses until such time as a sufficient appropriation is made by the State.

4. — Taking Pickerel "from the Waters of the Commonwealth" — Decision of District Court — Effect 430

The term "waters of the commonwealth," as used in G. L., c. 130, § 59, applies to all waters within the jurisdiction of the Commonwealth, and is not confined to waters owned by the Commonwealth.

While it is not the function of the Attorney General to review a decision of the district court, and such decision will be accorded due consideration and respect, it does not conclude him in advising State officers in regard to their official duties.

5. — Acceptance of Unconditional Gifts 636

In the absence of any express prohibition in the Constitution or statutes of the Commonwealth, the Division of Fisheries and Game, as a part of the Department of Conservation, is entitled to receive unconditional gifts of chattels, the title to which, however, vests in the Commonwealth, but any sums of money which may be offered to the Division of Fisheries and Game by way of absolute and unconditional gift to the Commonwealth must be deposited in the treasury of the Commonwealth, in accordance with Mass. Const., pt. 2d, c. II, § 1, art. XI, and G. L., c. 30, § 27, and can only be withdrawn from the treasury in accordance with the method provided by law. On the other hand, the Department of Conservation has no authority to receive and accept any gift of money charged with any form of trust for the purpose of carrying on local activities of the Division of Fisheries and Game.

6. — Red Brook, Wareham — Passageway for Alewives — Regulation 193  
See FISHWAY. 1.

7. — Searches for Game or Fish — Powers of Inspector of Fish . . . . . 288  
See CONSTITUTIONAL LAW. 15.

**FISHERMAN** — Inland Waters — Licensing of . . . . . 296  
See INLAND WATERS. 1.

**FISHING** — Great Ponds — Public Rights — Authority of Selectmen of Towns . . . . . 226  
See GREAT PONDS. 1.

**FISHING AND HUNTING LICENSES** — License to rear Wild Birds or Game for Sale as Food — Surrender of License by Person convicted of Violation of Fish and Game Laws . . . . . 341

Licenses to hunt and fish, or to rear wild birds or game for sale as food, become *ipso facto* void upon the conviction of the licensee of a violation of the fish and game laws of the Commonwealth, and a refusal to surrender such license upon such conviction constitutes a misdemeanor, subjecting the licensee to the penalty imposed by G. L., c. 131, §§ 84 and 88, respectively.

**FISHWAY** — Red Brook, Wareham — Passageway for Alewives — Regulation of Obstructions . . . . . 193

The Commissioner of Conservation, by G. L., c. 130, § 17, has authority to prescribe by written order that a suitable and sufficient passageway for alewives be maintained in Red Brook, so called, in the town of Wareham.

**FOREIGN MORTGAGE CORPORATIONS** — Use of Words "Trust Company" . . . . . 550  
See TRUST COMPANY. 7.

**FOREIGNER** — Hunting or Fishing License — Unnaturalized Foreign-born Resident . . . . . 381  
See HUNTING OR FISHING LICENSE. 1.

**FUEL ADMINISTRATOR** — Power to require Information from Coal Dealers . . . . . 63

The Fuel Administrator, by virtue of his appointment under Gen. St. 1917, c. 342, and St. 1920, c. 610, has the power to summon witnesses and compel testimony for the purpose of ascertaining facts in regard to necessities of life, including coal.

2. — Power to fix Price of Fuel in Time of Emergency — Power of Governor to determine whether Emergency exists . . . . . 582

Those portions of Gen. St. 1917, c. 342, relating to the appointment, duties, authority and powers of a fuel administrator, which are revived and made operative until April 1, 1923, by St. 1922, c. 544, confer power upon the Governor, "when in his opinion the public exigency so requires," to fix reasonable prices for fuel during the period of the emergency, and to delegate power to such persons as he may select, to do in his name whatever may be necessary to carry said powers into effect; and as so construed the statute is not unconstitutional.

Under the police power and the authority conferred by Mass. Const. Amend. XLVII,

**FUEL ADMINISTRATOR** — *Continued.*  
 the General Court has power to provide for distribution of fuel at reasonable rates in time of public emergency, and to that end may authorize the Governor to determine whether such emergency exists, to fix reasonable prices for fuel during the continuance of the emergency, and to delegate to persons selected by him power to do in his name whatever may be necessary to carry said powers into effect.

**GARAGES** — Abutter . . . . . 37  
 A parcel of land does not abut upon another unless it touches it.

A parcel of land across the street from and opposite the site of a proposed garage is not land abutting thereon, within the meaning of St. 1913, c. 577, § 1, as amended by St. 1914, c. 119, § 1.

2. — Gasoline Permits — City of Boston — Fire Marshal . . . . . 329

Under St. 1913, c. 577, as amended by St. 1914, c. 119, authority to issue permits for the erection of garages in the city of Boston is vested exclusively in the street commissioners of said city, whose action in granting or refusing a permit is not subject to review by the Department of Public Safety of the Commonwealth.

Under G. L., c. 148, § 30, authority to issue permits for the storage of gasoline within the metropolitan district is vested in the State Fire Marshal.

Under G. L., c. 148, § 31, the State Fire Marshal may delegate the power vested in him by section 30 to any designated officer in any city or town in the said district, but subject to the appeals provided for in section 45.

Even though the State Fire Marshal, acting under G. L., c. 148, § 31, delegates to an appropriate officer the powers vested in him by section 30, he may, in his discretion, take original jurisdiction of any question arising under section 30, and, if he does so, the validity of the delegation, the action of the officer thereunder, and the propriety of any appeal therefrom become immaterial.

3. — Police Power — School, Hospital or Church . . . . . 439  
*See CONSTITUTIONAL LAW.* 28.

4. — License to store Gasoline — Permit to erect a Garage — Fire Marshal — Street Commissioners of Boston . . . . . 580  
*See GASOLINE.* 1.

**GASOLINE** — License to store Gasoline — Permit to erect a Garage — Fire Marshal — Street Commissioners of Boston . . . . . 580

The authority vested in the Fire Marshal by G. L., c. 148, §§ 30, 31 and 45 (formerly St. 1914, c. 795), to issue permits for the storage of gasoline is entirely distinct from the authority vested in the street commissioners of Boston by St. 1913, c. 577, as amended, to issue per-

**GASOLINE** — *Continued.*  
 mits for the erection of garages; and the authority so vested in the Fire Marshal does not depend upon the issuance of a permit to erect a garage, and is not affected by St. 1922, c. 316.

**GENERAL COURT** — Commission appointed by the General Court — Expenditures — Report . . . . . 8

Where the General Court has appointed a commission to investigate and to report on a fixed date, the General Court may extend the time for filing or may receive the report after the date fixed.

Expenditures from money appropriated for expenses incurred in the preparation of the report may be authorized, although the expenses are incurred after the time fixed for filing, if they are incurred before the report is actually received.

2. — Representative — Appointment to State Service — Salary . . . . . 220  
*See SALARY.* 3.

3. — Statutes — Amendment — Resolve 444  
*See STATUTES.* 3.

4. — Authority to arrest Disorderly Persons in the Chambers of . . . . . 469  
*See SERGEANT-AT-ARMS.* 1.

**GIFTS** — Acceptance — Delegation of Legislative Authority — Division of the Blind . . . . . 643

Authority to accept a gift to the Commonwealth is in the Legislature unless the Legislature has delegated such authority.

The Department of Education is authorized by G. L., c. 69, § 3, to receive "in trust for the Commonwealth . . . any gift or bequest of personal property for educational purposes," and therefore may receive a legacy of \$2,000 "to the Massachusetts Commission for the Blind."

2. — Fisheries and Game — Acceptance of Gifts . . . . . 636  
*See FISHERIES AND GAME.* 5.

**GOVERNOR AND COUNCIL** — Power to require the Commissioner of Banks to furnish Information . . . . . 120

Under Mass. Const., pt. 2d, c. II, § I, art. IV, and c. II, § III, art. I, the Governor and Council have incidental power to require the Commissioner of Banks to furnish such information as the Governor and Council, under the obligation imposed by their several oaths of office, determine that they require to guide them in ordering the affairs of the Commonwealth agreeably to the Constitution and the laws of the land.

G. L., c. 167, § 2, does not limit this power to require the Commissioner of Banks to furnish information for such purpose.

2. — Determination of a Salary — Whether by Concurrent Action or by Action as a Single Board . . . . . 131

**GOVERNOR AND COUNCIL** — *Continued.*

The Constitution recognizes two kinds of executive business which may come before the Council: one, that which is to be done by the Governor and Council acting together as a single executive board; and the other, that which is to be done by concurrent action of the Governor, as executive magistrate, and of the Council.

Ordinarily, if a statute provides that the act shall be done by the Governor, by and with the advice and consent of the Council, it requires concurrent action by the Governor and by the Council.

Ordinarily, if a statute provides that an act shall be done by the Governor and Council, it requires action by a single executive board composed of the Governor and Council, in which the Governor has one vote.

Where a statute provides that a salary shall be fixed by the Governor and Council, the substance of the subject-matter is of greater significance than niceties of verbal construction, and the statute will ordinarily be construed to require concurrent action by both Governor and Council, since such action may impose a fixed charge upon the treasury.

G. L., c. 14, § 2, requires that the salary in question be fixed by concurrent action of the Governor and of the Council.

3. — Travel outside Commonwealth — Expenses . . . 138  
See ATTORNEY GENERAL. 1.

**GREAT PONDS** — Fishing — Public Rights — Authority of Selectmen of Towns . . . 226

There is no authority in the selectmen of towns, in the absence of specific statutory authority, to restrict the right of the public to fish in any great pond of the Commonwealth.

**GUARANTY CAPITAL** — Foreign Mutual Fire Insurance Company — Admission — Liabilities . . . 144  
See INSURANCE. 3.

**H. V. GREENE COMPANY** — Sale of Shares of Capital Stock — Word "Certificate" . . . 298  
See CAPITAL STOCK. 1.

**HARVARD COLLEGE** — Power to confer Academic Degrees . . . 327  
Mass. Const., pt. 2d, c. V, § 1, art. I, ratified and confirmed the power of the President and Fellows of Harvard College to grant academic degrees of every kind.

2. — Records and Papers — What may be certified by the Secretary . . . 328  
See RECORDS AND PAPERS. 1.

**HEALTH** — License to engage in the Business of the Manufacture or Bottling of Non-Alcoholic Beverages . . . 403  
See PUBLIC HEALTH. 3.

**HIGH SCHOOL** — Domicil — High School Pupil — Tuition — Transportation . . . 393

G. L., c. 76, § 6, does not apply where a minor is a legal resident of one town but goes to another for purposes of employment only, inasmuch as said minor is not residing temporarily in a town other than the legal residence of his parent or guardian "for the special purpose of there attending school."

2. — Legal Obligations already entered into — Exemption of a Town from maintaining a High School — Attorney General . . . 565

The exception touching "legal obligations . . . already entered into," made by Mass. Const. Amend. XLVI, § 2 (anti-aid amendment), must be construed to mean lawful contracts entered into prior to the adoption of the amendment, and still existing.

A bequest to trustees to establish a high school, free to all the children of Deerfield, made upon condition that the town shall annually appropriate and pay over to the trustees a sum equal to all the taxes assessed upon the trust estate, with a gift over to the town of Whately in case the town of Deerfield should fail to comply with said condition for the space of one year, does not, when accepted by the town, constitute a legal obligation to make such appropriation, within the meaning of Mass. Const. Amend. XLVI, § 2, since the town is left free either to fulfil the condition or to forfeit the property.

A bequest upon condition that the town of Deerfield shall pay over to trustees who hold the gift a sum equal to the taxes assessed upon the trust estate imposes no obligation upon the town to make any payment, where the property is by special statute exempted from taxes.

An illegal appropriation of money by a town to a private academy which furnishes free high school teaching to the children of the town will not justify the Department of Education in exempting the town from maintaining a public high school.

The Attorney General does not determine the facts upon which he advises; such facts must be determined by the department which requests the opinion.

3. — Federal Reservation — State Reimbursement — Tuition . . . 593  
See PUBLIC SCHOOLS. 3.

**HIGHWAYS** — Construction of — Shoeing of Horses — Sharpening Picks — Care of Tools — Labor performed . . . 211  
See LIEN. 2.

**HOSPITAL** — "Anti-aid" Amendment — Payment to Private Hospital for Deaf, Dumb or Blind of Compensation for Support . . . 415  
See CONSTITUTIONAL LAW. 26.

**HOURS OF LABOR** — Hours of Employment of Women and Children — Meaning of the Word "Week" . . . . . 203

In the absence of express statutory declaration, the word "week," as used in G. L., c. 149, § 56, does not mean any consecutive seven days, but should be given its usual meaning, and be considered equivalent to the phrase "calendar week."

**HOUSE OF CORRECTION** — Transfer 243  
The Commissioner of Correction, under G. L., c. 127, § 105, is authorized to transfer all the prisoners from one house of correction to another for any purpose within his discretion.

**HOUSE OF REPRESENTATIVES** — Special Election — Order and Precept — Decision of the House as to Validity . . . . . 214  
*See ELECTIONS.* 1.

2. — Incompatible Offices — Power to determine Disqualification — Right of *De Facto* Member to Salary . . . . . 358  
*See CONSTITUTIONAL LAW.* 19.

**HUNTING OR FISHING LICENSE** — Unnaturalized Foreign-born Resident — Citizens . . . . . 381

A native of the Philippine Islands, resident in this Commonwealth, who has not been naturalized and who does not own real estate assessed for taxation at not less than \$500, is not entitled to a hunting or fishing license.

Territory acquired by conquest or purchase does not, *ipso facto*, become a part of the United States, within the meaning of the Constitution.

The Fourteenth Amendment is limited, with respect to citizenship, to persons born or naturalized in the United States.

Natives of the Philippine Islands did not become, and are not, citizens of the United States.

**ILLEGITIMATE CHILD** — Distribution of Personal Property . . . . . 216

Under G. L., c. 190, §§ 5 and 6, where an illegitimate child dies intestate, leaving personal property, his illegitimate brothers and sisters cannot share in his estate, but only those can share who would be entitled by inheritance through his mother if he had been legitimate.

2. — Support from Labor of Father in the Massachusetts Reformatory 592

Where the father of an illegitimate child is committed to the Massachusetts Reformatory on a complaint for bastardy, the child and its mother, when in needy circumstances, may claim the benefit of G. L., c. 273, § 9.

3. — Registration of Birth . . . . . 207, 619  
*See BIRTHS, MARRIAGES AND DEATHS.* 1.

**INCOME TAX** — Local Taxation of Intangible Personal Property — Exemption — Domicil . . . . . 607

A person who becomes a resident of this State prior to April 1 is not subject to local taxation upon intangible personalty owned by him upon that date when the income received therefrom during the previous year is not subject to the income tax.

G. L., c. 59, § 5, cl. 27, when construed with G. L., c. 62, §§ 49-53, exempts from local taxation intangibles, the income of which is of the kind made taxable by G. L., c. 62, even though such income cannot in fact be taxed because the recipient was not a resident of this State at the time such income was received.

2. — Distribution of Capital of Domestic Corporation in Liquidation . . . . . 15  
*See TAXATION.* 1.

3. — Collection from Non-resident Delinquent . . . . . 395  
*See TAXES.* 3.

4. — Additional Assessments — Notice 616  
*See TAXATION.* 17.

**INCOME TAX RETURNS** — Inspection of . . . . . 639  
*See AUDITOR.* 1.

**INDEMNIFICATION OF THE COMMONWEALTH** — State Highways — Land outside Existing Public Way . . . . . 22  
*See EMINENT DOMAIN.* 1.

**INLAND WATERS** — Licensing of Fishermen . . . . . 296

Unless the contrary appears by express provision or clear implication, the words "inland waters," as used in G. L., c. 131, § 3, apply to waters where the tide does not ebb and flow.

**INSTITUTIONS** — Accounts of Institutions — Approval by Trustees or Commissioner of Department — Auditor . . . . . 164

Accounts of sales of property by an officer of a State institution may be approved by the head of the department having supervision and control of the institution, or by the trustees or other supervising board or officer.

Requirements for approval of bills for articles furnished and expenses incurred in such institutions depend on particular statutory provisions relating to each institution, which are quoted or referred to and considered.

By G. L., c. 11, § 7, the Auditor is authorized to require affidavits with respect to such expenditures, to be made by the disbursing officers of the various institutions.

**INSURANCE** — Agreement by Company guaranteeing Credit Report as True Statement of Facts set forth — Responsibility for Accuracy of Own Work — Contract of Insurance . . . . . 11

**INSURANCE** — *Continued.*

An agreement by a company guaranteeing that a credit report, at the date of such report, is a true statement of the facts which it sets forth, and limiting the responsibility of the company to any error of statement, advice or recommendation which misleads or causes loss to the subscriber, and further stipulating that payment shall be for the actual net loss caused by such error, is not a contract of insurance.

2. — Foreign Mutual Fire Insurance Company — Admission — Requirement of Assessable Policy — Fixing of Contingent Mutual Liability . . . . . 45

A foreign mutual fire insurance company cannot be admitted to transact business in this Commonwealth unless by its by-laws and policies it fixes the contingent mutual liability of its members.

3. — Foreign Mutual Fire Insurance Company — Admission — Guaranty Capital — Net Cash Assets — Liabilities . . . . . 144

A foreign mutual fire insurance company having a paid-up guaranty capital of \$100,000, liabilities of \$58,240.01, a surplus over liabilities (excluding guaranty capital) of \$27,518, and contingent assets of \$136,385.14, is qualified for admission to do business in the Commonwealth, under G. L., c. 175, § 151, cl. 2d (3), since the company has net cash assets equal to its total liabilities, and contingent assets of not less than \$100,000.

The guaranty capital of the company, in the interpretation of this particular section, is not to be construed as a liability.

4. — Services furnished by an Automobile Service Company — Contract of Insurance . . . . . 150

An agreement by an automobile service company to furnish towing, repairs and automobile goods incidental to the operation of a car through the period of a year, for a fixed sum, is not a contract of insurance.

5. — Declaration of Trust — Partnership — Agent's or Broker's License . . . . . 614

Partnership licenses under G. L., c. 175, § 173, may not be granted to persons doing business under a declaration of trust.

- INTEREST** — Rate of Interest on Taxes . . . . . 38  
*See TAXES.* 2.

2. — Interest on Deposits — Savings Departments . . . . . 339  
*See STATE BANKS.* 1.

- INTOXICATING LIQUOR** — Druggist — License — Federal Permit . . . . . 627  
*See DRUGGIST.* 1.

- INVESTMENTS** — Savings Banks — Authorized Investments — Commissioner of Banks . . . . . 173  
*See SAVINGS BANKS.* 1.

2. — Trust Company — Investments — Limit of Liabilities of Any One Person . . . . . 249  
*See TRUST COMPANY.* 6.

- JUDGES** — District Attorneys — Information to the Supervisor of Administration . . . . . 360  
*See STATE OFFICERS.* 1.

- JUSTICE OF THE PEACE** — Notary Public — Time of Residence in Massachusetts . . . . . 371

There is no legal requirement as to time of residence in Massachusetts before a person may become a justice of the peace or notary public.

2. — Constitutional Law — Women — Eligibility to be appointed — Effect of Nineteenth Amendment 527

As the Constitution prescribes the mode of appointment, tenure and method of removing justices of the peace, the qualifications for that office cannot be prescribed or modified by statute, and therefore St. 1922, c. 371, does not apply thereto.

By reason of the adoption of the Nineteenth Amendment to the Constitution of the United States, women are not excluded by the Constitution from any elective or appointive office, and are therefore now eligible to appointment as justices of the peace.

3. — Right of Women to Appointment 247  
*See CONSTITUTIONAL LAW.* 14.

- JUVENILE OFFENDERS** — Custody — Term of Detention — Parole 161

A boy transferred from the Massachusetts Reformatory to the Industrial School for Boys, or a girl transferred from the Reformatory for Women to the Industrial School for Girls, under G. L., c. 120, is in the custody of the institution to which he or she is transferred.

Such transfer does not operate to extend the term for which the boy or girl was originally committed; when the term expires the inmate should be discharged, but if the term extends beyond the minority of the child, the child should be returned to the reformatory.

Boys and girls so transferred may be paroled only in accordance with G. L., c. 120, § 21.

- LABOR** — Women and Children — Employment in Certain Kinds of Business — "In Laboring" . . . . . 306  
*See WOMEN AND CHILDREN.* 1.

- LABORERS** — Metropolitan District Commission — Appropriation . . . . . 441  
*See WORKMEN'S COMPENSATION.* 1.

**LAUNDRY** — Authority to investigate  
 Prices of Laundry Work — Com-  
 modities . . . . . 251  
*See NECESSARIES OF LIFE.* 1.

**LEASE** — State Departments — Execu-  
 tion of Leases — Governor and  
 Council . . . . . 55

A State department has no power to execute a lease unless authorized so to do by the Legislature.

An appropriation of money to cover the expense of a lease does not ordinarily confer incidental authority to execute it upon the department which is to occupy the leased premises.

Where money has been appropriated to meet the cost of leasing premises for a department, such lease has, by custom, been executed by the Governor and Council on behalf of such department.

2. — Taxation — Income Tax — Sale of Lease . . . . . 136  
*See TAXATION.* 5.

3. — Acts making Unenforceable Pro-  
 visions in Leases . . . . . 194  
*See CONSTITUTIONAL LAW.* 13.

**LEGACY AND SUCCESSION TAX** —  
 Stock of Voluntary Association  
 owned by Non-resident . . . . . 458

Under St. 1920, c. 396, stock of a voluntary association owned by a non-resident is not subject to a succession tax on his death, where the property of the association consists wholly of stocks of foreign corporations, and neither of the trustees nor any office for the transfer of shares is within the jurisdiction, since complete succession may be accomplished without invoking the aid of our laws, and there is nothing to which the taxing power can be applied.

But if at the time of the decedent's death the voluntary association owned property in the Commonwealth, his interest through the voluntary association in that property is subject to the tax.

The mere fact that a voluntary association is stated to be organized under the laws of Massachusetts does not give jurisdiction to tax its shares, where neither shareholders, trustees nor property of the association is within the State.

2. — Gift to Wife of Promissory Note . . 159  
*See TAXATION.* 6.

3. — Determination of Liability of an  
 Estate to a Tax . . . . . 284  
*See TREASURER AND RECEIVER-  
 GENERAL.* 1.

4. — Exemptions — Gift for Such  
 Charitable Purposes . . . . . 368  
*See TAXATION.* 12.

5. — Stock of Massachusetts Corpora-  
 tion . . . . . 655  
*See TAXATION.* 18.

**LEGAL HOLIDAY** — Governor — Pro-  
 clamations — Legislative Power . . 321  
 The establishment of a legal holiday calls for the exercise of legislative power, and the Governor has no power to establish a legal holiday by proclamation.

**LEGISLATURE** — Constitutional Law  
 — Contract made by Statute —  
 Review of Question whether Con-  
 tract was procured by Fraud or  
 Undue Influence . . . . . 519

The Legislature has power to investigate the conduct of its own members in enacting legislation.

If a contract be made by statute, a repeal of said act impairs the obligation of said contract, within the meaning of U. S. Const., art. I, § 10.

If a contract be made by statute, the Legislature has no power to set said contract aside upon the ground that it was procured by fraud and corruption.

As the court does not possess legislative power and cannot repeal a statute which the Legislature has constitutional power to enact, it will not hear and determine whether a constitutional statute, which creates a contract, was procured by fraud or corruption.

2. — Power of Legislature to ratify Acts  
 of City Officials done under an  
 Unconstitutional Charter —  
 When a Local Act may be limited  
 to take effect under the Forty-  
 eighth Amendment . . . . . 175  
*See CONSTITUTIONAL LAW.* 11.

3. — Civil Service — Veterans' Pref-  
 erence — Creation of Office  
 of Controller — Continuation  
 Schools . . . . . 349  
*See CONSTITUTIONAL LAW.* 17.

4. — Impairment of Contract — Change  
 of Remedy . . . . . 410  
*See CONSTITUTIONAL LAW.* 25.

5. — Gifts to the Commonwealth —  
 Acceptance . . . . . 643  
*See GIFTS.* 1.

6. — Supervisor of Accounts . . . . . 679  
*See STATE OFFICE.* 1.

**LICENSE** — Division of Waterways and  
 Public Lands — Date . . . . . 647

A license which requires the approval of the Governor and Council takes effect when so approved, and its date is the date of such approval.

2. — Payment of Required Fee . . . . . 662  
 Under G. L., c. 138, § 19, the fee for a license of the fourth class must be not less than \$250, and no valid license may be issued by the licensing authorities upon payment of a fee fixed by them at a lesser figure.

**LICENSE** — *Continued.*

3. — Warehouseman — Surrender of License — Cancellation of Bond . . . 274  
*See WAREHOUSEMAN. 1.*
4. — License to rear Wild Birds or Game for Sale as Food — Surrender of License . . . 341  
*See FISHING AND HUNTING LICENSES. 1.*
5. — Fruits and Vegetables — Hawkers and Pedlers . . . 574  
*See ORDINANCES. 1.*

**LIEN** — Claim for Materials furnished Subcontractor for Construction of Building at Boston State Hospital — Money retained under Terms of Statute and Contract — Trust . . . 75

A claim filed by a concern that furnished materials to a subcontractor of a principal contractor who built a building at the Boston State Hospital for the Department of Mental Diseases, is within the terms of G. L., c. 30, § 39, provided the claim was seasonably filed.

Under the case of *Nash v. Commonwealth*, 174 Mass. 335, it must be taken that the Commonwealth had money in its hands which the statute cited intended should be security for the payment of the said bill, and that the money came to the Commonwealth for that purpose and was held by it as trustee for the concern.

2. — Construction of State Highways — Shoeing of Horses — Sharpening Picks — Care of Tools — Labor performed or furnished . . . 211

The shoeing of horses, the sharpening of picks and the taking care of other tools by a subcontractor in connection with the construction of a State highway is not labor performed or furnished, "used in the construction or repair of public buildings or other public works," within the intendment of G. L., c. 30, § 39.

- LIGHTS** — Automobiles — Operation . . . 177  
*See AUTOMOBILE. 2.*

- LOBSTERS** — Fisheries and Game — Right of Property — Extension of Privilege to use Fisheries . . . 176  
*See FISHERIES AND GAME. 1.*

2. — License — Alien . . . 286  
*See FISHERIES AND GAME. 2.*

3. — Referendum Petition, Law subject to . . . 435  
*See CONSTITUTIONAL LAW. 27.*

- LOCAL TAXATION** — Income Tax — Local Taxation of Intangible Personal Property — Exemption — Domicil . . . 607  
*See INCOME TAX. 1.*

- MARRIED WOMAN** — Settlement — Statutory Period of Absence — Minor Child . . . 126  
*See SETTLEMENT. 1.*

2. — Pauper — Settlement — Married Woman . . . 227  
*See SETTLEMENT. 2.*

3. — Domicil — Settlement — Married Woman . . . 437  
*See SETTLEMENT. 4.*

- MASSACHUSETTS AGRICULTURAL COLLEGE** — Salaries of Officers and Employees of the Massachusetts Agricultural College paid wholly or in Part from Federal Funds — Supervisor of Administration . . . 105  
*See SALARY. 2.*

2. — Patents — Right of the Massachusetts Agricultural College to use a Patented Formula for Experimental Purposes . . . 366  
*See PATENTS. 1.*

**MASSACHUSETTS INSTITUTE OF TECHNOLOGY** — Land — Eminent Domain . . . 25

The Massachusetts Institute of Technology may sell to the Commonwealth the bare legal title to land conveyed to it by St. 1861, c. 183, but the land when so conveyed would be subject to the equitable easements arising from the restrictions contained in that act.

The erection of a memorial column or a statue would not be inconsistent with the maintenance of a square "as an open space."

St. 1861, c. 183, does not limit or infringe upon the right of the Commonwealth to exercise the power of eminent domain.

- MASSACHUSETTS NAUTICAL SCHOOL** — Salaries of Officers and Employees of the Commonwealth — Increases . . . 5  
*See SALARY. 1.*

- MASTERS IN CHANCERY** — Officers — Women — Eligibility to be appointed Standing Masters in Chancery . . . 588

A standing master in chancery is not a "judicial officer," within the meaning of Mass. Const., pt. 2d, c. 111, art. I.

Under St. 1922, c. 371, a woman is eligible to appointment as a standing master in chancery.

- MATRON** — Chief Matron and Assistant Chief Matron — House of Detention in Boston . . . 152  
*See CIVIL SERVICE. 4.*



**MATTRESSES** — Manufacture and Sale of Mattresses, Pillows and Similar Articles having a Filling of Second-hand Material — Investigation by the Department of Public Health . . . . . 255

The general purpose of G. L., c. 94, §§ 270-277, is to prohibit (1) the sale or use of second-hand filling for mattresses, pillows and similar articles without a tag showing that it is second-hand; and (2) the use in such articles of any material which has been used in a hospital or about the person of any one having an infectious or contagious disease.

In case of violation of any provision of G. L., c. 94, §§ 270-277, it is the duty of the Department of Public Health to proceed by complaint to enforce the penalties provided.

**METROPOLITAN DISTRICT COMMISSION** — Salaries of Officers and Employees of the Commonwealth — Classification . . . . . 601

The power granted to the commissioners of the Metropolitan District Commission, under G. L., c. 28, § 4, to fix the compensation of employees is subject to G. L., c. 30, §§ 45 and 46, providing that the salaries of all officers and employees holding offices and positions required to be classified, with certain exceptions, shall be fixed in accordance with the classification and specifications of the Supervisor of Administration.

The salaries of employees of the Metropolitan District Commission are not "salaries . . . regulated by law," within the excepting clause of G. L., c. 30, § 46.

**METROPOLITAN WATER WORKS** — Statute — Construction . . . . . 667

Under St. 1897, cc. 445 and 467, requiring annual payments to be made by the Commonwealth to certain towns on lands taken or acquired for the metropolitan water works, in amounts equal to the previously assessed value of such land, so long as the land shall remain the property of the Commonwealth, no deduction from the amounts of such payments may be made on account of the subsequent removal or destruction of buildings on the land when assessed.

**MILITARY AID** — Civil and Military Settlements — Soldiers' Relief . 632  
See SETTLEMENT. 5.

**MILK** — Filling Point of Glass Bottles or Jars used for the Distribution of Milk or Cream . . . . . 123  
See WEIGHTS AND MEASURES. 1.

**MINIMUM WAGE COMMISSION** — Decree — Publication of Names of Employers . . . . . 236

Under G. L., c. 151, §§ 4 and 11, the Minimum Wage Commission is required to publish the names of employers who it has ascertained are not obeying its decrees.

**MINIMUM WAGE COMMISSION** — *Continued.*

The members of the commission are not liable in an action for damages for publishing the names of such employers, if the publication is made in good faith.

**MINOR CHILD** — Married Woman — Statutory Period of Absence . 126  
See SETTLEMENT. 1.

**MOTOR VEHICLES** — Chauffeurs . . . . . 7

A person operating his own motor vehicle who receives compensation for any work or services in connection therewith is a chauffeur, within the meaning of Gen. St. 1915, c. 16.

A person operating his own motor vehicle who transports stock or materials in any way directly connected with his business, and who does not receive compensation for such transportation, is not a chauffeur.

A salesman working for the owner of a motor vehicle, who uses it in connection with the business of his employer, may be a chauffeur if he receives a portion of his pay for services in driving the motor vehicle.

Such salesman may, at the discretion of the commission, be exempted from the definition of chauffeur and be designated as an operator, if his principal occupation is that of salesman and if his employer is a manufacturer or dealer.

2. — Operator's License — Trucks used by National Guard . . . . . 663

Motor trucks furnished by the United States for the use of the National Guard do not have to be registered, nor are the operators of them required to be licensed.

**NARCOTIC DRUGS** — Confiscation — Disposition . . . . . 414

Under G. L., c. 94, § 215, the Department of Public Health is vested with discretion relative to the disposition of the articles or drugs enumerated, and they may be destroyed or disposed of in any way not prohibited by law. Said department may deliver such articles or drugs to the United States Department of Justice, to be used in evidence, in exchange for such form of receipt and upon such conditions as to custody, use and return as the Commissioner of Public Health shall deem advisable.

**NATIONAL BANK TAX** — Place of Assessment of Personal Property of Deceased Persons — Distribution . . . . . 417  
See TAXATION. 15.

**NATIONAL GUARD** — Registration of Trucks used by National Guard — Operator's License . . . . . 663  
See MOTOR VEHICLES. 2.

**NECESSARIES OF LIFE** — Special Commission on — Authority to Investigate Prices of Laundry Work — Commodities . . . . . 251

**NECESSARIES OF LIFE** — *Continued.*

In St. 1921, c. 325, § 2, the word "commodities" means articles of merchandise, such as fuel, and does not include labor or other service.

Laundry work is not a necessary of life, within the meaning of St. 1921, c. 325, § 2.

Laundry work does not relate to or affect the production, transportation or sale of commodities which are necessities of life, within the meaning of St. 1921, c. 325, § 2.

It follows that the commission is not authorized to investigate circumstances affecting the prices of laundry work.

**NEPONSET VALLEY IMPROVEMENT** — Payment for Construction Work in Lieu of Damages

The balance of an appropriation made by the Legislature in 1911 for damages caused by the taking of land, easements or rights in land, in connection with the protection of the public health in the valley of the Neponset River, can be paid out of the treasury only as money for such damages, and cannot be used for certain construction work in favor of land-owners in lieu of the payment of money for damages.

**NON-ALCOHOLIC BEVERAGES** —

Department of Public Health —  
Local Boards of Health — Li-  
cense to engage in the Business  
of the Manufacture or Bottling  
of . . . . . 403  
*See PUBLIC HEALTH.* 3.

**NORFOLK COUNTY TUBERCULAR**

**HOSPITAL** — Retirement As-  
sociation — Contributions by  
Employees . . . . . 379  
*See RETIREMENT ASSOCIA-  
TION.* 1.

**NOTARY PUBLIC** — Time of Residence in Massachusetts

*See JUSTICE OF THE PEACE.* 1.

**NOTICE** — State Highways — Certificate of Layout — Order of Taking

*See EMINENT DOMAIN.* 1.

## 2. — Income Taxes — Additional Assessments

*See TAXATION.* 17.

**OFFICE** — House of Representatives — Incompatible Offices — Power to determine Disqualification — Right of *De Facto* Member to Salary

*See CONSTITUTIONAL LAW.* 19.

**OPTOMETRY** — Examination and Registration of Applicants — Approval of Schools

G. L., c. 112, § 68, giving to the Board of Registration in Optometry power to approve schools of optometry whose graduates may apply for examination, is a valid exercise of the police power, and is constitutional.

**ORDINANCES** — Fruits and Vegetables

— Hawkers and Peddlers — Li-  
cense . . . . . 574

G. L., c. 101, § 22, is to be construed as an assumption by the Commonwealth of the right to regulate the sale by hawkers and peddlers, in any city or town mentioned in the license, of any fish, fruits, vegetables or other goods, wares or merchandise, the sale of which is not prohibited by law; and while the aldermen or selectmen may license the sale of fish, fruit and vegetables within their respective territories, under the authority conferred by G. L., c. 101, § 17, they have no legal right or power to prohibit the sale of said articles by hawkers and peddlers duly licensed by the Director of Standards, regardless of whether a local license has or has not been granted therefor.

**OVERSEERS OF THE POOR** — Dangerous Diseases — Support

*See PUBLIC HEALTH.* 4.

**PARADE** — Grounds for Parade, Drill and Small Arms Practice

*See VOLUNTEER MILITIA.* 1.

**PAROLE** — Successive Sentences — Expiration of Sentence

*See PRISONER.* 1.

## 2. — Deductions for Good Behavior

*See PRISONER.* 2.

## 3. — Juvenile Offenders — Custody — Term of Detention

*See JUVENILE OFFENDERS.* 1.

**PARTNERSHIP** — Insurance — Declaration of Trust — Broker's License

*See INSURANCE.* 5.

**PATENTS** — Right of the Massachusetts Agricultural College to use a Patented Formula for Experimental Purposes

Use of a patented article, formula or process for experimental purposes, without the consent of the patentee or his assigns, would be unjustifiable, constituting an infringement of the patent, even though there be no sale or profit derived from such use.

**PATHOLOGIST** — Medical Registration — Pathologist

A person acting as a pathologist should be registered under G. L., c. 112, §§ 2-12, providing for medical registration.

**PAUPER** — Settlement — Married Woman

*See SETTLEMENT.* 2.

**PEABODY, CITY** — Election of Superintendent of Schools — City Charter

*See PUBLIC SCHOOLS.* 1.

**PENAL INSTITUTION** — Inmate afflicted with Certain Diseases — Treatment and Discharge . . . 99

The head of a penal institution is justified in holding an inmate whose sentence has expired, provided said inmate is afflicted with one or more of the diseases referred to in G. L., c. 111, § 121.

Such inmates may be isolated from the public, whose health might be endangered by contact with them, but not being bound by prison rules intended to govern the conduct of prisoners under sentence for crime, they may not be punished for violation of such rules.

The provisions of G. L., c. 268, § 16, relating to escaped prisoners, refer solely to persons under sentence, and have no application to inmates held under G. L., c. 111, § 121.

**PENALTY** — Failure to file Tax Returns — Power of Commissioner . . . 48  
*See TAXATION.* 3.

**PENSION** — Teachers' Retirement System — Basis of Reimbursement paid to Cities and Towns . . . 324  
*See TEACHERS.* 1.

2. — Retirement — Perquisites . . . 571  
*See RETIREMENT.* 1.

**PERSONAL PROPERTY** — Distribution — Illegitimate Child . . . 216  
*See ILLEGITIMATE CHILD.* 1.

**PHYSICIANS AND DENTISTS** — Citizenship as Requirement for Registration — Reasonable Regulations for Public Health . . . 141  
*See CONSTITUTIONAL LAW.* 9.

**PICKEREL** — Taking Pickerel "from the Waters of the Commonwealth" — District Court . . . 430  
*See FISH AND GAME.* 4.

**PILGRIM TRICENTENARY COMMISSION** — Surplus Material — Sale — Disposition of Proceeds . . . 320

Under Spec. St. 1919, c. 187, the Pilgrim Tercentenary Commission has the power by sale to dispose of such property and equipment as cannot be utilized, but the money received by the commission through the sale of such surplus property must be paid into the treasury of the Commonwealth, where it becomes part of the general fund or ordinary revenue of the Commonwealth, and as such can be expended only in the manner provided by G. L., c. 29, § 18.

**PILOT** — Appointment — Qualification — Residence in the Commonwealth . . . 219

Under G. L., c. 103, § 11, residence in this Commonwealth is not a necessary qualification for the office of pilot in the ports and places embraced by that section.

**PLYMOUTH** — Fire Department — Appointment and Removal . . . 476  
*See CIVIL SERVICE.* 6.

**POLICE COMMISSIONER** — Police Officer — Board of Health — Word "Detail" . . . 217  
*See POLICE OFFICER.* 1.

**POLICE OFFICER** — Board of Health — Word "Detail" . . . 217  
 A police officer detailed to the board of health, under St. 1889, c. 450, § 7, as amended by St. 1911, c. 287, is subject to the rules and regulations of the police department.

If a police officer so detailed is guilty of misconduct, he may be tried and punished by the police department, but not by the board of health.

**POLICE POWER** — Garage — School, Hospital or Church — Property Rights . . . 439  
*See CONSTITUTIONAL LAW.* 28.

2. — Statute forbidding One to sell or lease upon Condition that it be used exclusively for his Own Products . . . 483  
*See CONSTITUTIONAL LAW.* 34.

**POLL TAXES** — Exemption — Military or Naval Service . . . 103

The exemption from the payment of poll taxes, provided by Gen. St. 1918, c. 49, § 1, as amended by Gen. St. 1919, c. 9, is still in effect, regardless of Public Resolution No. 64, 66th Congress, effective March 3, 1921, entitled "A Resolution declaring certain acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency expired."

**PREMIUMS** — Bonds — Registers of Probate . . . 3  
*See REGISTERS OF PROBATE.* 1.

**PRICE FIXING** — Power of Governor to fix Price of Fuel in Time of Emergency . . . 582  
*See FUEL ADMINISTRATOR.* 2.

**PRIMARIES** — Elections — Municipal Primaries . . . 462  
*See CONSTITUTIONAL LAW.* 31.

**PRISONER** — Successive Sentences — Parole — Expiration of Sentence . . . 32

A prisoner in a jail or house of correction, whose sentence for another offence to the same institution is to begin "from and after expiration of" the first sentence, is eligible to parole upon the first sentence when not more than six months of it remain unexpired.

The successive sentences must be considered separately.

A parole upon the first sentence does not cause that sentence to expire.

**PRISONER** — *Continued.*

Where a prisoner is paroled upon the first sentence, he cannot be committed to the institution upon the second sentence until the first has expired.

2. — Paroles — Deductions for Good Behavior . . . 114  
 The deduction provided for by G. L., c. 127, § 130, is not a deduction from sentence but a deduction from the period of confinement only, and allowance of such deduction does not cause the sentence to "expire" previous to the date on which it would expire by its own terms. Accordingly, such deduction is not to be considered in determining whether a prisoner is eligible to release on parole under the provisions of G. L., c. 127, § 141.

3. — Houses of Correction — Transfer 243  
*See HOUSE OF CORRECTION.* 1.

**PRIVATE BANKERS** — Surrender of License — Bond . . . 130

Where a person licensed to do business under G. L., c. 169, § 3, proposes to surrender his license and to take out a new license, in the exercise of a proper discretion the old bond may be given up and a new bond in a reduced amount accepted, but the new bond should be conditioned to apply to business previously done as well as to business to be done.

2. — Property of, in Possession of Commissioner of Banks, under G. L., c. 167, §§ 1 and 22 — Right of Administrator to administer Such Property . . . 569

Where the Commissioner of Banks takes possession of the property of an insolvent private banker, under G. L., c. 167, §§ 1 and 22, the bond given by such banker, under G. L., c. 169, §§ 2 and 3, is not an asset of the estate of such banker after his decease, and neither that bond nor its proceeds should be surrendered by the Commissioner to the administrator of such banker.

Where the Commissioner of Banks takes possession of the property of an insolvent private banker, under G. L., c. 167, §§ 1 and 22, and such banker fails to contest his right so to do within the ten days prescribed by section 33, and thereafter dies, his administrator succeeds only to the rights of his intestate, and is likewise barred.

**PRIVATE DETECTIVE** — Effect of License — Right of Constable to engage in the Business of a Private Detective . . . 605

The license granted to a private detective, under G. L., c. 147, § 23, authorizes the licensee to engage in and to solicit the business of procuring evidence for use in civil or criminal proceedings, and to employ operators, agents and assistants for the conduct of such business.

A constable, by virtue of his appointment as such, has no right to solicit business as, or engage in the business of, a private detective.

**PROFITS ON SALE** — Income Tax — Sale of Lease containing Option to purchase Reversion . . . 43  
*See TAXATION.* 2.**PROHIBITION** — Constitutional Law — Delegation of Legislative Power — Eighteenth Amendment . . . 179  
*See CONSTITUTIONAL LAW.* 12.**PROVINCE LANDS** — Town of Provincetown — Local Taxation — Structures on Flats by Licensee of the Commonwealth . . . 85

The town of Provincetown cannot assess taxes on structures erected by licensees under G. L., c. 91, § 14, upon the flats of the Commonwealth at the said town.

**PUBLIC CHARITY** — Federal Constitution — Contract Clause — Legislative Relief — *Cy Urès* . . . 66  
*See CONSTITUTIONAL LAW.* 4.**PUBLIC FUNDS** — Appropriation — Emergency . . . 572  
*See BOARD OF HEALTH.* 2.**PUBLIC HEALTH** — Dispensary — Last National Census . . . 30

G. L., c. 111, § 57, requiring cities and towns having a population of 10,000 or more, as determined by the last national census, to establish and maintain a dispensary, applies whenever by a national census a town has a population of 10,000 inhabitants.

2. — Constitutional Law — Regulations and Standards for the Manufacture, Sale or Transportation of Foods, Drugs, Medicines and Liquors — Eighteenth Amendment . . . 391

Under G. L., c. 94, § 192, the Legislature has imposed upon the Department of Public Health the power and duty of making certain rules and regulations which shall conform to certain standards set forth in the statute, which standards may be changed from time to time, in which event the rules and regulations must be changed to conform therewith.

3. — Local Boards of Health — License to engage in the Business of the Manufacture or Bottling of Non-Alcoholic Beverages — Permit . . . 403

Under St. 1921, c. 303, the power to grant and revoke permits for the manufacture and bottling of non-alcoholic beverages is vested exclusively in boards of health of cities and towns, although the Department of Public Health, under G. L., c. 94, §§ 186 to 196, has certain duties to perform relative to adulteration and misbranding of food and drugs.

The Department of Public Health has no authority to order local boards of health to enforce any of the provisions of the act, should such boards be negligent in such duties.

<b>PUBLIC HEALTH</b> — <i>Continued.</i>	
4. — Dangerous Diseases — Support — Overseers of the Poor . . . . .	433
Under G. L., c. 111, § 6, the Department of Public Health shall define what diseases shall be deemed to be dangerous to public health, and, under section 32, where a local board of health has acted in the matter, it shall retain charge thereof, including whatever support may be necessary, to the exclusion of the overseers of the poor.	
5. — Rules and Regulations — Delegation of Legislative Power — Protection of Water Supply — Great Ponds . . . . .	465
Under the delegation of legislative power conferred by G. L., c. 111, § 160, the Department of Public Health may make rules and regulations to prevent the pollution and secure the sanitary protection of all waters in this Commonwealth used as sources of water supply.	
6. — Manufacture and Sale of Mattresses, Pillows and Similar Articles having a Filling of Second-hand Material — Investigation by the Department of Public Health . . . . .	255
<i>See</i> MATTRESSES. 1.	
<b>PUBLIC LIBRARY</b> — Towns — Support . . . . . 18	
<i>See</i> TOWNS. 1.	
<b>PUBLIC MONEYS</b> — Amount deposited in Any One Bank — How determined . . . . . 384	
Under G. L., c. 29, § 34, the "amount deposited" by the Treasurer and Receiver-General in any one bank or trust company is determined either by the books of the bank, or by adding to the balance shown by the books of the Treasurer and Receiver-General all outstanding checks not known to have been certified at the instance of the holder or paid.	
2. — Appropriation for Private Purpose — Authority of Town to reimburse the Victims of a Powder Explosion . . . . .	478
<i>See</i> CONSTITUTIONAL LAW. 33.	
<b>PUBLIC PARK</b> — Change of Use — Metropolitan District Commission — Armory Commission . . . . . 560	
To transfer certain land now owned by the Commonwealth and acquired for boulevard purposes by the Metropolitan Park Commission, now succeeded by the Metropolitan District Commission, to the Armory Commission, to construct and maintain an armory thereon, legislative authority is necessary.	
<b>PUBLIC RECORDS</b> — Registrar of Motor Vehicles — Report of Accident . . . . . 548	

<b>PUBLIC RECORDS</b> — <i>Continued.</i>	
The report required to be sent to the registrar by every person operating a motor vehicle which is in any manner involved in an accident is not open to public inspection.	
<b>PUBLIC SCHOOLS</b> — Election of Superintendent of Schools — City Charter of Peabody . . . . . 56	
The provision of the city charter of Peabody requiring that the school committee shall annually elect a superintendent of schools has been modified by G. L., c. 43, § 32. Accordingly, since in Peabody the superintendent has already served for three consecutive years, the school committee may not now elect a superintendent annually.	
2. — Superintendency Union — Withdrawal — Effect of Dissolution . . . . . 452	
Under G. L., c. 71, § 63, where the joint committee of a superintendency union has entered into a contract with a superintendent for a term of three years, which contract will not expire until June, 1924, the contract comes within the protection afforded by U. S. Const., art. I, § 10. Accordingly, in the event of the withdrawal of one of the towns from the superintendency union, the constituent towns will not be relieved of their financial obligations under the contract, provided the superintendent fulfils his part thereof and has not been previously removed in accordance with said section 63.	
3. — Federal Reservation — State Reimbursement — Tuition . . . . . 593	
The town of Harvard is not required by St. 1921, c. 296, to provide high school facilities for children living within its boundaries but on the Federal reservation known as Camp Devens. In this respect there can be no distinction between a high school and an elementary school.	
<b>PUBLIC UTILITIES</b> — Sale of Securities — Registration . . . . . 245	
<i>See</i> SECURITIES. 1.	
2. — Sale of Securities Act — Registration — Sale by Corporation of its Own Securities — Profit . . . . . 261	
<i>See</i> SECURITIES. 2.	
<b>RECEIVING-TELLER MACHINES</b> — Business of Receiving Deposits . . . . . 645	
<i>See</i> SAVINGS BANKS. 4.	
<b>RECORDS AND PAPERS</b> — Certification — What may be certified by the Secretary of the Commonwealth . . . . . 328	
A written opinion given by the Attorney-General to the Secretary of the Commonwealth is a "paper in his department," within the meaning of G. L., c. 9, § 11, copies of which may be certified and furnished by the Secretary in the manner prescribed by law.	

**RECORDS AND PAPERS** — *Continued.*

Where an officer is authorized by law to furnish a certified copy of a record or paper in his custody, his certificate that a fact is established by such record or paper cannot be substituted for the copy so authorized.

**REFERENDUM** — Lobster Fisheries . . . 435  
*See CONSTITUTIONAL LAW.* 27.

**REGISTERS OF PROBATE** — Registers of Probate — Bonds — Premiums . . . 3

Registers of probate, being charged with the duty of receiving money which they are required to pay over to the Treasurer and Receiver-General, by G. L., c. 217, §§ 18 and 20, are officials charged with the duty of receiving and disbursing money, under G. L., c. 30, § 17, and are therefore entitled to be reimbursed for amounts paid by them for premiums on their official bonds, required by G. L., c. 217, § 12.

The Commonwealth is under obligation to reimburse registers of probate for payments of premiums on their official bonds, although no appropriation has been made and no money is available therefor.

2. — Assistant Registers of Probate — Clerks in the Registries of Probate for Suffolk and Middlesex Counties — Stenographers — Clerical Assistants . . . 334  
*See CIVIL SERVICE.* 5.

**REGISTRAR OF MOTOR VEHICLES** — Report of Accident . . . 548  
*See PUBLIC RECORDS.* 1.

**REGULATIONS** — Boards of Health — Approval of Attorney-General . . . 280  
*See BOARDS OF HEALTH.* 1.

2. — Regulations and Standards for the Manufacture, Sale or Transportation of Foods, Drugs, Medicines and Liquors — Eighteenth Amendment . . . 391  
*See COMMISSIONER OF PUBLIC HEALTH.* 1.

**RELIGIOUS CORPORATION** — Federal Constitution — Contract Clause — Repeal of Charter of a Religious Corporation without Reservation of the Right to Appeal . . . 58  
*See CONSTITUTIONAL LAW.* 3.

**RELIGIOUS SOCIETY** — Power of Legislature to terminate Trust . . . 90  
*See CHARITABLE TRUST.* 1.

**RENT** — Acts making Unenforceable Provisions in Leases . . . 194  
*See CONSTITUTIONAL LAW.* 13.

**REPRESENTATIVE** — Appropriation of Public Money — Unearned Salary . . . 530  
*See CONSTITUTIONAL LAW.* 37.

**RESOLVE** — Statutes — Amendment — Amendment of Act by a Resolve . . . 444  
*See STATUTES.* 3.

**RESTRAINT OF TRADE** — Minimum Resale Prices — Agreements to maintain Prices . . . 541  
Agreements designed to maintain prices after the seller has parted with the title to his goods, and to prevent competition among those who trade in them, is a violation of law.

Such agreements may be expressed or implied from a course of dealings, or other circumstances.

A system for maintaining resale prices, which is made effective by co-operative methods between the manufacturer and various dealers and agents to the extent that it constitutes a scheme which restrains the natural flow of trade, is illegal.

**RESTRICTIONS** — Commonwealth — Back Bay Lands — Enforcement . . . 578  
*See BACK BAY LANDS.* 1.

**RETIREMENT** — Pension — Perquisites 571  
The right of the superintendent of the State Farm to reside there, with his family, is a perquisite and not a part of his salary.

The value of the family maintenance of such superintendent cannot be considered in determining the amount of his pension upon retirement.

**RETIREMENT ASSOCIATION** — Employees of the Norfolk County Tubercular Hospital and Norfolk County Agricultural School — Contributions by Employees . . . 379

Employees of the Norfolk County Tubercular Hospital and the Norfolk County Agricultural School are employees of the county and members of the Retirement Association under the provisions of G. L., c. 32, §§ 20 and 22.

Contributions to the association should be paid by said employees from the date upon which they became members, as defined in § 22.

2. — State Police Officers — Additional Appointments — Date of Commencement of Service — Pensions — State Retirement Association . . . 472

The provisions of G. L., c. 32, § 6S, as amended by St. 1921, c. 487, § 1, relative to retirement for disability, are not applicable to the additional officers appointed to the Division of State Police under G. L., c. 22, § 9A.

The provisions of law relative to the State Retirement Association are applicable to the additional officers appointed under G. L., c. 22, § 9A.

**REVOCACTION OF PERMIT** — Drug-  
 gist — License — Intoxicating  
 Liquor . . . . . 627  
*See DRUGGIST.* 1.

**ROYALTIES** — Trading with the Enemy  
 Act — License . . . . . 669  
*See TRADING WITH ENEMY*  
 ACT. 1.

**SALARY** — Officers and Employees of  
 the Commonwealth — Increases  
 — Employees in Massachusetts  
 Nautical School . . . . . 5  
 G. L., c. 30, § 47, prohibits any increase in  
 the salaries of officers and employees classified  
 under G. L., c. 30, §§ 45-50, and exceeding or  
 to exceed \$1,000, authorized thereunder  
 between December 1 and May 31 in any year,  
 from taking effect until June 1 following.  
 It follows that no increase can be made  
 which will be retroactive.

2. — Officers and Employees of the Com-  
 monwealth — Employees of the  
 Massachusetts Agricultural Col-  
 lege paid wholly or in Part from  
 Federal Funds — Supervisor of  
 Administration . . . . . 105  
 Salaries of employees of the Massachusetts  
 Agricultural College, paid from State appro-  
 priations, must be fixed by the trustees of the  
 college, under G. L., c. 75, § 13, in accordance  
 with the classification and specifications of the  
 Supervisor of Administration, under G. L.,  
 c. 30, § 46, and hence are subject to his super-  
 vision and approval.

Employees who are paid wholly or in part  
 from Federal funds, under the Smith-Lever  
 act of May 8, 1914, chapter 79, are nevertheless  
 State employees, and their salaries are subject  
 to the supervision and approval of the Super-  
 visor, since the funds are paid to the State and  
 the salaries are paid by the State.

Employees who receive salaries from so-  
 called "States Relations Service" funds, com-  
 ing directly from the Federal Department of  
 Agriculture, are joint employees of the State  
 and Federal governments, and their salaries,  
 so far as they are received from the Federal  
 government, are not subject to the supervision  
 and approval of the Supervisor.

3. — Representative to the General  
 Court — Appointment to Posi-  
 tion in the State Service — Sal-  
 ary . . . . . 220

An appointment of a representative to the  
 General Court to a public office, where the  
 appointment is made after the regular session  
 of the General Court, is not in violation of  
 G. L., c. 30, § 21, prohibiting the payment of  
 two salaries to the same person.

4. — County Accounts — Additional  
 Compensation to Persons receiv-  
 ing Salaries from Counties . . . . . 315

Under G. L., c. 262, §§ 50 and 53, a police  
 officer is not entitled to a fee for testifying as

**SALARY** — *Continued.*  
 a witness in a criminal case during the time for  
 which he receives a salary or allowance; but  
 if he is employed and paid for night work, and  
 is called into court during the day, he should  
 be paid his fees; and if he attends as a witness  
 at a place other than his residence, he may be  
 allowed a witness fee instead of his expenses.

Whether a regular police officer is entitled  
 to additional compensation for services in  
 bringing to land a human body found in any  
 of the harbors, rivers or waters of the Com-  
 monwealth, under G. L., c. 38, § 17, depends  
 upon whether he is acting within the scope of  
 his duties, on the one hand, or in violation of  
 duty, on the other hand.

Where a probation officer is appointed by  
 the court to act as temporary clerk, or a clerk  
 of court is appointed by the court to act as  
 probation officer, additional salaries are  
 properly paid.

5. — Governor and Council — Deter-  
 mination of a Salary — Whether  
 by Concurrent Action or by Ac-  
 tion as a Single Board . . . . . 131  
*See GOVERNOR AND COUNCIL.* 2.

6. — House of Representatives — In-  
 compatible Offices — Right of  
*De Facto* Member to Salary . . . . . 358  
*See CONSTITUTIONAL LAW.* 19.

7. — Payment of Unearned Salary to  
 Dependents of Deceased Officer  
 or Employee of a City or Town . . . . . 474  
*See CONSTITUTIONAL LAW.* 32.

8. — Appropriation of Public Money  
 for a Private Purpose . . . . . 530  
*See CONSTITUTIONAL LAW.* 37.

9. — Officers and Employees of the  
 Commonwealth — Classification  
 — Metropolitan District Com-  
 mission . . . . . 601  
*See METROPOLITAN DISTRICT*  
 COMMISSION. 1.

10. — State Employee — Pension De-  
 duction . . . . . 629  
*See STATE EMPLOYEE.* 1.

**SALES** — Statute forbidding One to sell  
 or lease upon Condition that it  
 be used exclusively for his Own  
 Products . . . . . 483  
*See CONSTITUTIONAL LAW.* 34.

2. — Minimum Resale Prices — Agree-  
 ments to maintain Prices . . . . . 541  
*See RESTRAINT OF TRADE.* 1.

**SALISBURY BEACH ROAD** — Better-  
 ments — Assessment — Collec-  
 tion . . . . . 264  
*See BETTERMENTS.* 1.

**SAVINGS BANK BUILDING** — Savings Banks — Investment of Deposits . . . . . 562  
*See SAVINGS BANKS.* 3.

**SAVINGS BANK INSURANCE** — Savings Banks — Definition — Powers and Duties — Life Insurance Business . . . . . 454

A savings bank is an institution for receiving the moneys of depositors in moderate amounts, and investing them for the use and benefit of depositors.

The powers and duties of a savings bank are strictly defined and regulated by statute, and do not include those pertaining to a general banking business.

A contract by which a savings bank is to act as agent for a depositor in holding a life insurance policy and receiving and transmitting premiums thereon, and is to make payments to the depositor and others of amounts called for by the policy, requires the doing of a life insurance rather than a savings bank business, and is unauthorized.

2. — Savings Banks — Savings Insurance Plan . . . . . 558

A plan by which a savings bank, as agent for a savings and insurance bank under G. L., c. 178, § 13, transmits payments of premiums and receives dividends for a depositor, and performs other incidental services for the savings and insurance bank, is not unlawful.

Since G. L., c. 178, § 13, does not authorize the savings departments of trust companies to act as agents of savings and insurance banks, they would not be authorized to engage in business under the plan proposed.

**SAVINGS BANKS** — Authorized Investments — Commissioner of Banks 173

It is the duty of savings banks subject to G. L., c. 168, to determine the legality of proposed investments in bonds of gas, electric or water companies, under G. L., c. 168, § 54, cl. 6, and of the Commissioner of Banks, under G. L., c. 167, §§ 2 and 5, to determine whether the statutory provisions have been complied with.

There is no provision giving to the Department of Public Utilities authority to decide whether bonds of such companies which have been issued may or may not be purchased by savings banks.

2. — Trustee — Eligibility after Bankruptcy or Poor Debtor Proceedings . . . . . 227

A trustee in a savings bank, discharged from office by reason of having taken the benefit of the bankruptcy or poor debtor laws, under G. L., c. 168, § 23, is not barred from subsequent election.

3. — Investment of Deposits — Purchase of, and Extraordinary Alterations in, Bank Building . . . . . 562

**SAVINGS BANKS** — *Continued.*

A savings bank may, with the approval of the Commissioner of Banks, invest in the acquisition of a suitable bank building a sum not exceeding an amount determined in the manner prescribed by the first sentence of G. L., c. 168, § 54, cl. 11, but in no event exceeding \$200,000.

The authority of a savings bank, with the approval of the Commissioner, to invest deposits in extraordinary alterations in or additions to a bank building already owned by it, which is conferred by the second sentence of G. L., c. 168, § 54, is separate from and independent of the authority to invest such deposits in the acquisition of such building, and the amount which may be expended for alterations is not diminished by the sum spent for such acquisition, although the amount which may be invested in such alterations is likewise determined in the manner prescribed by the first sentence.

The amount which the Commissioner should approve either for the acquisition of a bank building or for extraordinary alterations in or additions thereto, is, within the limits prescribed, to be determined by him in the exercise of a sound discretion.

4. — Business of Receiving Deposits — Automatic Receiving-Teller Machines . . . . . 645

Automatic receiving-teller machines installed by savings banks for receiving deposits of small coins may properly be regarded as depts. within G. L., c. 168, § 25.

Under G. L., c. 168, § 25, automatic receiving-teller machines may be maintained and established by a savings bank, with the written permission of, and under regulations approved by, the Commissioner of Banks.

5. — Definition — Powers and Duties — Life Insurance Business 454, 558  
*See SAVINGS BANK INSURANCE.* 1, 2.

**SAVINGS DEPOSITS** — Taxation — Returns by Trust Companies to the Commissioner of Corporations and Taxation . . . . . 543  
*See TAXATION.* 16.

**SCHOOL SAVINGS SYSTEM** . . . . . 657  
*See TRUST COMPANY.* 8.

**SCHOOL UNION** — Public Schools — Superintendency — Withdrawal — Effect of Dissolution . . . . . 452  
*See PUBLIC SCHOOLS.* 2.

**SCHOOLS** — Department of Education — Continuation Schools — Refusal to maintain — Forfeiture of Funds by the Commonwealth 302

It is the duty of the Department of Education to require the maintenance of a continuation school in those municipalities in which, in any year, 200 or more minors under sixteen



**SCHOOLS** — *Continued.*

are employed not less than six hours per day, by authority of employment certificates or home permits, exclusive of minors employed only during vacations.

A town which has accepted Gen. St. 1919, c. 311, and in which, during 1920, 308 minors of the class described were employed not less than six hours per day, by authority of employment certificates or home permits, exclusive of minors employed only during vacations, is required to maintain a continuation school during the ensuing school year.

If such town has refused or neglected to appropriate the money necessary for the maintenance of such a continuation school, in compliance with G. L., c. 71, § 26, it becomes the duty of the Department of Education to estimate the sum necessary properly to provide for the maintenance of the school, and to notify the Treasurer and Receiver-General that the said town has forfeited from funds due it from the Commonwealth a sum equal to twice that so estimated.

**SEARCH AND SEIZURE** — Searches for Game or Fish — Powers of Inspector of Fish . . . . . 288  
See CONSTITUTIONAL LAW. 15.

**SECOND SOCIETY OF UNIVERSALISTS** — Repeal of Charter of a Religious Corporation granted without Reservation of the Right to Appeal . . . . . 58  
See CONSTITUTIONAL LAW. 3.

**SECRETARY** — Rearrangement of the Constitution — Printing of Rearrangement in Blue Book — Expenditure of Public Money . . . . . 524  
See CONSTITUTION. 1.

2. — Statute — Time of taking Effect . . . . . 198  
See STATUTE. 1.

3. — Registration of Births — Illegitimate Children . . . . . 207  
See BIRTHS. 1.

4. — Elections — Expenditures by or on Behalf of Candidates for City Offices . . . . . 242  
See ELECTIONS. 2.

5. — Records and Papers. — Certification — What may be certified by the Secretary of the Commonwealth . . . . . 328  
See RECORDS AND PAPERS. 1.

6. — Referendum Petition — Lobster Fisheries . . . . . 435  
See CONSTITUTIONAL LAW. 27.

**SECURITIES** — Sale of Securities — Registration . . . . . 245

Where a partnership is registered as a broker, under St. 1921, c. 499, the partners may sell securities on behalf of the firm with-

**SECURITIES** — *Continued.*

out being personally registered as brokers or salesmen.

Where a corporation is registered as a broker, under St. 1921, c. 499, as a general rule an officer who regularly engages in the business of selling or acquiring for sale securities on behalf of the corporation should be registered as a salesman, but an officer need not be registered in order to make an occasional purchase or sale.

2. — Sale of Securities Act — Registration — Sale by Corporation of its Own Securities — Profit . . . . . 261

St. 1921, c. 499, applies to the ordinary case of a corporation issuing and selling its own securities, unless they are in the classes exempted by the act, and the corporation should be registered as a broker, as required by the act.

**SENATE** — Police Power — Statute forbidding One to sell or lease upon Condition that it be used exclusively for his Own Products . . . . . 483  
See CONSTITUTIONAL LAW. 34.

**SENATE AND HOUSE** — Tenure of Office — President of the Senate — Speaker of the House of Representatives — Biennial Elections 199  
See TENURE OF OFFICE. 1.

**SENATORS AND REPRESENTATIVES** — Apportionment of Senators and Representatives — Census of Legal Voters — Substitution of Apportionment based on Local Enumeration for Constitutional Census — Executive Construction of Constitution . . . . . 344  
See CONSTITUTIONAL LAW. 16.

**SERGEANT-AT-ARMS** — Authority to arrest Disorderly Persons in the Chambers of the General Court — Superintendent of Buildings . . . . . 469

The sergeant-at-arms is charged with the duty of maintaining order in the chambers of the General Court, and he is authorized to make arrests, if necessary, in the performance of this duty.

The Superintendent of Buildings has authority to make arrests for criminal offences committed in any part of the State House or its appurtenances.

**SET-OFF** — Debt due from Insolvent Trust Company against Stockholder's Liability — Stockholder's Liability against Debt due from Insolvent Trust Company 270

A stockholder cannot set off a debt due from the commercial department of an insolvent trust company against the statutory liability imposed upon him by R. L., c. 116, § 30, as amended by St. 1905, c. 225, since the debt is owed by the corporation, and such

**SET-OFF** — *Continued.*

liability is enforced for the benefit of its creditors.

A receiver of an insolvent bank, or the commissioner in possession thereof, may set off the statutory liability imposed upon a stockholder by R. L., c. 116, § 30, as amended by St. 1905, c. 228, when such liability is duly fixed, against a debt due from the commercial department to said stockholder, since such set-off does not prejudice either stockholder or creditors.

**SETTLEMENT** — Married Woman — Statutory Period of Absence — Minor Child . . . . . 126

The settlement of a married woman is not dependent upon her physical presence in the town of her husband's settlement. The statutory period of absence necessary to defeat the settlement of a wife or a widow is to be reckoned from the date of the husband's divorce or death.

Upon marriage, the wife acquires the settlement of her husband, and the death of the husband does not revive her ante-nuptial settlement.

A married woman living apart from her husband for five years prior to his death does not lose her settlement upon his death; she is constructively present until the marriage is terminated, unless she acquires a separate domicile for purposes of divorce.

G. L., c. 116, § 1, is not retrospective and does not apply to the case of a minor child whose father died prior to the enactment thereof (originally St. 1911, c. 669).

Inability of a husband or father to maintain a wife or minor child committed to a State hospital or institution of charity prevents the acquisition by him of a settlement unless reimbursement of the cost of such maintenance is made under G. L., c. 116, § 2.

## 2. — Pauper — Settlement — Married Woman . . . . . 227

Under G. L., c. 116, §§ 1 and 5, a woman who marries acquires her husband's settlement although she is a minor, and does not lose the settlement so derived by reason of five years' absence, if during part of the time she was a minor.

## 3. — Domicil — Reimbursement of Cities and Towns under the Relief Laws — Soldier — Philippine Insurrection . . . . . 407

A settlement is defeated under the provisions of G. L., c. 116, § 5, by an absence of five consecutive years, during which a person resides and intends to make his domicile away from his former place of settlement, although during said period such person makes visits to relatives or friends in his former place of settlement, and during a portion thereof is employed in the place of his former settlement without living there.

A soldier who served in the Philippine insurrection is not to be regarded as having been

**SETTLEMENT** — *Continued.*

engaged in a war against a foreign power, within the meaning of G. L., c. 116, § 1, par. 5.

## 4. — Domicil — Settlement — Married Woman . . . . . 437

Under G. L., c. 116, § 1, where a woman born in Boston, having a settlement there derived from her parents, married a man who never had a legal settlement in any city or town in the Commonwealth, and her parents left Boston in 1911 and acquired a settlement elsewhere, the legal settlement of such woman after the death of her husband continues to be in Boston.

## 5. — Civil and Military Settlements — Military Aid and Soldiers' Relief — Dependents . . . . . 632

An existing civil settlement of a soldier or sailor who served in the Spanish War, Philippine Insurrection or World War is not defeated by the provisions of St. 1922, c. 177.

While St. 1922, c. 177, is retroactive, and the military settlement is acquired as of the date of the entry of the soldier or sailor into the service, and not as of the date when the act takes effect, such settlement may be defeated or changed in any of the ways provided by law.

Dependents of a soldier or sailor who died prior to June 17, 1922, the date upon which St. 1922, c. 177, took effect, acquire the same military settlement as the soldier or sailor would have acquired had he lived.

Dependents eligible to receive soldiers' relief under G. L., c. 115, and amendments thereof, may receive it in the place where the soldier or sailor had acquired a civil settlement, if such settlement has not been lost; otherwise, from the city or town in which such dependents are deemed to have acquired a military settlement, unless such military settlement has been lost.

**SHEPPARD-TOWNER ACT** — Violation of Rights reserved to States — Right of State to bring Suit . . . . . 492  
*See* CONSTITUTIONAL LAW. 35.**SHERIFF** — Second-hand Automobile — Sale under Execution — Notice to Registrar of Motor Vehicles and Chief of Police . . . . . 77  
*See* AUTOMOBILE. 1.**SINKING FUNDS** — Temporary Use of Other Funds to buy Bonds for Sinking Funds . . . . . 273

Since, under Mass. Const., pt. 2d, c. II, § I, art. XI, funds cannot be issued out of the treasury save by a proper warrant "agreeably to the acts and resolves of the general court," the Treasurer and Receiver-General cannot, in the absence of statute, buy bonds for sinking funds with other moneys in the treasury, even though the temporary shortage in such other funds would probably be made good in the near future out of expected income.

**SLASH** — Fire — Removal of Slash after cutting Timber . . . 464  
 See FIRE PREVENTION. 2.

**SLAUGHTERING**—Inspectors—Charge for Services . . . 682  
 See FEES. 1.

**SMOKE AND CINDERS** — Police Power — Delegation of Legislative Power . . . 54  
 See CONSTITUTIONAL LAW. 2.

**SOLDIERS AND SAILORS MEMORIAL** . . . 25  
 See MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

**SOLDIERS RELIEF** — Civil and Military Settlements — Military Aid . . . 632  
 See SETTLEMENT. 5.

**STATE BANKS** — Interest on Deposits — Savings Departments . . . 339  
 State banks may not pay interest on deposits except in the instances enumerated in R. L., c. 115, § 40.  
 Under G. L., c. 167, § 12, it is not lawful for State banks to maintain savings departments and to solicit accounts in the manner of savings banks.

**STATE EMPLOYEE** — Pension Deduction — Workmen's Compensation Act — Wages — Board — Auditor . . . 629  
 St. 1922, c. 341, § 2, providing for the addition of \$5 per week, in certain instances, to the cash payment for regular services, concerns only the basis upon which annuity contributions and computation of pensions based upon prior service are to be made under the retirement and pension system outlined in G. L., c. 32, and, consequently, should not enter into the basis of the computation of awards made to injured employees under the workmen's compensation law.

Whenever an employee is provided with board, in accordance with the practice in a State institution, the same is in the nature of a perquisite, which is not to be included in determining the "average weekly wages" under G. L., c. 152.

Accordingly, the State Auditor is not required to approve vouchers for awards made by the Department of Industrial Accidents under the provisions of G. L., c. 152, if it appears that the \$5 addition granted under St. 1922, c. 341, and the value of maintenance have been included in the basis of computation for said awards.

2. — Medical Services . . . 529  
 See WORKMEN'S COMPENSATION. 2.

**STATE HIGHWAY** — Ancient Culverts — Artificial Stream — Easement by Prescription . . . 156  
 In 1894 the Commonwealth, in laying out and constructing a State highway in the town

**STATE HIGHWAY** — *Continued.*  
 of Holden, rebuilt certain ancient culverts in their same locations, and have maintained them during the intervening twenty-seven years.  
 If water has been collected into an artificial stream or channel and been cast upon an abutter's property during this long period, the Commonwealth has acquired, by prescription, an easement to cast water on the land in question.

2. — Certificate of Layout — Order of Taking — Land outside Existing Public Way — Statutory Notice — Indemnification of the Commonwealth . . . 22  
 See EMINENT DOMAIN. 1.

3. — County Commissioners — Taking by Eminent Domain — Entry within Two Years . . . 450  
 See EMINENT DOMAIN. 2.

**STATE HOUSE** — Assignment of Location for Veterans of Foreign Wars — Furnishings . . . 362  
 See CONSTITUTIONAL LAW. 20.

**STATE OFFICE** — Supervisor of Accounts . . . 679  
 The Legislature has power to change or abolish an office created by it.  
 St. 1922, c. 545, abolishing the office of the Supervisor of Accounts, is constitutional and valid.

**STATE OFFICERS** — Judges of Certain Courts — District Attorneys — Duty to furnish Information to the Supervisor of Administration 360  
 The words "every state officer, department or head thereof," as used in G. L., c. 30, § 38, when construed in connection with Mass. Const. Amend. LXVI, and G. L., c. 30, § 1, are confined to officers of the executive branch and do not include officers of the judicial branch.  
 G. L., c. 30, § 38, does not require the Supreme Judicial Court, the Superior Court, the Land Court and courts of probate and insolvency to furnish information to the Supervisor of Administration.

Although district attorneys are not "officers of the commonwealth," within the meaning of Mass. Const., pt. 2d, c. I, § II, art. VIII, they are "state officers," within the meaning of G. L., c. 30, § 38, and must furnish information prescribed by that section to the Supervisor of Administration.

**STATE POLICE OFFICER** — Commissioner of Correction — Warrants 432  
 A special State police officer appointed under the provisions of G. L., c. 127, § 127, has authority to serve only the warrants and orders of removal or transfer of prisoners issued by the Commissioner of Correction.

**STATE POLICE OFFICER** — *Continued.*

2. — Additional Appointments — Pensions — State Retirement Association . . . . . 472  
*See RETIREMENT ASSOCIATION.* 2.

**STATE RIGHTS** — Sheppard-Towner Maternity Act — Extent of General Welfare Clause of Federal Constitution — Violation of Rights reserved to States — Right of State to bring Suit . . . . . 492  
*See CONSTITUTIONAL LAW.* 35.

**STATUTE** — Time of taking Effect . . . 198  
 St. 1921, c. 430, changing the names of the various "police" courts to "district" courts, under Mass. Const. Amend. XLVIII, The Referendum, pts. I and III, may not take effect earlier than ninety days after it became a law.

2. — Construction . . . . . 209  
 St. 1921, c. 502, § 3, authorizing the State Treasurer to transfer a balance of \$49,123.43 from one fund to another, where the actual balance is greater than the sum stated, should be construed to direct the transfer of the entire balance.

3. — Amendment — Amendment of Act by a Resolve . . . . . 444  
 The General Court has power to ratify corrections made in the General Laws by the committee which printed the same.

While the question whether an act can be amended by a resolve appears to be open in this Commonwealth, such amendment should, as matter of form, at least, be made by an act.  
 To avoid question, corrections made by the committee on printing the General Laws should be ratified by an act rather than by a resolve.

4. — Drainage Law — Application of Amendatory Statute to Pending Proceedings . . . . . 545

It is a general principle that a new statute which provides merely for changes in remedy or in modes of procedure will not invalidate steps taken before the statute goes into effect, but will apply to all proceedings taken thereafter.

St. 1922, c. 349, making certain changes in the procedure prescribed by G. L., c. 252, and other changes not material to the inquiry, is applicable to proceedings pending when the statute took effect, since no constitutional rights are impaired.

5. — Metropolitan Water Works — Construction . . . . . 667  
*See METROPOLITAN WATER WORKS.* 1.

**STATUTE OF LIMITATIONS** — Commonwealth — Liability on Note — Statute of Limitations . . . . . 231

**STATUTE OF LIMITATIONS** — *Continued.*

The Commonwealth is not obligated to pay either principal or interest on a note issued under St. 1793, c. 29, subject to redemption by payment when provision should be made therefor, when provisions for part payments were made by successive acts until St. 1821, cc. 69 and 87, which provided for payment of the remainder before July 1, 1821, after which date interest was to cease.

Under G. L., c. 258, § 5, the note, and interest thereon, was barred by the statute of limitations.

The Treasurer and Receiver-General has no power to waive the bar of this statute.

**STOCK** — Trust Companies — Issue of Stock — Payment in Cash or by Note — Enforcement of Note — Status of Subscriber — Scope of Advisory Power of Attorney-General . . . . . 158  
*See TRUST COMPANY.* 3.

2. — Corporations — Issue of Stock — Consideration . . . . . 263  
*See CORPORATIONS.* 1.

3. — Massachusetts Corporation — Legacy and Succession Tax . . . . . 655  
*See TAXATION.* 18.

**STOCKHOLDERS** — Trust Company in Possession of Commission of Banks — Right of Inspection of Books by Stockholders . . . . . 221  
*See TRUST COMPANY.* 4.

2. — Set-off — Debt due from Insolvent Trust Company against Stockholder's Liability — Stockholder's Liability against Debt due from Insolvent Trust Company . . . . . 270  
*See SET-OFF.* 1.

**SUPERINTENDENT OF BUILDINGS** — Sergeant-at-Arms — Authority to arrest Disorderly Persons 469  
*See SERGEANT-AT-ARMS.* 1.

**SUPERVISOR OF ACCOUNTS** — Supervisor and Assistant Supervisor of Accounts — Officers — Approval of Governor and Council . . . . . 1  
*See CIVIL SERVICE.* 1.

2. — State Office — Abolition . . . . . 679  
*See STATE OFFICE.*

**SUPERVISOR OF ADMINISTRATION** — Salaries of Officers and Employees of the Commonwealth — Employees of the Massachusetts Agricultural College paid wholly or in Part from Federal Funds . . . . . 105  
*See SALARY.* 2.

**SUPERVISOR OF ADMINISTRATION** — *Continued.*

2. — State Officers — Judges of Certain Courts — District Attorneys — Duty to furnish Information to the Supervisor of Administration 360  
*See STATE OFFICERS. 1.*

**SUPPORT** — Illegitimate Child — Support from Labor of Father in the Massachusetts Reformatory . 592  
*See ILLEGITIMATE CHILD. 2.*

**"SYNAGOGUE"** — Eminent Domain — Taking of Picture exhibited in a Public Library upon a Public Charitable Trust . 508, 539  
*See CONSTITUTIONAL LAW. 36.*

**TAX RETURNS** — Verification by Commissioner . 233

The authority given to the Commissioner of Corporations and Taxation by G. L., c. 62, §§ 28 and 30, to verify returns and to require supplementary returns, is limited to cases where, for some particular reason, the Commissioner believes the return filed to be fraudulent or incorrect.

**TAXATION** — Income Tax — Distribution of Capital of Domestic Corporation in Liquidation . 15

Where a domestic corporation transfers all its assets to another, receiving in exchange cash and securities which it distributes among its stockholders in liquidating its affairs, the stockholders receive no income which is taxable under either Gen. St. 1916, c. 269, § 2, or § 5, cl. (c) now G. L., c. 62, § 1, and § 5, cl. (c), respectively.

## 2. — Income Tax — Gains and Profits — Sale of Lease containing Option to purchase Reversion . 43

Since an option to purchase the reversion after a lease for years is a covenant which runs with the land and passes as an incident of the leasehold estate, a profit realized from the sale of a lease which contains such an option is not taxable under G. L., c. 52, § 5, cl. (c), unless a profit realized from the sale of the leasehold would be taxable under said provision.

## 3. — Return — Penalty for Failure to file — Power of Commissioner . 48

The Commissioner of Corporations and Taxation has discretion, under G. L., c. 62, § 55, to abate the additional tax imposed for failure to file a return, which discretion is not exhausted by one exercise.

## 4. — Domestic Corporation — Liability of Corporation not engaged in Business . 93

A domestic corporation which sold all its assets and ceased doing business prior to Jan. 1, 1920, is not subject to taxation under the provisions of Gen. St. 1919, c. 355, and St. 1920, c. 550, as amended, both of which became effective on or after that date.

**TAXATION** — *Continued.*

Under Gen. St. 1919, c. 355, a domestic business corporation is subject to tax with respect to the doing of business, and not with respect to the privilege of doing business, as under St. 1909, c. 490, pt. III, §§ 39-41.

## 5. — Income Tax — Sale of Lease . 136

The sum received from a sale of a leasehold interest is taxable, under G. L., c. 62, § 5, cl. (c), as a gain from the sale of intangible personal property.

## 6. — Legacy and Succession Tax — Gift to Wife of Promissory Note . 159

Prior to the enactment of St. 1920, c. 478, a gift by a husband to his wife of a promissory note took effect on his death, and the property was subject to a legacy and succession tax.

## 7. — Domestic Business Corporation — Return to Federal Government — Application for Abatement . 223

A domestic business corporation which began to do business on April 29, 1919, and whose first Federal return was due May 15, 1920, is not required, in its return made under Gen. St. 1919, c. 355, pt. I, § 4, as of April 1, 1920, to make any statement of net income, and is taxable on the value of its corporate excess alone.

It cannot be said as a matter of law that application for abatement of a tax illegally exacted, under G. L., c. 58, § 27, made within six months after payment of the tax, may not be amended, while still undecided, after the six months have run.

## 8. — Correction of Tax . 235

The remedies given by statute for correction of a tax are exclusive.

Where, after payment of a tax assessed to a corporation, no application for abatement is made or petition is filed in court within the time allowed by law, the taxpayer has no legal claim against the Commonwealth on account of error in the assessment.

The Legislature is the keeper of the conscience of the Commonwealth.

## 9. — Income Tax — Exemption — Charity — Gift to Individual in Trust for Charitable Purposes . 258

G. L., c. 62, § 8, par. (c), exempts from taxation income of intangible personal property if such property is owned by or held in trust within the Commonwealth for religious organizations, whether or not incorporated, if the principal or income is used or appropriated for religious, benevolent or charitable purposes, within the meaning of G. L., c. 59, § 5, cl. 10.

The income of a bequest of intangible personal property to "His Eminence William O'Connell of Boston, Massachusetts, a Cardinal of the Holy Roman Catholic Church, . . . to be used by him . . . for such charitable purposes as he may deem best, in memory of my mother," is not exempt from taxation under G. L., c. 62, § 8, par. (c), since

**TAXATION — Continued.**

the bequest is to the Cardinal in his personal capacity and not to the Roman Catholic archbishop of Boston, who, by St. 1897, c. 506, § 1, is created a corporation sole, and the property is held in trust for a religious organization.

10. — Deposits in Savings Departments of Trust Companies — Returns — Inspection of Books . . . 276

There is no provision in G. L., c. 63, for the assessment of an additional tax on deposits in savings banks and savings departments of trust companies upon discovery that the tax first assessed was incorrect.

G. L., c. 63, § 69, does not authorize the Commissioner of Corporations and Taxation to inspect the books of a savings bank or trust company for the purpose of verifying returns on which taxes have been assessed and paid.

11. — Trust Companies — Liability to Tax where Company is in the Hands of the Commissioner of Banks or has voluntarily ceased to do Business . . . 309

Trust companies in the hands of the Commissioner of Banks on April 1 are not subject to tax under G. L., c. 63, § 58.

Trust companies having ceased to do business on April 1 are, nevertheless, subject to tax under G. L., c. 63, § 58.

12. — Legacies and Successions — Exemptions — Gift to be used for Such Charitable Purposes as the Donee may deem Best . . . 368

Exemptions from taxation are not to be lightly inferred even in the case of a charity.

A gift by will to an individual "to be used by him for such charitable purposes as he may deem best" is not exempt from an inheritance tax, under Gen. St. 1916, c. 268, § 1 (now G. L., c. 59, § 1), since the gift is neither "to or for the use of charitable . . . societies or institutions, the property of which is by law exempt from taxation," nor "for or upon trust for any charitable purpose to be carried out within this commonwealth."

13. — Abatement — Whether Tax correctly assessed upon the Basis of an Erroneous Return is illegally exacted . . . 386

A tax correctly assessed upon the facts stated in an erroneous return is not "illegally exacted," within the meaning of G. L., c. 58, § 27, and cannot be abated under that section.

14. — Abatement — Effect of Failure to apply for Abatement within Thirty Days after Notice of Assessment is sent . . . 388

Where a corporation failed to file a proper return, and the Commissioner of Corporations and Taxation assessed a tax under G. L., c. 63, § 45, upon double the amount of income as determined by him, and gave notice of such assessment, a failure by the corporation to

**TAXATION — Continued.**

apply for abatement within thirty days, as required by G. L., c. 63, § 51, terminates the power of the Commissioner to correct or abate such assessment.

Failure to receive a notice to file a proper return does not excuse a failure to apply for abatement within thirty days after the date of the notice of assessment of the tax.

15. — Distribution of National Bank Stock Tax — Place of Assessment of Personal Property of Deceased Persons . . . 417

It is a general principle that taxes on personal property of deceased persons should be assessed in the place where the deceased last dwelt.

Under G. L., c. 63, § 5, distribution of a tax assessed under G. L., c. 63, § 1, to the executors of a deceased person should be credited to the town where he last dwelt.

16. — Banks and Banking — Savings Deposits — Nature of Such Deposits — Returns by Trust Companies to the Commissioner of Corporations and Taxation of the Amount of Profits paid upon Deposits in the Savings Department . . . 543

A deposit in the savings department of a trust company is a trust rather than a debt.

A book evidencing a deposit in the savings department of a trust company is not an "evidence of indebtedness," within the meaning of G. L., c. 62, § 33.

While the division of profits made by trust companies upon deposits in their savings departments may for some purposes be regarded as "interest" and for other purposes be regarded as "dividends," it is not interest paid by the trust company "on its bonds, notes or other evidences of indebtedness," within the meaning of G. L., c. 62, § 33, and the trust company is not required by that section to make a return thereof to the Commissioner of Corporations and Taxation.

17. — Income Taxes — Additional Assessments — Notice and Opportunity to confer with the Commissioner of Corporations and Taxation . . . 616

An additional assessment of income taxes cannot be made after the two-year period prescribed by G. L., c. 62, § 37, has expired.

The notice and opportunity to confer, for which G. L., c. 62, § 37, as amended by St. 1922, c. 143, provides, are conditions precedent to the making of an additional assessment of income tax.

If a taxpayer, having received notice of the intention of the Commissioner of Corporations and Taxation to assess an additional income tax, confers with the Commissioner before the ten days prescribed by G. L., c. 62, § 37, as amended by St. 1922, c. 143, have expired, the Commissioner need not wait to make the

**TAXATION** — *Continued.*

assessment until the ten-day period has expired.

The Commissioner cannot shorten the ten-day period by prescribing the time at which such conference shall be had.

If the taxpayer has not conferred with the Commissioner, the Commissioner cannot make an additional assessment of income tax until the ten-day period prescribed by G. L., c. 63, § 37, as amended by St. 1922, c. 143, has expired, even though the two-year period within which such assessment may be made will expire before the ten days have elapsed.

18. — Legacy and Succession Tax . . . 655

Under St. 1922, c. 403, stock of Massachusetts corporations, the property of a resident who died intestate, is not subject to a succession tax on the death of a non-resident next-of-kin, before distribution of the estate of the resident decedent, as property of the non-resident decedent.

The title to all the personal property of a deceased person vests in his executor or administrator by relation from the time of his death.

19. — Exemption of Property of United States Housing Corporation . . . 671

The property of an agency of the Federal government is exempt from State taxation which obstructs the operations of the government through that agency; but not otherwise, unless Congress has indicated an intention that it shall be exempt.

Whether real estate held by the United States Housing Corporation after the close of the war was subject to local taxation, on the facts presented, is uncertain.

20. — Province Lands — Local Taxation — Structures on Flats by Licensee of the Commonwealth . . . 85  
*See PROVINCE LANDS.*

21. — Constitutional Law — Appropriations — Public Purpose . . . 112  
*See CONSTITUTIONAL LAW.* 6.

**TAXES** — Abatement — Statutory Remedy Exclusive . . . 28

An application for abatement of taxes claimed to have been illegally assessed, made more than six months after payment, cannot be granted.

The remedies provided by statute for the correction of a tax illegally assessed are exclusive, and no relief can be had unless the method prescribed is followed.

2. — Rate of Interest . . . 38

Under G. L., c. 59, § 57, where taxes remain unpaid after the expiration of three months from the date on which they became payable, interest is chargeable from the due date at the rate of 6 per cent upon a tax not exceeding \$200, and at the rate of 8 per cent upon that portion of the tax in excess of \$200.

**TAXES** — *Continued.*

3. — Income Tax — Collection from Non-resident Delinquent . . . 395

Taxes are not debts or contracts, but mere local statutory obligations.

Where the delinquent is a non-resident and has no property within the jurisdiction, the Commonwealth is without power either to collect a tax in its own courts or to invoke the aid of a sister State for that purpose.

**TEACHERS** — Retirement System — Pensions — Basis of Reimbursement paid to Cities and Towns . . . 324

In view of St. 1921, c. 460, the reimbursement paid to cities and towns on account of pensions paid to teachers retired by cities and towns under G. L., c. 32, § 16, should be based upon the pension factors established by G. L., c. 32, § 10, from and after Aug. 26, 1921, the date when said St. 1921, c. 460, became effective.

**TEACHERS' RETIREMENT ASSOCIATION** — Termination of Membership — Part-Time Employment by City of Boston . . . 624

Teachers who are members of the State Teachers' Retirement Association discontinue their membership in such association after appointment by the city of Boston to positions where they receive only part of their salary for courses that come under the provisions of G. L., c. 74, §§ 1-24, inclusive, serving the remainder of their time in courses for which there is no reimbursement, and under which they would be subject to the retirement laws for regular Boston public school teachers.

**TENURE OF OFFICE** — President of the Senate — Speaker of the House of Representatives — Biennial Elections . . . 199

Under the present system of biennial elections, the presiding officers of the Senate and House of Representatives hold office for the two-year term for which the members of the Senate and House were elected and until the General Court, as organized, shall be dissolved "on the day next preceding the first Wednesday in January in the third year following their election."

**THEATRES** — Regulation of Price charged for Admission — Condition inserted in the License . . . 445  
*See CONSTITUTIONAL LAW.* 29.

**TOWN MEETING** — Warrant — Appropriation — Municipal Finance — Vote — Rescission — Director of Accounts . . . 515

Under an article of the warrant for an annual town meeting an appropriation was passed by a majority vote for the purpose of building a school building. Under another article of the same warrant the town authorized the borrowing of the amount appropriated by a two-thirds vote "of the voters present and voting," as required by G. L., c. 44, §§ 1 and 7.

**TOWN MEETING** — *Continued.*

Subsequently, at a special town meeting called pursuant to a warrant containing articles expressly calling for the rescinding of the action taken at the annual town meeting, it was voted by a majority vote to rescind the appropriation aforesaid, while consideration of the remaining articles specifically referring to the borrowing was indefinitely postponed.

Held, That the revocation and rescission of the original appropriation by a majority vote of the special town meeting resulted in rendering the action taken at the annual town meeting ineffective without an express rescission thereof. Accordingly, the Director of Accounts would not be authorized to approve notes issued under authority granted by vote of the annual town meeting.

**TOWNS** — Public Library — Support . . . 18

A library in a town, to which the inhabitants have free access and of which they have the use, although it is not a town library owned and controlled by the town, is a public library for the maintenance of which a town may appropriate money under G. L., c. 40, § 5, cl. (18), and c. 140, § 172.

Mass. Const. Amend. LXVI, § 2, does not prohibit the use of public money for a library primarily intended for the use of the public, and to which the public is freely admitted.

## 2. — State Tax — Interest — Abatement . . . 389

Where, owing to a controversy as to the amount of reimbursement from the proceeds of the income tax due to a town, under G. L., c. 70, § 1, the amount of the State tax assessed to the town, under St. 1921, c. 399 and 492, was not paid within the time required, interest assessed as provided by the statute cannot be abated.

3. — Continuation Schools — Refusal to maintain — Forfeiture of Funds by the Commonwealth . . . 302  
*See SCHOOLS.* 1.**TRADING WITH THE ENEMY ACT**

— License — Royalties — Re-payment . . . 639

Under the provisions of the Trading with the Enemy Act, the royalties paid under a license to manufacture processes under any patent owned or controlled by an enemy or ally of an enemy are deposited in the treasury of the United States as a trust fund for the benefit of the licensee and the owner of the patent.

The sole reason for the requirement of the payment of royalties is to secure the owner of the patent in the event that he brings suit within the statutory period.

If the owner of the patent does not bring suit within the statutory period, further royalties need not be paid, and the sums already paid in are to be returned to the licensee.

**TRAVEL** — Attorney-General — Travel outside Commonwealth — Expenses . . . 138  
*See ATTORNEY GENERAL.* 1.

**TREASURER AND RECEIVER-GENERAL** — Legacy and Succession Tax — Determination of Liability of an Estate to a Tax . . . 284

The Treasurer and Receiver-General cannot determine, and should not attempt to advise, whether real estate is charged with a lien for payment of a legacy and succession tax which may become due in the future.

2. — Private Bankers — Surrender of License — Bond . . . 81  
*See BANKERS.* 1.3. — Power to compromise a Claim due to the Commonwealth — Treasurer and Receiver-General — Power of Attorney-General to compromise a Pending Case . . . 169  
*See CLAIMS.* 1.4. — Commonwealth — Payment by Check — Mailing — Duplicate Check . . . 171  
*See CHECK.* 1.5. — State — Construction . . . 209  
*See STATUTE.* 2.6. — Commonwealth — Liability on Note — Statute of Limitations . . . 231  
*See STATUTE OF LIMITATIONS.* 1.7. — State Finance — Sinking Funds — Temporary Use of Other Funds to buy Bonds . . . 273  
*See SINKING FUNDS.* 1.8. — Public Moneys — Amount deposited in Any One Bank . . . 384  
*See PUBLIC MONEYS.* 1.9. — Betterments — Assessment — Collection — Salisbury Beach Road . . . 264  
*See BETTERMENTS.* 1.10. — Towns — State Tax — Interest — Abatement . . . 389  
*See TOWNS.* 2.**TRIALS** — District Courts — Double Trials — Statute . . . 425  
*See CRIMINAL LAW.* 1.**TRUST COMPANY** — Foreign Corporations — Doing Business — Appointment of Unregistered Foreign Trust Company as Trustee of Real Estate under a Will . . . 35

A trust company organized under the laws of another State which has not been authorized to do business in this Commonwealth, as required by G. L., c. 167, § 37, cannot be appointed trustee under a will disposing of real estate situated in this Commonwealth.



**TRUST COMPANY — Continued.**

Quere, whether, under G. L., c. 172, § 52, a foreign trust company authorized to do business in this Commonwealth, as required by G. L., c. 167, § 37, could be appointed trustee under a will disposing of real estate situated in this Commonwealth.

2. — Federal Reserve System — Power of Commissioner to authorize a Boston Trust Company which is a Member of the Federal Reserve System to act as a Reserve Agent for Other Trust Companies . . . 96

Acting under the power conferred by G. L., c. 172, § 75, the Commissioner of Banks may authorize a Boston trust company which is a member of the Federal reserve system to act as reserve agent for other trust companies.

Under G. L., c. 172, § 81, a trust company which becomes a member of the Federal reserve system is governed as to the management of its reserve by the Federal Reserve Act and not by G. L., c. 172, § 75.

3. — Issue of Stock — Payment in Cash or by Note — Enforcement of Note — Status of Subscriber — Scope of Advisory Power of Attorney-General . . . 158

The statutes which govern the issue of stock require that such stock shall be paid for in cash.

If stock of a trust company be issued in exchange for a note, the illegality of such action is not a defence to enforcement of the note.

If stock of a trust company be illegally issued for notes, and the company confers upon the debtor, and the debtor accepts, the status of stockholder, such stockholder may, in a proper case, be assessed as such in addition to the liability to pay such notes.

4. — In Possession of Commissioner of Banks — Right of Inspection of Books by Stockholders . . . 221

Stockholders of a trust company in the possession of the Commissioner of Banks have no right, without an order of court, to inspect the company's books.

G. L., c. 172, § 19, is inapplicable where a trust company is in the possession of the Commissioner of Banks.

5. — Charter — Right of Purchaser after Liquidation . . . 239

The charter of a corporation is the right given by general law or special statute to organize and conduct its business in accordance with its purposes and powers.

Until a corporation is dissolved, even after it has ceased to do business, it continues to be organized, with by-laws, stockholders and officers.

The charter or franchise of a corporation is not in its nature transferable.

**TRUST COMPANY — Continued.**

G. L., c. 172, § 44, and c. 156, § 42, do not authorize the sale of the charter of a trust company, but only of its transferable assets.

6. — Investments — Limit of Liabilities of any One Person . . . 249

There is no limit to the amount to which a trust company may invest its funds in the stock of a single corporation.

There is no limit to the amount of bonds of a corporation which may be held by a trust company, unless they are acquired as a part of a transaction by which a loan is made contrary to G. L., c. 172, § 40.

7. — Foreign Mortgage Corporations — Branch Offices — Use of Words "Trust Company" . . . 550

With certain exceptions, only trust companies incorporated under the laws of Massachusetts can lawfully use the words "Trust Company."

An exemption in a statute which limits the application of a general policy should be construed strictly in favor of the Commonwealth.

Such a statute should be construed so as to carry out the intent of the Legislature, if the intent can be reasonably ascertained from the words used, or by fair implication, although such construction may seem contrary to the ordinary meaning of the letter of the statute.

Foreign mortgage corporations which were authorized to do business in the Commonwealth prior to Oct. 1, 1899, and which were conducting an established business here at the time of the passage of that act, may use the words "Trust Company."

8. — School Savings System . . . 657

The powers of trust companies with respect to receiving deposits are defined by G. L., c. 172, § 31, and are not limited in that respect by laws regulating the receiving of deposits by savings banks.

G. L., c. 172, §§ 60 and 61, are not a limitation of the powers of trust companies with respect to receiving deposits.

G. L., c. 168, § 25, containing provisions authorizing savings banks to arrange for the collection of savings from school children, applies only to savings banks.

A certain described plan for a school savings system, introduced by a trust company, is held not to be in violation of law.

9. — Debt due from Insolvent Trust Company against Stockholder's Liability — Stockholder's Liability against Debt due from Insolvent Trust Company . . . 270  
See SET-OFF. 1.

10. — Taxation — Deposits in Savings Departments of Trust Companies — Returns — Inspection of Books . . . 276  
See TAXATION. 10.

**TRUST COMPANY** — *Continued.*

11. — Taxation — Trust Companies — Liability to Tax where Company is in the Hands of the Commissioner of Banks or has voluntarily ceased to do Business . . . 309  
*See TAXATION.* 11.
12. — Commissioner of Banks — Possession of Trust Company — Public Officer — Advice by Attorney-General or Special Counsel . . . 312  
*See COMMISSIONER OF BANKS.* 2.
13. — Taxation — Savings Deposits — Returns by Trust Companies to the Commissioner of Corporations and Taxation . . . 543  
*See TAXATION.* 16.

- TUITION** — High School Pupil — Transportation . . . 393  
*See HIGH SCHOOL.* 1.

- UNITED STATES HOUSING CORPORATION** — Taxation — United States Housing Corporation . . . 671  
*See TAXATION.* 19.

- VENDORS** — Conduct of Business in Two or More Cities at the Same Time . . . 57  
An attempt by a transient vendor licensed under G. L., c. 101, to conduct business in two or more cities of the Commonwealth at the same time constitutes a violation of said statute.

- VETERAN** — Reappointment after Honorable Discharge . . . 528  
*See CIVIL SERVICE.* 7.

2. — Inspectors of Plumbing — Qualifications . . . 548  
*See CIVIL SERVICE.* 8.

- VETERANS OF FOREIGN WARS** — State House — Assignment of Location — Furnishings . . . 362  
*See CONSTITUTIONAL LAW.* 20.

- VETERANS' PREFERENCE** — Constitutional Law — Civil Service — Creation of Office of Controllor — Continuation Schools . . . 349  
*See CONSTITUTIONAL LAW.* 17.

2. — Disabled Veterans — Established Lists . . . 598  
*See CIVIL SERVICE.* 9.

- VOCATIONAL SCHOOLS** — "Anti-Aid" Amendment — Appropriation of Public Funds — Private Teaching Agencies . . . 356  
*See CONSTITUTIONAL LAW.* 18.

- VOLUNTARY ASSOCIATION** — Legacy and Succession Tax — Stock owned by Non-resident . . . 458  
*See LEGACY AND SUCCESSION TAX.* 1.

- VOLUNTEER MILITIA** — Armory — Cities and Towns — Grounds for Parade, Drill and Small Arms Practice . . . 428

Under our statutes the quartering of troops and their training are distinct functions.

A city or town is not relieved from its obligation to furnish suitable grounds for parade, drill and small arms practice merely because an armory of the first or second class has been furnished by the Commonwealth in the city or town in question.

- VOTER** — Apportionment of Senators and Representatives — Census of Legal Voters — Substitution of Apportionment based on Local Enumeration for Constitutional Census — Executive Construction of Constitution . . . 344  
*See CONSTITUTIONAL LAW.* 16.

- WAREHOUSEMAN** — Surrender of License — Cancellation of Bond . . . 274

The surrender of a license by a warehouseman to the Secretary of the Commonwealth is not complete until after notice of discontinuance of such license by publication, in accordance with G. L., c. 105, § 6.

Power to cancel the bond of a warehouseman upon surrender of license would seem to be incidental to the power to accept surrender of the license, when and if it is determined by the Governor, with the advice and consent of the Council, that there is no liability outstanding or enforceable thereunder.

2. — Bond — Release by Governor and Council . . . 443

As the bond given by a warehouseman, under G. L., c. 105, § 3, is held in trust to secure the public, the Governor and Council should not undertake to determine and advise the warehouseman and his surety as to the effect upon the bond of the retirement of the warehouseman from business.

- WARRANTS** — Commissioner of Correction — Special State Police Officer . . . 432  
*See STATE POLICE OFFICER.* 1.

- WATER SUPPLY** — Department of Public Health — Rules and Regulations — Delegation of Legislative Power — Protection of Great Ponds . . . 465  
*See PUBLIC HEALTH.* 5.

- WATUPPA POND** — Department of Public Health — Rules and Regulations — Protection of — Great Ponds . . . 465  
*See PUBLIC HEALTH.* 5.

**WEEK** — Labor and Industries — Hours of Employment of Women and Children — Meaning of the Word "Week" . . . . . 203  
*See HOURS OF LABOR.* 1.

**WEIGHTS AND MEASURES** — Filling Point of Glass Bottles or Jars used for the Distribution of Milk or Cream . . . . . 123  
 Under G. L., c. 98, § 15, where milk or cream is sold in a bottle or jar not having a definite measuring point, and said container is not filled to the level of the bottom of the cap or stopple thereof, a person selling the same is guilty of giving a false or insufficient measure.

**WILL** — Appointment of Unregistered Foreign Trust Company as Trustee . . . . . 35  
*See TRUST COMPANY.* 1.

**WITNESSES** — Power to require Information from Coal Dealers . . . . . 63  
*See FUEL ADMINISTRATOR.* 1.

**WOMEN** — Justice of the Peace — Right of Women to Appointment . . . . . 247  
*See CONSTITUTIONAL LAW.* 14.

2. — Eligibility of Women to be elected to Congress . . . . . 383  
*See CONSTITUTIONAL LAW.* 22.

3. — Eligibility to be appointed Masters in Chancery . . . . . 588  
*See MASTERS IN CHANCERY.* 1.

**WOMEN AND CHILDREN** — Employment in Certain Kinds of Business — "In Laboring" . . . . . 306  
 The inquiry whether a woman or child employed in one of the businesses enumerated in G. L., c. 149, § 56, is engaged "in laboring," within the meaning of that section, presents a mixed question of law and fact, to be determined under the circumstances of each case.

**WOMEN AND CHILDREN** — *Continued.*

If the duties discharged by a woman or child employed in one of the businesses enumerated in G. L., c. 149, § 56, are discharged during regular hours, are of routine character, are of a grade similar to those ordinarily performed by women or children in the businesses enumerated, and do not involve judgment or discretion, a finding that such woman or child is engaged "in laboring," within the meaning of G. L., c. 149, § 56, would ordinarily be warranted, even though the labor performed be largely mental and only incidentally manual; but such a finding might in some instances be negated by proof that similar duties are discharged by women and children in other businesses than those enumerated in said section.

2. — Labor and Industries — Hours of Employment of Women and Children — Meaning of the Word "Week" . . . . . 203  
*See HOURS OF LABOR.* 1.

**WORKMEN'S COMPENSATION** — State Employees — Metropolitan District Commission — Appropriation . . . . . 441  
 Compensation for injuries received by laborers, workmen and mechanics employed under the provisions of St. 1922, c. 13, should be paid from the appropriation under that act.

2. — State Employees — Medical Services . . . . . 529  
 State employees, not entitled to the benefits of the workmen's compensation act, are not entitled to medical services for injuries sustained in the course of their employment.

**ZOOLOGICAL SOCIETY** — "Anti-Aid" Amendment — Appropriations . . . . . 117  
*See CONSTITUTIONAL LAW.* 7.















